

CONSIDERATION

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Learning objectives

By the end of this session, you should be able to.....

explain the concept of consideration in contract

Describe the rules for determining a party's intention to enter into a contract



CONSIDERATION:

Seller → provides goods – or promises to provide goods

in exchange for . . .

Provides money – or promises to provide money ← Buyer

and vice versa



Examples of consideration

Consideration is sometimes defined as “the price paid for a person’s promise”.

Promise to perform a service



Can you think of some examples of consideration?

Money



Promise to refrain from a course of action



Hand over goods



Definitions of consideration

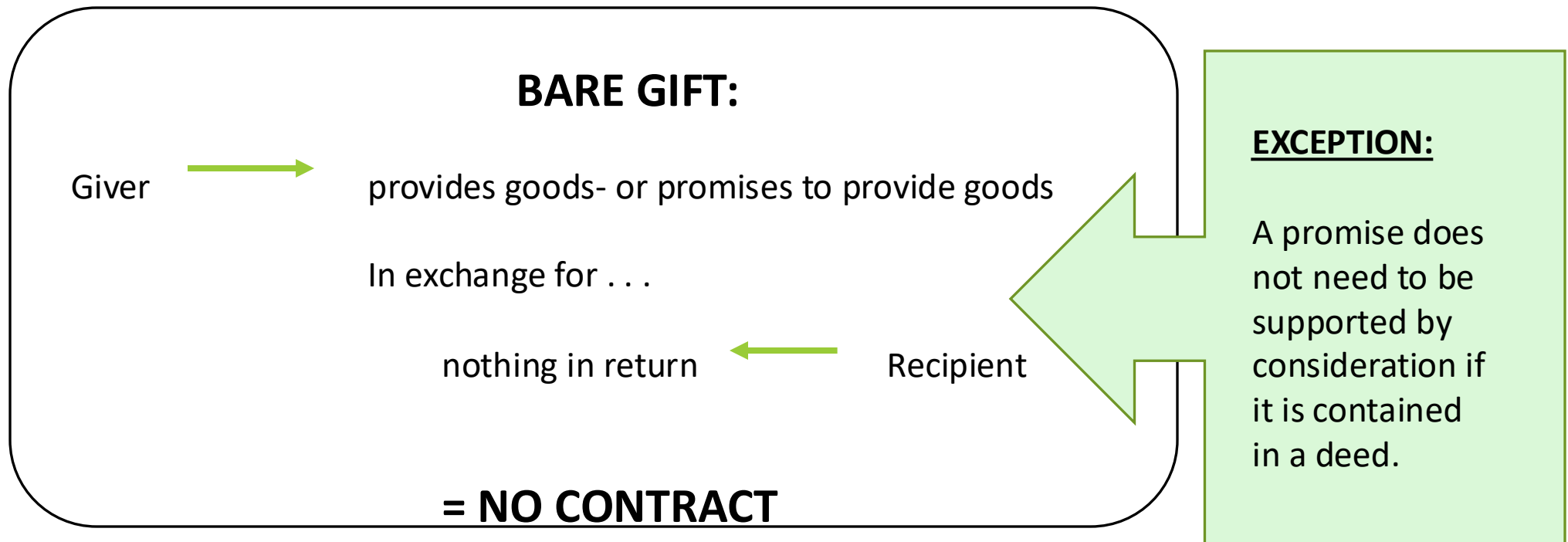
- ❖ *An act or forbearance of one party; or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable – Dunlop v Selfridge [1915]*
- ❖ *“A valuable consideration . . . May consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other” – Currie v Misa [1875]*



Essential requirement



What happens in the scenario where a person agrees to buy a gift for another person.



Types of consideration

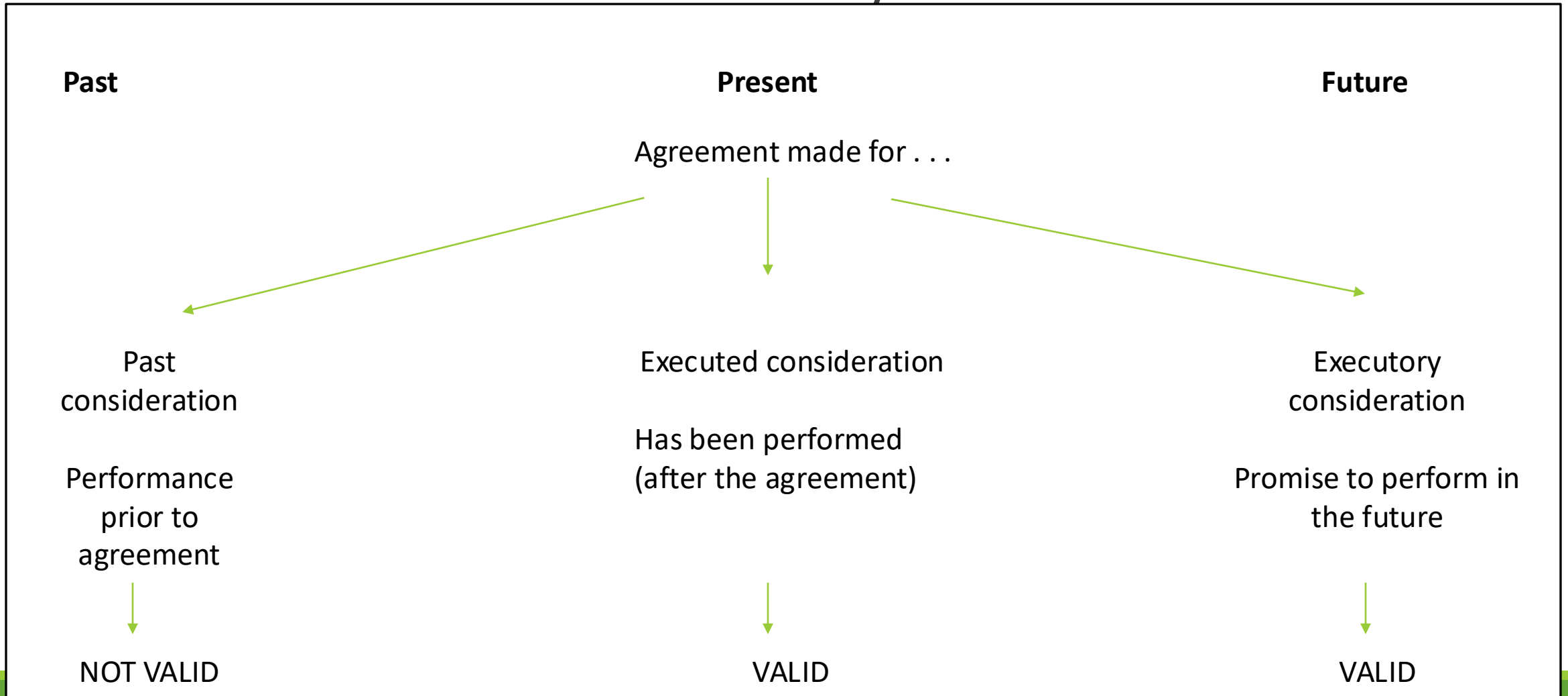
There are two main types of valid consideration:

- **EXECUTED** CONSIDERATION
- **EXECUTORY** CONSIDERATION

1. **EXECUTED**: When a party performs his part of the contract at the time of entering into the contract
2. **EXECUTORY**: When the parties exchange promises to do something in the future



Executed and executory consideration



The rules governing consideration

1. Consideration must move from the promisee;
2. Consideration must not be past;
3. Consideration need not be adequate; and
4. Consideration must be sufficient



1. Consideration must move from the promisee

In order to sue, and enforce a promise, a claimant must usually show that **he** supplied consideration for that promise.

Tweddle v Atkinson [1861]

Dunlop Pneumatic Tyre case [1915]

Dunlop could not sue Selfridge because Dunlop had not provided any consideration for the contract between Selfridge and the wholesaler.



2. Consideration must not be past

General rule: If A promises to pay B for something that B has already done (without prior agreement), this is not valid consideration and there is no obligation to pay.

E.g. A promises to pay B £50 in gratitude after B saved him from drowning. A's promise is made for past consideration and is therefore unenforceable. If B wanted to claim the money, he should have negotiated a price before he pulled A out of the water.



Is it past? – Did the act occur before the promise was made?



2. Consideration must not be past

Roscorla v Thomas [1842]



Contract entered into for
the sale of a horse

Statement made
by seller re
“quality” of the
horse

Consideration from
buyer?

Any consideration from
buyer completed before
statement is made

Nothing valid
from buyer in
exchange

= NO CONTRACT



2. Consideration must not be past

Re McArdle [1951]



Agreement

House decoration completed
and paid for by X

Promise from others to pay
For decoration

Consideration from
X?

**Consideration
completed before the
agreement**

Nothing valid from X in
exchange

= NO CONTRACT



2. Consideration must not be past

THE DOCTRINE OF IMPLIED *ASSUMPSIT*



- Major exception to the past consideration rule

IF ONE PARTY, AT THE REQUEST OF THE OTHER, PERFORMS A SERVICE OF A KIND THAT IS **NORMALLY** PAID FOR, THE COURT WILL USUALLY ASSUME THE SERVICE WAS MEANT TO BE PAID FOR AND WILL ENFORCE A LATER PROMISE TO PAY.

- Originated in *Lampleigh v Braithwait* [1615]

- *Devani v Wells* [2019]



Doctrine of implied *assumpsit*

Pao On v Lau Yiu Long [1980] confirmed the principle applied, provided that:

the act was performed at the request of one party

It was understood between them that some reward could be expected; and

The later payment promise, or other benefit received, was otherwise lawful.

Re Casey's Patents [1892] applied the doctrine to the business world. Casey agreed to promote certain patents held by Stewart. Two years later, Stewart wrote, promising a one-third share in the patents; this promise was held to be enforceable. – Parties understanding that the work would be remunerated.



3. Consideration need not be adequate

Consideration does not need to be of equal value (economically) to the thing given in exchange.

Laissez faire – Judges believe that it is for the parties to make whatever contract they want.

- Very trivial acts can amount to consideration:

“Halifax estate agents sold for £1”

“Lloyds banking group has agreed to sell its Halifax estate agency business to LSL Property Services for £1, and said 460 jobs would go. The loss-making business has 218 offices . . .”

BBC News online, October 2009

*Chappell & Co v Nestle Co
Ltd [1960]*



4. Consideration must be sufficient

Consideration must be recognised by the law as being of some benefit to promisor or detriment to the promisee.

Forms part of the previous rule: **Consideration must be sufficient , but need not be adequate.**

Thomas v Thomas [1842] “consideration means something which is of some value in the eye of the law”.

White v Bluett [1853]- a promise by a son to ‘cease his complaints’ to his father was held not to be consideration.



One particular issue arises where the promisee is using something that he is already legally obliged to do so as consideration for a new contract.

General rule: It is no consideration to do something you must do anyway.

The situations in which this could arise can be grouped as:

1. Existing public duties
2. Existing contractual duties
3. Existing duties to repay a debt
4. Existing contractual duties to a third party



Collins v Godefroy
[1831]

1. Existing public duties

A promise to perform a public duty imposed by law is not normally sufficient consideration, as consideration cannot consist of doing what the law already requires.

Existing public duties

Existing situation

A → legally obliged to appear in court as a witness

New promise:

offers to pay A to appear in court as a witness ← B

A → performance of existing public/legal duty and no more

= NO VALID CONSIDERATION



Glasbrook Bros v Glamorgan County Council [1925]

Harris v Sheffield United Football Club [1988]

Reading Festival Ltd v West Yorkshire Police Authority [2006]

Existing public duties

Existing situation:

A → legally obliged to protect the public

New promise:

Offers to pay for police protection/cover at colliery/football stadium etc ← B

A → provision of police **over and above** the statutory expectation

= VALID CONSIDERATION FROM A



2. Existing contractual duties

If A is contractually obliged to build a wall for B for £5,000 and B then promises A an extra £2,000 to have the wall finished on time, A provides no fresh consideration for the promise of the extra £2,000 (i.e. he is suffering no extra detriment) he is under an existing contractual duty to B to build the wall on time.

Stilk v Myrick [1809] illustrates this point.



Existing situation:

Stilk →

agrees to work as part of the crew on a boat

agrees to pay Stilk to work as part of the crew on a boat

← Myrick

New promise:

offers to pay Stilk an additional sum for continuing to
work as part of the crew on a boat

← Myrick

Stilk →

performance of existing contract duty and no more

= NO VALID CONSIDERATION FROM STILK

Williams v Roffey Bros [1990]

Existing contract:

Williams → agrees to undertake carpentry work for Roffey Bros

agrees to pay Williams £20,000 for carpentry work

← Roffey Bros

New promise:

offers Williams additional payments to complete on time

← Roffey Bros

Williams → performance of existing contractual duty and no more

BUT = VALID CONSIDERATION FROM WILLIAMS AS ROFFEY BROS HAS OBTAINED A PRACTICAL BENEFIT FROM THE NEW PROMISE

3. Existing duties to repay a debt

A promise to pay part of a debt cannot normally be sufficient consideration.

A promise not to enforce a full debt will be enforceable only if the person to whom it was made can show that he gave the other party something additional to, or different from what he already owed.

Examples include:

- Payment before the date the debt is due at the creditor's request
- Payment at some place other than where it is due;
- Payment made using something different as payment – for example goods are accepted instead of money.



Part payment of a debt – the rule at common law

Pinnel's Case [1602]: "Payment of a lesser sum on the day in satisfaction of a greater cannot be satisfaction for the whole".

" but the gift of a horse, hawk or robe etc., in satisfaction is good for it shall be intended that a horse, hawk or robe, etc., might be more beneficial to the claimant than money, in respect of some circumstance, or otherwise the claimant would not have accepted it in satisfaction".

Modern day application can be seen in **Simantob v Shavleyan [2019]**

D& C Builders Ltd v Rees [1965]

The common law rule contained in Pinnels case was confirmed in **Foakes v Beer [1884]**



Promissory Estoppel

Mitigated the harshness of the decision in *Foakes v Beer*

Modern development of the doctrine can be found in *Central London Property Trust Ltd v High Trees House Ltd* [1947]

What is promissory estoppel? *Combe v Combe* [1951]

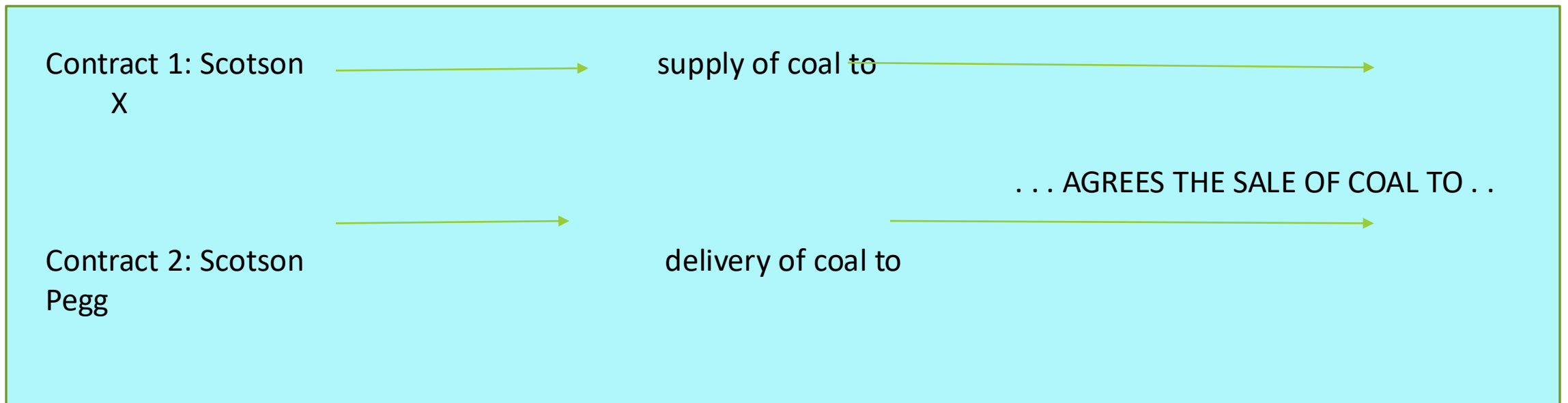
“where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his word and acted in it, the one who made the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance has been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word”.



4. Existing contractual duties to a third party

General rule: using the performance of a duty owed to a third party under an existing contract will be good consideration.

This can be seen in *Scotson v Pegg* [1861]



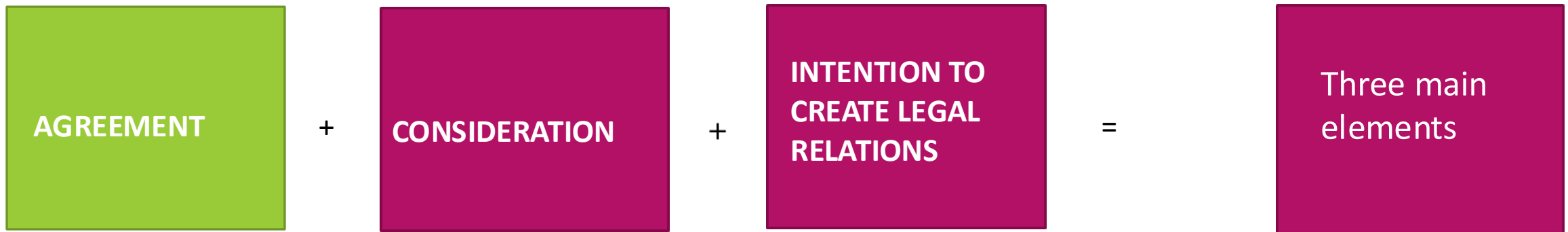
SCOTSON HAS PROVIDED VALID CONSIDERATION UNDER BOTH CONTRACTS



Self-assessment questions

1. How is consideration defined in *Currie v Misa* [1875]?
2. Distinguish between 'executed' and executory' consideration
3. What is the difference between 'adequate' and 'sufficient' consideration?
4. After your next-door neighbour mowed your lawn out of kindness, you agreed to pay him for his trouble. Is there an enforceable contract?
5. Will performance of an existing duty be sufficient consideration?

Third essential element



Aims to prevent agreements that never intended to have legal liability from taking up the courts' time.

Rebuttable presumptions

X: Difficult to establish a persons intention on a date in the past

The Courts have developed two rebuttable presumptions governing:

- Family and social agreements; and
- Business agreements

REBUTTABLE PRESUMPTION: An initial assumption that can be overturned by evidence to the contrary



1. Family and Social agreements



General rule: It is generally presumed that an agreement between family members or friends in a social context **IS NOT** intended to be a contract.

Agreements between husband and wife are generally presumed not to create a legal relationship – ***Balfour v Balfour [1919]***

Merritt v Merritt [1970]

An agreement between other family members and/or close friends is also presumed not to be binding. – ***Jones v Padavatton [1969]***



**THIS DOES NOT MEAN THAT THERE CAN NEVER BE A CONTRACT
BETWEEN PARTIES IN A CLOSE RELATIONSHIP**

Family and social agreements:

Rebutting the presumption



Courts start from the presumption that the parties did not intend their agreement to be legally binding. – Look at what the parties said and did.

Once the parties have broken down (spouses have separated, divorced etc) any agreement between them is likely to be treated as legally binding. **Merritt v Merritt [1970] – dealing at ‘arms length’**

*If one party puts himself at a **disadvantage** as a result of an agreement, this is strong evidence that he considers the agreement to be legally binding, and the other party will find it hard to deny the existence of a contract.*

Family and social agreements:

Rebutting the presumption



Simpkins v Pays [1955]- an agreement between members of the same household could be binding.

Wilson v Burnett [2007] – those who intend to share competition prizes would be well advised to make their agreement formal

2. Commercial or business agreements

An agreement made in the course of business IS presumed to be legally binding.

WHY?

This is because of a need for certainty in such transactions and the importance of a trader being able to rely on a promise that has been made to him in the course of business.

This can be shown in *Edmonds v Lawson [2000]*



ESSO PETROLEUM Ltd v Customs and Excise Commissioners [1976]



Esso ran a sales promotion in which 'coins' showing members of the England football squad for the 1970 World Cup were to be given away free, one with every four gallons of petrol. The scheme was advertised on television and by posters at filling stations. The case arose when for tax purposes it became necessary to decide whether or not there was a contract of sale – did a motorist who bought four gallons of fuel have a contractual right to one of the coins?

WHAT DO YOU THINK WAS HELD?

The House of Lords held by a majority, that the coins were not being sold, and so were not liable for tax, but that there was an intent to create legal relations. Lord Simon pointed out that the 'whole transaction took place in a setting of business relations', that it was undesirable to allow companies to make promises in advertisements that they were not bound to keep, and that Esso knew that, despite the coins' negligible monetary value, they would be attractive to motorists and Esso would derive considerable commercial benefit from the scheme.

Commercial agreements

In commercial agreements, where it is important to promote consistency and certainty, there is a presumption that there is an intention to create a legal relationship.

Attrill and Others v Dresdner Kleinwort [2013] - the presumption is a very strong one

McGowan v Radio Buxton [2001] -

Commercial or business agreements: Rebutting the presumption

There are certain situations in which this presumption will not be followed

- Volumatic Ltd v Ideas for Life Ltd [2019]
- **'mere puffs'** (extravagant claims not intended to be binding)
- Some business agreements contain a **clause** to the effect that the agreement is not intended to be legally binding

Rose & Frank v Crompton Bros [1924] – honourable pledge clause

Blue v Ashley [2017]

Edwards v Skyways Ltd [1964]

Letters of comfort

Whether the writer intends to be legally bound or not will depend upon the circumstances, particularly the wording of the letter and what reliance the recipient had reasonably placed upon it.

Kleinwort Benson Ltd v Malaysian Mining Group [1989] -The legal effect of a letter of comfort depends upon the wording of the letter

Self-assessment questions

1. In what circumstances can the legal presumption made regarding intention to create legal relations in social and domestic transactions be rebutted?
2. What is the presumption regarding intention to create legal relations in commercial transactions?