

Answers from Mr. H. C. GUTTERIDGE - London

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1.- I do not think that any serious difficulty is caused in practice by the operation of the rule referred to in Question N<sup>o</sup>. 1. It is well understood in business circles that a gratuitous promise to keep an offer open is only binding in honour and cannot be enforced by legal proceedings.

If a buyer for any reason wishes to obtain an offer which is to remain open for a definite period he can procure the seller to grant him a so-called "option" giving him the right to call for delivery of the goods at a fixed price during the stated period. The "option" must of course be paid for. These "Options" are not used, as a rule, except for purposes of speculation. I have, it is true, in my experience met with a few contracts of this kind which related to genuine purchases of goods, but the circumstances were exceptional, and I think it is correct, in substance, to say that option contracts are not part of the normal machinery of business in England. They are frequently utilised both in America and in England in connection with speculation in produce, chiefly wheat. These speculative transactions possess no legal validity, generally speaking, by reason of the fact that they are usually void under the Gaming Act 1845.

See Benjamin 5th Ed. p. 614.

Moreover these transactions are not viewed with favour in business circles, and the present day tendency is to take steps to discourage them.

See J. G. Smith "Organised Produce Markets"

Options of a genuine character are sometimes utilised for the purpose of securing shipping tonnage.

Speculative options are, of course, quite common in relation to Stock Exchange transactions.

2.- I think that the difficulty in reconciling the Anglo-American and Continental views on this question is mainly one of a technical character. I am sure that a great many English lawyers and business men believe that it is right that a seller, who fixes a term during which his offer is to remain open, should be held to his promise whether he has received any consideration or not. At the same time the suggested change would meet with considerable opposition as it would strike at one of the fundamental or imperative rules of the English law of contracts, and there is no marked indication at the moment of any desire to alter the rules as to consideration. There is however a feeling amongst a certain Section of English lawyers that the time is coming when the doctrine of consideration might be reviewed and altered in certain directions e.g. the rule that consideration must move from the promisee is found to be inconvenient, and has been abrogated in many of the jurisdictions of the United States, and there are signs of a similar movement in England (See "Contracts for the benefit of third persons" Law Quarterly Review Vol. 46 page 12). For the above

On the other hand an unscrupulous trader will frequently use these technicalities in order to evade his obligations and I believe that both legal and commercial opinion in England would welcome some modification of the law in this respect. The lines which such modification might follow have been suggested by Sir William Holdsworth (History of English Law Vol. VIII p. 48) and Professor Winfield (Salmond & Winfield's Law of Contracts p.141).

4.- It is true that an unscrupulous person may attempt to evade his obligations where a contract has been made by telegram or over the telephone, and my remarks in Answer N<sup>o</sup>. 3 are equally applicable to such a case. I should however like to make the following additional observations. Very often a contract by telegram cannot be evaded by pleading the statutory defence, because the original post office or other form signed by the sender or his agent is admissible in evidence in order to show that there is a memorandum in writing.

See Chalmers 10th Edition page 26.

Godwin v. Francis (1870) 5 C.P. 295.

McBlain v. Cross (1871) 25 L.T. 804.

As regards contracts made over the telephone the view is widely held amongst business men that such contracts should always be confirmed in writing. The reason for this is that the circumstances in which a telephone conversation takes place lend themselves with peculiar facility to a misunderstanding which afterwards results in a dispute. The time allowed for a telephone

conversation is short, and there may be difficulty in hearing very clearly, and so on. There may in certain cases even be a doubt as to the identity of the person at the other end of the telephone wire. I have on more than one occasion been present in Court when the Judge trying a case arising out of such a contract has rebuked the parties for their unbusiness like conduct in not confirming the telephone conversation by means of an exchange of letters. The evidence of a party to such a contract is much strengthened if he can prove that he wrote immediately to the other party giving his version of what was said.

I wish to make it clear however that the view expressed above relates to business practice and does not in my opinion lessen the objections to the statutory defences in their present form, although the policy on which section 4 of the Sale of Goods Act 1893 is founded is often defended by lawyers on this very ground.

5.- I think that the only possible answer to this question is that, generally speaking, there is no fixed time at which the risk passes to the buyer. This follows from the words "unless otherwise agreed" in Section 20 of the Sale of Goods Act 1893.

It is necessary to distinguish between C.I.F. and other forms on contract.

a) In the case of a C.I.F. Contract the Goods are always at the risk of the buyer as soon as they are shipped and the seller has obtained the shipping documents. The reason for this is that it

follows from the very nature of the contract. The parties clearly intend that the risk shall fall on the buyer, who is to obtain either the goods themselves or if they are lost the benefit of the insurance. In other words we have here an illustration of the governing rule, that the risk will pass at such time as the parties intend it to pass. I might add that there is no room in a C.I.F. contract for the expression of a contrary intention, as the contract would then become C and F, and not C.I.F. Law & Bonar Ltd. v. British American Tobacco Co. (1916) 2 K.B. 605.

The risk will pass on shipment etc. in the case of a C.I.F. contract even when the goods form part of an undivided bulk

Groom Ltd. v. Barber (1915) 1 K. B. 316.

- b) Although in cases other than that of C.I.F. contracts the incidence of the risk normally depends on the passing of property there is no reason why the risk should not pass at a different time from the property if the parties so agree.

Section 20 of the Sale of Goods Act 1893 and See per Lord Parker in The Parchim (1918) A.C. at page 168

If the various decisions relating to contracts for the sale of part of an undivided bulk are examined it will be seen that the test applied by the English Courts is the intention of the parties. If the parties intend that the risk shall pass either before or after the property effect will be given to such intention. This method of dealing with the matter appears clearly if such cases as Healy v. Howlett (1917) 1 K.B. 337 Cunningham v. Robert Munro 28 Com. Cas. 42 are compared with Castle v. Playford L.R. 5 Ex. 165 and L.R. 7 Ex. 98; and Anderson v. Morice

L.R. 10 C.P. 58 and 1 A.C. 713; Sterns v. Vickers (1923) 1 K.B. 78; Stock v. Inglis 10 A.C. 263 is a case which stands rather by itself, as whatever may be the rule as to the incidence of risk, it is clear that an undivided interest is, for the purposes of the law of insurance, an interest in every portion of an undivided bulk. See Arnould on Marine Insurance Vol. 1 Sect. 284.

I think that the matter can be put in this way. The Court will carefully examine all the facts of the case, and if it appears that the parties intended that the risk should pass independently of property they will hold that such was the agreement. If this is kept in mind I think that there is no difficulty in reconciling the various cases. For instance the conduct of the parties in Sterns v. Vickers shows that they contemplated that the risk should fall on the buyer at once. In Healy v. Howlett there was no evidence of any such intention prior to appropriation.

6.- In order to avoid any possible confusion I think it will be advisable to deal separately with:

- (a) Passing of risk
- (b) Passing of Property

and also to distinguish between:

- (c) C.I.F. Contracts
- (d) Other usual forms of contract i.e. F.O.B. Ex Ship, contracts.

a) The passing of the risk.- There is no fixed rule because the question depends on agreement between the parties (Sale of Goods Act 1893 Section 20)

(i) In the case of C.I.F. contracts the risk (as has been pointed out) passes when the goods are shipped and the seller has obtained the documents called for by the Contract.

The seller must forward the documents as soon as possible, but the risk will pass even before they are despatched. Further the documents may be despatched if the goods have been shipped and have subsequently been lost to the knowledge of the seller (See Manbre Saccharine Co. v. Corn Products Co. (1919) 1 K.B. 198) The seller is under no obligation to give notice of shipment, but the contract frequently stipulates for notice to be given. Such notice cannot take the place of a bill of lading unless otherwise agreed.

Denbigh Cowan & Co. v. Atcherley & Co. (1921) 90 L.J.K.B.836

Heilbut Symons & Co. v. Harvey & Co. (1922) 12 L. Rep. 455

(ii) In the case of F.O.B. contracts the risk will, unless otherwise agreed, pass on shipment of the goods. Stock v. Inglis (1885) 10 A.C. at p. 271. In this case it is obligatory for the seller under section 32 (3) of the Sale of goods Act to give to the buyer sufficient notice of shipment to enable the latter to insure.

Wimble v. Rosenberg (1913) 3 K. B. 743.

Northern Steel Co. v. Batt & Co. (1917) 33 T.L.R. 516

(iii) In the case of an "Ex Ship" Contract the goods are at the risk of the seller until he has done everything that it is necessary to enable the buyer to obtain delivery from the ship.

Yangtze Insurance Association v. Lukmanjee

(1918) A.C. 585

## II. The passing of property

(a) In the case of C.I.F. contracts questions of very great difficulty arise. There is no fixed rule because the fundamental proposition is that property will pass at such time as the parties intend it to pass, and property and risk may pass at different times.

The governing factor in each individual case is the intention of the parties which is to be ascertained from all the facts of the case including, in particular, the form which is taken by the documents which are to be tendered to the buyer.

(i) There is only one case in which the intention can be said to be manifest i.e. where the bill of lading is taken out in the name of or to the order of the buyer or his agent and is then forwarded to the buyer.

Here there is obviously an un conditional appropriation of the goods to the contract and property will pass to the buyer on shipment.

Tregelles v. Sewell (1862) 7. H. & N. 574

This case is hardly ever met with in practice.

(ii) If the bill of lading is taken out in the name of or to the order of the buyer or his agent but is retained by the seller, in order to secure the price the position is not so clear.



The question which arises is whether in such a case the passing of the property is suspended until the buyer tenders the price. This is the view taken by Scrutton L. J. in Karberg v. Blythe (1915) 2 K.B. at p. 387, Kennedy (C.I.F. Contracts 2nd Edition at p. 144) takes the same view. It appears however to be doubtful whether the retention by the seller of the bill of lading in these circumstances has any effect, other than that of enabling the seller to bring pressure to bear on the buyer to pay the price. There is no direct decision on the point other than the above mentioned dictum of Scrutton L. J. - This case is one which is very rarely met with, and is almost negligible.

(iii) Where the bill of lading is taken out by the seller in his own name or to his order and is retained by him or by the financing banker (the normal case at the present day) the presumption is that the seller has reserved the right of disposal with the intention of retaining the property in the goods. The burden of displacing this presumption is on the buyer or those who claim through him. I do not propose (unless it is desired that I should do so) to discuss the question whether the reservation of the right of disposal is merely another way of describing the exercise of the unpaid seller's lien, or whether it amounts to a conditional passing of property which becomes absolute as soon as the buyer tenders payment of the price. The tendency at the present day is very strongly to hold that where the right of disposal is reserved for the purpose of securing the price there is no unconditional appropriation of the goods to the contract and that property therefore does not pass to the buyer unless

and until payment of the price against the documents. The following cases illustrate the tendency

Stein Forbes & Co. v. County's Tailoring Co. ( 1917 )

85 L.J.K.B. 448;

The Miramichi ( 1915 ) P. 71;

The Prinz Adalbert ( 1917 ) A.C. 586;

Eastwood & Holt v. Duder ( 1926 ) 31 Com. Cas. 251

There may be cases such as The Parchim (1918) A.C. 157 where it will be held that property passes on shipment but such cases must be regarded as exceptional, more particularly in view of the fact that import and export transactions are usually financed by means of bankers' confirmed credits.

I might add that there is no obligation on the seller under a C.I.F. contract to appropriate goods to the contract until the very last moment i.e. when the documents are tendered. This deprives the question of the passing of property of much of its practical importance.

(b) The position as regards F.O.B. contracts is less complicated, because unless otherwise provided for in the contract property passes on shipment, and this is what usually happens.

(c) In "Ex ship" contracts unless otherwise agreed property will not pass until the seller has done all that is required to enable the buyer to obtain delivery from the ship.

(III) In practice the question as to the passing of property is sometimes dealt with specifically in the contract of sale, but this is somewhat rare.

7.-

I agree that there is a deplorable lack of consistency as regards the use of the term "rescission". It is employed in a somewhat indiscriminate manner not only in legal literature, but also in decisions of the Courts, both in England and in America.

As is pointed out by Anson (Law of Contracts 17th Edition at page 344) there must be two parties to a rescission, unless it takes place by virtue of a judgment of a Court of Law. See also Michael v. Hart (1902) 1 K.B. at p. 490. Therefore it would seem to be incorrect to apply the term to any case where all that happens is that a party is entitled to treat a contract as no longer subsisting either owing to something ab extra the Contract (as, for instance, want of capacity, illegality, or fraud), or because of an essential breach by the other party. Unfortunately the term has been used to cover all cases in which a party can claim to be freed from duties imposed on him by a Contract (See General Billposting Co. v. Atkinson (1909) A.C. 118).

I also agree that it is desirable that some degree of uniformity should be achieved as regards the use of the word, though I do not think that the consequences of its mis-use are of great practical importance.

Further I do not think that there is any very tangible difference between the use of the term in England and the sense in which it is employed in America. Professor Williston's criticism of the English fiction of an implied condition that a renunciation of performance is an offer of cancellation which may be accepted by the other party has much to support it, but this theory is now deeply rooted in the law of England. After all the

consequences of the English and the American view of the matter are the same save in two respects:

(1) In America the party aggrieved by renunciation is in no way prejudiced if he elects to insist on performance, whereas in England he does so at his peril. (2) In England if the aggrieved party elects to keep the Contract open the damages are measured as at the date when performance should have taken place. In America they are fixed by reference to the time of the renunciation. These are the only really important differences, and I do not think that they arise from any theory as to the nature of the right of the aggrieved party to consider himself freed from the Contract. The question is therefore largely one of words.

8. As a general rule a seller will not recover interest unless the buyer has agreed (either expressly or by implication) to pay interest. It is true that the Civil Procedure Act 1833 gives the Courts a discretionary power to award interest, but this power is rarely used. This can be explained on two grounds. First of all, the Civil Procedure Act 1833 only applies as a rule to actions for the price of goods if there has been a previous demand in writing for payment coupled with a notice that interest will be claimed from the date of the demand. A demand of this kind is in practice only made occasionally, probably either because business men are unaware of the rule which may entitle them to claim interest, or because it has for the time being escaped their memory. Secondly in any event the Courts are not in the habit of awarding interest

under the Act unless it is thought that the buyer has been deliberately and contumaciously avoiding payment. The failure of business men to make use of the provisions of the Act of 1833 is no doubt also largely due to this attitude of the Courts towards the matter.

9.- I have had some personal experience of contracts calling for a specification by the buyer, as I have at various times been called to act as Counsel in litigation arising out of such contracts in the iron trade between England and Belgium. The Courts do not treat the date by which the specification must be given as imposing an absolute obligation on the buyer unless this appears definitely from the Contract to be the intention of the parties. The duty of the buyer, generally speaking, is to specify within a reasonable time. The question therefore almost invariably becomes one of fact, i.e. as to what is a reasonable time in the circumstances and this probably accounts for the paucity of case law on the topic.

An absolute refusal to specify, or a failure to specify, within the fixed time or within a reasonable time as the case may be will of course constitute a breach of contract entitling the seller to claim damages on the principle laid down in Mackay v. Dick (1881) 6 A.C. 251.

The position would seem to be the same in America, though up to the present I have not been able to find a direct authority.

10.- The action for damages for non acceptance contemplated by Section 50 of the Sale of Goods Act 1893 does not necessarily pre-suppose that property in the goods has not passed to the buyer. If the title is in the buyer the seller can either sue for the price, or, if it suits him better, he can sue for damages for non-acceptance. In practice the seller usually sues for damages, as this often avoids difficult questions as to whether property has passed or not.

Chalmers Sale of Goods 10th Edition p. 123.

It should be noted that if the seller has resold the goods he can only sue for damages.

Lamond v. Davall (1847) 9 Q.B. 1030.