1. Introduction

GENERAL

1.01 The content of an agreement consists in its terms, express and implied. Even a contract made in writing, purporting to contain all its terms within the four corners of the document is likely, on careful examination, to be found to contain implied as well as express terms. Any contract of sale, for example, will contain such terms as are implied by the Sale of Goods Act 1979, unless expressly excluded (and even then, the exclusion may be held invalid). In an oral contract, whether or not subsequently evidenced in writing, or a part-oral, part-written contract, many of the terms are likely to be implied terms. In British Crane Hire Corp Ltd v. Ipswich Plant Hire Ltd, the whole contents of a written standard hire contract were implied into the oral contract for hire of a piece of machinery. It is obvious, then, that an understanding of implied terms is essential to an understanding of the contents of a contract and, therefore of what amounts to breach and how damages should be calculated.

1.02 This book aims to set out in some detail the law of England and Wales on implication of terms in contracts. An attempt is made later in this chapter to trace the origins of implied terms in English law, while in Chapter 2 we discuss the theoretical context of implication of terms, before turning to the detail of the various aspects of the doctrine in Chapters 3 to 7, with a detailed consideration of the leading authorities. Since England & Wales remains a significant jurisdiction of choice for parties to international contract-related litigation, including many cases where neither party has any link to the jurisdiction, and decisions of the English courts continue to be influential in many other common law jurisdictions, it is hoped that this book will be of value to practitioners, academics and students far beyond these shores.

1.03 Implication of terms presents a difficulty for the law in common law jurisdictions. It conflicts with fundamental ideas about contract that have

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had, and still enjoy, significant influence on the common lawyer’s mind. First, it offends against the idea of sanctity of contract. Neither Parliament nor the court is a party to a contract and it is therefore not for the court to intermeddle in the terms the parties have agreed. Arguably, this should be the case even if the lack of a particular term makes the contract unworkable, since the unworkable contract is the only deal made between the parties and they should not be taken to have agreed to a quite different, albeit workable contract. Secondly, it offends against the idea of freedom of contract, for precisely the same reasons. Indeed parties sometimes insert clauses known to one party to be wholly unenforceable but put there for tactical reasons (e.g., penalty clauses and not a few exemption clauses), or make whole ‘contracts’ that are not enforceable as such, as with agreements ‘binding in honour only’. In these cases the courts strike down the offending clause, leaving the contract to be interpreted in its absence, or decline to enforce the agreement as a contract; they do not rewrite the clause to make it legitimate (or, say, strike down a penalty and then imply a liquidated damages clause), or conclude that an honour clause makes for such a failure of consideration that the parties as reasonable businesspeople cannot have intended.

1.04 With regard to terms implied by statute, there is no question that implication cuts across the parties’ freedom of contract where the term cannot be excluded by an express term, as is the case with the implied terms in sections 12 to 15 of the Sale of Goods Act 1979 in contracts involving a consumer buyer. Whether or not the parties are at liberty to exclude such a term and whether or not they have done so in fact, such terms still cut across the sanctity of contract, since if the parties do not in fact refer to them so as to exclude them (if they may) this may be through ignorance rather than deliberation and in that case it is not possible to say that they meant such terms to form a part of their contract. And the necessity of excluding such a term expressly dictates part of the contract where this is done. It is submitted that the same applies to terms implied by law as an automatic incident of any given species of contract.

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2 Unfair Contract Terms Act 1977, ss. 6(1)(a) and 6(2)(a). The implied term in s. 12 SGA 1979 cannot be excluded against any buyer, consumer or otherwise: s. 6(1)(a) UCTA 1977 while the terms in ss. 13 to 15 cannot be excluded as against a consumer, and can only be excluded against a buyer in the course of business if exclusion is reasonable: s. 6(3).

3 See below, Chapter 3.
Where terms are implied from custom, however, or are implied ‘in fact’, the law’s explanation is one of interpretation of the contract made between the parties; of ascertaining actual intention, which might only imperfectly have been expressed in words, oral or written. So far as this explanation is justified, then there is no interference with either freedom or sanctity of contract. On the contrary: the parties’ intentions are being more completely recognized and upheld by the implication of a term in these cases. That, at any rate, is the justification, and it draws strength from commercial convenience, in that parties engaged in a particular trade, for example, would generally expect that they are operating within the customary matrix of that trade so that opting out of a custom is easier than having to opt in every time, while parties generally cannot actually anticipate every possibility and provide for it, so that implication in fact is a useful part of the litigation content of contract, provision of which is the function of contract law and upon which parties can rely.

Civil law jurisdictions typically do not require any general doctrines of implied terms. The approach, typified in French law, is to prescribe quite closely the terms on which different kinds of contracts are made. Coupled with a ‘good faith’ approach, this dispenses with the requirement for implied terms. Since the civilian approach does not place such an emphasis on freedom of contract as common law jurisdictions do, an implied term approach, though unnecessary, would not present the conceptual difficulties to poses for the common law, and good faith takes care of lacunae left by the codes, with no problem presented by belief in contractual freedom and party autonomy.

It may be argued, as the Australians Carter and Peden have, that implied terms are one of the common law’s inbuilt mechanisms for achieving the same ends as good faith in the civil law. The lack of a general requirement of good faith in contracting is a notable characteristic of the

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4 See below, Chapter 5.
5 See below, Chapter 7.
6 However, implied terms may still live in otherwise civilian-style legal environments. Japanese law, for example, has a Civil Code and a Commercial Code, yet also uses terms implied from course of performance and from trade usage: see Z. Kitigawa, ‘Use and Non-Use of Contracts in Japanese Business Relations’ in H. Baum (ed), Japan, Economic Success and Legal System (deGruyter: Berlin and New York, 1997).
common law approach, though the extent of the rejection of good faith varies between different common law jurisdictions. Good faith is almost entirely absent as a doctrinal concept in the law of England and Wales,\(^8\) while in U.S. law the Uniform Commercial Code enjoins good faith in performance and enforcement, but not negotiation.\(^9\) The extent to which good faith is a requirement at the negotiation stage in any jurisdiction is questionable, whatever might be claimed. The idea of negotiating with all cards on the table is not only alien to the common law but is only very partially applicable in any jurisdiction. It is unlikely in the extreme, for example, that a customer in a French car showroom in France, on enquiring about the suitability to his requirements of its flagship vehicle would be told that it is very stylish and comfortable but that if reliability is important to him then a Japanese car would be more suitable as the French manufacturer in question has had many complaints on this score. Moreover, no French court would be likely to uphold a contention that the failure of the showroom staff to point out the shortcomings of their goods is a breach of good faith. Good faith at this stage requires mainly specific information and an avoidance of what in common law jurisdictions would be called ‘misrepresentation’.

1.08 Lord Denning’s attempt in *Liverpool City Council v. Irwin*\(^{10}\) to make reasonableness not merely necessary in defining an implied obligation but also sufficient to justify making an implication in the first place, could be regarded as an attempt to introduce a good faith requirement as to terms, that is to say a requirement that the terms of the contract meet with broad notions of fairness. This attempt failed, of course, when this approach was firmly rejected by the House of Lords in the same case.\(^{11}\)

\(^8\) Insurance contracts are contracts *uberrimae fidei*, and the Unfair Terms in Consumer Contract Regulations 1999 (originally 1994), implementing an E.U. directive, makes reference to good faith in the terms of consumer contracts.

\(^9\) UCC §1–203: ‘Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.’ This provision should be read together with § 1–102(3):

The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimer by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.


\(^{11}\) [1977] A.C. 239. See especially at 258 per Lord Cross and at 254 per Lord Wilberforce.
1.09 It can further be argued that civil law does have implied terms, if not quite to the same extent as common law. The compulsory terms in a civil code provided as incidences of different types of contract are surely no different from terms implied by statute, save that terms implied by statute may in some, but not all, instances be excluded by express agreement (see Chapter 6). Indeed, these also fulfil the role of terms implied by law and by custom and usage, though again without the option of contracting out and, necessarily, by a different mechanism. The ‘implied terms’ of the civilians are what are called ‘mandatory terms’ rather than ‘default terms’. That is to say that the court applying the code does one of two things: either imposes a term on the parties different from one to which they had agreed, or supplies a term to fill some gap in the contract’s provision which the parties did not want the court to fill.12 Where the common law differs is primarily in the fact that in the common law most implied terms supply default rather than mandatory rules and in the possibility of implying terms in fact into individual contracts when disputes reach judgment.13

CATEGORIZATION

1.10 There are a number of ways one can categorize implied terms. Textbooks tend to split them into the categories of terms implied by statute, terms implied in law, terms implied in fact, and terms implied by trade usage or custom. Alternatively, ‘terms implied by common law’ is sometimes adopted to cover both implications in fact and implications into all contracts of a particular type as a matter of law. There is no reason why usage and custom should not also fall under this heading. Lord Steyn in *Equitable Life Assurance Society v. Hyman* divided implied terms into ‘general default rules’ and ‘ad hoc gap fillers’.14 This has the limitation, however, of neither distinguishing sufficiently between the sources nor indicating the degree of mandatoriness that might be expected. Terms implied by statute, for instance, may well prove mandatory and unavoidable, as discussed below. In this sense, Lord Steyn’s division also lacks

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13 Discussed below in Chapter 7.
clarity as it does not acknowledge that some implied terms are not default rules at all, but mandatory.\textsuperscript{15}

1.11 A law-and-economics approach might be to divide implied terms into mandatory and default rules. Mandatory terms are those which cannot be avoided by the parties expressly agreeing to inconsistent terms. Such rules would include UCC 1–203, section 12 of the Sale of Goods Act 1979, and sections 13 to 15 of the same Act in sales from business sellers to consumer buyers. Default terms are ones which apply if the parties do not agree otherwise.

1.12 It would also be possible to categorize implied terms into fixed litigation content, comprising statute-implied terms, terms implied by usage or custom and terms implied as a matter of law, and \textit{eo instante} litigation content, covering terms implied in fact.

1.13 It is the first manner of categorization, however, which has most often commended itself to the textbook writers, that seems to fit most closely with the language of the judiciary when one looks across the cases as a body, and that makes readiest sense of the subject from the point of view of the practitioner. This is the approach adopted in this book, therefore, in which terms implied by statute, terms implied as a matter of law, terms implied from usage or custom and terms implied in fact are dealt with in separate chapters. This should not, however, be taken as a theoretical preference on the part of the author; a number of ways are equally satisfactory for different purposes.

**PURPOSES OF IMPLIED TERMS**

1.14 From a practical perspective, implied terms might be viewed as a technique of construction or interpretation of contracts. That does not say very much, however, as it says nothing about why implied terms should be adopted for use in interpretation, and nothing about whether they should be so used or to what end.

1.15 As an interpretative technique, implied terms leave something to be desired. To what extent, for instance, does any implied term represent a

\textsuperscript{15} McMeel points out that the origin of Lord Steyn’s terminology is in fact North American: see G. McMeel, \textit{The Construction of Contracts} (OUP: Oxford, 2007) at 10.04 n. 7.
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‘reading’ of a contract? The answers to such questions, though, are both a matter of degree and a matter of individual preference. We might draw an analogy with interpretation in the arts, distant as this world may seem from the world of contract law. If a Shakespeare play is performed in a reconstructed Elizabethan theatre, with boys playing women, costumes and sets as close as we can manage to what would likely have been experienced in Elizabethan times, and actors sticking faithfully to the words of the First Folio, then that is as faithful an interpretation as we can probably manage. But do we really want boys playing women? Is that part of the intention of the playwright or just a result of operative limitations in Shakespeare’s time? And would Shakespeare want ‘authentic’ dress if he could return today? Or would he be surprised that actors were not dressed in more normal garb? If, in order to evoke similar feelings of familiarity as might have been enjoyed by the Elizabethan audience we transpose Romeo and Juliet to modern-day street gangs, are we interpreting more accurately or just taking an astounding liberty?

1.16 Moving to music, should performances of Mozart require an orchestral pitch of A = 421 instead of A = 440, so that everything is played a semitone lower than it appears to be written, and should the modern concert grand piano be eschewed for something that sounds like a battered upright in a bar, so that the performance will sound more like it would have done in Mozart’s day? How can we know he would have wanted it to sound like that if he had had the choice of having it played on modern instruments? And does the realm of legitimate ‘interpretation’ of history, or ‘artistic licence’ run out before or after making a film show the Enigma machine captured by Americans from U571 (actually sunk by the Royal Australian Airforce) rather than by the Royal Navy from U110 before the U.S. even joined the war, as actually happened?

1.17 What these examples demonstrate is that one’s purpose and ‘taste’ (which in law translates to ‘policy’) must determine one’s answers. The final example above, moreover, demonstrates that we are likely to have divergent views about the difference between interpretation and invention. And though we probably all will be able to draw, at least to our own satisfaction, a reasonably clear dividing line between interpretation and invention, we will also have differing views about the legitimacy of pure invention in different contexts.

1.18 It is submitted that it is easier to see terms implied by law as default but not generally mandatory terms, as interpretative techniques aimed at the better understanding of parties’ intentions as imperfectly expressed in
their words, since parties might be taken, if they are in a particular trade, or if they have engaged lawyers to draft the contract document, to be aware of the implications that will be made if they do not express an intention to the contrary. But there are still important ‘ifs’ here: they may not be in the trade, or might not have familiarized themselves with trade usage (particularly if they have not had a dispute of this nature before), and lawyers may not be fully competent or expert in the relevant trade, or the courts may not have determined yet that such and such is in fact a usage of that trade. Moreover, if we exclude mandatory implied terms and terms implied in fact from our consideration, then we have hardly achieved a legitimate categorization of implication as an interpretative technique.

1.19 So, can mandatory implied terms be seen as interpretative? It is submitted that they clearly are not. Rules of interpretation, of which there is a considerable number, have as their function the eliciting of the joint intention of the parties at the time the contract was made, consistent so far as possible with the policy of maximizing certainty. Certainty is achieved, so far as it can be, by consistent application of rules of what might be called legal grammar. But this is an exercise that is necessarily bounded by what the parties have actually said or, preferably, written. The parties may or may not have had in mind the existence and content of any relevant mandatory terms. One implication of the findings of Beale and Dugdale’s classic survey is that parties might well not have them in mind, owing to an ignorance (deliberate or otherwise) of contract law which may well go as far as not actually achieving legally-binding agreements at all.16

1.20 On the other hand, parties may well develop some knowledge of mandatory terms relevant to their business from experience of disputes and from simply being in the trade; the tacit knowledge of nearly every retailer, for instance, as to the general thrust of section 14 of the Sale of Goods Act 1979. Such knowledge might be taken to have been part of the backdrop against which the express agreement was made. Although the parties might have preferred to contract without such mandatory terms, that does not mean that they did not intend the mandatory terms to have effect; they intended to contract and that in itself imports a good deal into the bargain.

1.21 That said, this is still not an interpretative action on the part of the court, any more than the calculation of damages or the application of the

requirement to mitigate loss or the rule against penalties. These are positi-
ve rules of law affecting every contract, not a device of interpretation,
unless all of contract law is merely interpretative, and that is an extreme
position indeed.

1.22 If mandatory terms are not devices of interpretation or construc-
tion, what about default terms drawn from legislation, the common law, or
trade usage and custom? These seem to have a better claim, in that the
parties can contract out of them and therefore might be taken to have
accepted them if they fail to contract out. Thus, the contract, properly
construed, includes such default terms as are not inconsistent with the
express terms. Again, however, it is submitted that this places too great
a strain on the idea of interpretation, certainly of construction. To return
to our theatrical analogy, to call such an act interpretation, let alone con-
struction, is very like assuming that any characters left alive at the end of
the play as written must be assumed to have the fate similar characters
have in other plays of the type and period, so a new act can be written in
detailing these fates and called ‘interpretation’. Would we generally con-
sider, in ordinary language, that this was ‘interpretation’? It is submitted
that some would and others would not, so categorizing such behaviour
as interpretation would be at least suspect and by no means necessarily a
consensus position.

1.23 The difficulties with seeing the use of such terms as an interpretative
device become even greater when the law of agency is taken into account.
In this case a principal is taken to agree to any practices or customs of
the market concerned unless directly contrary to the express terms of the
agency agreement. It must often be the case that principals are not aware
of what such terms might be, and the trouble of ascertaining them (even
the chances against knowing what questions to ask to ascertain them)
will generally be too great. Which of us, in instructing our stockbroker to
buy or sell shares on our behalf is fully aware of the customs of the stock
exchange in question?

1.24 Which leaves us with terms implied in fact. This category of implied
term is perhaps the most debated, indeed contested. Here there is no
resource of established terms; instead a term is devised from the ground
up by the court, which deems it to have been a term the parties really

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17 See, for example, Cunliffe-Owen v Teather & Greenwood [1967] 3 All E.R. 561; [1967] 1 W.L.R. 1421 (Ch.D.).
Implied terms in English contract law

intended to apply but didn’t actually discuss. This is not the place for a detailed consideration of the debates around terms implied in fact, the law on which has its own chapter in this book, where these matters can be discussed more fully. Nevertheless, some observations seem to be called for here.

1.25 The first leading case on terms implied in fact is *The Moorcock*.\(^{18}\) It is the judgment of Bowen LJ that is best known, and it is known particularly for his test of necessity to give business efficacy to a contract. In *Reigate v. Union Manufacturing (Ramsbottom) Ltd*,\(^{19}\) Scrutton LJ also adopted this business efficacy test, though in the slightly different phrase ‘necessary in a business sense to give efficacy to the contract’ and went on to explain that this meant

if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, ‘What will happen in such a case,’ they would both have replied, ‘Of course, so and so will happen; we did not trouble to say that; it is too clear’.\(^{20}\)

And in *Shirlaw v. Southern Foundries (1926) Ltd*,\(^{21}\) Mackinnon LJ adopted the same formula with ‘some one’ replaced by an ‘officious bystander’.\(^{22}\) Whether the business efficacy test and the ‘officious bystander’ test are two tests or one, and how best the test(s) can be described is discussed in detail in Chapter 7. But the thrust is clearly that terms implied in fact are implied from some sort of ‘necessity’ and must be ‘reasonable’ (again, this requirement is discussed in Chapter 7).

1.26 Bowen LJ asked himself this question in *The Moorcock*:

how much of the peril of the safety of this berth is it necessary to assume that the shipowner and the jetty owner intended respectively to bear – in order that such a minimum of efficacy should be secured for the transaction, as both parties must have intended it to bear?\(^{23}\)

1.27 Three inferences are being made. First, that the parties intended the contract to have business efficacy. Secondly, what that business efficacy

\(^{18}\) (1889) 14 P.D. 64.
\(^{19}\) [1918] 1 K.B. 592.
\(^{20}\) At 605.
\(^{21}\) [1939] 2 K.B. 206.
\(^{22}\) At 227.
\(^{23}\) (1889) 14 P.D. 64, 69.
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amounted to in fact: that is to say, what was the purpose of the contract. Thirdly, what term is then to be implied as the least which must have been intended by the parties to give effect to that purpose.

1.28 The first is natural enough and does not require discussion. The second is not always quite so clear. In Couturier v. Hastie,24 for example, the purpose of the contract for sale of a quantity of corn in transit was disputed. One party argued that the purpose was the acquisition of corn; the other party argued that in fact it was simply a venture, and what was contracted for was the chance of corn or of receiving money under insurance covering the corn. The court concluded that the former was the true purpose of the contract and held that the contract was void, as we would say for mistake, on the basis that it was a contract for res extinguita. But the argument might just as well have gone the other way, and surely the idea of a contract for an adventure is far the more realistic in the context of many modern day sales of goods in transit, an example being oil, which is often sold a hundred or more times while at sea.

Implied Terms and Positive Rules of Law

1.29 The distinction between implied terms and positive rules of law is not, it is submitted, a clear one at all. It has, for instance, been suggested on occasion that a term implied in law is in actuality a positive rule of law. As mentioned above (para 1.10), Lord Steyn in Equitable Life Assurance Society v. Hyman,25 for example, described terms implied by law as ‘general default rules’.26

1.30 The default rules created by terms implied in law can usually be excluded by express terms inconsistent with the implied terms. Terms implied by statute can sometimes be displaced or excluded by express terms, and sometimes not. Default rules such as those in sections 17 and 18 of the Sale of Goods Act 1979 only take effect in the absence of express provision in the contract. A full discussion of this question would be a

24 (1856) 5 H.L.C. 673.
lengthy one, and beyond what is possible within the scope of a book of this length. A couple of observations will therefore have to suffice.

1.31 First, a term implied by law, custom or statute might (but not in all cases) be ousted by an express term inconsistent with the implied term. Similarly, default rules such as those in sections 17 and 18 of the Sale of Goods Act 1979, only apply where the contract is silent on the relevant point. To this extent, such implied terms operate in the same way as default rules. They are arguably, however, different from positive rules of law, in that we tend to think of such rules as being non-optional, as with the rule that a contract for immoral or illegal purposes is void. On the other hand, if the positive rule is expressed as ‘unless. . . then’, such a rule takes effect in precisely the same way as either implied terms or default provisions. Thus, implied terms could be expressed as positive rules of the ‘unless. . . then’ type.

1.32 Secondly, bearing the first point in mind, the distinction between a positive or default rule and an implied term is one without a difference at a practical level. This is only untrue where we say that one cannot resile from a positive rule. But this is also the case with some undoubted implied terms, for example the implied term in section 12 of the Sale of Goods Act 1979. It is fair to conclude, then, that discussion of whether a particular rule or term is an implied term or a positive rule of law is not only doomed to inconclusiveness in the case of at least some such terms or rules, but ultimately sterile in any case.

HISTORY OF IMPLIED TERMS

1.33 It is by no means easy to attempt to fix the date or method of entry into English contract law of the implied term. Part of the problem is conceptual: the first treatise on contract, as such, was that of Powell in 1790, followed first by Chitty in 1826 and then by a series of treatises starting with Addison in 1847 and culminating in Anson in 1879. Before the 19th century, what we should today call ‘the law of contract’ was not readily grasped as a discrete system at all.

1.34 Actions for what we would call a breach of contract took various forms, not just over time, but at any one time. Often the action was really tortious in nature: damages claimed for, say, injuring a horse while shoeing it. Wherein lay the duty not to injure it? In the promise of the farrier, or more precisely in the fact that the farrier had ‘taken it in hand’
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1.35 So we cannot easily look for 'contract' cases, and it is hard to trace the ancestry of those we do identify, as the reported judgments frequently make no reference to the cases relied on in reaching the decision.

1.36 Nonetheless, there do appear to be some promising lines of inquiry. First, implied contracts, properly so called; these were often a device of lawyers to bring another kind of case under the umbrella of assumpsit. For instance, a case of debt might be brought within the ambit of assumpsit by alleging an implied promise to pay the debt. A debt could not be recovered in assumpsit; it must be recovered through an action in debt, but the breach of the promise to pay the debt was a breach of undertaking and was therefore actionable in indebitatus assumpsit. The idea of the implied contract also permitted recovery in what became known as quasi-contract, or more commonly today, restitution. And though restitutionary claims no longer need to hide behind a fiction of implied contract, implied contracts remain of significance in shipping law, as with the implied contracts between the shipowner and the buyer in a c.i.f. sale, the shipowner and the seller in an f.o.b. sale, the shipowner and shipper where the ship is let on a time charter, and so on. Sales law offers another promising line of enquiry. One could also consider landlord and tenant cases, but only at the risk of clouding the issue of contractual terms with property law issues, manorial rights and so on.

Sales

1.37 Simpson states that 'in sale of goods the original position was caveat emptor' and that 'on an express warranty if one had been given, it was possible to sue in tort for deceit'.27 The caveat emptor rule applied as much to title as to quality or conformity with description. Simpson records that the earliest reported case where an action was brought on the contract for breach of an express warranty was Stuart v. Wilkinson,28 as late as 1778, but that the practice began around 1750. However, he also notes that the insistence on express terms began to be eroded from the case of Medina v. Stoughton as early as 1700,29 and that 'by the time of the decision in

28 (1778) 6 Doug. K.B. 18.
29 (1770) Holt 208; 1 Salk. 210; 1 Ld Raym. 593; 90 E.R. 1014.
Eichholz v. Bannister (1864)\(^{30}\) the exception had for all practical purposes eaten up the rule\(^{31}\).

1.38 The implied term as to title (so called) has its origin in the common law. As already noted, the original position appears to have been caveat emptor,\(^{32}\) but as early as 1688 it was held that a warranty of title was to be inferred from mere affirmation and circumstance. In Crosse v. Gardner,\(^{33}\) a case concerning a sale of oxen, it was held that mere affirmation amounted to a warranty (though the plaintiff had failed to allege a warranty) that the defendant was entitled to sell, since the oxen were in his possession and the plaintiff had no way of knowing of the rights of another (the true owner having recovered the oxen from the plaintiff). Shortly after, in Medina v. Stoughton the defendant sold a lottery ticket to the plaintiff, affirming it to be his own. In fact it belonged to a third party. It did not avail the defendant to say that he bought it bona fide then sold it to the plaintiff. Holt C.J. held that ‘where one having the possession of any personal chattel sells it, the bare affirming it to be his amounts to a warranty, and an action lies on the affirmation, for his having the possession is a colour of title, and perhaps no other title can be made out’.\(^{34}\) This is not quite what we mean by an implied term, since there is an affirmation involved, but it required a sort of implication in the law at the time, and the case represented an inroad into the caveat emptor principle in respect of entitlement to sell a chattel.

1.39 The rule was still being stated as caveat emptor in 1849, but with extensive exceptions which had clearly developed over time and in part amounted to an extension of Crosse v. Gardner and Medina v. Stoughton, and had to a large extent nullified the rule itself in the ordinary commercial context at least. In the case of Morley v. Attenborough,\(^{35}\) which concerned the sale of a harp, the headnote explains:

There is no implied warranty in the contract of sale of a personal chattel; and in the absence of fraud, a vendor is not liable for a defect of title, unless there be an express warranty or an equivalent to it, by declaration or conduct. A warranty may be inferred from usage of trade, or from the nature of the trade.

\(^{30}\) 17 C.B.N.S. 708; 144 E.R. 284.
\(^{31}\) Simpson, n.27, above, p. 17.
\(^{32}\) See, for example, Deering v. Farrington (1675) 3 Keble 303; 84 E.R. 734.
\(^{33}\) (1688) Carthew 90; 90 E.R. 656.
\(^{34}\) (1770) 1 Salk. 210; 210; 91 E.R. 188.
\(^{35}\) (1849) 3 Exch. 500; 154 E.R. 943.
being such as to lead to the conclusion that the person carrying it on must be understood to engage that the purchaser should enjoy that which he buys, as against all persons; as where goods are bought in a shop professedly carried on for the sale of goods.

1.40 By 1864, the implied term was clearly established. *Eichholz v. Bannister*\(^\text{36}\) involved a sale of cloth by the defendant warehouseman in Manchester for £18/4s.\(^\text{37}\) The plaintiff purchaser then resold them a few days later for £19/15s. The goods, however, were recognized as stolen goods and returned to the plaintiff from whom they were in turn taken by the police. The defendant argued that there was no warranty of title in a sale of goods and a plaintiff in such cases would be confined to an action in deceit, if deceit there had been. The old authorities were said to support this strongly, though it was noted that Blackstone J. (presumably in his *Commentaries*) had said that ‘in contracts for sale it is constantly understood that the seller undertakes that the commodity he sells is his own’,\(^\text{38}\) indicating an early view as to implied warranty of title. The court, Erle C.J., Byles and Keating JJ., held that there was a warranty of title. The judgment of Byles J. is short and pithy and representative of the views of his brother judges, and it warrants reproduction here almost in full.

\[\ldots\]\ It has been said over and over again that there is no implied warranty of title on the mere sale of a chattel. But it is certainly as [Erle C.J.] has observed, barren ground; not a single judgment has been given upon it. In every case, there has been, subject to one single exception, either declaration or conduct. Chancellor Kent, 2 Com. 478, says: ‘In every sale of a chattel, if the possession be at the time in another, and there be no covenant or warranty of title, the rule of caveat emptor applies, and the party buys at his peril;’ for which he cites the dicta of Lord Holt in *Medina v. Stoughton*. . . and of Buller, J., in *Pasley v. Freeman*\(^\text{39}\). . . “But,” he goes on, “if the seller has possession of the article, and he sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title.” Thus the law stands that, if there be declaration or conduct or warranty whereby the buyer is induced to believe that the seller has title to the goods he professes to sell, an action lies for a breach. There can seldom be a sale of goods where one of these circumstances is not present. I think Lord Campbell was right when he observed that the exceptions had well nigh eaten up the rule.

\(^{36}\) (1864) 17 C.B.N.S. 708; 144 E.R. 284.

\(^{37}\) Apparently, at least. The invoice shows a price of £19/0/0d, less a 1.5 per cent cash reduction rounded to 6 shillings, but a total of £18/4/0d, which should, of course, have been £18/14s.

\(^{38}\) (1864) 17 C.B.N.S. 708, 713.

\(^{39}\) (1789) 3 T.R. 51; 100 E.R. 450.
1.41 Simpson traces an implied term that goods sold by description be merchantable, even where the seller was not proven to have known of the defect, to the case of *Laing v. Fidgeon*. This case involved the sale and purchase of, among other goods, 48 saddles from a manufacturer in Birmingham, for reasonable prices between 24 s. and 26 s. each. The goods were shipped to North America and on inspection there were found to be unmerchantable without being restuffed and relined. Although it was contended by counsel for the defendant that the price was one at which merchantable goods of that description could not have been supplied, that the plaintiff must have known this and that, therefore, there could be no warranty of merchantable quality, the court (Gibbs C.J.) held that this was no argument: the defendant could have declined the order if he thought the price inadequate; accepting the order meant undertaking to supply goods of merchantable quality. Neither Taunton’s report nor Campbell’s report, however, mentions any prior authority at all.

1.42 The case of *Jones v. Bright* concerned the sale of copper for sheathing a ship. The defendants knew the purpose for which the copper was required. A mutual acquaintance of the parties, one Fisher, told the defendants ‘Mr Jones is in want of copper for sheathing a vessel and I have pleasure in recommending him to you, knowing that you will sell him a good article’, to which one of the defendants replied ‘Your friend may depend on it, we will supply him well’. The actual copper sheets were selected by the plaintiff’s shipwright and the price paid was that commanded by top quality sheet copper. The copper, however, lasted only about four months, rather than the four or five years normally expected. The evidence differed as to whether the problem was extrinsic (‘the inveteracy of the barnacles in the river at Sierra Leone’) or intrinsic (perhaps too much oxygen during the process of manufacturing the sheets). This question was left to the jury, which found that the defect was intrinsic. Judgment was then directed in favour of the plaintiff.

1.43 On appeal, counsel for the plaintiffs argued that ‘when an article is sold for a particular purpose, a warranty is implied that it is fit for that

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40 (1815) 6 Taunt. 108; 128 E.R. 974.
41 Though according to Campbell’s report, the contract was for ‘50 saddles, to be charged about 28 s. each’: 4 Camp. 169; 171 E.R. 55. Campbell was counsel for the plaintiff in this case.
42 (1829) 5 Bing. 533; 130 E.R. 1167.
43 At 534.
44 At 534.
purpose. The case of Fisher v. Samuda was alluded to as a case where the quality of the goods had not been allowed to be raised, but it was distinguished on the grounds that the problem there had been procedural, because the defendant (being sued for the price of beer) had not raised the quality in his defence to the original action. In fact, in that case Lord Ellenborough clearly indicated that poor quality was a legitimate defence which should have been raised in the first place. While in Gardiner v. Gray, a case concerned with waste silk that was not saleable under that denomination, the same judge held that

The purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, there is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply. He cannot, without a warranty, insist that it shall be of any particular quality or fitness; but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them.

The same principle appears to have been adopted by Lord Ellenborough in Bluett v. Osborne.

1.44 In Parkinson v. Lee, however, it was held that there was no implied warranty of merchantable quality in sales by sample, presumably on the application of the other side of the same principle: where there is no inspection there is a warranty, where there is an inspection, as with a sale by sample, then there is no warranty as to merchantable quality since the buyer is able to make up his own mind on this point. Though in Okell v. Smith, a case concerning the sale of 16 copper pans, Bayley J. held that a buyer was entitled in appropriate circumstances to make a reasonable trial use of goods and if they were not fit for the purpose for which they were sold the seller would be obliged to take them back.

45 At 535.
46 (1808) 1 Camp. 190; 170 E.R. 925.
47 At 191.
48 (1815) 4 Camp. 144; 171 E.R. 46.
49 At 145.
50 (1816) 1 Stark. 384; 171 E.R. 504.
51 (1802) 2 East 314; 102 E.R. 389. There was in this case, incidentally, an express warranty that the bulk (of hops) would correspond with the sample.
52 (1815) 1 Stark. 107; 171 E.R. 416.
Implication of Assumpsit

1.45 Of course, the implied terms discussed above are nothing like the first implications. Mediaeval sales were enforced through the actions of debt and detinue. The first allowed the seller to recover the price as a debt; the second allowed a buyer to oblige the seller to deliver up the goods. Both were problematic as the mode of trial was wager of law. This meant that a defendant could escape liability by swearing and getting 11 others (compurgators) to swear likewise, that he did not owe the money or was not obliged to deliver the goods. Assumpsit, on the other hand, came with trial by jury. The problem was that there was no outstanding promise to sue on in assumpsit. The lawyers got around this by claiming an implied promise to pay the debt. So, the sale contract raised the debt, but the assumpsit was the promise to pay the debt.

1.46 Whether this should properly be seen as an implied term, however, seems doubtful: it is clearly more in the nature of an implied contract: the whole assumpsit, that is to say the ‘taking in hand’ or what we today call the contract, is implied from the debt. That said, what is clear is that there was no room for implied terms in debt or detinue, or in covenant (an action on a sealed document which seems, for reasons unknown, never to have been popular) either, as requirements in covenant were formal in the extreme. The development of implied terms was, at any rate, a development belonging to the actions of special and *indebitatus* assumpsit.

Summary

1.47 We can conclude, it is submitted, that while sales seem to have given rise to implied contracts at a very early date, the technique of implication as such may well have first arisen in the implication of the assumpsit arising from a debt. Sales, however, may well have provided the main arena for the development of implication of terms, since implication of terms is, in its character, oil for the wheels of commerce. However, the difficulties in tracing clear genealogies through judgments, particularly because so many older judgments cite no prior authority for what is being held to be the law, mean that it is unlikely that it will ever be possible to say with any certainty or even with reasonable confidence.