# RECENT TRENDS IN THE ENGLISH LAW OF CONTRACT

Anyone who writes of recent trends exposes himself to two main dangers. The trend may well only exist in the mind of the writer; in such matters it is easy for personal prejudices to affect judgment. Secondly the trend may prove to be nothing more than a temporary wandering from well known paths, which are soon to be resumed. The author who wrote after *Pillans v. Van Mierop*[1] might well have had to swallow his words twelve years later. Those dangers are increased when many of the cases discussed relate, in part at least, to emergency conditions, or to emergency legislation which, although conforming to a general pattern, may well contain peculiarities of wording which may rob the cases of general significance. Although it is hoped that these dangers have been avoided any conclusions here offered must be put forward with diffidence. In one way it is these emergency conditions which, while they may increase the dangers, serve to justify this article. The novel issues which spring from them cause a re-examination of established principles, and accelerate developments in what might otherwise be a topic of slow growth. To this introduction of apology may be added a word of thanks. It is likely that English lawyers will be as grateful for *McRae v. Commonwealth Disposals Commission*[2] as will be Australian lawyers for any recent English decision.

Outstanding among the developments is of course the discussion of the doctrine of consideration. The first rush of excitement which followed the *High Trees Case*[3] has subsided. In that first excitement a commentator could write that what Parliament was reluctant to do Denning J. (as he then was) had done.[4] Now perhaps a somewhat more limited view of the effects of that case must be taken. In part this is due to a discussion of the case in legal periodicals,[5]

1 (1765) 3 Burr. 1663.

2 [1951] Argus L.R. 771.

3 *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130.

4 (1947) 63 Law Q. Rev. at 20 and 289, referring to the recommendation of the Law Revision Committee dealing with the rule in *Pinnel's Case.*

5 Including an article, *Recent Developments in the Doctrine of Consideration,* by Denning L.J. himself in (1952) 15 Mod. L. Rev. 1, subsequently referred to; *Recent Developments in Estoppel* by S. J. Wilson in (1951) 67 Law Q. Rev. 330; *Central London Property Trust Ltd. v. High Trees House Ltd.,* by Cheshire and Fifoot in (1947) 63 Law Q. Rev. 283; *Equitable Estoppel To-day,* by L. A. Sheridan in (1952) 15 Mod. L. Rev. 325.

in part to judicial restatements of the principle involved, notably in *Combe v. Combe*.[6] In that case the principle was restated (at 220) in the following words:—"The principle, as I understand it, is that 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 on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had 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."[7] This principle, Denning L.J. emphasized in the same case, did not sweep away the doctrine of consideration which, he said, "still remains a cardinal necessity in the formation of a contract, though not of its discharge." It might therefore be wondered wherein lay the revolutionary character or indeed the novelty of this much discussed doctrine. That novelty is said[8] by the learned Lord Justice to lie in this, that "In former times the act done, in order to be good consideration" (i.e., in cases of a promise for an act) "had to be a benefit to the promisor or a detriment to the promisee. These phrases were historically intelligible. 'Benefit' conveyed the notion of a *quid pro quo*. 'Detriment' conveyed the tortious origin of the action of assumpsit. But nowadays there are some grounds for suggesting that an act may be good consideration even though it is not a benefit to the promisor nor a detriment to the promisee." Here the Lord Justice is speaking of the formation of contracts. In that context the two statements read together amount to saying that, while recent cases demonstrate that consideration is still necessary for the formation of a contract, the concept of what amounts to consideration has been somewhat broadened by them.

It seems arguable that even this element of novelty may be overstated. Direct authority for any alteration in the law of con-

[6] [1951] 2 K.B. 215.

[7] Perhaps even this restatement is somewhat too broad; the modification need not necessarily be permanent, although this quotation would suggest that it must be. This matter will be discussed subsequently.

[8] *Recent Developments in the Doctrine of Consideration*, (1952) 15 Mod. L. Rev. 1, at 2.

sideration in the formation of contracts must be looked for elsewhere than in the *High Trees Case,* since, if the distinction between the formation and dissolution or variation of contracts, upon which Denning L.J. insists, is to be maintained, the *High Trees Case* must fall into the second class. This authority can, it is claimed, be found in *Robertson v. Minister of Pensions,*[9] *Foster v. Robinson,*[10] and *Wallis v. Semark.*[11]

In *Foster v. Robinson* a farm labourer was a tenant of a cottage at a rent of £3/5/- payable every six months. On his retirement the farmer-landlord said that the tenancy could be cancelled, and the labourer could live on rent-free for the rest of his life. On his death, his daughter (since she could thereby claim benefits under the Rent Restriction Acts) claimed that the original tenancy was still subsisting. This claim was rejected, the Court finding that there had been a surrender by operation of law. In reaching this conclusion the Court of Appeal stated that undoubtedly the landlord's promise was binding. The reason for this being, it is alleged, simply that the promise 'was acted on',[12] the surrender could be consideration because there would be no surrender unless the promise were binding. With respect, it seems that there is here no more than the long standing logical difficulty of holding one promise consideration for another in cases of promise for promise. Yet practical necessity has long said that consideration exists in such cases. The difficulty with this case is in part that it was an appeal from a County Court, which must be limited to questions of law, and since the transaction had occurred some time in the past the facts were, in any event, not easily ascertainable. When what there are, are analysed, it seems that there was in fact a promise to surrender in return for a promise to grant a licence. The difficulty is then not one of consideration, since although at first sight the advantages are all with the tenant, in fact that is not so because of the operation of our Rent Restriction Acts. What *is* the difficulty is that of surmounting the absence of a memorandum in writing or deed. In any event so far as surrender by operation of law depends upon some doctrine of estoppel it is

9 [1949] 1 K.B. 227.
10 [1951] 1 K.B. 149.
11 [1951] 2 The Times L.R. 222.
12 See (1952) 15 Mod. L. Rev. at 7.

a doctrine of long standing,[13] though its long history does not make it any more logical or consistent with the general body of law.

That case appears at best to be inconclusive. The second, *Wallis v. Semark,* is hardly stronger. There at some stage in an existing tenancy the rent book was altered from one month's notice on either side to two years' notice on the landlord's part. Again the agreement was held binding, apparently on the ground that the tenant had acted upon it.[14] Again however it is not clear that consideration cannot be found in the ordinary sense. Indeed Somervell L.J. was prepared to find it.[15] It is arguable that simply by staying on after the alteration the tenant incurred obligations under the new tenancy, which would be sufficient consideration. The same difficulties about ascertaining the facts exist here with the added complexity that both parties to the arrangement were dead. Again therefore since the facts are ambiguous, and could, on one basis, show conventional consideration the case is not a strong authority for any new law. The third case, *Robertson's Case,* involving the question of the acceptance of liability for a service pension, is perhaps hardly a contract case at all. The question at issue is one of the revocability of an administrative act.

It must also be remembered that this idea of acting upon a promise affording consideration is no novelty, even when it confers no benefit on the promisor. Moreover the idea of detriment has always been a broad one. In a group of cases arising out of the 1914-18 war, where local authorities had issued circulars promising to make up the wages of those of their employees who joined up, the act of enlisting was held sufficient consideration.[16] Indeed the language of some of the cases has a striking similarity to that of the "new" cases, speaking of statements of intention being made binding by the plaintiff acting on them. Perhaps the most striking is the statement of Lord Birkenhead in *Ralli Bros. v. Walford Lines Ltd.*[17] "It appears to me to be established that M. said to R., 'Do not bother

13 See *Wallis v. Hands,* [1893] 2 Ch. 7, or *Fenner v. Blake,* [1900] 1 Q.B. 426, and *The Implied Surrender of Leases,* (1952) 16 Convey. 202, by D. Pollock, which shows clearly the difficulties of the application of estoppel. Indeed what seems more likely is that in this context there is some special theory of part performance to get over the difficulty of the absence of deed or memorandum.

14 Per Denning L.J., [1951] 2 The Times L.R. at 226.

15 [1951] 2 The Times L.R. at 225.

16 *Shipton v. Cardiff Corporation,* (1917) 87 L.J. K.B. 51; *Davies v. Rhondda Urban District Council,* (1917) 87 L.J. K.B. 166, 34 T.L.R. 44; *Budgett v. Stratford Co-operative and Industrial Society Ltd.,* (1916) 32 T.L.R. 378.

17 (1922) 13 Lloyds List L.R. 223.

to insure, we will insure. Do not worry, do not bother any more to do what you would otherwise have done, insure against the risk. We will insure for you and make you safe.' It is hardly denied and cannot be denied that if a promise were made in this way coupled with a request to the plaintiffs not to effect an insurance, and if their promise were accepted and the request acted upon in the faith of that promise, that would be sufficient consideration." Such a statement is hardly distinguishable from the statements of the "new" principle, but in destroying the novelty of the latter, it reinforces their authority.

So far as the doctrine of consideration affects the formation of contracts, it seems that recent cases merely show that detriment to the promisee suffices; a proposition which is not new,[18] but which perhaps required re-stating. The concept of detriment is broad, it can consist either of undertaking some fresh obligation or of the performance of some act which might not otherwise have been performed or of the withholding from doing some act which would otherwise have been done. All that is necessary is that there must be some causal connection between the promise and the act or abstention. That is to say that the promise was intended to and did provoke the act or abstention in question. The mere fact that there exists both a promise and some act which could have amounted to consideration will not suffice unless this causal link can be shown.[19] Not merely does this broad concept of consideration lessen the ill-effects of the doctrine, it possibly makes that doctrine desirable.[20] Thus in *Shanklin Pier Ltd. v. Detel Products Ltd.*,[21] A. made certain representations about his paint with the intent that B. should specify this paint for work to be done on B.'s property by C. B. did so specify. The representations were not fulfilled and B. was held entitled to sue A. upon an independent warranty, the only consideration for which could be B.'s making the contract with C., a contract causally linked with the representation. Indeed this is not the only

18 See *Pollock on Contracts* (13th edn.), 138. The passage is by Sir Frederick Pollock himself.

19 See the discussion in *Bob Guiness Ltd. v. Salomonsen*, [1948] 2 K.B. 42 at 47, and *Oliver v. Davis*, [1949] 2 K.B. 727.

20 There may perhaps be a swing back in favour of the doctrine of consideration, and against the report of the Law Revision Committee. Thus F. H. Lawson can write, "That doctrine, therefore, exaggerated as some of us think it to be, can be made to serve rational ends. It has also performed, for Scots law as well as for English law, a service of the utmost value": *The Rational Strength of English Law*, at 49.

21 [1951] 2 K.B. 855.

case where the oddities of the doctrine produced beneficial results, in enabling the court to give damages for what at first sight amounted to mere representation. The same result was reached in *Webster v. Higgin*[22] where, in the face of a clause in a contract of sale excluding all liability on warranties, the purchaser was able to sue upon a representation as to the quality of the car which turned out, in the words of the Master of the Rolls, to be "nothing but a mass of secondhand and dilapidated ironmongery". The representation was construed as forming part of a separate and antecedent contract of guarantee, the consideration for which was to be found in signing the main contract. It is true that the possibility of finding a separate contract should not be overrated, a clear promise must in all cases be found. Thus the answers to requisitions under English conveyancing practice will not be thus construed.[23] Nevertheless the possibility is valuable, and exists in part because of the vagaries of the doctrine of consideration.[24]

These cases upon consideration also have their effect on the doctrine of the modification and discharge of contracts. Whether it is possible to segregate the formation and discharge of contracts as clearly as Denning L.J. would wish may be doubted. So far as the discharge is the result of an agreement, the validity of the agreement cannot vary according to whether it is considered as terminating an existing obligation or creating a new one.[25] In practice moreover it is extremely difficult to tell whether there has been a variation of an existing contract, or the discharge of one contract and the sub-

22 [1948] 2 All E. R. 127. These cases may be of use to a purchaser who in law buys from a finance company and not from the person who exhibits the article purchased and makes the representation. See *Brown v. Sheen and Richmond Car Sales Ltd.*, [1950] 1 All E.R. 1102, and contrast *Drury v. Victor Buckland, Ltd.*, [1941] 1 All E.R. 269, turning on the warranties in the Hire Purchase Act 1938. These cases, particularly *Webster v. Higgin*, also provoke some consideration of the nature of contracts. It is reasonable to suppose that neither party had any idea that he had made a contract of warranty until the plaintiff's solicitors discovered it for him.

23 *Mahon v. Ainscough*, [1952] 1 All E.R. 337.

24 Going further back it seems that it is only in the way discussed above that any consideration can be found for the contract to take the highest bid found by Martin B. in *Warlow v. Harrison*, (1855) 1 E. & E. 309, though for an attack on the authority of this case see (1952) 68 Law Q. Rev. 238, and for a reply see the issue of October 1952. The contrast with *Harris v. Nickerson*, (1873) L.R. 8 Q.B. 286, is to be explained not on the grounds of consideration but simply on the nature of the statement made, which was not a promise, but an offer to treat.

25 Consider for example, *Morris v. Baron & Co.*, [1918] A.C. 1; the differing effect of the agreement there turns solely on the Statute of Frauds.

stitution of another. It is perhaps in this context that recent cases have worked the greatest reform or clarification. That reform has come about through a closer regard to the effect of equitable rules upon the common law. The strict rule that there can be no oral variation of a contract required by law to be in writing has frequently been a cause of hardship. Now it seems that many difficulties can be overcome by an equitable doctrine akin to estoppel.[26] This principle has been expressed[27] as follows: "It is a principle when applied to contractual rights which A. may have against B. which means that when once A. has represented that he will not insist upon precise performance, and B. has acted on that representation, A. will be estopped from setting up the strict terms of the original contract unless he can by notice or otherwise indicate to B. that the original contract is restored. If B.'s conduct is such, or the contractual right is such, that restoration cannot come about, then A. will be estopped for all time." Perhaps the clearest illustration is *Charles Rickards Ltd. v. Oppenheim*[28] where in a contract for the sale of goods, time being of the essence, the buyer indicated that he would waive the stipulation as to time. He was entitled, after further prolonged delay, by notice to make time once more of the essence, and thus restore the right to cancel the contract, which earlier he had lost by his waiver. This was clearly a case where the original position could be restored. It is arguable that the *High Trees Case* illustrates the cases where it cannot be. The debtor having acted upon the representation of release from part of the rent, and thus incurred new obligations on the footing of what he believed his financial position to be, would be worse off if he had later to pay in full than he would have been had he been called upon to do so originally. The same equitable idea which underlies the statement, "Speaking generally, the fact that the recipient" (of money paid under a mistake) "has spent the money beyond recall is no defence unless there was some fault, as, for instance, breach of duty on the part of the paymaster,"[29] would here operate to prevent a resoration of the original position by mere notice. The representation can be regarded as raising the same equities as the fault. Where such a principle operates the Rule in *Pinnel's Case* ceases to create difficulties, not because of

26 See *Central London Property Trust Ltd. v. High Trees House Ltd.*, by G. C. Cheshire and C. H. S. Fifoot in (1947) 63 Law Q. Rev. 283, and *Recent Developments in Estoppel* by J. F. Wilson in (1951) 67 Law Q. Rev. 330.

27 67 Law Q. Rev. 333.

28 [1950] 1 K.B. 616.

29 *Larner v. London County Council,* [1949] 2 K.B. 683, at 688.

any alteration in the law of consideration, but because of an enduring estoppel.

From this group of cases it seems that the novelty is only to be found in the variation of contracts, not in their formation. The doctrine of consideration remains unaffected, though some of its characteristics have been re-emphasized. Even the novelty of variation has a respectable background of history.[30] Some space has been given to these cases since they are ones constantly recurring, appropriately or not, in current litigation; some attempt to study their effects seemed therefore important. They have however significance beyond this, as illustrations of other forces which are operating strongly. Two may be mentioned. One is that there is a much greater readiness to analyse situations with precision. The other may be called a renewed or reinforced influence of morality upon law.

Just as in the land law the operation of the Rent Restriction Acts has caused the courts to undertake a much closer analysis of the effect of customary practices under the English completion procedure, and of matters such as weekly tenancies, which were not often the subject of litigation when notice to quit could be freely given,[31] so also in contract there is a much greater readiness to examine not merely what contract was made, but where it was made. Of one aspect of this *Webster v. Higgin* is an illustration, but it has been most clearly brought out in cases dealing with clauses purporting to exempt from liability, and estate agents' commission. So, in *Olley v. Marlborough Court Ltd.*,[32] the hotel posted notices liberally in the bedroom exempting the proprietors from liability. The plaintiff was entitled to disregard these notices since the contract had been concluded a few minutes earlier downstairs by signing the visitors' book (see per Singleton L.J. at 547). Moreover the court was prepared to consider whether the contract was for a week, and then renewable, or initially for an indefinite period subject to notice. In the former case if the theft had occurred in the second week, the notices might have become operative, whereas they never could in the second case. So also with estate agent cases, where often the sequence of events is that the vendor goes to the agency, puts the

30 *Hughes v. Metropolitan Rly.*, (1877) 2 App. Cas. 439; *Besseler Waechter Glover and Co. v. South Derwent Coal Co. Ltd.*, [1938] 1 K.B. 408; and the other cases discussed in the article in 67 Law Q. Rev. above referred to.

31 *Universal Permanent Building Society v. Cooke*, [1952] Ch. 95; *Coventry Permanent Economic Building Society v. Jones*, [1951] 1 All E.R. 901.

32 [1949] 1 K.B. 532.

house he wants to sell on their books, and the next day receives a letter "confirming" the agency and referring to various special terms on the back. The court has been quite prepared to regard the communication of the terms as too late.[33]

The same influence may be seen in what is perhaps an increased liberality in admitting evidence contradicting what is at first sight a complete written memorandum of the contract. In several cases of auction sales, particularly of cattle, where the printed conditions apparently excluded all warranties, evidence has been admitted of an antecedent conversation which the courts construed as making clear that the purchaser would only bid if satisfied on a certain matter. The assurance which he received has been treated as part of the main contract, and the printed conditions have been read as subject to it.[34]

This last group of cases shows that this precise analysis is also related to the high standard of commercial morality now expected by the courts. Through it substantial justice has been done.[35] This

33 *Trinder and Partners v. Harris,* [1951] W.N. 416. This argument as to timing has not however been accepted in all cases, and is only a part of the fierce struggle which estate agents have conducted against vendors who can easily change their minds in a sellers' market. The struggle started with *Luxor (Eastbourne) Ltd. v. Cooper,* [1941] A.C. 108, and continues through cases such as *Bennet Walden and Co. v. Wood,* [1950] 2 All E.R. 134, and *Dennis Reed Ltd. v. Goody,* [1950] 1 All E.R. 919. For an illustration of the rule of strict construction now used in such cases see *Boots v. Christopher and Co.,* [1952] 1 K.B. 89—a commission 'on the purchase price obtained' means on the money received. None is payable therefore if the purchaser though able does not complete and the vendor does not force him to. For concentration on the timing of contracts in other contexts see *Dennant v. Skinner,* [1948] 2 All E.R. 29.

34 *Couchman v. Hill,* [1947] K.B. 554; *Harling v. Eddy,* [1951] 2 All E.R. 212. In contrast to this liberality, possible where the Sale of Goods Act is involved, the courts have under the Statute of Frauds clearly decided that although the plaintiff may waive an unwritten term solely for his own benefit he cannot concede an unwritten term for the benefit of the defendant and thus claim that there is a sufficient memorandum: *Burgess v. Cox,* [1951] Ch. 383.

35 In contrast, *Pocock v. A.D.A.C. Ltd.,* [1952] 1 The Times L.R. 29, and *James v. T. H. Kent and Co. Ltd.,* [1951] 1 K.B. 551, are perhaps cases where too strict an interpretation of the Statute of Frauds caused a failure in this respect. In the first the term "consultant", in the second "director", was held not to be a sufficient identification of the work to be done. The second case is more noteworthy for its observations on *Scott v. Pattison,* [1923] 2 K.B. 723. The newly recreated Law Revision Committee has been asked whether the recommendations of the former Committee on the Statute of Frauds should be implemented. Perhaps two recommendations will suffice for reform.

insistence on good conduct has mostly been in evidence in regard to exemption clauses. Increasingly the courts have emphasized that not merely must the clause be clear, but that attention must be fairly drawn to it. Moreover increasingly these clauses are strictly construed,[36] particularly in the exclusion of liability for negligence. Thus one to the effect that "The report to be furnished does not imply any warranty of condition or description of the plant examined nor is the corporation in any way liable in case any dispute shall arise as to such condition or description", was held not to exclude liability for a failure to use due care in preparing the report.[37] It has also been emphasized that a party cannot take advantage of such a clause where he has committed a fundamental breach of the contract.[38] And where a receipt for goods contained exemption clauses, the effect of which was innocently misrepresented, the clauses were held ineffective, the court giving short shrift to the argument that innocent misrepresentation did not entitle a person to avoid clauses of a contract but at most to avoid the whole contract leaving no contract for breach of which damage could be given.[39] Indeed these are hard times for the ticket profferor. The days are past when the Court would say, "Now giving that document" (a ticket) "to an ordinary grown up man who presumably could read, what more could the company reasonably do to bring the condition to his notice?" This turn in favour of the ticket holder is accentuated by the recent scheme of the Transport Tribunal prohibiting special exemptions from liability in railway tickets, a step which had been taken in 1950 in respect of road transport in public service vehicles.[40]

It seems that this development is part of an insistence upon fair trading practices which is reflected elsewhere, as in the greater stringency of the Companies Act 1948. Behind it seems to lie a concern on the part of the courts to do what would generally be regarded as satisfactory between the parties rather than to insist

[36] See *Olley v. Marlborough Court Ltd.*, [1949] 1 K.B. 532; *Beaman v. A.R.T.S. Ltd.*, [1948] 2 All E.R. 89, [1949] 1 All E.R. 465. See also *John Lee and Son (Grantham) Ltd. v. Railway Executive*, [1949] 2 All E.R. 581, as to such a clause in a lease.

[37] *D. H. Broad v. General Accident etc. Corp.*, [1951] 2 Lloyds List L.R. 201.

[38] *Alexander v. Railway Executive*, [1951] 2 All E.R. 442.

[39] *Curtis v. Chemical Cleaning and Dyeing Co. Ltd.*, [1951] 1 All E.R. 631. In any event even if this argument had been accepted liability in negligence irrespective of contract would it seems have remained.

[40] Road Traffic Act 1930, s. 96. Perhaps the general turn of the tide dates from *Davies v. Collins*, [1945] 1 All E.R. 247, holding that an exemption clause did not protect where there had been a delegation of the work to be done, unauthorised by the contract.

upon a narrow interpretation of established rules of law.[41] It is this motive which appears to explain other cases such as *Sir Lindsay Parkinson and Co. Ltd. v. Commissioners of Works*[42] where by the letter of his contract the contractor was bound to carry out all variations directed by the commissioners, the contract fixing a maximum profit. The works in fact carried out exceeded by some millions the value of the works originally contemplated. The contractor claimed, and won, additional profit. Any strict rule of construction must have excluded this claim, but that exclusion would have worked hardship. The effect of the case was later summarized by Denning L.J. as being that the court will not apply the strict words of the contract to an uncontemplated turn of events, but will do therein what is just and reasonable.[43]

It is true that the passage just quoted was singled out for criticism by Lord Simon in the House of Lords in the *British Movietonews Case*,[44] but it may be doubted whether the criticism does not hit rather more at the phraseology of the Lord Justice's remarks than at their effect. Lord Simon quoted with approval as embodying the true rule some words of Asquith L.J., "that where the language of a contract is capable of a literal and wide, but also of a less literal and a more restricted, meaning, all relevant circumstances can be taken into account in deciding whether the literal or a more limited meaning should be ascribed to it." The same conclusion may be reached by either path. Indeed the practical effect of the views taken by the Court of Appeal and the House of Lords of the *Lindsay Parkinson Case* illustrates this point. Under either decision the contractor escaped the consequences of an onerous contract which a literal construction could have held binding on him.[45]

41 "Unlike the somewhat aloof dignity of the ordinary court of justice, with the feeling that the recipient ought to be glad to get whatever he is given, the commercial law and the commercial courts take a particular pride in attracting business and in dealing with it in a manner which is felt to be satisfactory," said Mr. Justice Devlin in a lecture, *The relation between commercial law and commercial practice*, printed in (1951) 14 Mod. L. Rev. 249.

42 [1949] 2 K.B. 632.

43 *British Movietonews, Ltd. v. London and District Cinemas, Ltd.*, [1951] 1 K.B. 190, 201; and see the comments of J. G. Fleming, *The sanctity of contract in eclipse*, (1950) 24 Aust. L.J. 306, which however perhaps overstates the trend.

44 [1952] A.C. 166, at 184.

45 The *Lindsay Parkinson Case* was not itself the subject of an appeal to the House of Lords. The views of the latter on it are however expressed in the *British Movietonews Case*.

This conflict of opinions between the House of Lords and Denning L.J. is worthy of notice for another reason. What has been called the insistence upon morality has at times been widely expressed, particularly by Denning L.J. Thus in *Smith v. River Douglas Catchment Board*[46] he said, in reference to the principle of *Dunlop v. Selfridge,* that "it can be met either by admitting the principle and asserting that it does not apply to this case, or by disputing the principle itself. I make so bold as to dispute it . . . It has never been able entirely to supplant another principle whose roots go much deeper. I mean the principle that a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise; and the court will hold him to it, not only at the suit of the party who gave the consideration but also at the suit of one who was not a party to it, provided that it was made for his benefit." It is very doubtful whether a rule allowing third parties to sue is thus strongly established even though it might be desirable that it should be.[47]

Similarly the assertions in *Solle v. Butcher,*[48] that the rule in *Angel v. Jay* as to the effect of innocent misrepresentations is no longer good law, and that mistake makes a contract voidable, although convenient between the particular parties, seem, with respect, to be of doubtful validity as propositions of general law. The second is difficult to reconcile with older cases, particularly the *non est factum* cases, and it is arguable that the mistake there made was neither fundamental nor as to a matter of fact.[49] As to the first proposition, that rescission is possible even of an executed contract for innocent misrepresentation, it seems likely that the rule has in the past been too widely stated. Cases like *Whittington v. Seale-Hayne*[50] show that rescission has been granted. Nevertheless it seems that the denial of the proposition has in its turn been too broadly stated. In *Leaf v.*

46 [1949] 2 All E.R. 179, at 188.

47 *Re Greene,* [1949] 1 All E.R. 167, in the Chancery Division is a clear expression of the general position. Indeed it is possible that Prof. Corbin unintentionally did English law a disservice by his article in (1930) 46 Law Q. Rev. 12. Since then scarcely any action has succeeded on this trust principle.

48 [1949] 2 All E.R. 1107.

49 See the comments in (1950) 66 Law Q. Rev. 169 and (1950) 13 Mod. L. Rev. 362, and the dissenting judgment of Jenkins L.J. at 703-5; and see *A Study in the relationship between common law and equity in contractual mistake,* by C. Greenfeld, in (1952) 15 Mod. L. Rev. 297.

50 (1900) 82 L.T. 49, and see (1950) 13 Mod. L. Rev. 362.

*International Galleries*[51] the Court of Appeal, while accepting the general possibility of rescission, denied it in the particular case, because, were the representation a condition it would, by acceptance, have been reduced to a warranty, for which rescission does not exist as a remedy. Again it is a result which seems eminently reasonable, but it comes very near to reaching by a circuitous route the conclusion which *Angel v. Jay* reached directly.

It is therefore evident that although there probably exists a tendency, which it might scarcely be unfair to summarize as an attempt to do justice between party and party, it is a tendency to which exceptions can easily be found. It is moreover one which has on occasion been overstated.

Two further topics may be mentioned as having a general interest though distinct from the cases already discussed. The first is illegality. Here the wagering cases have been prominent. *Hill v. William Hill (Park Lane) Ltd.*[52] has created greater difficulty in evading the Gaming Acts, but it has not entirely stopped the flow of cases which attempt to do so. *MacDonald v. Green*[53] has shown that *In re O'Shea*,[54] holding recoverable loans to pay lost bets where the money is paid to the loser, is only applicable where the loan is a loan at large, and is capable of being used for other purposes. Probably a greater check to such attempts comes from *R. v. Weitz, ex parte Hector McDonald Ltd.*,[55] where the court held that any solicitor pursuing in an innocent guise, such as an account stated, what was in effect an action upon a gaming debt, was guilty of contempt of court. Although in the circumstances of the case no order for committal was made it is an interesting authority on contempt committed by pursuing a feigned cause of action. The warning that it gave was reinforced by the Law Society which published an opinion to the effect that any solicitor acting on instructions to recover such debts would be guilty of professional misconduct.

51 [1950] 2 K.B. 86. Illustrations of broad statements and corrections can be multiplied. Compare *Howell v. Falmouth Boat Construction Ltd.*, in the Court of Appeal, [1950] 1 All E.R. 538, and in the House of Lords, [1951] 2 All E.R. 278. The anxiety to do justice between the parties perhaps led the Court of Appeal to overlook a fundamental principle reasserted by the House of Lords. Compare the notes in (1950) 13 Mod. L. Rev. 376 and (1952) 15 Mod. L. Rev. 69.

52 [1949] 2 All E.R. 452, fully discussed by H. A. J. Ford in *Wagers and Collateral Contracts*, (1949) 23 Aust. L.J. 487.

53 [1950] 2 All E.R. 1240.

54 [1911] 2 K.B. 981.

55 [1951] 2 All E.R. 408.

Of more general interest is *Bigos v. Bousted*,[56] on the issue of the recovery of money paid or property transferred under an illegal transaction where no part of the illegality has been carried out. Securities had been deposited under an agreement made in England for a loan to be made in Italy contrary to the English currency regulations. As it turned out the loan was not made, because the lender refused to lend. In an action by the "lender" (which was abandoned), the "borrower" counterclaimed for the return of his securities, on the ground that the illegal purpose had not been carried out. After reviewing the authorities, Pritchard J. rejected the counterclaim. The cases, he said, fell into two groups, those where nothing illegal was done because the plaintiff repented and those where nothing illegal was done because of some frustration (in the ordinary sense) where, for example, as in *Alexander v. Rayson*[57] the Assessment Committee was not deceived. In cases of the latter class no recovery was possible. The present case could not be regarded as one of the repentance group, there being no change of heart of the borrower. He could not therefore recover. Once again the insistence on repentance seems to emphasize the influence of morality. It would seem therefore than once a party has put it out of his power to prevent the illegality his *locus penitentiae* has gone whether or not the act is done. If knowingly the gunsmith sells a gun to a modern Macbeth on credit he cannot recover even while the would-be murderer hesitates.

One other head of illegality reflects the tendency of the courts to reassert their jurisdiction. The cases here spring from *Gaisberg v. Storr*,[58] a decision following and perhaps extending *Hyams v. Hyams*,[59] holding that parties to divorce proceedings cannot make a binding agreement as to maintenance in consideration of the wife not applying to the court. It is held that the jurisdiction of the court to decide the amount of maintenance cannot thus be excluded.[60] This particular application of public policy may be

56 [1951] 1 All E.R. 92.

57 [1936] 1 K.B. 169.

58 [1950] 1 K.B. 107; as to the effect of such covenants on the whole deed see *Bennett v. Bennett*, [1952] 1 All E.R. 413.

59 [1929] A.C. 601.

60 Other illustrations in different fields are *In re Wynn Dec'd.*, [1952] 1 The Times L.R. 278 (no exclusion of the jurisdiction of the court on the construction of wills, though it seems that a different opinion obtains in Scotland: *Dundee General Hospitals v. Walker*, [1952] 1 All E.R. 896), and the wider powers to control administrative tribunals in *R. v. North umberland Compensation Appeal Tribunal, ex parte Shaw*, [1952] 1 K.B. 338. A similar concern has been apparent in the preservation of the Court's

questioned,[61] but it serves as an illustration of an attitude of the courts which appears to be well marked. On the other hand the decisions on motor car covenants have contained welcome restatements of sound principles. Inevitably the system of selling cars with a covenant against re-sale has provoked litigation. The validity of such covenants was upheld in *British Motor Trade Association v. Gilbert*,[62] one of the few cases in which reasonableness from the point of view of the public has been the deciding factor. The Court upheld the covenant, since one intended "to forward the interests of the public and protect honest dealers in the motor trade against those who are prepared to sacrifice principle to profit, cannot be otherwise than proper to protect the interests of the persons concerned". Further in *Monkland v. Jack Barclay Ltd.*[63] the distinction between public policy in the courts and public policy in Westminster was vigorously re-affirmed. The covenant scheme had the approval of the appropriate Ministry but Asquith L.J. commented: "Certain specific classes of contract have been ruled by authority to be contrary to the policy of the law, which is, of course, not the same thing as the policy of the government, whatever its complexion . . ." New types of contract should only be admitted as contrary to public policy when "incontestably and on any view inimical to the public interest." He added that the suggestion that governmental approval could be relevant was unfounded. "It could only be so relevant if the government's approval was some evidence that public policy called for the enforcement of the scheme. We think that this is an unfounded suggestion." These remarks may only repeat old principles, nevertheless they are comforting words in these days.[64]

Finally some cases on the measure of damages seem to be of more than local importance. Outstanding are *Monarch Steamship Co. Ltd., v. Karlshamns Olkefabriker (A/B)*[65] and *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*[66] In the first the House

jurisdiction to review expulsions from trade unions: *Lee v. Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175. Perhaps there is here a reaction to the establishment of so many administrative tribunals.

61 See (1951) 67 Law Q. Rev. 456.

62 [1951] 2 All E.R. 641. The difficulty of assessing damages where there is no open lawful market is also dealt with.

63 [1951] 2 K.B. 252, at 265.

64 Compare the refusal to allow any binding force to governmental interpretation of regulations in *Howell v. Falmouth Boat Construction Co. Ltd.*, [1951] A.C. 837, and the notes thereon in the Mod. L. Rev. referred to in note 51 *(supra)*.

65 [1949] A.C. 196.

66 [1949] 2 K.B. 528. It may, it seems, be necessary to review some of the older cases such as *Horne v. Midland Rly. Co.*, (1873) L.R. 8 C.P. 131.

of Lords clearly rested the rules governing remoteness upon foreseeability. What is foreseeable in this sense is what a reasonable man would contemplate as a serious probability as a result of the breach, had he thought of the matter at all. On this basis the rule in *Hadley v. Baxendale* was interpreted in the second case. Foreseeability must depend upon knowledge, and it is with this knowledge that *Hadley v. Baxendale* is concerned. Everyone must know what is likely to occur in the ordinary course of events, there is therefore liability under the first rule. Particular types of damage may only be foreseeable given particular knowledge. Hence the second rule. So in the *Victoria Laundry Case* loss of general profits was recoverable for failure to deliver a boiler, but loss on particularly profitable contracts was not, in the absence of special knowledge, though some element representing such profits must appear under the first head as likely to happen in a general sense. Had the boiler suppliers thought at all they must reasonably have thought of such matters.

So in *Biggin and Co. Ltd. v. Permanite Ltd.*,[67] where goods were sold by A. to B. knowing they were to be resold to C. The possibility of C. recovering from B. if they were defective must have been contemplated by A. Therefore the damages payable by B. to C. were the measure of the damages claimable by B. from A. Further, since B. had reached a settlement with C. on legal advice, since it is the policy of the law to encourage settlements, the sum thus agreed would be deemed reasonable as between A. and B. unless A. could produce evidence to the contrary. Again in *Mehmet Dogan Bey v. G. G. Abdeni and Co.*,[68] where due to delay in payment (in breach of contract) the creditor suffered loss due to devaluation, that loss was not recoverable since in view of the declarations of the United Kingdom Government and other circumstances it was not foreseeable. Whether that will hold true now that currencies seem to be less stable is perhaps arguable.[69]

67 [1951] 2 K.B. 314. See also for loss of profit recoverable for failure to open a confirmed credit, *Trans Trust S.P.R.L. v. Danubian Trading Co.*, [1952] 1 All E.R. 970. The loss of profit rather than market prices afforded the measure of damages. As to the time of opening such credits see *Pavia and Co., S.P.A. v. Thurmann-Nielsen*, [1951] 2 All E.R. 866.

68 [1951] 2 K.B. 405.

69 Since such questions seem likely to be of growing importance it is worth drawing attention to *Cummings v. London Bullion Co.*, [1952] 1 All E.R. 383, dealing with the date on which a debt in foreign currency should be converted, and see the critical notes in (1952) 68 Law Q. Rev. 163 and (1952) 15 Mod. L. Rev. 369. Although *Bonython v. Commonwealth of Australia*, [1951] A.C. 201, can hardly be called an English case the

Other topics and cases could be mentioned: *Bailey v. Bullock,*[70] on the distinction between actions in tort and in contract where a contract has been negligently performed, and also upon the admissibility in contract of damages for inconvenience but not for mere annoyance or mental suffering; *William Cory and Sons Ltd. v. City of London Corporation*[71] on the contracts of public authorities which conflict with bylaws; *Armstrong v. Strain*[72] holding that where the agent innocently makes a false statement the principal is not liable for fraud merely because he knows the true facts. The list could grow, but they are cases of narrow interest or uncertain limits. It is hoped that what have been given are the main groups. What is of interest is the manner in which the developments have been made. It is not generally by enunciating new principles but by the adaptation of old cases. Often they are little known cases,[73] but by this means considerable flexibility is achieved. Moreover the developments are largely in the Queen's Bench Division. With the exception of the celebrated *Diplock* litigation the cases in recent years which have provoked most comment have been common law cases. It is true it has been said, "It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect".[74] But it has also been said, perhaps in jest, by Chancery lawyers that the equity of the common law courts "could not be equity but must be a queer sort of common law of which they had never heard."[75] Whatever the answer to that debate it is at least clear that the common law courts have found no difficulty in adapting old cases to difficult times and have shown that the common law still has strength, pliability, and a strong concern for justice. It may be that the trends which have been discerned may seem exaggerated. Too often the waves with which one struggled in

article in (1952) 68 Law Q. Rev. 195, *On the meaning of 'pound' in English Law,* by F. A. Mann which it has prompted should be noted.

70 [1950] 2 All E.R. 1167.

71 [1951] 2 K.B. 476. Compare *Buchanan v. Redcliffe Town Council,* [1950] Queensland State Rep. 24.

72 [1952] 1 All E.R. 139. "You cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind", per Devlin J.; and see (1952) 15 Mod. L. Rev. at 232.

73 For example, *Bush v. Whitehaven Trustees* and *Parkinson's Case (supra),* a decision only reported in 52 J.P. 392, and *Lee v. Gray* (unreported) in *Harling v. Eddy (supra).*

74 *Nelson v. Larholt,* [1948] 1 K.B. 339, at 343 per Denning J.

75 F. H. Lawson, *The Rational Strength of English Law,* at 31.

a small boat have been but ripples to those watching from the distance. Even so, it must be said that to an Englishman the law of contract seems to have taken on a new youth.

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