

FOOTBALLERS, LOST DOGS AND REWARD PROMISES: OFFER AND ACCEPTANCE IN ENGLISH, AMERICAN AND AUSTRALIAN CONTRACT LAW

VICTORIA BARNES*

SALLY WHEELER**

ABSTRACT

This Article examines the issues raised by the case Washington v. Sturridge (2021) in the Los Angeles County Superior Court. The case itself was well-noted among contemporary news media sources. These sources were not interested in the case's potential landmark status or revolutionary judgments, but rather the celebrity status of the litigants. The defendant, Daniel Sturridge, is perhaps best known as a once high-profile footballer with a career as a prolific goal scorer and now as social media influencer. The claimant is an American rapper, who performs under the name Killa Fame. The facts of the case will, however, be familiar to all law students as they are typical of a classic reward promise case, also known as a unilateral contract. There is a nuanced difference between these nomenclatures of contract and promise in this factual matrix. The distinctiveness of the case under discussion is threefold. First, the case shows how a resolution to a relatively simple issue requires a common law solution constructed from three jurisdictions (England, the United States and Australia) to resolve it. Second, it shows how technological developments are absorbed into the common law and accommodated. Third, it demonstrates the enduring importance of context and social relations to contract law and common law.

TABLE OF CONTENTS

ABSTRACT	23
I. INTRODUCTION.....	24
II. CONTEXT.....	26
III. ENGLISH LAW	30
A. Offer.....	30
B. Acceptance	33
C. Revocation.....	37
D Intention to Create Legal Relations	39
E. Conclusion.....	41

* Reader in Commercial Law, Brunel University London

** Professor of Law, Australian National University

IV. <i>WASHINGTON V. STURRIDGE</i> (2021)	42
A. Offer and Acceptance	42
B. Intention to Create Legal Relations	43
C. Law, Morality, and Commonsense	44
V. CONCLUSION	45

I. INTRODUCTION

This Article examines the law surrounding the case of *Washington v. Sturridge* (2021) in the Los Angeles County Superior Court.¹ The facts of the case will be familiar to law students across the common law world and certainly in England and the United States. Daniel Sturridge, a sometime famous English footballer, then playing professional soccer in Turkey, lost his dog, Lucci, a Pomeranian, in a Los Angeles house during a burglary.² Sturridge later posted on social media,³ offering a reward for the dog's return.⁴ Washington (better known as Killa Fame) claims he returned Lucci,⁵ but Sturridge did not pay him the promised reward.⁶ Washington sued in the Los Angeles Superior Court for breach of contract and the cost of the reward.⁷ These facts resemble a typical reward-promise case. They are frequently used to illustrate the principles of offer, acceptance and revocation in the United Kingdom. They resonate with the hypothetical "lost dog" example given by Lord Justice (LJ) Bowen in *Carlill v. the Carbolic Smoke Ball Company* (1893). He stated:

If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs

¹ *Washington v. Sturridge*, Cal. Super. Ct. (2021).Case number 21STCV19397.

² Léonie Chao-Fong, *Daniel Sturridge Ordered To Pay £22,400 To Rapper Who Found His Lost Dog*, THE GUARDIAN (Dec. 25, 2021, 8:11 AM), <https://www.theguardian.com/world/2021/dec/25/daniel-sturridge-ordered-to-pay-22400-to-rapper-who-found-his-lost-dog>; Telegraph Reporters, *Footballer Daniel Sturridge Ordered To Pay £22,000 Reward To Man Who Found His Dog*, THE TELEGRAPH (Dec. 24, 2021, 9:27 PM), <https://www.telegraph.co.uk/news/2021/12/24/footballer-daniel-sturridge-ordered-pay-reward-man-found-dog/>; Joseph Lee, *Daniel Sturridge: Former Liverpool Striker Ordered to Pay £22k Over Lost Dog*, BBC NEWS (Dec. 25, 2021), <https://www.bbc.com/news/uk-59787330>.

³ "Social media" can be defined as "[i]nternet-based, disentrained, and persistent channels of mass-personal communication facilitating perceptions of interactions among users, deriving value primarily from user-generated content." Caleb T. Carr & Rebecca A. Hayes, *Social Media: Defining, Developing, and Divining*, 23 ATLANTIC J. OF COMM'N 46 (2015).

⁴ Chao-Fong, *supra* note 2; Reporters, *supra* note 2; Lee, *supra* note 2.

⁵ Sturridge has since disputed that Washington returned the dog and alleged on social media that the person who did find the dog received the reward.

⁶ Chao-Fong, *supra* note 2; Reporters, *supra* note 2; Lee, *supra* note 2.

⁷ *Id.*

to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance.⁸

Sturridge did not enter a defense to the claim that he made an offer to the world which Washington had accepted through performance. Without a defense, the court followed Bowen LJ's logic and ruled in favor of Washington, awarding him the cost of the reward.

This article considers the facts of the case and explores relevant cases principally through the lens of English contract law. How would such a case have been understood and argued in English law? With the dog lost in Los Angeles and the offer made there, the case was clearly justiciable in Los Angeles under California law, and not in an English court using principles of English law. First, the question about English law is important to ask given the background of the defendant. With one English-born litigant, it may be that there are different norms and expectations regarding the offering of rewards – and rules governing such behavior. Such a discussion may be useful in understanding the background of the case and the driving force behind the litigants' various responses to it. Second, this analysis is also useful to explore the links between English contract law and American contract law and the ways in which they have diverged.

The context of the case in our analysis, in contrast to the court's indifference to it, is key. The case was litigated as a classic promised reward case, but, as we explain, the medium of communication via Instagram is a significant departure from existing case law and the examples derived from it in the law school classroom. At various points in its journey from a purely oral form, contract law has been required to adapt to new technologies.⁹ This is as true of social media as it is of the development of writing, the printing press, email and, more recently, blockchain.¹⁰ After exploring the wider context, we turn to discuss principles of English law. We consider the relevant cases and the ways in which principles have been rationalized by leading judges. The third section considers the decision of the Los Angeles County Superior Court and the perspective of the litigants. Given the discussion of the difference between law and morals, this section examines the litigants' reflections on the case.

⁸ *Carlill v. the Carbolic Smoke Ball Co.* [1893] 1 Q.B. 270.

⁹ Chris Reed, *Online and Offline Equivalence: Aspiration and Achievement*, 18 INT'L J. OF L. & INFO. TECH. 248 (2010).

¹⁰ Sally Wheeler, *The Possibilities of IF-THEN-WHEN*, in REGULATORY INSIGHTS ON ARTIFICIAL INTELLIGENCE: RESEARCH FOR POLICY 162 (Mark Findlay et al. eds., 2022).

II. CONTEXT

The case itself was well-noted among news media sources.¹¹ This was not for its landmark status nor for the revolutionary judgment, but for its popular and public nature. What was most newsworthy about this case was not the presence of facts that are usually seen in a contract law assessment. Nor was it the allegation of wrongdoing or misbehavior in failing to pay the reward as promised in itself,¹² but the celebrity status of the individuals involved. The case allowed some an insight into the lives of the rich and famous. The defendant, Daniel Sturridge, is likely to have some recognition for a global or international audience.¹³ Sturridge is a soccer player; a center forward who currently plays for Perth Glory in Australia's A-League.¹⁴ At the height of his football career, he played for well-known teams in the English Premier League, such as Liverpool, Manchester City and Chelsea, among others.¹⁵ He played for the English national team between 2011 and 2017, earning 26 caps and scoring eight goals.¹⁶

In addition to being a professional sports player, Sturridge is also an "influencer,"¹⁷ who has a record label and a number of modelling contracts,¹⁸ which are promoted on his Instagram account,¹⁹ where he has a considerable following.²⁰ Instagram as a social media platform is based on the sharing of visual

¹¹ To name a few: Chao-Fong, *supra* note 2; Reporters, *supra* note 2; Lee, *supra* note 2.

¹² There were, of course, allegations that Sturridge had behaved improperly by failing to pay the reward as promised. See Chao-Fong, *supra* note 2; Reporters, *supra* note 2; Lee, *supra* note 2.

¹³ Philip Bajon, Victoria Barnes & Emily Whewell, *Global Legal Biography*, 9 COMPAR. LEGAL HIST. 127 (2021). (for more on the definition of "global" lives).

¹⁴ Catherine Paquette, *Perth Glory Sign Daniel Sturridge in Massive A-League Coup*, FTBL (Oct. 1, 2021, 12:51 PM), <https://www.ftbl.com.au/news/perth-glory-sign-daniel-sturridge-in-massive-a-league-coup-570641>.

¹⁵ Football (Sky Sports), SKYSPORTS, <https://www.skysports.com/daniel-sturridge> (last visited Jan. 27, 2022).

¹⁶ *General Information About the Player Daniel Sturridge*, NATIONAL FOOTBALL TEAMS, https://www.national-football-teams.com/player/45528/Daniel_Sturridge.html (last visited Sep. 20, 2022).

¹⁷ Luis V. Casalo, Carlos Flavián & Sergio Ibáñez-Sánchez, *Influencers on Instagram: Antecedents and Consequences of Opinion Leadership*, 117 J. OF BUS. RSCH. 510 (2020).

¹⁸ Jacob Davey, *Straight From the Sauce: Daniel Sturridge is About to Change the Game Once Again*, VERSUS (Feb. 7, 2019), <https://versus.uk.com/2019/02/straight-sauce-daniel-sturridge-change-game/>.

¹⁹ Youssef Chetioui, Hikma Benlafqih & Hind Lebdaoui, *How Fashion Influencers Contribute to Consumers' Purchase Intention*, 24 J. OF FASHION MKTG. & MGMT.: AN INT'L J. 361 (2020).

²⁰ At the time of writing, Daniel Sturridge has around 4 million followers on Instagram. In the brief, it states that Lucci, his dog, had his own Instagram page with 3,000 followers. Brief in Support of Default Judgment at p. 4 line 21, *Washington v. Sturridge*, No. 21STCV19397 (Cal. Super. Ct. L.A. County Dec. 3, 2021). Lucci, as of September 24 2022, has 31400 followers even though "his" account has only ever made 172 posts from 9 January 2018, see https://www.instagram.com/luccida_poochie/?hl=en (last visited Sept. 24, 2022). We might compare the size of Sturridge's following with that of the most followed person on Instagram, also a professional footballer, Cristiano Ronaldo.

images (photographs or videos) potentially modified and enhanced by filters, that are supported by a short message if the user wishes, to a following audience that is not necessarily reciprocal. Originally designed as an application for mobile devices only, its non-reciprocal nature and emphasis on pictures rather than text means that it can support users in self-promotion²¹ and other personal and corporate marketing activities.²² Influencers in social media contexts, particularly Instagram, generate their status from promoting new clothes, styles and fashions situated within their carefully curated visual stories. Success is determined by the degree of brand engagement from their followers.²³

The claimant is one Foster Washington. Various sources identify Washington as a rapper who performs under the name Killa Fame.²⁴ The reality is probably less glamorous than the label “rapper” might suggest. Washington was living in his car²⁵ so it seems fair to surmise that he was struggling financially at the time the reward was offered. In his declaration, Washington did not describe himself as a rapper or, indeed, as a performer of any kind. Here, he notes his previous employment working with animals as a “Vet Tech” (presumably short or industry-speak for a veterinary technician),²⁶ and indicates that he would like to return to this industry.²⁷ Killa Fame is not described as his rapper or musical persona by Washington himself, but rather, he calls it his “Twitter handle.”²⁸ The story, as presented by the news media, sheds some light on the private life of a would-be rapper and a celebrity footballer, whose initial prominence derived from his successful sporting career and who now seemed to be transitioning into becoming a celebrity figure, curating a new career outside sport on social media.²⁹

Ronaldo had 445m followers in June 2022, see <https://www.statista.com/statistics/421169/most-followers-instagram/> (last visited Sept. 20, 2022).

²¹ Sophie F Waterloo et al., *Norms of Online Expressions of Emotion: Comparing Facebook, Twitter, Instagram, and WhatsApp*, 20 NEW MEDIA & SOC’Y 1813 (2018).

²² Pavica Sheldon & Katherine Bryant, *Instagram: Motives for its Use and Relationship to Narcissism and Contextual Age*, 58 COMPUT. IN HUM. BEHAV. 89 (2016).

²³ Crystal Abidin, *#In\$tagLam: Instagram as a Repository of Taste, a Burgeoning Marketplace, a War of Eyeballs*, in MOBILE MEDIA MAKING IN AN AGE OF SMARTPHONES 119 (Marsha Berry & Max Schleser eds., 2014).

²⁴ See *Killa Fame*, SOUNDCLOUD, <https://soundcloud.com/killafame> (last visited Jan. 20, 2022).

²⁵ Washington states in his declaration, at the time of finding the dog, that he was “temporarily dwelling in my vehicle.” Declaration Pursuant to 585 CCP in Support of Default Judgment at para. 2, *Washington v. Sturridge*, No. 21STCV19397 (Cal. Super. Ct. L.A. County Dec. 3, 2021).

²⁶ *Id.* at para. 3.

²⁷ *Id.* at para. 9.

²⁸ *Id.* at para. 4. It was later changed to “yes I found Lucci” (Lucci being the dog’s name). Declaration Pursuant to 585 CCP in Support of Default Judgment at exhibit 2, *Washington v. Sturridge*, No. 21STCV19397 (Cal. Super. Ct. L.A. County Dec. 3, 2021).

²⁹ The lives of footballers are interesting in their own right. This case takes place over a decade after the famed TV show *Footballer’s Wives* (United Kingdom 2002-2006 and United States 2010) and the cultural fascination with WAGs. This fascination ended when it was considered to be sexist to categorize or refer to women purely on the basis of their relationship with a footballer. See Jasper

Sturridge posted a video on his Instagram account, explaining that Lucci, his dog, had been taken in a burglary from his house in the West Hollywood Hills, and offering a reward for its return.³⁰ The use of social media added to the story's appeal. There was, of course, the public nature of the buildup to the litigation—that is, in the reaction to the allegations that the dog had been found and that the reward had not been paid—and the litigation itself. The significant point here is that active engagement with Sturridge's post (e.g., in sharing, re-posting, or looking for the dog) or passive engagement (e.g., in reading) would give members of the public a greater sense of involvement in his quest to find his dog. Social media is built on the idea of connection, in which influencers create a “networked public” by publishing content for an audience whose members they do not know and cannot see.³¹ The everyday world of these influencers becomes visible, and their viewers (followers) begin to feel a sense of intimacy with them.³² This sense of “realness” is missing from legacy media—print and television (reality television excepted)—because those are edited sources.³³ Sturridge's Instagram followers would have felt involved in his predicament and would have participated actively or passively in the search for Lucci. Given this, they were likely to invest themselves in the next installment of the saga – the allegedly unpaid reward.

Indeed, Washington notes he heard of the lost dog because of the local news media (although this was indirect – Washington, says he heard first from a friend and then heard the broadcast).³⁴ A Los Angeles-based television station, KTLA Channel 5, had picked up the story. Washington explains he solicited advice from the reporter from the News program via Twitter when he found the dog.³⁵ After uploading a picture of the dog to Twitter,³⁶ Washington claims Sturridge's representative reached out to him to collect the dog—but he received a strong

Copping, *WAGs? That's Sexist Talk, Says Equality Watchdog*, THE TELEGRAPH, (Jun. 13, 2010), <https://www.telegraph.co.uk/sport/football/world-cup/7823337/WAGs-Thats-sexist-talk-says-equality-watchdog.html>; Felicity Morse, *This World Cup, Let's Stop Calling Women WAGs*, THE INDEPENDENT, (Jun. 11, 2014), <https://www.independent.co.uk/voices/comment/this-world-cup-let-s-stop-calling-women-wags-9523697.html>; Dana Johannsen, *Time to Ditch the Word WAG*, NZ HERALD, (Feb. 2, 2015), <https://www.nzherald.co.nz/sport/dana-johannsen-time-to-ditch-the-word-wag/DGBW4PHEALRPHITRTMLFFKSOW4/>.

³⁰ See Chao-Fong, *supra* note 2; Reporters, *supra* note 2; Lee, *supra* note 2.

³¹ TAMA LEAVER, TIM HIGHFIELD & CRYSTAL ABIDIN, *INSTAGRAM: VISUAL SOCIAL MEDIA CULTURES* 103f (2020).

³² Jihyun Kim & Hayeon Song, *CELEBRITY'S SELF-DISCLOSURE ON TWITTER AND PARASOCIAL RELATIONSHIPS: A MEDIATING ROLE OF SOCIAL PRESENCE*, 62 COMPUT. IN HUM. BEHAV. 570 (2016).

³³ Andrew M. Ledbetter & Colten Meisner, *EXTENDING THE PERSONAL BRANDING AFFORDANCES TYPOLOGY TO PARASOCIAL INTERACTION WITH PUBLIC FIGURES ON SOCIAL MEDIA: SOCIAL PRESENCE AND MEDIA MULTIPLEXITY AS MEDIATORS*, 115 COMP. IN HUM. BEHAV. 106610 (2021).

³⁴ Declaration Pursuant to 585 CCP in Support of Default Judgment at para. 4, *Washington v. Sturridge*, No. 21STCV19397 (Cal. Super. Ct. L.A. County Dec. 3, 2021).

³⁵ *Id.* at para. 6.

³⁶ *Id.* at exhibit 2.

reaction from Sturridge's fans on social media. Washington claims that Sturridge's fans were "extremely fascinated by the sequence of events": some debated whether he was responsible for the theft, and others on the morality of claiming the reward.³⁷ Washington explained that this continued: he received death threats, and later, "someone threw an incendiary device into [his car]," thereby destroying the car and all his property in it.³⁸ He believes the perpetrator was "inspired by some kind of sick loyalty to Daniel Sturridge over the dog."³⁹ Throughout this chain of events, Sturridge and Washington courted media attention, with Sturridge celebrating the return of the dog and thanking those on social media for their support and raising awareness,⁴⁰ while Washington continued to tweet about the non-payment of the reward.⁴¹

A court case over the promised reward was probably not what most would have imagined as a natural development in the life cycle of this story. The litigation is as inherently intriguing as the character or identity of the actors. The reality of contract practice is that most contract disputes concern a hierarchy of documents interspersed with oral explanations and comments.⁴² In this sense, this case takes us back to the orality,⁴³ still heavily used in legal education settings to explain contract doctrine. However, the presence of social media gives a contemporary twist that brings us into the twenty-first century. This reward promise was not seen in a newspaper or post office shop window.⁴⁴ It is demonstrative of how communication methods have changed and developed over the last two centuries. Physical newspapers are no longer the most commonly-read resources in the digital age.⁴⁵ With the rise of virtual marketplaces, online shopping, and in particular, internet commerce⁴⁶ have been encouraged by COVID-19 lockdowns in some

³⁷ *Id.* at para. 9.

³⁸ *Id.* at para. 11.

³⁹ *Id.*

⁴⁰ *Id.* at exhibit 2.

⁴¹ *Id.*

⁴² Gillian K. Hadfield & Iva Bozovic, *SCAFFOLDING: USING FORMAL CONTRACTS TO SUPPORT INFORMAL RELATIONS IN SUPPORT OF INNOVATION*, 2016 WIS. L. REV. 981 (2016).

⁴³ Contract law is still taught within the academy with a high dependence on the oral scenario. Concepts such as offer, acceptance, consideration, mistake and misrepresentation are illustrated through imagined oral exchanges between protagonists. See PETER MEIJES TIERSMA, *THE LANGUAGE OF OFFER AND ACCEPTANCE: SPEECH ACTS AND THE QUESTION OF INTENT*, 74 CAL. L. REV. 189 (1986).

⁴⁴ The example here being *Carlill v. the Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256.

⁴⁵ A Pew Research Center survey from September 2020 indicates the rise of digital news media and the decline in popularity of print news media. See Elisa Shearer, *More Than Eight-in-ten Americans Get News from Digital Devices*, PEW RESEARCH CENTER, (Jan. 12, 2021), <https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/>.

⁴⁶ In 2020 global e-retail sales surpassed \$4.2 trillion dollars in value, see Koen van Gelder, *E-commerce Worldwide - Statistics & Facts*, STATISTICA, (Sep. 26, 2023), <https://www.statista.com/top-ics/871/online-shopping/>.

jurisdictions.⁴⁷ It is to imagine people gathering around the local post office window to read the notices placed there, or rushing to purchase the locally printed buy and sell sheets. The digital economy and its implications are beginning to have an impact on English contract law, as software is now embraced in some provisions.⁴⁸

Its modern contextual setting aside, *Washington v. Sturridge* (2021) features traditional legal issues, such as offer, acceptance, revocation, and intention to create legal relations. We now turn to discuss the relevant principles of English law.

III. ENGLISH LAW

This section explores the principles of English law relevant to this case. There are four separate legal issues – offer, acceptance, revocation, and intention to create legal relations – and this section deals with each of them in turn.

A. Offer

To establish the difference between an offer and invitation to treat, the leading English cases of *Carlill v. the Carbolic Smoke Ball Company* (1893) and *Partridge v. Crittenden* (1968) are traditionally utilized. These cases are different in terms of the type of representation made by the promisor and the way in which the Court treats those representations. *Carlill* (1893) is typically used to show an offer, while *Partridge* (1968) does not. *Partridge* (1968) instead represents an invitation to treat or mere puff.⁴⁹

Carlill v. the Carbolic Smoke Ball Company (1893) is known to all contract law students for its wide utility and dexterity: since it involves a legally binding contract, and presents elements of offer, acceptance, consideration, and the intention to create legal relations. The historical path to *Carlill* and the context which surrounds it has been examined by the legal historian Brian Simpson.⁵⁰ Warren Swain notes the case is also memorable because “the facts have such an

⁴⁷ E-commerce grew between two and five times faster during the pandemic, see *How E-commerce Share of Retail Soared Across the Globe: A Look at Eight Countries*, MCKINSEY & COMPANY, (Mar. 5, 2021), <https://www.mckinsey.com/featured-insights/coronavirus-leading-through-the-crisis/charting-the-path-to-the-next-normal/how-e-commerce-share-of-retail-soared-across-the-globe-a-look-at-eight-countries>.

⁴⁸ See the preface in CHRISTIAN TWIGG-FLESNER & RICK CANAVAN, ATIYAH AND ADAMS’ *SALE OF GOODS* (14th ed. 2020). Recent examples include the Consumer Rights Act 2015 and *The Software Incubator Ltd. v. Comput. Assoc. UK Ltd.* [2022] 2 All E.R. (Comm) 139, [2021] Bus. L.R. 1442. Software was previously not clearly included. See also *St Albans City and Dist. Council v. Int’l Comput. Ltd.* [1996] 4 All E.R. 481.

⁴⁹ *Partridge v. Crittenden* [1968] 1 W.L.R. 1204.

⁵⁰ A. W. B. SIMPSON, *QUACKERY AND CONTRACT LAW: THE CASE OF THE CARBOLIC SMOKE BALL*, 14 J. OF LEGAL STUD. 345 (1985).

aura of unreality about them.”⁵¹ One might say the same of *Washington v. Sturridge* (2021). Simpson explains the facts of *Carlill* in far more detail and with far greater vivacity than can be done here.⁵² These are the essential points. In response to a serious influenza outbreak, the Carbolic Smoke Company placed an advertisement that said “100l. reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. 1000l. is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter.”⁵³ This was held by the Court of Appeal to constitute a unilateral offer.⁵⁴ It was an offer to the world that was clear and capable of being accepted.⁵⁵ A unilateral promise in return for an act was an offer,⁵⁶ perhaps better expressed as a two-sided arrangement but with only a one-sided obligation.

Often, if an advertisement is not an offer, it is considered an “invitation to treat” or a “mere puff.” The legal historian Anat Rosenberg observes that the puffery doctrine began with the case of *Carlill v. the Carbolic Smoke Company* (1893),⁵⁷ which was the catalyst for much in the way of legal change. The same could be said of William Reynell Anson’s textbook. Swain describes it as the “first true contract textbook produced for students.”⁵⁸ Rosenberg notes that after *Carlill* (1893), Anson’s treatise included “puffery” for the first time.⁵⁹ Here, Anson explained what puffery was and cited a selection of cases as examples.⁶⁰ Anson

⁵¹ Warren Swain, *Predicting the Direction of Australian Contract Law in the Next 25 Years*, in PRIVATE LAW IN THE 21ST CENTURY, 102 (Kit Barker, Karen Fairweather, & Ross Grantham eds., 2017).

⁵² Simpson’s aim was to write about these cases with an element of fun. Angela Fernandez, *Legal History as the History of Texts*, in OXFORD HANDBOOK OF LEGAL HISTORY, 246 (Markus D. Dubber & Christopher Tomlins eds., 2018). In an understated and unpretentious manner, Simpson hoped that his work ‘may show that we can obtain greater enjoyment and instruction from the study of cases if we discover more about them than is provided by the law reports.’ A. W. B. SIMPSON, *LEADING CASES IN THE COMMON LAW* vii (1996).

⁵³ *Carlill v. the Carbolic Smoke Ball Co.* [1893] 1 Q.B. 257.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See also *Bowerman v. Ass’n of British Travel Agents Ltd* [1996] C.L.C. 451.

⁵⁷ Anat Rosenberg, *Legal Ridicule in the Age of Advertisement: Puffery, Quackery, and the Mass Market*, 61 AM. J. LEGAL HIST. 281, 281 (2021).

⁵⁸ Warren Swain, *Rescuing contract law pedagogy from the nineteenth century*, in REIMAGINING CONTRACT LAW PEDAGOGY: A NEW AGENDA FOR TEACHING (Warren Swain & David Campbell eds., 2019).

⁵⁹ Entry in *Scholars of Contract Law*. See *SCHOLARS OF CONTRACT LAW*, (James Goudkamp & Donal Nolan eds., 2022).

⁶⁰ Treatises and textbooks were of vital importance. It was the analysis of the treatise writer and their words that mattered; they explained the value of the case and its capacity to generate a wider rule. Stephen Waddams, *The Authority of Treatises in English Law (1800-1936)*, in *LAW AND AUTHORITY IN BRITISH LEGAL HISTORY, 1200-1900* (Mark Godfrey ed., 2016).

commented it is “an advertisement or puff which no reasonable person would take to be serious.”⁶¹ Lindley LJ, the famed commercial lawyer,⁶² said in his judgment in *Carlill* that the advertisement could not be mere puff. He read the passage “1000l. is deposited with the Alliance Bank, showing our sincerity in the matter” in the advertisement literally.⁶³ He said, “we are not inferring a promise; there is the promise, as plain as words can make it.”⁶⁴ From this point onwards, it was clear that an advertisement could be linked to “puffery” and could be firmly and clearly identified.

Contemporary examples of invitations to treat or mere puffs can be found in the cases of *Partridge v. Crittenden* (1968) and *Fisher v. Bell* (1961).⁶⁵ *Partridge v. Crittenden* (1968) revolved around an advertisement proffering a female bramblefinch for sale.⁶⁶ Offering this bird for sale was an offence under section 6 (1) of the Protection of Birds Act 1954. Although Partridge was initially found guilty, the Queen’s Bench Division reversed the decision. It found the advertisement was not an offer in the strict doctrinal sense, but an invitation to treat. Lord Parker CJ’s rationale was that if this was an offer, then anyone who read the advertisement would be entitled to enter into a binding contract and receive the goods promised. This could not be so because, presumably, the offeror was in possession of a limited number of bramblefinch hens.⁶⁷ In other words, if this were an offer in the strict doctrinal sense, many would be disappointed to find that the contract, now legally binding, could not be fulfilled. The law was constructed here to give a degree of certainty for those entering into contracts and to blend the law with “common sense.”⁶⁸ *Partridge v. Crittenden* (1968) is well remembered today, but relied upon *Fisher v. Bell* (1961), which was heard only a few years prior with Lord Parker CJ presiding.⁶⁹

Fisher v. Bell (1961), like *Partridge v. Crittenden* (1968), involved the sale of an item that was prohibited by law. It was alleged that the shopkeeper offered a flick knife for sale contrary to section 1 (1) of the Restriction of Offensive Weapons Act 1959. Lord Parker CJ confessed that like “most lay people... I ... would be

⁶¹ Rosenberg, *supra* note 57, at n. 18.

⁶² Victoria Barnes, *Interrogating the Self-told Narrative: Lord Lindley’s Autobiography, his Life and his Legal Biography*, 41 J. LEGAL HIST. 143 (2020).

⁶³ *Carlill v. the Carbolic Smoke Ball Co.* [1893] 1 Q.B. 261. The price and deposit of money as well as the seriousness of the claim has, for some, clear links to intention to create legal relations. We return to this point in section 3(c).

⁶⁴ *Carlill v. the Carbolic Smoke Ball Co.* [1893] 1 Q.B. 262.

⁶⁵ *Partridge v. Crittenden* [1968] 1 W.L.R. 1204 is used traditionally more often to demonstrate such a point.

⁶⁶ *Id.*

⁶⁷ *Partridge v. Crittenden* [1968] 1 W.L.R. 1209-10. Here he borrowed the words from Lord Herschell in *Grainger & Son v. Gough* [1896] A.C. 325.

⁶⁸ *Partridge v. Crittenden* [1968] 1 W.L.R. 1210.

⁶⁹ *Id.* at 1209.

inclined to the view that to say that if a knife was displayed in a window like that with a price attached to it, it was nonsense to say that that was not offering it for sale.”⁷⁰ However, he insisted that the Restriction of Offensive Weapons Act 1959 must be interpreted alongside the general principles of contract law. Here, he remarked that it “is perfectly clear that according to the ordinary law of contract the display of an article with a price on it in a shop window is merely an invitation to treat. It is, in no sense, an offer for sale the acceptance of which constitutes a contract.”⁷¹ In Lord Parker CJ’s mind, there was a clear disjuncture between what ordinary people might expect the letter of the law to be and what it was in practice. Yet, when these comments are taken with those in *Partridge v Crittenden* (1968), there is clear rationale and theory behind the legal rules.

B. Acceptance

English law operates a “mirror image” approach to acceptance. A contract can only be formed if acceptance corresponds to the offer. An acceptance that does not correspond to the terms of the offer destroys that offer, rendering it incapable of being accepted at any point in the future. The parties have to be *ad idem* (as one) after the acts considered to be the “offer” and “acceptance.”⁷² For bilateral contracts, the House of Lords’ decision in *Gibson v. Manchester City Council* (1979) was clear that conduct was insufficient proof of acceptance.⁷³ Returning to *Carlill* (1893), it provides the leading discussion of acceptance in English contract law in relation to unilateral contracts. With the act of inhaling the smoke ball being carried out in the exact manner specified and in its entirety, *Carlill* provided acceptance.⁷⁴ There was a meeting of the minds here, as is traditionally needed to make a contract. Bowen LJ commented in the case that “One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together.”⁷⁵ Yet, he went on to say that “if the person making the offer, expressly or impliedly

⁷⁰ *Fisher v. Bell* [1961] 1 Q.B. 394.

⁷¹ *Id.*

⁷² For a thorough explanation of how English Law constructs and construes these categories, see the judgements of the Court of Appeal in *Butler Machine Tool Co. Ltd. v. Ex-Cell-O Corp. (England) Ltd.* [1979] 1 W.L.R. 401.

⁷³ *Gibson v. Manchester City Council* [1979] 1 W.L.R. 294.

⁷⁴ Lindley LJ noted that in following the instructions exactly “there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of the opinion, therefore, that there is ample consideration for the promise.” *Carlill v the Carbolic Smoke Ball Co.* [1893] 1 Q.B. 265. Although it was in Lindley LJ’s view linked to consideration, Goff LJ in *Daulia Ltd. v. Four Millbank Nominees Ltd.* [1978] 2 W.L.R. 261 framed this point around offer and acceptance instead. He said, “the true view of a unilateral contract must in general be that the offeror is entitled to require full performance of the condition which he has imposed and short of that he is not bound.”

⁷⁵ *Carlill v. the Carbolic Smoke Ball Co.* [1893] 1 Q.B. 269.

intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is sufficient acceptance without notification.”⁷⁶ There was no need for Carlill to communicate acceptance. Simpson comments on this point that the “application of the offer and acceptance analysis to such (unilateral) promises has never been happy; it only became canonical late in the nineteenth century in the celebrated case of *Carlill v. the Carbolic Smoke Company* (1892).”⁷⁷ Legal scholar Jonathan Morgan considers that unilateral contracts are different; being in “rather an anomalous category – offers that cannot be accepted by explicitly saying ‘I accept!’”⁷⁸ Instead, what we have is a simple commitment to perform if the conditions of the promise are met. The commitment is “singly and solely the consequence of promising.”⁷⁹ Constructing unilateral contracts as anything other than promises is a result of focusing enforcement on bilateral arrangements.

The creation of new communication technologies requires those adjudicating contract disputes to augment existing rules to include that technology or to create new rules. Some communication methods such as fax and telex, despite being considered revolutionary at the time of their adoption, have been comparatively short lived.⁸⁰ Nevertheless, each one has to be assessed to see where in the schema of contract rules it fits. In *Brinkibon v. Stahag Stahl und Stahlwarenhandels GmbH* (1983), when the notice of acceptance was sent by Telex, the House of Lords found that the message was effective when received on the telex machine of the intended recipient. In this instance, telex technology was treated as just another form of instantaneous communication. Lord Wilberforce was at pains to point out that there could be exceptions to this rule in the case of broken machines, messages delivered on telex machines belonging to other people and so forth. He stated, “No universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie.”⁸¹ What Lord

⁷⁶ *Carlill v. the Carbolic Smoke Ball Co.* [1893] 1 Q.B. 269-270.

⁷⁷ A. W. B. SIMPSON, *LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW* 186 (1987).

⁷⁸ JONATHAN MORGAN, *GREAT DEBATES IN CONTRACT LAW* 14 (Palgrave Macmillan, 2d ed. 2015). “Now reads “Unilateral contracts are another example. They cannot be accepted by explicitly saying ‘I accept!’ but only by conduct. JONATHAN MORGAN, *GREAT DEBATES IN CONTRACT LAW* 14 (London: Red Globe Press, 3d ed. 2020).

⁷⁹ PETER GOODRICH TIERSMA, *CONTRA MUNDUM: IN DEFENCE OF PROMISES*, IN *SPEAKING OF LANGUAGE AND LAW: CONVERSATIONS ON THE WORK OF PETER TIERSMA* 83 (Lawrence Solan, Janet Ainsworth, & Roger W. Shuy ed., 2015).

⁸⁰ Telex was a method of communication developed in the interwar period to exchange written documents. It ceased being supported by British Telecom in 2008. See Jonathan Coopersmith, *Old Technologies Never Die, They Just Don't Get Updated*, 80 INT'L J. FOR THE HIST OF ENG'G & TECH. 166, 166 (2010).

⁸¹ *Brinkibon Ltd. v. Stahag Stahl GmbH* [1983] 2 A.C. 42.

Wilberforce seems to be advocating is a formalist assessment of how the use of a new technology does or does not fit the established rules of contract law and a contextual assessment of how the event fits into established businesses practices and the subjective intentions of the parties. This case is a strong example of the classical or formalist approach of judicial reasoning in English contract law.⁸² The five law lords who give judgments reason by means of expressing the basic rule, explore any exceptions that exist to that rule and then return to the general rule. Exceptions are justified by means of commercial expediency. They envisage the possibility of further exceptions if the facts demanded it within their return to the general rule.

The issue of how and when a contract is formed online is informed by the principles and cases discussed above. Goods displayed on websites are invitations to treat for which browsers make offers that sellers can accept. In these respects, there is no difference between internet sales and physical sales.⁸³ Textbook writers, Robert Merkin and Séverine Saintier, explain the rationale behind such a rule is the same online as in a shop; the “site provider can therefore avoid entering into contracts with online buyers in excluded jurisdictions. Moreover, the provider’s stock may be limited, and if the website is an invitation to treat so that customers make offers to buy, the provider can manage its stock and will not find itself bound to supply all those online buyers who seek to place orders.”⁸⁴ This also helps if there are pricing mistakes, particularly in the online shopping context as there are likely to be more consumers who have the ability to “snap it up.” Although as *Hartog v. Colin & Shields* (1939) shows, there are obvious mistakes. The buyer cannot “snap up” an offer known not to be intended.⁸⁵ In face-to-face sales, there are a plethora of other statutory rules that govern. For example, there is a rule regarding the display and provision of the seller’s terms and conditions of sale, unfair terms, and any exclusions of liability claimed by the seller.⁸⁶

There is further nuance to these rules surrounding acceptance. One such area concerns whether knowledge of an offer and reliance on that offer is necessary for acceptance. There are two leading authorities in English jurisprudence on this point. The most recent of these emphasizes the ubiquitous and parasitic nature of the common law as it is an authority from the High Court of Australia; *R v. Clarke*

⁸² J WIGHTMAN, DOES ACCEPTANCE MATTER?, IN ESSAYS FOR CLIVE SCHMITTHOFF 145 (John Adams ed., 1983). It is often forgotten that “formalist” reasoning is a theory of justification not a case based teaching method. See A. W. B. Simpson, *Legal Iconoclasts And Legal Ideals Essay*, 58 CIN. L. REV. 819, 834 (1989).

⁸³ DONAL NOLAN, OFFER AND ACCEPTANCE IN THE ELECTRONIC AGE, IN CONTRACT FORMATION AND PARTIES 61 (Andrew Burrows & Edwin Peel ed., 2010); Elizabeth Macdonald, *When is a Contract Formed by the Browse-Wrap Process?*, 19 INT’L J. OF L. & INFO. TECH. 285, 285 (2011).

⁸⁴ ROBERT MERKIN & SÉVERINE SAINTIER, POOLE’S TEXTBOOK ON CONTRACT LAW 45 (15th ed. 2021).

⁸⁵ *Hartog v. Colin & Shields* [1939] 3 E.R. 566.

⁸⁶ See The Elec. Com. (EC Directive) Regul. 2002, (S.I. 2002/2013).

(1927).⁸⁷ In English law, the earlier case of *Williams v. Carwardine* (1833) seems to suggest that a person who claims, in a contract, to recover an offered reward must have knowledge of the reward. Their precise motives for performing the act requested are irrelevant.⁸⁸ This interpretation of *Williams* is endorsed by the first instance judge, Hawkins J, in *Carlill*.⁸⁹ At base, a court must determine what the intention of the claimant was in performing the act. To infer acceptance of the offer the claimant requires knowledge of the offer.

In *Clarke*, the High Court of Australia suggests that something more than mere knowledge of the offer is required. The claimant was required to show that he “had act[ed] on,”⁹⁰ or “reli[ed] upon,”⁹¹ the offer. However, this is expressed by an objective assessment that can be rebutted by the presentation of evidence to the contrary. In other words, if the reward was such that a person could be induced to act and the person had so acted, reliance would be presumed. This appears to impose a higher obligation on the claimant than mere knowledge, even if the “reliance” required is heavily qualified. In terms of whether it is the *Williams* position of mere knowledge or the *Clark* position of reliance that an English court would adopt, the answer is unknown, as the differing standards have never been adjudicated upon. In many instances, the position of the claimant will satisfy both tests. The only position a claimant could take that would see a viable distinction between the two positions would be to assert to the offeror that, despite knowledge of the offer, they had no intention of accepting the proffered reward.⁹²

English textbook writers seek to build a consensus between these two decisions by establishing the courts’ willingness to see an agreement, where there is awareness of an offer and a response to it. “Agreement, it is true, has often been inferred from the parties although it does not exist in fact,”⁹³ say the writers of the textbook *Cheshire, Fifoot and Furmston’s Law of Contract*. Hugh Collins, adds that many “judges simply ignore the nexus (of agreement) rule completely, encouraged perhaps by the belief that an informant, who acted in an exemplary fashion and without mercenary motives, should be able to recover.”⁹⁴ In his textbook, Ewan McKendrick agrees that there “is a case for making an exception in the case of unilateral contract, at least where performance of the act cannot subject the performing party to any detriment.”⁹⁵ He adds “[p]rovided that the

⁸⁷ *R v. Clarke* [1927] 40 C.L.R. 227.

⁸⁸ 4 B & Ad 621; 1 N & M 418; 2 LJKB (NS) 101; 5 Car & P. 566.

⁸⁹ *Carlill*, 2 Q.B. at 489.

⁹⁰ *R*, 40 C.L.R. at 235.

⁹¹ *Id.* at 241.

⁹² Paul Mitchell & John Phillips, *The Contractual Nexus: Is Reliance Essential?*, 22 OXFORD J. OF LEGAL STUD. 115, 115 (2002).

⁹³ M. P. FURMSTON, GEOFFREY CHEVALIER CHESHIRE & CECIL HERBERT STUART FIFOOT, CHESHIRE, FIFOOT AND FURMSTON’S LAW OF CONTRACT 72 (2012).

⁹⁴ HUGH COLLINS, THE LAW OF CONTRACT 167–68 (4th ed. 2008).

⁹⁵ EWAN MCKENDRICK, CONTRACT LAW: TEXT, CASES AND MATERIALS 111 (10th ed. 2022).

promisor has obtained the performance for which he promised to pay, it can be argued that the law should impose upon him an obligation to carry out his promise.”⁹⁶ The opposite position from an offeree needing knowledge or reliance of a reward promise to take that reward is; can an offeror can revoke their offer before acceptance by complete performance takes place? We now turn to a discussion of this situation in English law.

C. Revocation

The usual rule in English law is that an offer can be withdrawn or revoked before acceptance is communicated. Withdrawal of an offer must be brought to the notice of the offeree,⁹⁷ but revocation of an offer in a unilateral contract will always be more difficult because the offeree need not give notice of acceptance to the offeror. Acceptance often becomes clear to the offeror when the requested act is completed. Does this mean that an offeror cannot revoke an offer once performance has begun, or is it the offeree who embarks upon performance worrying that the offer might be revoked at any point before their performance is complete?⁹⁸ In reward cases this is perhaps less of a problem. For example, Sturridge’s dog can only be found once, no matter how many people look for it. This is contrasted with the facts of *Carlill*, where a large and indefinite number of people may have decided to use the Smoke Ball. The Restatement (Second) of Contracts⁹⁹ deals with these issues by dispensing with the term “unilateral contract,”¹⁰⁰ using instead the phrase “[w]here an offer invites an offeree to accept by rendering performance and does not invite a promissory acceptance.” It then asserts that an option contract is created when the offeree begins performance. The offeror is bound to perform under the option contract until either the requested act is completed, or a stated time limit in the offer has expired or a reasonable time has lapsed.¹⁰¹

The position in English Law is less certain, because *Errington v. Errington and Woods* (1952).¹⁰² In this case, a father provided a deposit for a house for his

⁹⁶ *Id.*

⁹⁷ *Dickinson v. Dodds*, 2 Ch. Div. 463 (1876).

⁹⁸ The potential scenarios are worked through as issues of policy in Donald Clark, *Revocation and the Unilateral Contract: A Reappraisal*, 2000 N. Z. L. REV. 17 (2000).

⁹⁹ RESTATEMENT (SECOND) OF CONTS. § 45.

¹⁰⁰ See David G. Epstein & Yvette Joy Liebesman, *Bearded Ladies Walking on the Brooklyn Bridge*, 59 ARK. L. REV. 267, 267 (2006).

¹⁰¹ Peter Meijes Tiersma, *Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise*, 26 U.C. DAVIS L. REV. 1 (1992) (for a trenchant critique of this position Tiersma’s position is that a unilateral contract is a promise that like all promises becomes binding and irrevocable once it is accepted. The offeror, though bound from the moment of acceptance, has only a conditional obligation to perform until the offeree delivers performance. Interestingly he justified his position as reflecting the context in which parties would understand the relationship between them.

¹⁰² *Errington v. Wood* [1952] 1 K.B. 290.

son and daughter-in-law and promised that if they paid the mortgage repayments, he would transfer the title of the property to them. After some repayments had been made, the father died and the mother, having inherited his property through his will, brought an action for possession of the property.¹⁰³ Lord Denning LJ found that the “father’s promise [to transfer the title of the property to son and daughter-in-law] was a unilateral contract.”¹⁰⁴ It was “a promise of the house in return for their act of paying the installments. It could not be revoked by him once the couple entered on performance of the act, but it would cease to bind him if they left it incomplete and unperformed, which they have not done.”¹⁰⁵ The contract was binding and Lord Denning LJ expressed this by stating that “that was the position during the father’s lifetime, so it must be after his death.”¹⁰⁶ *Errington* is a case complicated by the rights of occupation as licensees obtained by the defendants under the prevailing rules of English land law.

Perhaps less equivocal, but also obiter, were the comments made by the Court of Appeal in *Daulia Ltd v. Four Millbank Nominees Ltd* (1978).¹⁰⁷ The Court’s view was that while it was clear that the offeror in a unilateral contract was not bound until he had received full performance, this was qualified by an implied obligation on the offeror, which arises as soon as the offeree starts to perform, not to prevent the “condition” (the requested performance) from being satisfied.¹⁰⁸ This implied obligation is a collateral promise and prevents the offeror from revoking their offer once the offeree has begun to perform.¹⁰⁹ The court does not give any further guidance on whether the implied obligation on the offeror is limited by time in anyway, but Treitel offers further guidance in his textbook. He comments, “it is probable that an offer of a reward for the return of lost property could still be withdrawn after someone had spent time looking for the property without success, but not after he actually found it and was in the process of returning it to the owner, but not after he had actually found it and was in the process of returning it to the owner.”¹¹⁰ Similar to when acceptance takes place, revocation also requires a contextualized examination of the facts themselves. In another instance of trans-

¹⁰³ *Id.* at 291.

¹⁰⁴ *Id.* at 295.

¹⁰⁵ *Id.* at 295. See Martin Hogg, *Promise: The Neglected Obligation In European Private Law*, 59 INT’L AND COMPAR. L. Q. 461, 471 (2010).

¹⁰⁶ *Errington*, *supra* note 102, at 295.

¹⁰⁷ *Daulia Ltd. v. Four Millbank Nominees Ltd.* [1978] 1 Ch 231.

¹⁰⁸ Although given as obiter dicta this is the clearest statement of the rule on revocation of a unilateral contract in English Law. Its logic was subjected to a sustained attack by the Federal Court of Australia in *Mobil Oil Australia Ltd v. Lyndel Nominees Pty Ltd* [1998] 153 A.L.R. 198.

¹⁰⁹ Charles Harpum & David Lloyd Jones, *Contracts to Contract—Some Answers; Some Questions*, 38 THE CAMBRIDGE L. J. 31 (1979).

¹¹⁰ G. H. TREITEL, *THE LAW OF CONTRACT* 37 (10th ed. 1999). This advice, and the sentence giving it, survives in the subsequent editions now written by Edwin Peel. See EDWIN PEEL, *TREITEL ON THE LAW OF CONTRACT* 42 (15th ed. 2020).

Atlantic adoption, English contract law texts suggest that *Shuey v. United States* may be a persuasive authority for allowing a reward offer to be revoked if that revocation is published in the same manner as the offer and prior to performance commencing.¹¹¹

D Intention to Create Legal Relations

All modern English contract texts assert that a condition of the enforceability of an agreement in contract law is that the parties should have intended to create legal relations between themselves. It is an evidentiary proposition judged from an objective standard,¹¹² that is generally assumed to be satisfied in commercial but not social and domestic settings. At base, this indicates that, in most cases, no positive intention to enter legal relations needs to be shown, despite this not according with what we know, empirically, about the use of contracts within businesses.¹¹³ *Carli* (1893) does not fit into this matrix, and its status as a case that supports this doctrine is questionable.¹¹⁴ Intention to create legal relations is not expressly discussed in the judgments. However, for Collins, it is Lindley LJ's judgment, and in particular his words about the seriousness of the promise being demonstrated by the deposit of the reward in a bank, that presents the doctrine in its early form.¹¹⁵ For some legal historians, the contest in *Carlill* was between "promises" and "puffery."¹¹⁶ Simpson, in his case in context paper, considered that the case introduced the doctrine of intention to create legal relations because it recognized "intention" as a requirement.¹¹⁷ There is evidence that some earlier texts advocated for it as a requirement, with a subset of those expressly attributing it to Civilian origins. However, as a case of precedent value, it was ignored for some time.¹¹⁸ The doctrine was first explored with vigor in the Court of Appeal judgment in *Balfour v. Balfour*.¹¹⁹

The facts of *Balfour v. Balfour* (1919) involved a husband and wife. The husband was posted as part of his employment to what is now Sri Lanka, but the

¹¹¹ *Shuey v. United States*, 92 U.S. 73 (1875).

¹¹² See the judgment of Lord Clarke in *RTS Flexible Systems Ltd v. Molkerei Alois Muller GmbH & Co. KG* [2010] UKSC 14.

¹¹³ Sally Wheeler, *Law in Action*, in REIMAGINING CONTRACT LAW PEDAGOGY: A NEW AGENDA FOR TEACHING 79 (Warren Swain & David Campbell eds., 2019).

¹¹⁴ MCKENDRICK, *supra* note 95, at 261 (in querying the case's relevancy to this doctrine). GEOFFREY SAMUEL, *A SHORT INTRODUCTION TO THE COMMON LAW* 143 (2013) (in citing the case to support the doctrine of intention to create legal relations).

¹¹⁵ COLLINS, *supra* note 94, at 68.

¹¹⁶ See Rosenberg, *supra* note 57, at 281.

¹¹⁷ See Simpson, *supra* note 50.

¹¹⁸ See Stephen Hedley, *Keeping Contract in Its Place - Balfour v. Balfour and the Enforceability of Informal Agreements*, 5 OXFORD J. LEGAL STUD. 391, 403 (1985) (on the question of which texts incorporated discussion of the doctrine when and how its origin was explained).

¹¹⁹ *Balfour v. Balfour* [1919] 2 K.B. 571.

wife stayed in England owing to ill health.¹²⁰ The husband had offered to support his wife by paying £30 per month, but shortly after arriving at his overseas post, he asked her for a permanent separation. The parties agreed maintenance would be paid post-separation. Mrs. Balfour sued in order to obtain the previously promised monthly sum.¹²¹ For two of the members of the Court, it was sufficient for Mr. Balfour's defense that the proposed arrangement went beyond the structures of support between spouses that legislation required. For Mrs. Balfour to succeed in contract, the parties would have had to be clear that they were creating a scheme of support of their own, and this clarity was thought to be lacking. Atkin LJ's judgment was written more generally around the need for an intention¹²² to create legal relations to be present in all contracts. This need could not be satisfied in arrangements between husband and wife or where "the parties agree to take a walk together."¹²³ Drawing these parallel risks trivializing domestic settings and conveying the impression that the personal sphere is a space where law has no role.¹²⁴ It has the effect of prioritizing the visible market economy over the site where many domestic participants perform unwaged and unseen labor,¹²⁵ and where there are frequent power imbalances and inequalities.¹²⁶ One has to wonder whether a similar factual scenario would be decided the same way today; property and pension arrangements between couples are sufficiently complicated for most people to realize that, at the minimum, legal formalities and binding arrangements are required.

Blue v. Ashley (2017)¹²⁷ makes clear that the intention to create legal relations remains alive and well in English contract law. This concerned an alleged oral contract between a well-known and wealthy retail magnate named Mike Ashley and a consultant named Jeff Blue. The contract said Ashley would pay Blue £15m if he could get *Sports Direct*, Ashley's retail company, to £8 per share. The shares rose to that price, but Ashley refused to pay Blue the £14 million he asserted was outstanding. He contended *inter alia* that there was no intention to create a legally binding agreement between them.¹²⁸ This is an interesting case as it

¹²⁰ *Id.* at 572.

¹²¹ *Id.* at 573.

¹²² To couch a requirement in terms of "intention" in circumstances where the parties are unlikely to have considered the idea at the time they made their agreement seems unreal, see SALLY WHEELER & JO SHAW, *CONTRACT LAW: CASES, MATERIALS, AND COMMENTARY* 150 (1994).

¹²³ *Balfour*, *supra* note 120 at 579.

¹²⁴ Prince Saprai, *Balfour v. Balfour and the Separation of Contract and Promise*, 37 *LEGAL STUD.* 468 (2017).

¹²⁵ Margaret Thornton, *Intention to Contract: Public Act or Private Sentiment?*, in *INTENTION IN LAW AND PHILOSOPHY* 217 (Ngairé Naffine, Rosemary Owens, & John Williams eds., 2001).

¹²⁶ Rosemary Auchmuty, *The Rhetoric of Equality and the Problem of Heterosexuality*, in *FEMINIST PERSPECTIVES ON CONTRACT LAW*, 51 (Linda Mulchay & Sally Wheeler eds., 2005).

¹²⁷ *Blue v. Ashley* [2017] EWHC 1928.

¹²⁸ *Id.* at paras. 49-57.

concerned what we understand best to be a commercial agreement made in a social setting; the claimant's position was that the agreement was made over an evening of extended alcohol consumption in a public house in the presence of other business associates. The trial judge, Leggatt J, commented that it was rare in "modern commercial litigation to encounter a claim... for millions of pounds, based on an agreement... made purely by word of mouth... [where] there is no contemporaneous documentary record."¹²⁹ The Court found eight reasons, all based on the context in which the arrangement was alleged to have been made, to determine that what occurred could not "reasonably have been understood as a serious offer capable of creating a legally binding contract."¹³⁰ These reasons included the informal setting of the conversation in a public house; the purpose of the occasion (to discuss other business matters with new associates and not to talk to Mr. Blue about his work); the very jocular and alcohol-fueled tone of the conversation; and the events immediately after the evening in question which showed that there had been no follow-up discussion of the offer made.¹³¹ *Balfour* (1919) was not cited in this case, and no reference was made to viewing domestic and commercial settings differently. Instead, Leggatt J refers to the relevant factors in deciding whether intention is present or not as being whether the arrangement is made in a social context, expressed in vague language, or in anger or jest.¹³² This supports the idea that the intention to create legal relations is an essential part of English contract law, unlike contract law in the United States.¹³³ Despite doubts about the proposition's origin and history,¹³⁴ In English Contract law it is based firmly on an assessment of the contextual setting of the parties and their interactions.

E. Conclusion

This section has examined some of the jurisprudence that supports contract formation in English Law. Examining the relevant cases in offer, acceptance, revocation, and the intention to create legal relations doctrine has elucidated the principles that must be applied to the facts of *Washington v. Sturridge* (2021) to determine the likely outcome of the case, were it to be argued in England. We now turn to discuss this in more detail.

¹²⁹ *Id.* at para. 65.

¹³⁰ *Id.* at para. 80.

¹³¹ *Id.* at paras. 81-107. See further Warren Swain, *Without the Power to Drink or Contract*, 24 EDINBURGH L. REV. 26 (2020).

¹³² *Ashley*, EWHC at para. 56.

¹³³ See Restatement (Second) of Contracts § 21 (1981) ("Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract"); see also WALTER H.E. JAEGER, *WILLISTON ON THE LAW OF CONTRACTS* (3d ed. 1957).

¹³⁴ See B. A. Hepple, *Intention to Create Legal Relations*, 28 CAMBRIDGE L. J. 122 (1970).

IV. WASHINGTON V. STURRIDGE (2021)

This section applies the law to the facts of *Washington v. Sturridge* (2021). It outlines the facts as alleged by either party, both inside and outside of the courtroom. The facts themselves seem to be the subject of some dispute. It then explains what these factual disputes mean for the interaction between law and morality in an international legal arena.

A. Offer and Acceptance

Sturridge's reward promise constituted an offer, although the amount offered for the reward was not initially clear. We might question whether lack of clarity around the level of reward rendered Sturridge's offer too uncertain to accept. However, the English courts have been very clear that they are very reluctant to declare an agreement "too uncertain," if the parties intended there to be a legally binding agreement.¹³⁵ Washington thought that it ranged from 30,000 US Dollars to 30,000 Euros.¹³⁶ The initial Instagram video posted in the aftermath of the burglary on July 19, 2019, may not have been clear. The words actually used by Sturridge then were "I'll pay anything. I'm dead serious. Somebody please find my dog."¹³⁷ However, the reports from media outlets, namely KTLA Channel 5, state the reward was 30,000 US Dollars. It claims that this figure was reached with Sturridge's help.¹³⁸ The brief states that "Defendant Mr. Sturridge was reported in multiple public media outlets as saying that he would pay for his dog to be returned... and the amount of 30,000 dollars was widely quoted."¹³⁹ If this was the case, and it is again important to note that the factual account presented by Washington was uncontested, the offer itself was clear enough. It was certain and capable of being accepted.

Much like in *Carlill* (1893), Sturridge presented a promise to the world, although this was a post on social media and was repeated with more clarity in various news media outlets rather than in a newspaper. He offered a reward for the

¹³⁵ *Durham Tees Valley Airport v Bmibaby* [2010] EWCA 485.

¹³⁶ Declaration Pursuant to 585 CCP in Support of Default Judgment at para. 4, *Washington v. Sturridge*, No. 21STCV19397 (Cal. Super. Ct. L.A. County Dec. 3, 2021).

¹³⁷ Kieran Jackson, *Ex-Liverpool star Daniel Sturridge 'is being SUEd by a man who found his lost Pomeranian dog in Los Angeles in 2019 and says the England striker has STILL not paid him the 26,000 reward'*, DAILY MAIL (May 25, 2021, 5:38 AM), <https://www.dailymail.co.uk/sport/sportsnews/article-9616309/Ex-Liverpool-star-Daniel-Sturridge-SUEd-man-lost-dog-Los-Angeles-2019.html>.

¹³⁸ Steve Kuzj, Nisha Gutierrez-Jaime & Kimberly Cheng, *Soccer Star Daniel Sturridge Offers to 'Pay Anything' for Beloved Dog Stolen From His Hollywood Hills Home*, KTLA5 (Jul. 9, 2019, 6:59 AM), <https://ktla.com/news/local-news/soccer-star-daniel-sturridge-offers-to-pay-anything-for-beloved-dog-stolen-from-his-hollywood-hills-home/>.

¹³⁹ Brief in Support of Default Judgment at paras. 7-10, *Washington v. Sturridge*, No. 21STCV19397 (Cal. Super. Ct. L.A. County Dec. 3, 2021).

return of the dog and this by nature made it a unilateral offer. The post on social media was not a mere puff. It was not so wild that it was unbelievable. The brief indicates that “Mr. Washington, upon reading these statements or hearing audio recordings, or descriptions of such statements or recordings... took the information from the news at face value, as a bona fide unilateral offer that invited a specific performance.”¹⁴⁰ From this statement, it appears that Washington found the media outlets’ statements to be credible and believed such statements induced the contract. Sturridge’s statements were not an invitation to treat; they did not resemble the cases of *Partridge v Crittenden* (1968) nor *Bell v Fisher* (1961). There is no allegation that the offer was revoked at any point – that is, prior, during or after acceptance took place – by either party. So, this legal issue and the analysis therein can be dispensed with.

All that was needed to accept Sturridge’s offer was to carry out the act specified in its entirety. As it was a unilateral offer, no separate communication was needed to accept Sturridge’s offer. This was not a bilateral offer that required a mirror-image acceptance. Washington alleges that he read the post on social media and therefore, had knowledge of the offer,¹⁴¹ thus inadvertently navigating the complexity and uncertainty of the rules in *Williams v. Carwardine* (1833) and *R v. Clarke* (1927). Washington found the dog and returned the animal to Sturridge.¹⁴² In doing so, Washington carried out the act in its entirety and thus supplied acceptance. Again, Washington follows the path set out to fulfill the conditions in *Carlill* (1893). The absence of a defense from Sturridge meant court was deprived of an opportunity to consider its view of the use of Instagram as a vehicle for making unilateral offers.

B. Intention to Create Legal Relations

There are some subtleties in applying the principles of intention to create legal relations to the facts of this case. Part of the issue here is the conflict between *Carlill* and *Balfour* and the evolution of contract law. Looking to the seriousness of Sturridge’s actions, and whether he did have the intention to create a contract, Washington’s lawyer points implicitly to the method of making the contract. “This contract may be framed as a contract in writing, as well as oral offer, with [t]he same result,” the brief states.¹⁴³ Certainly, a home-made video of Sturridge speaking, published on Instagram, would not have the same oversight or careful crafting as a written newspaper advertisement as in the example of *Carlill*. If we

¹⁴⁰ *Id.* at paras. 10-14.

¹⁴¹ Declaration Pursuant to 585 CCP in Support of Default Judgment at para. 2, Washington v. Sturridge, No. 21STCV19397 (Cal. Super. Ct. L.A. County Dec. 3, 2021).

¹⁴² For more discussion of this allegation, which is contested, see the following section.

¹⁴³ Brief in Support of Default Judgment at paras. 6-7, Washington v. Sturridge, No. 21STCV19397 (Cal. Super. Ct. L.A. County Dec. 3, 2021).

think about the context in which the video was made, it was in the immediate aftermath of the discovery of the burglary. Entering into a contract was likely the last thing on Sturridge's mind. In any event, Washington's lawyer considered the video and advertisement of the video via news outlets "as being 'writing' in modern parlance."¹⁴⁴ He said "[d]efendant Mr. Sturridge was reported in multiple public media outlets as saying that he would pay for his dog to be returned, that he was 'dead serious' that his dog was much more important to him than material possessions, and the like."¹⁴⁵ Explaining he was "dead serious" is perhaps not akin to depositing money in a bank as per *Carlill*. Although as noted earlier, *Carlill* is a dubious example of this doctrine.¹⁴⁶ *Blue v. Ashley* provides more assistance in how an English court would isolate and weigh individual contextual factors. This question, as well as Washington's allegations, may still be an issue for a courtroom in England. Had Sturridge entered a defense, he might have pointed to his use of Instagram in his role as an influencer in clothing fashions and to the types of statements that are usually made on Instagram.

C. Law, Morality, and Commonsense

Washington's claim was uncontested in a Los Angeles court and therefore, he won his case. A statement made in the spirit of the original communication on social media contests Washington's account of events. A dispute now lies over the factual matrix of the case rather than the law itself. Sturridge claims that Washington did not return the dog and that the reward was paid to the person who did return the dog. If Washington did not return the dog, he could not have accepted the offer and carried it out in the manner specified by the advertisement. Thus, he would no longer fulfill the conditions in *Carlill* and as such be entitled to the reward. Sturridge's rebuttal is factual and tells us much about his view on the relationship between morals and the law. With this statement, Sturridge acknowledges the post he made on social media was indeed an offer and that it was both capable of being accepted and was accepted. There was a legally binding contract between the two and Sturridge was either aware of the implications of this or felt morally bound to honor his promise of payment. Therefore, the dispute is not about the operations of legal mechanisms or the letter of the law. There is no claim that these norms are outlandish or beyond what a reasonable person might expect and so should not be legally binding. Sturridge simply maintains that Washington was not the proper person to claim such a reward.

There is a clear discrepancy in the two sets of facts alleged by either party. This contradiction, and the debate about the exact course of events, may make it difficult to understand why Sturridge did not offer a rebuttal. It is not clear why he

¹⁴⁴ *Id.* at paras. 10-14.

¹⁴⁵ *Id.* at paras. 7-10.

¹⁴⁶ *Carlill v. the Carbolic Smoke Ball Co.* [1892] EWCA 1, [1893] Q.B. 256.

did not present evidence to the court. The dog's return was documented on social media, and it is logical to assume there may be photographic or video evidence of the monetary transaction associated with the reward being paid to an individual who was not Washington. Sturridge's reluctance to litigate may be explained by the international nature of the case rather than his moral disposition. Losing the case by refusing to plead may have been a reasonable legal strategy, especially if one looks at it from a commercial standpoint.¹⁴⁷ Washington's claim relied upon a simple legal argument, but mounting a defense against this may have been seen as expensive. Sturridge's legal fees may have been projected to exceed the cost of paying the reward again. Unlike England, in the United States, each litigant is responsible for their own legal fees, even if ¹⁴⁸ the oft dubbed "English rule" results in the loser paying.¹⁴⁹ As Sturridge is now based in Australia and has a background in the United Kingdom, it is unlikely that he holds any assets in the United States. Assuming this is the case, to enforce the order and to claim against Sturridge's assets outside of the United States would result in new litigation in a new legal arena, such as Australia or the United Kingdom.

V. CONCLUSION

Washington v. Sturridge (2021) provides a modern take on the seminal case of *Carlill*. Both cases are reward promises. The reward promise offered in *Washington v. Sturridge* (2021) is a result of criminal activity: owing to the burglary of Sturridge's dog and offering a reward for its return. Much like *Carlill*, the facts here are so located in human interest that the case immediately becomes a cause célèbre for those commentators outside the legal profession.¹⁵⁰ There are some notable differences with *Carlill*, however. The context has been updated to be shaped around a global audience operating today in digital age. The case focuses on two individuals who operate in the public eye and as a result have a strong

¹⁴⁷ That is opposed to the potential reputational damage caused by acquiescing or failing to correct Washington's claims.

¹⁴⁸ Walter Olson & David E. Bernstein, *Loser-Pays: Where Next?*, 55 MD. L. REV. 1161 (1996) (discussing the loser-pays rule and the comparison between countries); John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 L. & CONTEMP. PROBS. 9 (1984) (discussing the American Rule and outlining United States attorney fee recovery in the late colonial period).

¹⁴⁹ Olson & Bernstein, *supra* note 148, at 19; Leubsdorf, *supra* note 148, at 19.

¹⁵⁰ See the media sensationalism of *Vardy v Rooney*, dubbed "Wagatha Christie", and the TV drama on Channel 4 and Disney+ documentary. Nadia Khomami, *Michael Sheen cast as Coleen Rooney's lawyer in 'Wagatha Christie' TV drama*, THE GUARDIAN (Oct. 12, 2022, 5:00 PM), <https://www.theguardian.com/culture/2022/oct/12/michael-sheen-coleen-rooney-lawyer-wagatha-christie-tv-drama-david-sherborne-channel-4>; Gemma McSherry, *Coleen Rooney secures Disney+ 'Wagatha Christie' documentary*, THE GUARDIAN (Aug. 26, 2022, 10:23 AM), <https://www.theguardian.com/uk-news/2022/aug/26/coleen-rooney-secures-disney-wagatha-christie-documentary-rebekah-vardy>.

following on social media. The original offer was made on social media. Sturridge's continued discussion of the incident on social media ensures the case itself remains newsworthy. The last word on the factual matrix of the case comes from a tweet by Washington; "it's a Shame! I had to hire a Lawyer in Australia just To Collect my lawsuit from @DanielSturridge and @PerthGloryFC and you got the Money Bruh!!".¹⁵¹

This Article shows the importance of maintaining an international and comparative approach towards *Washington v. Sturridge* (2021). The case itself was heard in a Los Angeles court and litigated using American law. Yet, the background of the litigants was far more international. Sturridge was English. His refusal to engage with the lawsuit may have been a result of a different set of norms and understanding of his legal obligations. Through the legal analysis conducted in this Article and Sturridge's extralegal statements, this interpretation appears unlikely. He sees no disconnect between his moral obligations and his legal obligations. It shows that he understood his post on social media was a reward promise and capable of creating a legally binding contract. Indeed, the legal analysis here shows the similarities between the decision in an American courtroom and the likely decision in an English court. The discussion of English law also adds another layer. In exposing the relevant English law, it is apparent there are strong links between English, American and Australian case law.

Both American and Australian case law inform English contract law. English contract law is not an outlier, nor is it aiming to create a set of uniform legal principles. Yet, it does look outwards. This is often in order to gain insights and inspiration, especially where English law is unclear, or has not been settled. The Australian case *R v. Clarke* (1927) is central to understanding acceptance. It informs the English law on the question of whether those ignorant of an offer can accept it. Although this area of law is the subject of much academic comment, whether we appreciate the inroads into English law or not, *R v. Clarke* (1927) is a strong legal precedent that informs the theorization as well as substance of English contract law. Again, when it comes to revocation, English law looks to *Shuey*, an American case, for guidance. These links, and the circulation of law, as well as people, can be seen by considering *Washington v. Sturridge* (2021) through the prism of English law.

¹⁵¹ @KillaFame, TWITTER (Jul. 29, 2022, 9:33 AM), <https://twitter.com/MetaToddler/status/1553056220608471040?cxt=HHwWgIChme-ZyI0rAAAA>.