Existence of a Contract

* To give advice, first thing you have to figure out is whether there IS a contract and that there still is a contract.
* Time very important, not just when something happened but if it still is happening, or if something happened in intervening period that affects what used to exist.
* Common law: once the contract is created, never goes away, can’t make it go away, it’s always there. Equity, however, was capable of making things go away that did exist or changing one thing into another thing. If you’re trying to make a contract go away, that would be equity’s role. Called rescinding the contract.

Content of the contract

* You need to find something in the contract that is the basis of the complaint. Where does the necessary additional info come from? Won’t be from equity. Statute is always the easiest in this regard, statutes just put something in the contract that gives basis for complaint.
* If you didn’t have the statute, it’s conceivable that common law would recognize the contract, but no basis for complaint, no source for the additional info.

Remedy

* Common law response is damages, give money. Other legal systems would want the original promise fulfilled. Common law endures because it can be satisfied with a substitute in money, much more efficient. Equity would want “specific performance.” Equity won’t give money.
* If each system gives a different answer, how do you know what to do or impose order? There’s a hierarchy between these three systems. First, statute prevails. If you can find a statutory provision that operates on point, it trumps everything else. Problem is the common law and equitable courts have been very good at narrowing statutory provisions to as small as possible.
* After statutory is the common law. This is the principle that equity follows the law, which means that you see what common law thinks first and then you see what equity does. Unlike statute, common law doesn’t govern the situation, you look at it first, but you can then see what equity says.
* If equity gives different result, “equity prevails over the common law.”
* Reason you look at CL first is that equity is not a complete code.
* When equity comes in to do something with a contract, particularly to undo it, equity is often more concerned about before the contract, in the discussion. CL is the opposite, only really cares about post-contract. For equity, it’ll usually be using at deceit/lies or abuse of power, that one party lied in the formation of the contract. That lie is called “misrepresentation.”
* Equity will only give a different remedy than the common law if it’s convinced that the common law remedy is not adequate.
* Usually stick with CL because generally hesitant to order people who are reluctant and force these hostile parties to work together
* Equity is always concerned with what CL did, wants to know what CL did first.

Analyzing a Contract

* Treat contract as a thing, examine it, look at formation first, then see what happens when things go right or wrong.
* Existence of a contract vs. Enforceability of a contract, what you can do with it vs. Whether it exists or not. Existence is simply whether or not you have one.
* If there is no contract, and I gave you a horse thinking there was one, then I get the horse back. Contract is a mechanism for validating property transfers. Contract itself doesn’t convey the property, the performance of the contract does. You get an obligation that I will perform the contract. Contract justifies this, without it, there is no legally justifiable reason why something I once owned is now yours.
* Contracts justify various consequences and make them binding, without contract, not binding.

Unenforceable contracts

* If no one complains and the other party performs, it’s fine. If the contract is in existence but not enforceable, it means the court won’t enforce it, but you get to keep horse if I perform it.
* Problem is if it’s unenforceable and I don’t perform, don’t give the horse. Mechanisms of state won’t help you, you can’t get remedies of damage either as this comes under contract too, you have no way of complaining.
* If there’s no contract at all = “void.” Common law always decides whether a contract exists or not. Quality of a contract, whether it can be enforced, is probably equitable. If you have a contract that is unenforceable, it’s still there, law won’t make it disappear, law just won’t do anything about it.
* Contract, by comparison, that is voidable (usually equitable), means that one of the parties can make it go away.

Voidable

* Trying to figure out whether there is a contract or if it’s void, you’re probably considering issues of offer and acceptance.
* After you decide if there is a contract, next issue to decide whether you can get rid of it (voidable) or if it’s enforceable.
* Voidability will be at behest of one of the party. You can’t void a contract if it’s already void.
* Example of void contract: created under duress. You can’t void a contract if you were the one putting on the pressure. You’re underage, can’t legally enter a contract.
* If a contract is voidable, one party can void it, it is voided for both parties and property is returned. Contract cannot be voided if that party cannot return the property.
* There are many voidable contracts that will never be voidable, making them perfectly valid contracts exactly the same as any other contract. They exist and they are enforceable.
* Contracts can be voidable for common law reasons, but usually for equitable.

Offer and Acceptance

* Contract comes into existence when it’s accepted, without acceptance, no contract.
* Offer sets the terms of acceptance, can’t have acceptance without an offer. Acceptance in itself doesn’t not create contract

Canadian Dyers Association

* Canadian Dyers wanted the contract fulfilled, wanted to get the land the thought they bought. Court has to see whether there was a contract, whether there was an offer and acceptance. Clear there’s an acceptance, but what was the offer?
* Offerer’s intention from the perspective of the person who received the communication. Question of the intention that’s involved in the words that were said, not a subjective test (can’t just ask a person, “what did you mean by that?). We’re not looking at the actual person who received the communication, but a reasonable person situated in that context. How would this hypothetical person interpret this? If that person would read it as being an offer?
* Ways to know what a reasonable person would think the intention was in this context: The language. You could’ve made it clear that it wasn’t an offer by saying “this is not an offer.” Also look at the circumstances of the case and the conduct that the parties engage in.
* Circumstances: may be things already in existence, the history between and of the parties can mean you’re very brief in your communications, used to the way they normally deal with each other and figure they know what to expect, no need to go back to the basics in the language.
* Intention: is there or isn’t there any offer? Was it intended as an offer? Language, circumstances conduct.
* Conduct: after the communication was made, the parties behaved as if this was an offer. Danger of using their conduct is, “danger of manufactured evidence,” need to look at context. If I lead you to believe that I’m making an offer that you can accept, surely the court will recognize these as offers because I’m misleading you, if the court sees this as an offer that can be accepted. But what if you make these misleading offers and 10 people accept, do you now have 10 contracts? If a reasonable person would see these as acceptable offers, you have to perform all contracts.
* The test: Would a reasonable person interpret that as an offer when put in the same surrounding circumstances?

**Class 4 – Communication, Offer & Acceptance (Boots), Terms & Representations, Invitation to Treat**

Communication

* Just because you call something a contract, doesn’t mean it is, the law determines that. Just like putting label of offer on something doesn’t make it an offer.
* Communications: expressed (written, oral), there’s also “implied” (action, inaction, silence). Categorization of how something was done.
* You have various parts of negotiations that happened before there was a contract entered into. Have to figure out which communications fall under negotiation and which under contract.
* Some things have no significance at all. The law might say that you can’t assign meaning to certain things, impossible for something like this to ever translate into a legal responsibility, empty. These statements are called a “mere puff.” They have no meaning and no reasonable person would act as though they were true.

Terms and Representations

* Some things might have some significance even if fall under negotiations (quotation of price, physical characteristics of what’s for sale, experience, etc).
* Most terms in contracts are promises, promises to do something usually. Generally speaking, terms are statements of intention for the future, not statements of fact.
* Could be outside the contract, but nonetheless important to that contract. They’re motivations for entering the contact, but not terms of the contract.
* Terms are what is going to happen after the contract from the point of acceptance. Why you entered the contract is back in negotiation, which can give you motivations to enter the contract unless it is a mere puff, upon which no reasonable person would rely on to enter. These causes for motivation are called “representations.” They have legal significance. Don’t just figure out what is in the offer, but also what representations were made.
* Law may say that it’s not a direct representation but contained within it is an implied representation.
* Breach of term doesn’t mean contract disappears, contract is still there, it’s just enforceable.
* However if you argue that the breach is not a term, but a representation that didn’t make it in, that gives you means for rescinding the contract. Sometimes, thus, representation will give you more power than a term, can call it misrepresentation, and since your motivation for entering the contract, the representation, wasn’t true, you were tricked into the contract.
* Only the victim of misrepresentation can use it to void the contract. Person who made misrepresentation can’t use it
* When a statement of fact becomes a promise, it can become entered as a term in the contract
* a guarantee means you’ll continue to guarantee the truth of the statement of fact into the future, indefinitely.
* Void = this is not and never has been a contract, rescind means there was a contract but it’s been terminated.

Pharmaceutical Society v. Boots

* Early days of over the counter medications, usually was supposed to be behind counter. Complaint probably lodged by competitor, trying to say Boots not playing by the rule. Pharmacists are supposed to supervise sale.
* Regulation says: the SALE must be under supervision of pharmacist. A sale is a type of contract. Regulations are saying that that type of contract has to be entered into, issue is when the contract is affected here. Upon acceptance. So court is trying to figure out when acceptance occurs. However, to know this, we have to know whether there was an offer to be accepted.
* Offer could be whatever the price tag was, but what is the acceptance – when you pick it up, or when you pay for it? Can’t be when you pick it up, as then obligated to pay for it when you pick it up.
* Store is the offeror and the person who picks the product up is the offeree.
* Advertisement could be an invitation to treat, could also be a representation.
* Court rules that sale was entered into when product was taken up into counter, where it was under supervision of pharmacist. Accepted at counter, where it is under supervision of pharmacist. Had acceptance been at shelf, taking product off, it wouldn’t have been.

Invitation to Treat

* Not an offer, though can be construed as such. Only means “let’s do business.
* Used car lot with cars with price tags may not be an offer, just invitation to treat, entice you to come in and make an offer. Why isn’t the price tag an offer? It’s not clear what the $5000 is for. For terms, you need to know more than the flat price, lots of details that you need to know that aren’t discussed with the simple price tag. Invitation to come in and learn those details.
* Local authority gives invitation to treat and you then have construction companies who make the offers and local authority accepts one group’s offer. The other two groups have no contract, but problem for them: expenditure of time and money to make sure your bid conforms to the form and process, and what if the group that was accepted didn’t conform to the form of bid asked for? Out of luck because no contract, can’t just complain of unfairness
* Invitation to treat doesn’t lead to acceptance (you’re looking for offer), but it can be significant as it can be a source for representation, some things can also be both offer and invitation

**Class 5 – Carlill, Offer, Communication of Offer**

Carlill v. Carbolic Smoke Ball Co.

* Distinguishing an offer from an invitation to treat or “hot air.” Is someone making an offer to a contract if someone accepts or is it simply a statement that no reasonable person would consider to be possible as the basis for a contract?
* Carbolic said offer was “too vague,” too many offerees, no notification of acceptance, and no consideration. It also wasn’t intended as an offer.
* Question of construing what was said, “construction,” and determining what a reasonable person would understand was being offered. For something to be an offer, it has to be certain enough to form basis of a contract. Certainty of terms comes from the offer.
* Court says there aren’t too many offerees; you can make an offer to the whole world if you want; you’re the one making the offer, you determine who to make the offer to, and have only yourself to blame. Just because one reasonable person sees it as an offer doesn’t mean another can’t as well. Offer can be to an infinite number of offerees, but not infinite number of offers.
* You can revoke the offer when you get to a certain number of offerees or limit it.
* Where clear there is only one of an item or a very small number, that offer may not be an offer but only an invitation to treat.
* Carlill money reward: could make argument that there’s a finite amount of money to go around and that this was not serious.
* Product liability: she has a contract not only from the store she bought it at, but also with Carbolic. Contract to buy the thing is with the store, other is with the manufacturer/warrantee
* Can’t sue person for it not working like supposed to based on sales contract, so can’t sue store
* How do you enter contract with manufacturer who’s not there, no face-to-face? Could be product registration, which is an acceptance of offer. Retailer also occupies position of being an agent, while manufacturer is the principal. They have agency contract. You are entering a warranty contract or guarantee contract.

Concerns arising from Carllil – power of the offeror

* If there is more than one way to go after a single person for compensation, than you can’t use a single breach to claim two or three or four times for the same loss from the same person.
* What you can do, though, is make more than person contractually liable for the same breach
* How does the manufacturer prevent the consumer from claiming twice for the same thing? You just put it in the contract. In setting up the offer, you can control what happens in the contract, put these various things in, like have to claim against retailer first and can only claim on manufacturer if you win there, for instance. Offer puts control of contract in the hands of the person who makes the offer. While the offeree controls whether there is a contract, it’s the offeror who controls what is in the contract and how it will operate.
* Court may say not to be taken seriously as an offer, however, if there’s no liability. For it to be a contract, there have to be consequences for a breach, so can’t be too favourable.
* Offeror can also control how the offer is accepted. Not just what the offer contains but how you accept. Controlling also when the offer is said to be accepted, so it’s controlling the point at which you have a contract, and thus obligations, before which you have no obligations.
* May be in one party’s interests to delay this as long as possible, don’t want to be liable to the other person until absolutely have to be. When you accept is in your hands, but I want to delay that as long as possible, make it as late as possible, so I want to control when you CAN accept. You can do that through the offer.
* You can also revoke your existing offer to see if you can get a better deal from somebody else.
* option contract: I’m making you an offer and you don’t yet know whether you can accept, since you have to do investigations, gather money, etc, but you know I can revoke the offer, and your acceptance takes time and investment, so it becomes stipulated in the contract that I cannot revoke the offer

Carlill v. Carbolic Smoke Ball

* Terms of acceptance: Buying the smoke ball, starts use, completed use, her illness, request for money. This is really all the offer mentions as terms. But question is when does she actually accept? Court didn’t have to decide here as any of these could be it and they all occurred.
* Acceptance in Carlill was made at the time the letter was mailed.
* Carlill – distinguishing whether something is an offer, or if it could reasonably considered an offer. Courts will try to favour people who may well rely on something being an offer, people don’t say hot air for no reason when they’re in the business of making money, you want people to take your ads seriously and rely on them. So you try to structure an offer to stop obligations from ever coming into existence or possibly delaying acceptance till later at which point you may be able to revoke.

Communication of offer

* if they’re not communicated, they’re of no legal interest, even if they fulfill requirements. It’s irrelevant what you say if there’s no one to hear you. Doesn’t matter how a reasonable person would interpret it, no one can hear

**Class 6**

Williams v. Carwardine

* in terms of offer, we don’t care about motive, but we do care about knowledge and communication. Why they’re choosing to do what’s necessary to accept an offer is not important.
* We have no authority whatsoever however on whether she actually knew or not, one of the lawyers just said the handbill was placarded all over town and this was sufficient

Clarke

* Williams case being used. You had to present info that led to the arrest and conviction for those responsible for all the murderers. Clarke had a different motive entirely and also claimed to have completely forgotten the offer, no knowledge of it when he met terms of acceptance. He doesn’t get the award.
* He also didn’t fulfill offer, didn’t give info that led to arrests. This bill said “SHALL lead conviction” unlike Carwardine that said “may.”
* Court says you have to know about the offer, Clarke had forgotten the offer, and they use Williams to show this
* Seems you have to know that what you’re doing is leading to a contract. You can have different motives, but you accepting the terms can have little to do with motive
* To a certain extent the cases are driven by the results the courts want. Courts can come up with various doctrines that can complicate things so that what can be clear-cut in one circumstance isn’t in another circumstance. Clarke is obscure about what exactly someone has to show in terms of their communicat/knowledge/motive towards an offer in order to accept it.
* Generally there has to be some form of intention on the part of the offeror to have the offer reach the person who purports to accept it.

Offer

* Offer is the starting point for the contract. Offer is significant because it contains all the terms of any contract that results. In and of itself it doesn’t mean much, there has to be acceptance.
* The acceptance in theory is just to say “yes” to whatever is in the offer and so offer is important foundation for the contract. Offer will contain not only the terms of the contract but is also the source of how acceptance is to occur
* Particular communication can be both an offer and an invitation to treat
* Only an offer can lead to a contract

Contract A/Contract B

* scenarios where a given statement can be acceptance of certain procedural terms but also offer)

Acceptance

* Acceptance is the saying of yes agreeing to the terms of a particular offer
* Saying yes can be by doing actions (Williams).
* It’s up to the offer itself to say what is to occur, presumption is that simply saying yes is sufficient but depending on the cases, there are situations that seem to call for a yes but there’s no actual communication between the parties, the offeree just starts performing the contract

Bilateral and Unilateral contracts

* offer says “offeror will do” and the “offeree will do.” If the offeror does x and y and the offeree does a and b. If it’s bilateral contract, offeree just says yes and these are all obligations in the contract, meaning that the offeror has a right to A and the offeree has a duty to do A.
* Bilateral – obligations on both sides, moment contract comes into existence after offeree says yes, both sides have duties/obligations.
* There are primary and secondary obligations. If offeree fails to do A, they will do B.
* If offer says that you accept by doing A and B and THAT is the yes, then there’s no contract until A and B are done, and when they are done, they the other party has obligations to do X and y, obligations are entirely on one side. This is what makes it unilateral, the only obligations and only remedies are entirely one side. Say yes, both sides have duties = bilateral. Say yes by performing action, then one side has obligations = unilateral.

The importance of the Time of Acceptance

* Representations cease to be relevant at the moment the contract comes into existence. Misrepresentations will not affect contract unless they occurred before the contract, and so time of acceptance is crucial.
* Breach can only occur after acceptance, doctrine of unfairness only after, most doctrines occur to stuff before acceptance (misrepresentation, mistake, duress, undue influence, unconscionability).
* Timing important for remedies. Breach occurs after acceptance and remedy is damages, but how much you get is determined by knowledge you had before contract come into existence and after.
* Can’t be responsible for risks/damages associated with motive, hast to be knowledge relating to motive before moment of acceptance.

Livingstone

* Which side does the offer come from, as negotiation is a battle of forms, counter-offers. Difficult in course of ongoing negotiations to know who made the offer.
* Offer must come entirely from one party and the acceptance entirely from the other party.
* Acceptance can only be “yes,” you cannot add terms through your acceptance. If you try to do this, you are not accepting, you’re giving a counter-offer.
* Here, court is accepting that one of the parties must do offering and the other does the accepting and court just has to decide if there was something that was an offer that the other party accepted.

Butler Machine Tool

* Bad law and has been overruled.
* Denning says terms come entirely from one direction or entirely from the other, which is orthodox (shot fired first or shot fired last). Denning says, though, that sometimes shots fired on both sides. There is a concluded contract but we don’t know what the terms are, so we construe both sets of communications and try to give a harmonious result. If the differences are irreconcilable and contradictory, conflicting terms might be replaced by “reasonable implication” decided by the court.
* Problem: invitation for people to come to court. If you can’t figure out finer lines of your contract, just come to court. Invitation to litigate and clog up court. People won’t bother deliberating on contract, just expect courts to clear it up for them.
* Instead of Denning, courts use a fiction. We pretend terms came entirely from one side to prevent this floodgate. Terms come from offer, entirely from one side, even if in reality, the offeror accepts your suggestions and puts it in the offer and was going along with offerees contributions or it was a back and forth.

**Class 7**

Communication

* Communication of an offer is communication in the sense of creating something or initiating something. It’s not compulsory, you don’t have to communicate an offer, there’s no choice involved as in choosing between two things, it’s a standalone communication, representation is the same. A communication someone makes that is not required.
* Communication of acceptance is “an election.” Offeree is given an election . An election is a situation that puts someone in the position of having to choose. The two courses of action to choose between are incompatible, can’t have both. You also can’t stall beyond a particular point, at which point the law will make the decision for you and declare that you have made a choice via doing nothing.
* You have to make the election. Acceptance: status quo is to not have a contract, there is no contract. Offer is rejected if you fail to declare a decision.

Representation

* if I make a representation to you and it is false, a misrepresentation, you are in receipt of false information and the question is can you do anything about it? Misrepresentation is also a tort. Your ability to claim damages based on that communication is dependent on your having done something in reliance on it. That type of communication is significant legally only if one person makes it and the other does something in reaction to it, both parties are involved.
* Contract itself is like this, one party makes the offer and the other accepts, both parties are involved. Bargain-element. I can’t be held liable for my statement just for having made it, you must also be involved for it to be significant through having relied upon it in some way. If you haven’t relied on it yet, I can withdraw the offer without consequence.

Acceptance

* An offer is a statement that is not an election because an offer is of no relevance unless the other party accepts or responds. Acceptance, however, is an election. It is effective the moment it is communicated and it doesn’t matter if the other party doesn’t do anything. This means you can’t change your mind unilaterally, you can’t take it back or retract it like you can an offer when no one’s responded to it.
* The moment of communication of the acceptance is crucial because this is the time where it becomes relevant, as it’s an election, and elections become significant through communication alone.

Felthouse v. Bindley

* Auctioneer is raising contract defence: contract between nephew and uncle to sell horse to uncle was never completed due to failure to communicate acceptance, nephew never wrote back.
* You do not ask the parties involved whether they have a contract or not. It is not based on intention or consensus, parties can say or even think they have a contract, when they don’t.
* Case seems to say that there is no contract because no communication of acceptance. You cannot waive communication of acceptance, you cannot impose silence as acceptance on the other party. Case is taken as standing for this.
* Felthouse/Bindley has stood for the fact that even if the parties want there to be a contract, there is no contract if the offeree did/said nothing to accept the offer. There has to be acceptance and there has to be communication of acceptance and in this case there wasn’t any.
* You have to do something, silence alone should not be sufficient for acceptance, should take some positive step to show acceptance. Must be communication, doing cannot constitute.

Carlill v. Carbolic Smoke Ball

* Carbolic argued that Carlill never communicated acceptance. Thing is that in Carlill you’re not imposing a contract on anyone because you actually have to do something, the action is the communication.
* Communication is not necessarily to the other party. If it’s a bilateral contract, contract came into existence when she bought and started to use the smoke ball, it’s true Carbolic doesn’t know she’s done this, they didn’t impose a contract on her, she chose to do these things, but her actions can be taken as communication.
* Problem, of course, is that communication of this sort is difficult to prove. However, in bilateral contracts like this one, communication does not have to be directly to the offeror.
* If it’s a unilateral contract, she has to communicate directly to the other party.
* Buyer has no legal obligation with respect to goods that the buyer did not request, but if you do something, send a note about it, then you do have obligations about it. If you communicate too much with respect to it, you may start to get obligations as you’re treating it like you own it or have some responsibility towards it.
* Acceptance must involve some volitional element on the part of the offeree, something voluntary he/she does, can’t do nothing and then a contract comes into existence. Offeree must intend for there to be a contract and there must be some manifestation of that intention.

Brinkibon v. Stahag

* This matter of “when and where” a communication takes place
* Court is asking where was the contract made and whose law governs the contract, and where is the appropriate jurisdiction to litigate any questions under the contract.If a contract is made within a certain jurisdiction, than that court can take it. So need to decide when and where acceptance occurred, as that is the moment a contract is made.
* Telex, instantaneous communication, sent from London and received in Vienna so hence the contract was made in Vienna.
* More complicated cases, offeror probably has a term in the offer that specifically says “this contract is governed by the law of” so that contract itself stipulates whose law is going to apply, not so much a big deal figuring out where technically acceptance occurred.

**Class 8**

Household Fire v. Carriage

* Company issuing shares: more like an invite to treat. Otherwise, worried that too many people will accept. Can’t offer to the world when you only have so many shares. Shareofferings tend to be invitations to treat. It’s the person here, Grant, who actually makes the offer to buy.
* Grant gave offer via letter and Kendrick sent his acceptance via letter. Communication is by post. Household Fire are the liquidators. Household is in same position as previous parties were, take over for the insolvent company or bankrupt person involved.
* Liquidators role is to service the debts and liabilities of the company by getting as much income as possible. If Grant does own shares then why is Grant subject to claim? Unpaid up shares.
* Grant is going to escape liability of paying for shares is that there is no contract, no accept. Grant sent letter to Kendrick who sent to company, and company sent letter of allotment back to Grant, but Grant never received it.
* Court rules that there is a contract nonetheless, even if there is a requirement of communication of acceptance and Grant never got the letter. Post office is an agent in a situation where both parties agree to communicate by mail. The moment the letter goes into a mailbox or post office, that is the moment of acceptance.
* Judges raise the fairness issue to justify this. Someone has to shoulder the hardship, and shouldn’t be the guy who sent out his acceptance. Also, there’s a large margin for fraud if this isn’t the case, people can say that they sent out an acceptance and that it was just lost. If moment letter is put to post is moment of acceptance, this isn’t a possible scheme.
* Process is in control of the offeror, so if you don’t specify to the contrary but clearly accept use of post office, then moment it gets to post office is moment of acceptance. If you don’t want this, it was in your power to stipulate otherwise
* if you give the letter to someone else to deliver, that person won’t become an agent, moment of acceptance isn’t the moment it goes to this person’s hands. Only applies for post office.
* Post office has a way out of being liable (Grant/Kendrick can’t sue the). It’s a statute, court is eager to make post office an agent because statute gives them immunity.
* There’s a postal acceptance rule for acceptance, letting post office know is effective communication. We also know that there is no postal termination rule, giving post office notification of termination is NOT effective communication.

Postal offer?

* if I send you an offer that you never receive, but you do what’s required of the offer without knowing. Is there a postal offer rule? If you don’t know there’s an offer, there’s an authority for saying you can’t accept the offer.

Holwell Securities

* in order for acceptance to be valid, there must be actual communication to the offeror and the contract only comes into effect when offeror becomes aware of acceptance, not when post office gets it.
* There’s still no reason that notice can’t be to an agent (post office), no stipulation that notification couldn’t be to an agent, but court seemed to regard it as such nonetheless to void the postal acceptance rule.
* This is just a case where the dissenting opinion in Household Fire is being followed here. Parties cannot be said to have intended postal acceptance rule to apply and so it doesn’t and there must be actual communication. Look at context and circumstances, and parties cannot have intended there to be binding agreement until the offeree’s acceptance had actually been communicated to the offeror.

Rejection and Revocation

* Offeror, offeree, and the law itself. Three parties involved in these transactions. The termination of the offer can come from any of those three places.
* The person who makes the offer can terminate it, but can only do that before it’s accepted, but if he does terminate it, offer is said to be revoked.
* If you’re the offeree you can also terminate the offer through “rejection.”
* The law itself terminates the offer through “lapse of time.” There must be implied into the offer a time in which the offer must be accepted. Offer itself has implied term that it is automatically revoked after a period of time, law is pretending that this time element is in control of offeror. If the offeree does not act within a particular time, then the offeree is preferring the status quo.

Revocation

* offeror can end an offer at any time, even if an offer actually says it will not be revoked for a period of time. I can revoke the offer even though I said I’d leave it open. This is because there’s no contractual obligation yet, there is no legal reason why I have to live up to this promise. There’s no contract in existence, how are you holding me to this promise?
* You revoke an offer by communicating a revocation. No prescribed form of telling the other person, as long as the other party knows or ought to know that the offer is revoked, than that’s fine. Effective revocation.
* Where you made the offer in a mass distribution way, you can probably revoke in a similar fashion, even if an individual party that saw the first message may not see the second.
* Revocation can actually be included in the offer, if it says in the terms that the offer is not open after such a time, that it’ll only stay open so long.

Byrne v. Van Tienhoven case.

* Court rules that that there is no postal rule of revocation, revocation is not until the other party is notified. And thus, here, because revocation was not communicated until after the offer had been accepted, it cannot be revoked.
* Parties must be of the same mind at the same time for a contract to exist, via English law. There must be some consent or actual meeting of the minds, and that can’t exist if there’s not a single point in time where both parties want a contract to be in existence. In this case, there is no point where both parties want a contract at the same moment in time

Dickinson v. Dodds

* Revocation doesn’t have to be actual words. There are other ways that it can be said you had communicated. Person gets word through the grapevine that offer is revoked, heard from someone else, a reliable person, then it is effective.
* Action can also constitute communication of revocation. If action had to be known by other party and could only be interpreted as such, than offer is treated as terminated even without communication between parties.
* Here, someone told him that offer had been accepted by another party and court assumes this is reliable source of info. This is thus deemed sufficient communication of revocation.
* If it’s not a reliable person, it may not work even if what he/she says is true. It’s just a cause for inquiry, not effective communication.

**Class 9**

Problems with revocation law

* where you have an offer made in anticipation of a unilateral contract, the ability of the offerer to revoke the offer when the offeree has started to do what is necessary to accept but hasn’t finished. Historical answer is that there’s nothing the offeree can do about that.
* But seems unfair for the offeror to revoke offer. Way around is for courts to avoid characterization of the contract as unilateral. Make it a bilateral contract that’s already in existence.
* Problem is that this can contort the offer too much for the courts to try to make it look like bilateral. Also, despite this being done in favour of offeree, the offeree may not like it as he may prefer not being bound to do certain things (the terms of acceptance) which he may not have even ascertained the possibility of.

Errington v. Errington and Woods

* is acceptance when the husband and wife agreed to start making payments or when they started making payments? This is probably a bilateral contract that came into existence at the outset: i don’t have to transfer title until you make payments, conditional sale contract. Make payments over time and once the payments are made, ownership passes to you.
* Denning says you can’t revoke the contract when they’ve already started performance unless they cease performing. Denning says father’s promise was a unilateral contract.
* There is no contract until what is necessary to accept is finished. Denning says this was an offer made in the context that a unilateral contract would be created. This offer can’t be revoked once the offeree starts to perform he acts that are necessary to accept.
* We understand why in fairness it can’t be revoked, but fairness isn’t a legal principle. He does talk about an equitable right which will grow. But where does this equitable right come from?
* restitution, which is where Denning is. Having offerees start performance and then have that offer revoked would be unjust enrichment of the offeror, offerees did things for offeror for no gain.
* Offeror is unjustly enriched, offeree is making claim of restitution, saying offeror must have obligation imposed on him, otherwise he will be unjustly enriched. Context of unilateral contract where i have made you an offer and you have started to perform what is necessary, and I know that you’ve started, then I cannot revoke because it is unfair and unjust to revoke the offer and without an obligation to keep it open, there is unjust enrichment of me by the other side.
* Law in this area is that if you do make this offer, unilateral, the other person starts performing and you know about it, it cannot be revoked.
* Common law doesn’t recognize restitution, completely equity, so remedy not damages. Remedy is to return the money, that’s the usual remedy. This takes away the injustice, just give the money. Restitution’s normal remedy isn’t to force people to maintain contract, it’s to compensate, so that unjust enrichment is lost. It’s fair to force someone to keep an offer open when it’s being responded to, but it’s not clear why this can be done legally.

Rejection

* Rejection just needs to be communicated. When an offer is made to an offeree, then the offeree is given an election, either you accept or you reject, can’t have it both ways and there comes a time where the law requires you to make a choice. Law only gives you two choices.
* This is unilateral communication, you just tell person what your decision and how they respond or if they respond doesn’t matter. Just as long as you tell the other person in some form “no,” that’s the end of the offer. A “no” can take the form of a counter-offer and a counter-offer is thus tantamount to a rejection.
* By making a counter proposal they are legally ended the other person’s offer so legally, they are saying “no.” Have to be careful to word it to say that “I’m still considering your offer, but while i am considering it, what do you think of this” to avoid rejecting the original offer.

Lapse of Time

* No offer is ever open for an eternity. An offer will always lapse after a particular period of time.
* Offer can contain within it a time and it is obviously lapsed at the end of that time.

Barrick and Clark

* there was an offer made in the context of land and eventually there was a reported acceptance of it, but argument was that the acceptance came too late so there was no offer to be accepted. What the court did here was to try to figure out what was a reasonable time to accept in the context of that offeror. Court puts itself into the shoes of a reasonable offeror to figure out what would be implied as a reasonable time for the offer.
* Look at situations of the party, look at what the offer was for (land), whether it was a hot property or not (if market is great, there’s a rush, if it’s slow, no rush). Parties bringing bits and pieces of info about context in which offer was made, trying to imply into the offer what the time was for acceptance. What would a reasonable offeror imply or put in as time limit?
* Other way is to put yourself in the shoes of the offeree. Offeree isn’t making the offer so can’t be putting implications into the offer, but what offeree controls is the election. Case here is to say before offeree has purported to accept, whether it can be said that the offeree has elected to reject. Passage of time is an election just as much as an actual choice is. If i just wait beyond a reasonable time to make my decision, than the law says that I have made my decision
* Courts can say there is no time limit implied in the offer, would be fictional to imply there just wasn’t any. In this case, we don’t look from offeror perspective at all, only from offeree, so you get a really long time limit. Offeree’s behaviour can shorten time limit, getting involved in another contract or whatever, may be deemed an election.
* Implied time limit or the implied election is judged from your behaviour. Uncommunicated election is not election. In implied election, the offeror must know about the offeree’s behaviour for it to be considered implied election.

**Class 10**

Certainty of Terms Difficulties

1. Not enough in what was said: means something significant was left out that you need to know in order for a contract to work properly. Can’t have contract without it. Price is an example. Law usually tries to imply into the contract/offer the needed information and the question becomes when it is appropriate to do that.
2. Too much in what was said: too many possibilities from the info that is there. What is said is either ambiguous (could have more than one meaning) or could mean that there is some ambiguity in the contract in some other sense. Contract or written evidence can contain nonsense as well. There’s too much there and doesn’t make any sense in context of what’s there. Like reference to terms or conditions when there aren’t any in the contract. If truly nonsense, then just get rid of it or ignore it so doesn’t affect the contract. In other cases, it may not be nonsense, just something that the parties haven’t agreed to yet.

Misrepresentation

* extent to which that which is said is actually a term in the contract, whether you have a term or representation, and some certainty of terms issues can be gotten around by court saying what’s in question isn’t a term, but a mere representation.

Issue of rectification

* what you can do with respect to a written contract to change what it says. Very difficult to change a written contract. Doctrine of rectification says you can’t change written contract.
* Parole evidence rule: if you have a contract and it looks as though the written evidence of the contract contains the complete contract then the parole evidence rule says if there is a dispute about the contract, the court will not accept oral (parole) evidence of terms that are not written
* Can use certainty of terms to get around parole evidence rule, if you can find certainty issue in written evidence than the rule doesn’t apply as you can say written doesn’t appear complete due to uncertainty in it.

May and Butcher v. R

* May and Butcher contracted to buy excess tentage from government, fix prices for the goods from time to time with an arbitration clause for any disputes.
* Tentage are goods, so if you’re buying them, Sales and Goods Act applies.
* Statutes, Sales of Goods Act implies into the contract various terms/issues that supply all this info that is important legally. Statute tells you when, how goods are delivered and payment is made, tells you when ownership passes, tells you what interests of third party continue to affect. Purpose of the statute is to save contracts by providing all this info that ppl overlook.
* Parties didn’t agree on an actual price, only a method by which the price can be established. One method didn’t work and the other they didn’t get to. Is there a contract?
* Clearly one side wanted out of the contract. Easiest method: no contract because of problem with certainty of terms. Problem for them is that Sale of Goods Act seems tailor made for this problem, it’s whole purpose is to save contracts. Statues override common law.
* Sale of Goods Act: s. 12, sets out ways in which a price in a contract of sale can be set out.
* Parties agreed on mechanism for determining price and method of arbitration in the case of dispute. This contract does fall under 12(1). Problem is that the way that it was set or agreed upon in the contract didn’t work. 12(2) says if 12(1) doesn’t work, buyer must pay a “reasonable price,” which is determined by fact.
* But court says 12(2) only applies if you never MEANT to do 12(1), which is only possible if a contract has nothing at all about price in it. Weirdly, this means you’re better off saying nothing about price, because if you do, 12(2) can’t save the contract. This case was not well received.
* Court says 12(2) was unavailable because the parties did list some method that they wanted to use. This is an incorrect interpretation. If a statute specifically talks about one problem and is silent for another, that that which is not talked about is not meant to be applied
* Court said that in order for arbitration clause to be binding, it must be in a binding contract, and for it to be a binding contract there must be certainty of terms, and since price is uncertain here, the entire contract isn’t binding.
* May and Butcher seems to have gone out of their way not to save the contract

**Class 11**

Hillas and Arcos

* Parties in May and Butcher said nothing about price, so hard to construct what they want that price to be, whereas in HIllas and Arco, you can extrapolate from what the parties said to fill the holes.
* May and Butcher applies where you have nothing in the contract from which you can determine what the parties themselves would have said about the price, so they’re not completely silent on the point, but the method they set out can’t help the court determine what the price or the missing element would be. If the parties are completely silent and don’t mention anything at all about price or method, can just go to Sale of Goods Act.
* Hillas and Arcos says you can figure out where the parties are going, interpret what they meant, can work through what parties are thought to have meant in that contract. If you can’t do that, if nothing in contract you can use to construct terms between the parties and if the parties set out some kind of method to figure this stuff out, then you’[re May and Butcher
* Things can be missing in contracts, and there are ways of providing the missing element by implying it into the contract, it’s there, just can’t see it. Imply it through the parties themselves, work out what they did say and try to figure out what they meant in the context of this missing element. Or you can use an external element like a statute.

Foley

* Highlights difference between the two different approaches in Hillas and May and Butcher. Noted that in Hilass that the effect of May and Butcher is to drive business parties away from resolving disputes before the courts
* It’s rare that parties leave something out entirely and if they do, courts are good at using Hillas and Arcos approach to save it. Little more difficult is an issue of ambiguity in the contract, not that something is missing, it’s there, you just don’t know what it means.

Dealing with Ambiguities

* Common way of solving problem is to imply a term in the contract, you just look at surrounding circumstances, the history between parties, the other terms that are provided, and sometimes it becomes clear what the parties must be contracting about.
* Second way is to use “canons of construction,” a rule of construction that simply says that where there’s ambiguity in drafting that there are principles that the law uses, assumes that the parties wanted, to assist. Statements, for example, that express one thing means everything else is excluded. There’s a lot of policy that comes in disguised as canons of construction
* Third way, there are a lot of statutes that help out in determining what was said
* Courts can also ignore ambiguous terms, say they mean nothing and hence they mean nothing in the contract. This is possible where if you ignore something, the rest of the contract ends up making sense. If it was the heart of the bargain between parties, ignoring it would be inappropriate as you’d create a contract that the parties didn’t want.

Empress

* Bank is already in the court’s bad books, as you’re asking the court to do something, but they’re already not happy with your behaviour, as it’s clear you’re just out to get some money due to the bank robbery that took place.
* clear Bank willing to play market rate, which was established. Bank was willing to pay, but not reached due to this extra 15K demand. Court says won’t give Empress landlord a writ of possession.
* Contract doesn’t actually say good faith, only that they negotiate, court puts “good faith” into the contract. Court says no standard you can judge good faith against (Mannpar)
* Parties are not sent away to negotiate again in Empress, court doesn’t order them to negotiate in good faith, it doesn’t say anything about what necessarily the contract would be, just seems to suggest that if you’re willing to pay market rate, that would be acceptable. But we dont’ really know what good faith would mean in the context of this contract, only *that you don’t get a remedy if you deal in bad faith*

Mannpar

* Mannpar wanted extension of the contract. Peculiar situation, unique. There’s no market rate or similar benchmark here like Empress. There’s no objective standard against which to measure whether parties have used best efforts to negotiate in “good faith.” We don’t know what their contract should look like, so they don’t get the extension. Don’t know what the result would be because no objective standard, “good faith” itself is meaningless, unlike bad faith which could be tested.
* Mannpar is intergovernment in nature and is just different, one party (crown) has fidicuiary obligations to another (Skyway) which the court will respect.
* Solution would be to draft the contract more carefully, unless you put these ambiguities in deliberately to give yourself an escape to back out of the contract due to uncertainty of terms. Otherwise, set out specific criteria.

Intention to create Legal Relations

* another necessity to form contract is intention to create legal relations.
* parties seem to have instinctive sense for what agreements are not meant to have legal consequences so don’t litigate.
* Social arrangements (i promised to bring bottle of wine to dinner), there may be offer and acceptance and certainty of terms, etc, but court probably won’t help you out.
* Domestic arrangements, your mother promises you some money for college and not paying you, you could sue her, but courts will often say that was just generosity on her part but no intention to create legal relations, so all the offer and acceptance won’t help.
* They tend to be social and domestic contexts that fall afoul of this. There are social consequences, may never be invited again, so there are consequences, but in a different way. Common law says it’s of no interest to them, so there’s no answer to you.
* It can arise in commercial contexts as well, like Rose and Frank, but that’s unusual

Balfour

* husband promised wife an allowance, this was the context of the break-up of the marriage. He promised her money then wasn’t paying up, so she goes to court, saying he’s not paying me as he promised.
* Judge says worried that courts would be mobbed by litigation if cases like this were seen as legal obligations. Says parties never intended this to be legal arrangements. Parties here are their own courts.
* Most courts still won’t get involved in social and domestic issues, as it’s up to the parties to run their own lives in those contexts.
* Even if there is an intention to create legal relations, it may still be unenforceable if the agreement is immoral. So there may be other obstacles.

Rose and Frank

* Contract to oust the jurisdiction of the court is illegal, a contract to take your dispute somewhere else other than the court would be illegal. A contract that you’re agreeing that there won’t be legal consequences may run afoul of intention to create legal relations, but may also be an illegal contract.
* Rose and Frank shows ifference between saying that there are no disputes under this contract (gentlemen’s agreement) not meant to have any consequences before court or anyone else and explicitly saying that you can’t take any disputes to the court.
* Gentleman’s agreement is possible, that’s this case. You can prevent it from being a legal contract, it’s possible, but unlikely. Make an agreement that is not legally binding. Agreeing that you have a contract but any disputes are not to go to court is different from agreeing that it’s not a legally binding contract. The former is illegal at common law, need to make sure you have statute that overrides common law on such situations, otherwise contract is illegal.

**Class 13**

Executory Contracts

* If obligations are still outstanding, the contract is called executor, which means nothing has been done in the contract. Any obligations yet to be performed, nothing has been done.
* Once all obligations are performed and no problems, contract is executed
* If some things are done, but not others, this is “partly executed.”

Enforcement

* Unless you are privy to the contract/a party to the contract, you won’t be able to enforce it or the promises in it. Also can’t have contract enforced against you if you aren’t privy or party.
* If you have a promise in a contract and you want to enforce it, first device you can use to enforce is to say that the contract where that promise is found is a “formal contract,” which means the promises in it were made “under seal.”
* If not sealed, then look at consideration. If there is consideration for a promise, it is enforceable. No need for consideration if it’s sealed.
* If no seal or consideration for the promise, alternative is non-contract device of estoppel

Seal

* Historically, comes from the deed. Deed is a contract where all obligations in it are set out in writing and anyone who is a promisor in the contract affixes a seal to it showing their intention to be bound by the promises made in the contract.
* The seal makes your promises binding. Judges may take more liberal view on what constitutes seal. If trying to enforce throught his device, have to show a seal on a written contract, that the written contract spells out the promise you want enforced (NOT implied), and the alleged promisor has to have seal on it.
* Unilateral = only one party must make seal. Bilateral = both parties seal.

Royal bank v. Kiska

* problem of consideration. This was a contract of guarantee. Contract of guarantee always involves a third party, somehow. Party A loan money to party B, guaranteed by party C. Comforting for A knowing that if B can’t pay back, C will.
* Problem is consideration, B is getting something from me....but what’s C getting. Hence, these contracts, guarantee contracts will be under seal.
* Royal bank v. Kiska is guarantee contract. Guarantor doesn’t want to pay up, notoriously easy to get out of. Say it’s not sealed. Looks like one, but isn’t one. And if it’s not sealed, there was no consideration for it.
* This is Laskin’s dissenting opinion. Here, dissent carries a lot of weight. Laskin is dissenting not about consideration, but about the seal and whether there is one that’s effective
* He says promise isn’t enforceable because there isn’t consideration, but he also goes on to consider whether there’s a valid seal, and he says there was no seal either so not enforceable.
* Argument that this was a seal was that the bank printed “seal” right beside where defendant signed , where the seal would go.
* He says this isn’t good enough. You don’t need to have historical or formal types of seal, wax or foil whatever, the rules of what constitutes a seal have been relaxed, you can just draw one if you want.
* There needs to be some representation of a seal. A pre-printed form, especially when printed by the other party, the financial institution, is not good enough. No way of saying this pre-printed seal was put there by the promising party. This pre-print might be fine if made by the promisor. The seal must be put there by the person whose promise is being enforced.
* Can’t just put the seal there, the person must also realize why the seal is there. They just have to know that affixing a seal means that the contract is binding.
* For pre-printing, can just acknowledge that the seal is there, you can adopt it, but something has to show this, eg: initialling it, showing that you understand what it is that you’re adopting.

**Class 14**

Consideration

* Consideration leads to an informal contract.
* B is the promisor of Z and A is the promisee, A is trying to enforce so must establish the consideration, has to show that in exchange for promise Z, A gave consideration. There’s an exchange element. Not like seal, seal has nothing to do with exchange, just has to be put on by promisor, it’s unilateral way of making promises enforceable.
* Consideration is something of value given by the promisee at the time the promise is entered into. It has to be something of value (“fresh” considerations, usually has to be something new given at the time the promise is given). Consideration does not come after acceptance.
* can be an action or a deliberate inaction, or a promise. This action or promise given in exchange can be a benefit to the promisor or a third party, or it can be a detriment to the promisee, or it can be both.
* Consideration has to coincide with acceptance, has to come at the time of acceptance, not before or after. If there’s no consideration at the time of acceptance for promise Z, if there’s something afterwards that might be acceptance, it’s irrelevant.
* If there are subsequent promises contingent on a first promise, if there is no consideration for the first promise, they become unenforceable promises. If a party performs unenforceable promises, the other party can keep it, as a valid contract still exists, but if the party refuses to perform them, nothing the other party can do about it because they’re unenforceable.
* Consideration can be technically worthless, but as long as it’s something new and can be valued by someone, it works. Consideration for promisor to give you a valuable piece of jewelry can be a promise to give someone a peppercorn. As long as it’s fresh and has value to someone.
* It has to be intended, has to be intended that one thing is being given in exchange for the other. Must be intended to be consideration for the promise sought after.

Carill v. Carbolic Smoke Ball

* Consideration is a promise but it can also be an action, which is typical in unilateral contract
* Smoke Ball’s promise was to pay $100, what consideration is depends on when contract comes into existence. If it’s when smoke ball is purchased, the consideration is the promise to claim money or it could be the promise to use the smoke ball.
* In a unilateral contract, consideration cannot be a promise and must be an action. Here, action would be making the claim for $100, can’t be using or buying the smoke ball as those are in the past. They are required to accept the contract, but don’t constitute consideration, only the final act making the claim) is the consideration, though all were required to accept contract.
* If it’s a promise, the consideration is an obligation or set of obligations given in exchange. An action given in exchange is not an obligation.

Thomas v. Thomas

* Promise made that the deceased man clearly wanted, that the wife could live in this house.
* Thomas is a contract for an interest in land. A contract for land MUST be written. Terms in the contract must be in there as well as the consideration if it’s different.
* Here they’re saying there wasn’t any consideration. Wife didn’t give any, and there is none set out in the agreement, and so it’s an unenforceable contract and don’t have to give it to her.
* Court is distinguishing motive from consideration. Why they’re doing it is not part of the consideration. Why you’re doing it is irrelevant, it’s only that the other person did give something in exchange. A regard for the wishes of someone else is not important, that’s not what you gave, it’s just the motive.
* what you give in exchange does have to be something of value and it would have to be in the contract if there’s a writing requirement.
* Wife paid the estate, that was the consideration. Her promise to repair was also consideration. It’s to your detriment to promise to pay for repairs if there are any to be made.
* It’s not consideration if you have a legal duty to do something already, but if you promised to fulfill the legal obligation in a certain way, that would be different in the eyes of the law.
* Here, paying the ground rent is legal obligation, it comes with having the house, but paying that to me where I wouldn’t normally be the person to get payment, that’s the difference that makes it consideration.

**Class 15**

Motive

* Motive is relevant to contract, but not to formation or the issue of consideration. Motivation can be relevant to damages if there’s a breach.
* Motive for entering contract can overlap, can be the same as someone else’s consideration, but motive often comes from the wrong direction from consideration.

Consideration

* it is not important whether or not you have “enough” consideration. Just as long as you have some. You can even just pay one dollar for land. Common law is not concerned with adequacy
* In order for sale of goods act to apply, what needs to be paid for good is money, consideration. Sufficient consideration is anything that can be of value to someone

Pre-Conditions

* If you give me $5, I will give you coffee vs. If it snows, you will pay $5 and I will give you a coffee. The “if clauses” are very different. Both “if” statements are preconditions. In the latter case, once the precondition is met than BOTH the parties have enforceable obligations. In the latter case, nothing that says one party has to act first, unlike the former case.
* in the case of “if you give me $5,” that precondition is ALSO consideration. However, “if it snows” is a precondition that is not a consideration, it’s not a benefit given from one party to another or a detriment to one party.
* Condition precedent: describe an event that has to occur before something else is going to occur. It has to snow, or those terms will never be enforceable obligations.
* If there is a precondition to the enforceability of both parties’ obligations and that precondition is largely in the control of one party, there is no contract until that precondition is met. One party can’t hold the other hostage.
* There are also conditions subsequent and concurrent conditions. When you have a condition that ends something, that’s a condition subsequent. It’s a condition that ends or terminates an obligation. This would never be consideration and would never be part of acceptance
* If parties have not agreed to the contrary, then everything in the contract is concurrent, meant to occur at the same time unless parties stipulate conditions precedent and subsequent. Concurrent conditions = independently enforceable. Just because I didn’t give you $5 doesn’t mean you can’t give the coffee. We’re both in breach of contract. If we stipulate the $5 is a condition precedent, then I am in breach for not paying but you are not in breach for not giving coffee. Concurring must both occur at same time.

Issue of failure of consideration

* if there is no consideration for a promise in a contract, then you have to say there’s an absence of consideration. Can’t use term “failure,” as that means something different. Failure has to do with performance of the contract and is not to do with its binding nature

Forbearance

* straightforward forbearance constitutes consideration. Forbearance is a promise not to do something. As long as this promise is of value to someone, it’s a detriment/benefit and is clearly consideration. Promise not to sue, or not to drink coffee (even if I never drink coffee)
* However forbearance won’t work if it’s something that’d be impossible, like me promising not to get pregnant.
* Promising not to sue when I know I have no case = I’m promising not to cause you legal problems and bad publicity. This becomes extortion, not forbearance or consideration.

Callisher

* Promise not to take legal action can be consideration, forbearance not to bring a legal claim, but you have to show that the person who made that promise and is claiming it’s consideration must, as a reasonable person, have thought that that legal claim had some chance of success. If that person knew or ought to have known that there was absolutely nothing to that legal claim, then you’ve given no consideration, as you’ve given something that you know is of no value, even if you didn’t know, and so it is invalid consideration.
* Women’s child stole something from Zellers, Zellers promised not to sue if she gave them some money. She decided didn’t want to pay, and court said unenforceable as Zellers knew they had no case, can’t bring claim against the mother for child’s act.
* It’s about whether the person who would bring the claim knows that there is or isn’t a case. If you know you cannot sue, then it’s not consideration, but if you know you’re not going to sue, that’s irrelevant, as long as the other person thinks you’re going to
* if they really ought to have known that they didn’t have a case, but are morons and thought they did have a case, they’re going to have a hard to claiming honest ignorance

**Class 16**

Eastwood

* Reference to lord Mansfield, who said that all promises deliberately made ought to be held binding. Court criticizes that, saying that it annihilates the need for any consideration at all.
* Eastwood says past consideration doesn’t work. Consideration cannot be past.
* Idea is that court shouldn’t be bothered enforcing people’s promises unless the person gave something FRESH for it, that what was done in the past was over and can’t become part of a bargain later on. Consideration has to be new, newly created in exchange for the promise.
* Fairness argument here: have to give something new to get something new from the other party. Should have to pay in order to get something enforceable through the law of contract.
* Eastwood: past consideration is not adequate consideration.
* Plaintiff acted as girl, Sarah’s guardian, spent money on her education and took out a loan to do so. When Sarah came of age, she made the promise to pay this debt. She started paying, then got married to defendant, who promised also to pay the debt, then failed to make payments, so guardian sued.
* Court says only thing guardian gave in exchange for this promise were actions he’d already performed: paying money and looking after the girl when she was younger, a long time ago, that’s all past and so consideration is not valid in relation. No consideration for Sarah’s promise, even less for her husband’s
* Court did give way out in doctrine of ratification: If I have no capacity at the time I enter into contract with you or make promise and then subsequently get or regain capacity and repeat promise, it can be enforceable. Problem here is that when promise was made when there was a lack of capacity, it was made by the woman and not the man.

Lampleigh

* exception to rule of past consideration: if you have a situation where because of circumstances, it is not feasible for one party who is requesting something of the other party to negotiate what is going to be given in exchange at that time.
* A requests B to do something, B does an action at the request of the other party, but the other party doesn’t promise anything in exchange, so law considers this a gift/gratuitous action. If later on, A promises X on the basis of B’s having done this at A’s request earlier, than there can be an exception. If circumstances make sense that this promise would have happened later anyway, then promise would become enforceable and past consideration becomes valid. Distance in time is not legally important.
* This often happens in emergency situations, i need this right away for you to do this, I can’t go into details now about what I’ll do for you in exchange. You do what I request, then later on, out of gratitude, i promise to do something for you in exchange for what you have done. Is my promise enforceable? Probably it is, yes, despite the gap in time, according to Lampleigh.
* Some jurisdictions have changed this and covered these emergency situations by statute
* A voluntary courtesy will not have a consideration to uphold a contract. If something was just done voluntarily, there’s no binding promise. But if it’s done at request of one of the parties and then later on a promise is made to compensate for that earlier action, then the court says that that promise is binding because it couples itself with the action that went earlier. Even though it’s past consideration, the promise couples itself with the action that came earlier, so is NOT treated as past consideration
* Restriction: has to be an action done at request of other parties
* Does this mean that anytime I ask you to do something, and later promise to pay you for what you did earlier, is that sufficient? Restriction: there’s something about the situation that is an emergency situation or urgency, there’s some explanation why the promise didn’t come at the time (of requesting the action)

Pre-existing Legal Duty

* Pre-existing legal duty could be owed to one of 3 categories: existing duty to the public/state, to a third party (c), or to the promisee. If to public/state, could be just to obey the law, can’t promise to fulfill public duty you already have. Or A could be a public servant and is promising simply to perform his duties, again, already bound to do that based on employment contract with the state.
* Existing duty to third party can be any sort, but typically is a contract duty, so A already has a contract with C to pave C’s driveway, and A is promising in exchange for B’s promise that he’ll pave C’s driveway. He already owes that duty to C. Legally, you’re giving nothing if you already owe a duty. Not fresh consideration.
* A may already owe a duty to B herself. A already owes this duty, often a contract duty. For instance, A could be promising to pay the $100 he already owes B. This is not fresh consideration.
* There are ways around it: if I’m a parent and you’re the other parent, we have duties through statute to maintain the child, and I’m simply promising you for some money to maintain the child in a way I’m required to, it’s actually already a duty owed to the state, so your promise to pay me is unenforceable as I already owe this public duty. If however I’m promising to maintain the child in a particular way, that goes beyond the basic public duty, so there probably is consideration here. As long as it takes you outside the basic public duty, it could be consideration.

Pao On

* Pre-existing duty owed to a third party, case of Pao On.
* Ratio of case:promise to perform or the performance of, a pre-existing contractual obligation to a third party can be valid consideration, overturns old law. If promise is to fulfill pre-existing duty to third party, this is fresh consideration and makes binding contract, even though it’s something you’re already bound to do.
* It’s because you are actually creating something new. A is already required to pave C’s lane, and now is promising that again in exchange for B’s promise to pay $2000 dollars. It’s fresh consideration because if A fails to pave the lane, there are two people who can come after him, now not just C can enforce the paving, B can as well. Clearly a detriment to A because they not only owe the duty to C, but now also to B, which will increase the damages.
* Pao On: reason past consideration doctrine exists in the first place is that the law was concerned about parties putting duress on other people to extract a promise from them when what they’re giving in exchange is nothing, something they’re already bound to do for another party. Pao On says that’s a problem, but not to be addressed through consideration, but rather, duress.
* The plaintiff regrets contract, they realize their contract guarantees the price of their shares if it goes down, but not if it goes up. Say won’t honor share swap unless defendant agrees to new contract. Defendant enters into new contract, really want that building. Value of shares go down and defendant argues unenforceable contract, it’s past consideration based on pre-existing duty that plaintiff owed to Fu Chip, court decides this is not a problem, that promise to perform pre-existing duty to third party is valid consideration.

**Class 17**

Estoppel

* If all that’s being promised is a one sided promise to pay more, there’s no consideration and estoppels can be used in this context.
* Vague idea that if you contract work to be done, there is vague assurance that the work will be done. Williams and Rock case. Case has been criticized for it’s artificiality.
* Indicates that promises that are meant to be taken seriously, and are taken seriously, can be binding even when the traditional rules on consideration don’t seem to allow for that.
* Where there is no way to enforce a problem save for promissory estoppels, you can’t use it. You can’t make a contract binding solely through promissory estoppels, can’t use it as sole means of which to enforce a contract. Court thus turns back to contract to see if promise can be enforced through law of contract.

Greater Fredericton

* Promise to do this work and provide the equipment, but demand more money or won’t do it. Is this demand for extra money binding given pre-existing legal duty to provide equipment. Under pre-existing law, there wouldn’t be such a binding promise due to consideration problems.
* Court (on 190) says courts should avoid fictional attempts to find consideration, shouldn’t be seduced into hunt and peck theory to find consideration where none exists, or to manipulate it until it is not recognizable.
* Court says that where there is an existing contract between parties and there’s a change made within the context of one of the promises within that contract, that in order for the change to be binding, there does NOT have to be consideration, it’s not necessary, as long as it was sincerely made and genuinely negotiated change to the contract
* This is only in the context of the modification of an existing contract, doesn’t apply when there is no existing legal relationship between the parties. Not clear whether the doctrine here would apply to the modification of any other kind of duty (statutory or trust). Logic would seem to say it’s possible.
* Court here stresses that consideration is important, must be consideration for initial contract, but don’t need consideration for further modifications later.
* Any change that is made in variation to the contract made under this approach is subject to scrutiny for being entered under economic duress. If it was entered under economic duress, it will be unenforceable

Folkes and Beer

* one party is paying less and the other party is promising to accept less. Is that enforceable, when all that’s being given is not even the same consideration, but less of it. \ Folkes and Beer: this is not acceptable/enforceable. You can get around this through consideration, statute, or estoppels
* Parties entered into a contract to facilitate the payment of the judgment debt and way it worked out, the arrangement excluded interest. Question is whether that promise to accept this arrangement is enforceable when it’s someone agreeing to pay less. Court says no. Could have been made under seal, but without a seal, consideration had to be shown. Court says payment of a lesser sum in satisfaction of a greater sum cannot be satisfaction of the whole.
* simple promise to accept less when nothing is given in exchange is not a binding contract. If you’re party who wants to enforce this promise, you have to add something so that you are giving something new in exchange. You can tinker with the situation and as long as the party paying less is doing something new that wasn’t required before, then there is satisfaction sufficient to make that accord a binding one.

Foot and Rawlings

* there was existing indebtedness between parties, obligations owed by promissory notes. Piece of paper where there’s a promise to pay a certain amount. Then they reached a different arrangement which worked out to the party who had to pay actually got to pay less than under initial promissory note arrangement. Other party agreed to accept this form. But it’s not simply an agreement to pay less, as something was added. The dude was giving post-dated cheques, which was of value to the promisor who agreed to accept less as this format gave him certainty.
* paying less, but in a different form or particular form is enough of a difference to make the other party’s promise to accept less binding. Court doesn’t go into why it may be valuable to a party to get post-dated cheques as it doesn’t matter, the very possibility of being beneficial makes it valuable consideration, it’s something different.
* for this type of promise, there must be an accord in satisfaction, meaning that the other party must do something, a promise to do something which is different from what was originally required.

Part performance

* part performance of an obligation, either before or after it’s supposed to be performed, when expressly accepted by the creditor in satisfaction, though there isn’t any consideration, extinguishes the obligation.
* This is a statute that abolishes need for consideration in that specific context. But must comply strictly with what statute says, when it says “part performance,”: it means that, not the promise of part performance. Can’t use s. 43 until you have actually paid the lesser amount, not just promised to. It’s not just the promise to pay less, there’s also actual payment. There’s not just a promise to pay less (Folkes) but that person actually PAYS that amount (s.43), then it’s binding under s.43.
* If the part performance wasn’t MEANT to extinguish the larger, earlier obligation, then it doesn’t.

Estoppel

* For a statement of fact: estoppels by representation. Statement made by a court: res judicata. Statement that somebody gets interest in land: proprietary estoppel. In many cases of proprietary estoppels are about promise for interest in land. Promise is not enforceable through contract because form requirements not met or no consideration. Estoppel worked out that it could hold person to that promise but not like contract does
* In contract, you’re held to the promise assuming there’s consideration. Proprietary estoppel: i may have promised you land, and then I failed to live up to it, but we didn’t have a contract. Estoppel will work, however, because it’s land, but you may not get ownership of the land. Court will consider what’s the minimum necessary you need to satisfy the inequity that would otherwise result were I not held to my promise, which is usually a whole lot less than ownership of the land I promised
* Also consider how long they’re going to be held to the promise. In contract, it’s permanent. If I promise to give you a diamond for a peppercorn, I can’t just take it back. In estoppels, it depends on the estoppel, though it most, it will also be permanent.

Jordan and Money

* to hold someone to a promise, you need consideration, cannot do it through estoppel. Denning tries to reverse this decision. He says in High Trees that the law has not been standing still since then. He says there have since been cases presented as estoppels by representation, but weren’t really.

Promisory estoppels

* an estoppels, when it operates, holds a person who made a promise to a promise. When the promise was made sincerely, intended to be legally binding, and when the other person relied on it, that is actually did something in reliance on the promise. In this context, it’s binding.
* In consideration, you don’t have to do anything for my promise to be binding, just have to promise to do something. With estoppel: reliance and detriment that would be suffered if promisor was not held to his statement.

**Class 18**

Properitary estoppel

* law gives a remedy that is sufficient to satisfy equity, and it is permanent. You may not get what you were promised, usually less, whatever the law thinks is adequate to satisfy equity.

Promisory estoppels

* the law holds the maker to promise until sufficient notice given to end the estoppel. It’s said to be suspensory in effect, temporary in nature.
* The person to whom a statement is made can either hold maker to the truth or hold maker to the falsehood. Has this choice. You cannot do both, it’s an “election.” The communication of whatever decision you make, like by starting an action, that is the communication to the other party; once an election is made, then one of the two options is waived and “waiver” is the elimination of a legal choice that you once had but now have eliminated. Waiver can be the result of an election but can also describe the effect of an estoppel.

Central London

* estoppel by representation, says you can’t hold someone to a promise or assurance about their obligations to pay rent in the future (that’s an assurance, not a statement of fact), estoppels is about representation of fact not representations about assurance of the future.
* cases in which a promise has been made that was intended to create legal relations and to the person making the promise, it was intended to be acted upon and it WAS acted upon, so the promise must be honoured and the person must be held to it.
* A promise to accept a smaller sum when you’re owed a larger sum is binding if that person pays or starts paying you. Estoppels create the promise to accept the lower amount and not use your full, legal right to the larger sum. Estoppel is a defence here.
* There’s an obligation to pay rent, wartime issues arose, the market was difficult, landlord agreed to accept a lower amount of rent, the lower amount was paid. Now war is finished, and the landlord wants wants all the back-rent that wasn’t paid and it wants the full rent to be paid in the future, pursuant to the contract. Denning allows this doctrine, promissory estoppels, to operate as a defence to the landlord’s claim to get the full rent amount that he’s entitled to through contract.
* Decision also signals that though this promise to accept less is binding, it’s not permanent. He can notify the other person that he’s decided to end that promise, it is equitable to allow a person to give such a notice, you revert to your underlying legal position; a contract to pay full rent. Once the notice is given, through this action, for the future, the full rent is payable and the promise is ending, but it’s not retrospective, wouldn’t be fair
* you are held to the promise which suspends the existing obligations to the extent that the promise says so, you are held to the promise, but subject to reversion (back to the original obligations) with notice if it’s equitable to do so. Equitable here means that sometimes it wont’ ever be equitable to go back to the original obligations, and equity also determines the length of the notice.

Burrows

* there has to be a promise or assurance
* This is a way of enforcing a promise that’s not a term in a contract. It requires that there be a promise.
* there was a claim that a plaintiff could have made on several occasions in the past because there had been breach of an obligation, but they never made the claim. Plaintiff had never pursued a remedy in the past. Now it’s occurred again. This same problem had occurred in the past and plaintiff never took action, now it happens again, and plaintiff DOES claim for breach of action. Defendant says you can’t because you promised to not take action against me....but where’s the promise? It’s not enough to show that one party has taken advantage of indulgences granted in the past.
* You can’t translate a series of waivers into a promise that you’re going to continue to do that in the future. Just because someone behaved that way in the past doesn’t constitute a promise that they’re going to continue to do that in the future.

Combes and Combes

* confirms what London says: has to be a promise that amounts to an assurance that existing legal rights will not be used, a promise that results in a reduction or elimination of obligations that would otherwise exist. It doesn’t create obligations, just reduces existing ones.

D&C Builders

* must be equitable for it to be used. Have to establish that it is equitable, that it is fair.
* This requires two things: that the person to whom the promise was made actually has relied on the promise (not inequitable to go back on promise if the person to whom promise was made hasn’t relied on it or used it yet), means there has to be detrimental reliance by the promisee (for instance, by paying the lower rate)
* it also has to act generally fairly, in a fair context, fairness considerations. If I forced you to make a promise or tricked you to do it, the circumstances are unfair (D&C)

**Class 19**

Estoppel review

* there has to be a promise or assurance Burrows), implied is possible but unlikely. Must not be a cause of action, must be some reason someone is claiming something other than estoppel (gilbert steel, comb and comb)
* It can be part of a cause of action, however. If you have a,b,c,d and c is a writing requirement necessary for your contract and i told you not to worry about it, i can make a claim against you despite no writing and then say you are estopped from using that defence.
* Estoppel almost always operates to reduce an obligation.
* Promissory estoppels is equitable in nature, can even be called equitable estoppel. Part of the equitable aspect of it is the detrimental reliance, which is an equitable concern. there is no binding nature at all until the other party has relied on the promise or assurance which means you can go back on it up until someone relies on it.

D&C Builders and Reese

* If it’s simply not fair to hold someone to a given promise or assurance, detrimental reliance, you can’t. Again, equitable concern.
* extortive to get this promise to pay less, you know that party is in a bind. Estoppels may not work simply because it’s unfair to hold the person to the promise. There has to be some sort of voluntary nature to it, D&C was forced to accept less because they were in a bind and Reese knew.

Walton Stores

* court removes restriction in Combe and Combe, the idea that estoppels cannot be the basis for a cause of action. There was an exchange of documents, had to be an exchange, and until that was done, there is no contract. So it looks as though that while there’s clearly a general legal relationship, they’ve been negotiating for a long time, it’s a highly developed relationship, problem is that there’s this technicality that prevents there from being said to be a legal relationship between the parties.
* Generally accepted that there was no contract, so is there some other way of holding the party to the deal? Court uses estoppel. The problem was the Combs approach that you can’t use it for cause of action. Court here just eliminates that, a justification being that this is an equitable estoppel. Why can you use proprietary estoppels as basis for cause of action, but not promissory? Court thinks this a nonsensical distinction
* Concern in Comb was that there would be an undermining of the law of contract, consideration, if the estoppels were allowed to take over the enforcement of promises. The court here says far from taking it over, estoppels is helping the enforcement of contract. Here, in enforcing the promise, it facilitates a contract and leads to one.
* Court says promisorry estoppels will never overtake contract because estoppel is inherently uncertain, you don’t know for sure you’re going to get it until the court confirms it’s available, due to its equitable nature.
* Court adds another element to estoppel: in addition to showing the promise or assurance and detrimental reliance, have to show unconscionability.
* To show unconscionability if you want an estoppel, must show that you need the promissory estoppel to obviate the unconscionable effects that would otherwise follow. Not entirely clear what that means, as it’s not entirely clear what unconscionability means or what its limits are. For this court, it’s a limit on the use of estoppels.
* Promissory estoppel is used to enforce a promise that is not otherwise enforceable.
* Courts have considered and said warm words about it but doesn’t actually apply it, no Canadian decision actually applies Walton Stores, but also no case that says it’s wrong.

M v. A

* court is aware of Walton, but court says you have to have a promise that was considered to be binding in some way, an intention to create legal relations, in order for estoppel to work. As close as we came to applying Walton stores, it just didn’t work/apply in this situation.

Privity

* Means simply you must be privy to, or a party to, the contract to enforce it or have it enforced against you. Contract is a device that creates duties that are personal to you, does not change the world for people outside the contract. To say you have a right under a contract, you must be a party to it, to have an obligation under it, you must be a party to it.
* It’s a black and white issue in the common law, either you are or you aren’t, but law has difficulty in dealing with contracts with more than two parties. Law will instead act like separate contracts. Like three people, one of the parties just has one contract with each of the other two
* you have a party that is outside of the contract, than that’s the end of it. if X promises Y $200 if Z paints X’s house. Z paints X’s house but Y hasn’t paid the $200. Question is can anyone complain about this? Nothing can be done here. There are only two parties who can complain about the $200: Y can complain and Z can complain, but the problem with Y is that there’s no consideration and Z can’t complain because he didn’t make the promise and is not privy to the contract. Privity and consideration usually go hand and hand.
* Vertical privity: if you buy a car that turns out to be a lemon, can you sue the manufacturer? You can’t. Commonly in consumer situation, chain of contract: manufacturer, distributor, retailer, and consumer, each of which has a contract to the person above. You can sue the retailer but not anyone further up the chain because you don’t have a contract with them. Can still sue in tort, but not in contract, can’t jump up the chain as you only have contract with the level right above you (retailer).
* However, what if one link in the chain, say the distributor goes bankrupt? Retailer cannot jump up and sue the manufacturer, manufacturer becomes immune under law of contract. Requires the chain be unbroken.
* Horizontal privity: Contract made by A and B for the benefit of C

Tweddle and Atkinson

* horizontal privity. Kids get married, one of the fathers pays money the other father doesn’t. Kid is complaining. Court says you can’t sue because you’re not party to the contract. Father can’t sue because sustained no damage while the son can’t sue because not privy to the contract.

**Class 20**

Techniques for Circumventing Privity: specific performance, agency, trust.

Beswick

* horizontal privity.
* Nephew and uncle are in contract, uncle went into contract with nephew to benefit the aunt, who under the contract is to get an allowance. Nephew gets property transferred and is supposed to give aunt an allowance, which he starts to do, but when uncle dies, ceases.
* Aunt has two capacities after death. She is herself, but she is also her husband’s estate (executrix). Anything the uncle could’ve done, she can now do in his name.
* Denning says that the general rule is “no third person can sue or be sued under a contract to which he isn’t a party” but says that’s just a rule of procedure, goes to just the form of remedy.
* He says third party can enforce in name of contracting party if he had benefit under contract. Third party has a right arising by way of contract. House of Lords overrules Denning, but this view became influential
* Denning’s argument thus fails, but because she is representing the husband’s estate, whatever husband can do, she can do, and as party of contract, can argue breach of contract. Question is simply one of remedies at this point. Unavailability of damages, uncle can’t sue for damages as he was never meant to get benefit under this contract, so can’t get damages, no common law remedies, but when common law remedies don’t work, you can move to equity.
* Aunt, in her capacity as the uncle, is able to ask the court for this remedy of specific performance. Nephew is ordered to pay money to aunt in her personal capacity by virtue that aunt in her representative capacity sued as a party to the contract.

Specific Performance to Circumvent Privity

* especially horizontal privity, you can thus use specific performance.
* Although the party to the contract isn’t supposed to get benefit, that party can ask for specific performance, then other party will have to perform the obligation and by virtue of this, the third party will get the benefit that was intended under the contract.
* This party of a contract with benefit of third party can’t sue for damages, because they’re not actually getting any benefit themselves, but can sue for specific performance.
* Still, the third party is NOT bringing the action

Agency

* arguing that although it looks like i’m not a party to a contract, the person who is party to the contract is in fact representing me, so really i’m the other party to the contract, not the person who is there. Person in the contract is really just my agent and I’m the principal.
* Agency/principal relationship is often expressly entered into, agreed to between the parties that one person is the other’s agent.
* Can be implicit, it’s by necessity of the situation that one party must be the agent of the other.
* Problem is that if you are an agent for somebody else then there’s a very good chance that you yourself don’t have a contract. May benefit the principal, but therefore the agent is not party to the contract. For instance, why would the agent, B, be giving something if he’s getting no benefit and is not a party.
* Also, conflict of interest, B and C must have identical interests otherwise conflict. This is particularly the case where there’s an implicit agency.

Dunlop

* argued that the privity problem disappeared on the basis that Dew had entered contract with Dunlop as agent for Dunlop, so the contract was actually Self-Fridges with Dunlop, not with Dew, or that there may have been two contracts, entering into one contract as Dew and the other as agent of Dunlop. If this is the case, Dunlop does have contract with Self-Fridges, and this promise Self-Fridges made to Dew was really to Dunlop.
* But Dunlop gave consideration to Dew, but no consideration to Self-Fridges from Dunlop. Also Dew and Dunlop have conflict of interest, contract of sale, Dew would have possible claims against Dunlop on basis of this.
* Parties have to have some kind of connection with each other, like a family connection, but it is possible to have multiple agencies.

Selling your position under a contract

* just because you’re party to a contract doesn’t mean you must stay one. You can sell your position under the contract. You would no longer be party but if the third party likes the contract but isn’t a party to it, they can buy you out and buy your position under the contract.
* You can’t enhance the obligation by virtue of buying out someone else.

**Class 21**

Assignment

* A, B, and C, B can actually assign a contract position to C, another way to get around privity.
* Assignment is when A is not involved in that and may not realize contract has been assigned until he gets notice from assignee, which is when assignment becomes effective.
* However, if A is in on the agreement from the get-go, it’s called novation.

London Drugs

* Creates an exception to privity.
* Horizontal privity. London Drugs and B have a contract to transport goods, B’s employees (c) actually do the work that is relevant to this case. LD and B’s contract has a term in it that is a limitation of liability, meaning that if B damages the property of LD, their liability is limited to $40. Property of LD was damaged, and it was damaged by the employees’ negligence.
* So LD is bringing a claim against the employees, C. The employees want to be able to take advantage of a clause that’s in a contract to which they’re not a party to (the $40 limitation). That goes against privity, they’re not party to the contract so can’t enforce a term in it.
* Court gives exception here: if parties are in a contract which contains a term which was deliberately or was intended to benefit someone else outside the contract, then that party that’s outside of the contract can take advantage of that term to use it as a defence to an action brought by one of the contracting parties.
* Court limits that to employment situations. Where you have employees of an artificial corporation, any work or actual negligence are going to be done by the employees, so this limit on liability must relate to the people actually doing the work.

Fraser River

* eliminates qualification that person taking advantage of it must be in employment contract with whoever is party to the contract they want to enforce. They can have any kind of contractual relation with that person, not just employment.
* A and B have an insurance contract and B owns a barge and A is insurer and C is a tortfeasor, he damages the barge. Insurance is covering the damage for the barge owner and what the insurer is doing is bringing a claim in tort against the tortfeasor, saying you damaged the barge.
* In contract, there’s a no subrogation clause, so C is trying to raise this no subrogation clause.
* This exception of LD/Fraser River only applies to horizontal privity, only applies where there is a determinative contract that is a benefit to the third party, and the benefit has to be that it gives the third party a defence against some claim that could be brought against them. Can only be used as a defence