Chapter 7
Unenforceable contracts

SUMMARY

The elements required to form a contract have now been considered. Where they are all present, the parties are entitled to assume that the expectations reasonably raised by their conduct will be sanctioned by the courts. It will be necessary hereafter to examine the circumstances in which this assumption may be defeated in greater or in lesser degree by the presence of other factors—by mistake, for example, which at common law may make the contract 'void', or by misrepresentation, which may make it 'voidable'. But the English law has not been content to classify contracts as 'valid' on the one hand and as 'void' or 'voidable' on the other. It has allowed an intermediate position, where a contract, though valid, may yet be 'unenforceable' by an action at law unless and until certain technical requirements are satisfied. The 'unenforceable contract' is clearly a creature of procedural rather than of substantive law; and the origin of so peculiar a position is to be found in the passage, as long ago as 1677, of the Statute of Frauds. It is necessary, therefore, to examine the history of this statute and to observe its surviving effects in the modern law.

1 History and policy of the Statute of Frauds

Of the twenty-five sections of this Statute, two have been important in the history of contract, section 4 and section 17.

Section 4:

> No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.

Section 17:

> No contract for the sale of goods, wares or merchandises for the price of £10 sterling or upwards shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorised.

The raison d'être of the statute is to be found partly in the condition of seventeenth-century litigation and partly in the background of social and political uncertainty against which it must be focused. On the one hand, the difficulty of finding the facts in a common law action was considerable. Not only were juries entitled to decide from their own knowledge and apart from the evidence, but no proper control could be exercised over their verdicts. Moreover, until the middle of the nineteenth century, a ludicrous rule of the common law forbade a person to testify in any proceedings in which he was interested, and the parties to a contract might have to suffer in silence the ignorant or wanton misconstruction of facts which they alone could have set in a proper light.[1] The mischief had been aggravated by the acceptance in the sixteenth century of the validity of mutual promises unaccompanied by formality or by the proof of a *quid pro quo*, or, in other words, by the adoption of the principle of purely consensual contracts. On the other hand, the confusion attending the rapid succession of Civil War, Cromwellian dictatorship and Restoration had encouraged unscrupulous litigants to pursue false or groundless claims with the help of manufactured evidence. The statute, therefore, avowed as its object 'prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury'.

Contemporary conditions, while they suggest the necessity for some Parliamentary intervention, do not explain the particular form which it took. To modern eyes the choice of contracts in sections 4 and 17 appears quite

1 Readers of *Pickwick Papers* will remember that, in the case of *Bardell v Pickwick*, neither the plaintiff nor the defendant entered the witness-box (ch 34). On the history of the Statute, see Holdsworth *History of English Law* vol VI, pp 379-397; Simpson *History* ch XIII.

arbitrary. It has to be remembered, however, that these form but a small part of the statute, the bulk of which is devoted to the protection of proprietary interests in general. Writing was thus required to support the conveyance of land, the creation of leases, the proof of wills and declaration of trust;[2] and, in 1677, the adolescent law of contract was itself regarded as but a species of the law of property.[3] On this assumption it might be supposed that all contracts would have been included within the scope of the statute, and such, indeed, was apparently the original intention.[4] The reasons for the rejection of this draft and the substitution of specified types of contract remain a matter of speculation. Of the six selected, the close association with the conveyance of property doubtless explains the presence of contracts for the sale of goods, for the sale of interests in land, and, perhaps, with the growing importance of settlements, of agreements in consideration of marriage. A naive reluctance to rely upon belated recollection apparently prompted the inclusion of agreements not to be performed within a year. Of guarantees and promises by representatives to meet debts out of their own pockets it is only possible to say that, as the language of the section suggests, they were regarded by contemporary lawyers as of a 'special' character, either because they appeared strangely disinterested or offered peculiar opportunities to the perjurer. It is interesting, and perhaps significant, that these insular reasons for legislative intervention found a counterpart in parallel action on the Continent, where the acceptance of liability based on promise raised similar difficulties. It has, indeed, been suggested that a French Ordonnance of 1566, and possibly a later Ordonnance of 1667, offered the model or supplied the impetus to the English Statute of 1677.[5]

Upon the foundations thus darkly laid a vast structure of case law has been erected. Its extent may be gauged from the space accorded to it in standard textbooks, not only in England but in America, where the provisions of the Statute have been generally accepted.[6] Through this maze of litigation it is difficult to trace any guiding principle. But it is possible to suggest some clues to the underlying, and sometimes unconscious, aspirations of the judges. In the first place, the language of the statute was more than usually obscure. This fault has been judicially emphasised for at least two hundred years and is not confined to any one section. Of sections 5 and 6, relating to wills, Lord Mansfield declared the draftsmanship to be 'very bad'. He could not believe Lord Hale to be its author 'any further than perhaps leaving some loose notes behind him which were afterwards unskilfully digested'.[7] Sir James Stephen, in his analysis of section 17, concluded that the draftsman failed to understand the words he used and had but an imperfect appreciation of his own intentions.[8] Lord Wright in 1939 summarised the cases on sections 4 and 17 as 'all devoted

2 Ss 1-3, 5-9.

3 Thus Blackstone described the Statute as 'a great and necessary security to private property': Comm iv, p 432.

4 See the original draft set out in Holdsworth *History of English Law* vol VI, appendix I.

5 See Rabel 68 LQR 174.

6 Thus, of the 844 pages which comprise the first edition of *Blackburn on Sale*, published in 1845, 117 are devoted to the interpretation of s 17, and even in the eighth edition of *Benjamin on Sale* (1950), 140 pages are required to deal with the same section. In *Williston on Contracts* 3rd edn, the discussion of ss 4 and 17 occupies six chapters and over 800 pages.

7 *Wyndham v Chetwynd* (1757) 1 Wm Bl 95.

8 1 LQR 1 (1885).

to construing badly-drawn and ill-planned sections of a statute, which was an extemporaneous excrescence on the common law'.[9]

In the second place, the literal application of so imperfect a statute was likely to defeat its cardinal aim and to convert it into a potent instrument of fraud. The honest man disdained, the rogue coveted, its assistance. Lord Mansfield said that 'the very title and the ground on which the statute was made have been the reason of many exceptions against its letter',[10] and his colleague, Wilmot J, declared that, 'had it always been carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting, rather than preventing, frauds'.[11] A hundred years later Sir James Stephen expressed himself even more strongly. 'The special peculiarity of the 17th section of the Statute of Frauds is that it is in the nature of things impossible that it ever should have any operation, except that of enabling a man to escape from the discussion of the question whether he has or has not been guilty of a deliberate fraud in breaking his word.'[12] In the third place, the statute, it has been seen, was the product of a particular social and professional environment, and, when conditions changed, the statute itself lost its *raison d'être*. After the Evidence Act 1851 had permitted litigants to offer oral evidence in courts of common law, it became a conspicuous anachronism. Once more to quote Sir James Stephen, 'it is a relic of times when the best evidence on such subjects was excluded on a principle now exploded'.[13]

It is not surprising that the judges, impelled by these considerations, should have attempted to avoid the worst effects of the statute by a strained construction of its language. But the process, while often serving justice, more often made confusion worse confounded; and, by the end of the nineteenth century, practitioner and student alike had to pick their way through a tangle of case law behind which the original words of the statute were barely perceptible. In 1893, section 17 was repealed and replaced by section 4 of the Sale of Goods Act. Sir M D Chalmers, when he drafted this section, did so with obvious reluctance, observing wistfully that the Statute of Frauds had 'never applied to Scotland and Scotsmen never appear to have felt the want of it';[14] but it could not well have been omitted in an Act designed as a measure of codification. In 1925 the provisions in section 4 of the Statute of Frauds governing contracts for the sale of interests in land was repealed and re-enacted with slight modifications by section 40 of the Law of Property Act 1925; and this re-enactment may be justified by the relative complexity of the land law and the consequent need to secure ample time for investigation and reflection.

While these portions of the Statute of Frauds were being reproduced in modern legislation, criticism of the statute itself became ever more prevalent and ever more vocal. It was condemned by Sir Frederick Pollock in 1913[15] and

9 *Legal Essays and Addresses* at p 226. The uniform tenor of judicial criticism is interrupted by the lone voice of Lord Kenyon, who declared the Statute to be 'very beneficial' and to be 'one of the wisest laws in our Statute Book'. See *Chater v Beckett* (1797) 7 Term Rep 201 at 204, and *Chaplin v Rogers* (1800) 1 East 192 at 194. The approval of Lord Nottingham, as a part-author of the Statute, may be dismissed as ex parte.

10 *Anon* (1773) Lofft 330.

11 *Simon v Metivier (or Motivis)* (1766) 1 Wm Bl 599 at 601.

12 1 LQR 1.

13 Ibid.

14 See Chalmers *Sale of Goods Act* (12th edn, 1945) p 26.

15 29 LQR 247.

by Sir William Holdsworth in 1924,[16] and in 1932 Professor Williams ended his study of section 4 with the words 'the case for the repeal of the Statute seems unanswerable'.[17] The Law Revision Committee recommended in 1937 that both section 4 of the Statute of Frauds and section 4 of the Sale of Goods Act should be repealed. But their report was not accepted, and in 1952 the question was remitted to the Law Reform Committee. They also recommended repeal, but with one modification. Contracts of guarantee, in their opinion, were traps for the unwary and required special treatment. 'inexperienced people might be led into undertaking obligations which they did not fully understand', and unscrupulous persons might 'assert that credit had been given on the faith of a guarantee which in fact the alleged surety had no intention of giving'.[18] They thought, therefore, that this particular class of contract should retain the protection which it had long enjoyed. The proposals of the Committee were this time accepted. By the Law Reform (Enforcement of Contracts) Act 1954, section 4 of the Sale of Goods Act was repealed and all section 4 of the Statute of Frauds save in so far as it concerned 'any special promise to answer for the debt, default or miscarriage of another person'. The Statute has been an unconscionable time dying and even now is not quite dead. To the surviving aspects of its long and dismal story it is now necessary to turn.

2 Statute of Frauds, section 4, and Law of Property Act 1925, section 40

It is necessary to discuss in turn the two types of contract which may still be unenforceable under these Acts and their interpretation by the courts, the manner in which their technical requirements may be satisfied, and the effect of non-compliance. Section 40 of the Law of Property Act 1925 was repealed by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. This Act came into force on 27 September 1989 but its provisions are not retrospective. For the moment therefore both the 1925 and 1989 Act need to be understood. The Act of 1989 is discussed in section 3.

A THE TWO TYPES OF CONTRACT AND THEIR INTERPRETATION

1 SPECIAL PROMISE TO ANSWER FOR THE DEBT, DEFAULT OR MISCARRIAGE OF ANOTHER PERSON

When the Law Revision Committee first reported in 1937, a minority thought that contracts of guarantee should be *void* unless the terms were embodied in a written document. The later Committee, while sharing the view that such contracts offered peculiar perils to the unsophisticated, preferred to retain the old, if scarcely hallowed, language familiar to generations of lawyers, and

16 Holdsworth *History of English Law*, vol VI, p 396.
17 Williams *The Statute of Frauds, Section IV*, p 285.
18 See Law Reform Committee First Report, Cmd 8809. A minority of the earlier Committee in 1937 had felt an equal solicitude for the victims of spurious guarantees, but had suggested a different remedy.

with it the special quality of 'unenforceability'. The words quoted above were therefore saved from the general wreck of section 4 of the Statute of Frauds; and they have still to be applied, encrusted as they are with nearly three centuries of judicial interpretations.

It seems tolerably clear that the Parliament of 1677 designed by these words to cover promises by one person to guarantee the liability of another. But the determination of their exact scope has proved an arduous and complicated task. An obvious difficulty is the significance of the three terms, 'debt, default or miscarriage', unless, indeed, they are synonymous. The question was raised in 1819 in *Kirkham v Marter*.[19]

The defendant's son had, without the plaintiff's permission, ridden the plaintiff's horse and killed him, and he was therefore guilty of a tort against the plaintiff. The plaintiff threatened to sue him, and, in consequence of this threat, the defendant orally promised the plaintiff to pay to him the agreed value of the horse if the plaintiff would forbear his suit.

The defendant, when sued on this promise, pleaded the Statute of Frauds, and the plaintiff argued that the statute applied only where the liability guaranteed arose out of a pre-existent debt. The argument was rejected. Chief Justice Abbott said:

> The word 'miscarriage' has not the same meaning as the word 'debt' or 'default'; it seems to me to comprehend that species of wrongful act, for the consequences of which the law would make the party civilly responsible.[20]

The words of the statute were not confined to cases of contract; and, as the son had been guilty of a tort for which he might be sued, the father's undertaking was a 'promise to answer for the miscarriage of another person'. It would seem, therefore, that the guarantee in the case of a contractual liability is covered by the word 'debt' and, perhaps, by that of 'default', and the guarantee of a tortious liability by the word 'miscarriage'.

This conclusion may be accepted as a reasonable interpretation of terms which had no precise legal meaning. It is more difficult to justify the construction placed by the judges on the requirement that the liability guaranteed must be that 'of another person'. They decided that the legislature intended by these words to confine the statute to cases where the defendant had made a direct promise to the plaintiff to guarantee him against the default of some third party. It was thus held in *Eastwood v Kenyon*[1] that, if the promise was made, not to the creditor, but to the debtor himself, the statute did not apply.

Lord Denman said:

> The facts were that the plaintiff was liable to a Mr Blackburn on a promissory note; and the defendant, for a consideration, ... promised the plaintiff to pay and discharge the note to Blackburn. If the promise had been made to Blackburn, doubtless the statute would have applied: it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another, because the promise is made to that other, viz. the debtor, and not to the creditor, the statute not having in terms stated to whom the promise, contemplated by it, is to be made. But upon consideration we are of opinion that the statute applies only to promises made to the person to whom another is answerable.

19 (1819) 2 B & Ald 613.
20 Ibid at 616.
1 (1840) 11 Ad & El 438 at 445.

By a more comprehensive process of interpretation it has also been ruled that the use of the words 'of another person' assumes the continued existence of some primary liability owed by a third party to the plaintiff, to which the defendant's guarantee is subsidiary and collateral. A distinction has thus been taken between an arrangement whereby the original debtor continues liable and one in which he is discharged. In other words, a contract is not a guarantee within the statute unless there are three parties—the creditor, the principal debtor and the secondary debtor or guarantor. The essence of the contract is that the guarantor agrees, not to discharge the liability in any event, but to do so only if the principal debtor fails in this duty. There are thus two cases in which a contract is excluded from the statute on the ground that the promisor is not in fact answering 'for another person'.

The first case is where the result of a contract is to eliminate a former debtor and to substitute a new debtor in his place. Here it is idle to speak of guaranteeing the debt of another since that other has been released from all liability. As was said in an early case, if two come to a shop and one buys, and the other says to the seller:

> 'Let him have the goods, I will be your paymaster', or 'I will see you paid', this is an undertaking as for himself, and he shall be intended to be the very buyer and the other to act but as his servant.[2]

These words, though striking and often quoted, must be taken, not as an infallible test for the operation of the statute, but as an indication of the parties' intention. Whatever the language used, the question must be whether they intended that the promisor should assume sole or subsidiary liability. Even the stark phrase, 'Let him have the goods, I will see you paid', when thus read in the light of the context, may mean no more than, 'If he does not pay, I will'.

Again, suppose that a seller is unwilling to accept further orders from a buyer unless payment is made or security given for goods already supplied. If there is an oral agreement by which the creditor agrees to supply further goods to the debtor in consideration that X will assume sole responsibility for the existing debt, the statute does not apply. X's undertaking releases the original debtor from the liabilities so far incurred, and it is thus absolute and not in any way conditional upon non-payment by a third party.[3]

Secondly, a contract is not within the statute if there has never at any time been another person who can properly be described as the principal debtor. This is well illustrated by *Mountstephen v Lakeman*.[4]

> The defendant was chairman of the Brixham Local Board of Health. The surveyor to the board proposed to the plaintiff, a builder, that he should construct the connection between the drains of certain houses and the main sewer. The plaintiff desired to know how he was to be paid, and following conversation took place:
>
> Defendant: 'What objection have you to making the connection?'
> Plaintiff: 'I have none, if you or the board will order the work or become responsible for the payment.'
> Defendant: 'Go on, Mountstephen, and do the work, and I will see you paid.'

2 *Birkmyr v Darnell* (1704) 1 Salk 27.
3 *Goodman v Chase* (1818) 1 B & Ald 297.
4 (1871) LR 7 QB 196; affd LR 7 HL 17.

> The plaintiff did the work and debited the board, which disclaimed liability on the ground that they had never directly or indirectly made any agreement with him. The plaintiff then sued the defendant, who pleaded the statute.

The court had to consider the purpose and effect of the conversation between the parties. Did it mean that the defendant guaranteed a liability that primarily rested upon the board, or that he himself assumed an original and sole liability? Only in the former case could there be a contract to answer for the debt 'of another person'. Since the board had not ordered the work to be done and therefore was not a debtor in any sense of the word, it was held that the defendant was himself the only debtor and that his promise was outside the statute.

The court in this case sought to emphasise the distinction by suggesting appropriate nomenclature. If the undertaking was collateral and within the statute, it was to be described as a 'guarantee', if original and outside it, as an 'indemnity'.[5] Such terminology is doubtless of service in clarifying the issues to be faced. But contracting parties cannot be expected to use words as legal terms of art, and it remains for the court to interpret the sense of their agreement rather than to accept their language at its face value. If its purpose is to support the primary liability of a third party, it is caught by the statute, whatever the words by which this intention is expressed. If there is no third party primarily liable, the statute does not apply.[6]

These variations upon the theme 'of another person', if somewhat artificial, may be allowed to rest upon the inherent ambiguity of the language. A further distinction can be regarded only as a deliberate evasion of the statute.[7] Even though the defendant's promise is undoubtedly a 'guarantee' and not an 'indemnity', it will still be outside the statute, if it is merely an incident in a larger transaction. To come within the statute the guarantee must be the main object of the transaction of which it forms a part. The courts have adopted this argument in two types of case.

The first is where the defendant has given a guarantee in his capacity as a *del credere* agent. A *del credere* agent is one who, for an extra commission, undertakes responsibility for the due performance of their contracts by persons whom he introduces to his principal. Thus in *Couturier v Hastie*[8] the plaintiffs orally employed the defendants as *del credere* agents to sell a cargo of corn. The defendants sold it to a Mr Callender in ignorance of the fact that, at the time of the sale, it had ceased to exist as a commercial entity. Mr Callander, when he learned the truth, repudiated liability and the plaintiffs

5 See Blair 29 MLR 522; Stevn 90 LQR 246.

6 See *Guild & Co v Conrad* [1894] 2 QB 885, and compare the language of Vaughan Williams LJ in *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at 784-785. The distinction between guarantee and indemnity has passed from the Statute of Frauds into the general conceptual equipment of the English lawyer. See its application in the field of infants' contracts in *Yeoman Credit Ltd v Latter* [1961] 2 All ER 294, [1961] 1 WLR 828; Furmston 24 MLR 648; *Stadium Finance Co Ltd v Helm* (1965) 109 Sol Jo 471; Stevn 90 LQR 246 at 251-254; and in the field of recourse agreement between finance companies and dealers *Unity Finance Ltd v Woodcock* [1963] 2 All ER 270, [1963] 1 WLR 455; *Goulston Discount Co Ltd v Clark* [1967] 2 QB 493, [1967] 1 All ER 61. See also *Western Credit Ltd v Alberry* [1964] 2 All ER 938, [1964] 1 WLR 945.

7 See the remarks of Lord Wright in *Legal Essays and Addresses* at pp 226-230.

8 (1852) 8 Exch 40.

sued the defendants on their implied guarantee. The defendants pleaded, inter alia,[9] the Statute of Frauds, and the court rejected the plea. A higher reward had been paid to them, said Parke B,[10] in consideration

> of their assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them; and, though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given.

This language was adopted and applied by the Court of Appeal in *Sutton & Co v Grey*.[11] The defendants had undertaken to introduce clients to a firm of stockbrokers. It was orally agreed that the defendants should receive half the commission earned from the resulting transactions and that they should be liable for half the losses caused by the default of the clients. It was held that this last liability, though in essence a guarantee, was but part of a wider agreement and outside the statute.

The second type of case is where the defendant enjoys legal rights over property which is subject to an outstanding liability due to a third party. If, in order to relieve the property from the incumbrance, he guarantees the discharge of the liability, his promise is excluded from the statute and is binding even though made orally. In *Fitzgerald v Dressler*:[12]

> A sold linseed to B, who resold it at a higher price to C. A, as the seller, was entitled to a lien over the goods; he was free, that is to say, to keep them in his possession until he had received payment from B. C was anxious to obtain immediate possession, and A agreed to make delivery to C before he had been paid by B, in return for C's oral promise to accept liability for this payment.

It was argued that this promise was a guarantee within the meaning of the statute on the ground that, since B remained liable to A, C had in effect promised to discharge B's liability only if B himself failed to do so. The court rejected the argument and held C bound by his promise.

> At the time the promise was made, the defendant was substantially the owner of the linseed in question, which was subject to the lien of the original vendors for the contract price. The effect of the promise was neither more nor less than this, to get rid of the incumbrance, or, in other words, to buy off the plaintiff's lien. That being so, it seems to me that the authorities clearly establish that such a case is not within the statute.[13]

The result of such cases, however convenient, is so manifest a gloss upon the statute as, in more recent years, to disturb the judicial conscience. It has therefore been ruled that their reasoning will apply only where the defendant was the substantial owner of the property for the protection of which the guarantee was given. If he has no more than a personal interest in its security, he will be within the ambit of the statute. Thus in *Harburg India Rubber Comb Co v Martin*:[14]

9 The case also raised vital questions upon the effect of mistake. See p 255, below.
10 8 Exch 40 at 55.
11 [1894] 1 QB 285.
12 (1859) 7 CBNS 374.
13 Ibid at 394. See also *Williams v Leper* (1766) 3 Burr 1886.
14 [1902] 1 KB 778. See also *Davys v Buswell* [1913] 2 KB 47.

> The defendant was the director of and a shareholder in the Crowdus Accumulator Syndicate Ltd which he had in fact financed. The plaintiffs were judgment creditors of the syndicate and had sought by a writ of *fieri facias* to levy execution upon its property. The defendant orally promised the plaintiffs that he would indorse bills for the amount of the debt, if they would withdraw their writ.

The Court of Appeal held that the promise was a guarantee, not an indemnity, and that it did not fall within either of the exceptions discussed above. The defendant was not a debenture-holder but a shareholder, and he had no property in the goods upon which the plaintiffs sought to levy execution. His interest, therefore, was personal rather than proprietary. Vaughan Williams LJ sought to rationalise and to delimit the scope of the exceptions.

> Whether you look at the 'property cases' or at the '*del credere* cases', it seems to me that in each of them the conclusion arrived at really was that the contract in question did not fall within the section because of the object of the contract. In each of these cases there was in truth a main contract—a larger contract—and the obligation to pay the debt of another was merely an incident of the larger contract. ... If the subject-matter of the contract was the purchase of property, the relief of property from a liability, the getting rid of incumbrances, the securing greater diligence in the performance of the duty of a factor, or the introduction of business into a stock-broker's office—in all those cases there was a larger matter which was the object of the contract. That being the object of the contract, the mere fact that as an incident to it—not as the immediate object, but indirectly—the debt of another to a third person will be paid, does not bring the case within the section. This definition or rule for ascertaining the kind of cases outside the section covers both 'property cases' and '*del credere* cases'.

The courts, in applying this part of the section, may thus be confronted with two separate questions. Is the contract a guarantee or an indemnity, and, even if an undoubted guarantee, was it the main object of the parties' solicitude or a mere incident in a larger transaction? The answers given by generations of judges to these questions produce a result which would have astonished the draftsmen of the statute. It also suggests serious doubts as to the wisdom of retaining the old language and its unwieldy accumulation of case law. If it must be assumed that contracts of guarantee require special treatment, it would surely have been better to adopt the minority view of 1937 and declare such contracts void unless their terms were embodied in a written document. The slate would at least have been wiped clean and the judges enabled to approach their problems afresh unhampered by the subtleties and evasions of the past.

2 ANY CONTRACT FOR THE SALE OR OTHER DISPOSITION OF LAND OR ANY INTEREST IN LAND

These words, now to be found in section 40(1) of the Law of Property Act 1925, replace the old wording of section 4 of the Statute of Frauds, 'any contract or sale of lands, tenements or hereditaments or any interest in or concerning them'. The differences are purely linguistic: no substantial alteration in the law seems to have been intended or effected, and the old decisions still apply.

The words 'any interest in land' are comprehensive and cover leases as well as sales. They have thus been held to comprise agreements to take or let

furnished lodgings or to shoot over land or to take water from a well.[15] A contract will fall within section 40(1) if it has as one term a sale or other disposition of land, even though there are many other terms.[16] A unilateral contract in which the owner of land agrees to enter into a bilateral contract of sale if a potential purchaser does certain acts is within the section.[17]

The main difficulty, however, has been concerned with the classification of the produce of the soil. Are such products to be regarded as interests in land or as interests in goods? The latter were originally governed, not by section 4, but by section 17 of the Statute of Frauds, and afterwards by section 4 of the Sale of Goods Act 1893. If the products of the soil are interests in land, section 40(1) of the Law of Property Act 1925, contemplates a written memorandum as the sole method of satisfying the procedural requirements, while, if they are goods, the Sale of Goods Act admitted other possibilities. Now that section 4 of the Sale of Goods Act has been repealed, they either fall within section 40(1) of the Law of Property Act 1925, or they are exempt from any special statutory form.

The problem has in the past provoked the courts to a display of learning which may be described, according to taste, as nice or pedantic and most of which, fortunately, may now be discarded. The primary distinction at common law was between *fructus industriales* and *fructus naturales*. *Fructus industriales* have been defined as corn and other growths of the earth produced not spontaneously, but by 'labour and industry'; *fructus naturales* as the spontaneous product of the soil, such as grass and even planted trees, where 'the labour employed in their planting bears so small a proportion to their natural growth'.[18] The antithesis, it must be confessed, is somewhat unreal: the cultivation of fruit trees requires as much skill and industry as the cultivation of wheat and barley. But the idea underlying the distinction would seem to be the contrast between seeds that require to be planted afresh each year and the perennial produce of the soil, even if, as in the case of fruit trees, the parent stock has been originally planted by the hand of man.

Fructus industriales have always been regarded as goods. The classification of *fructus naturales* has caused more difficulty. At common law it appeared to depend upon the moment contemplated in the contract of sale for their severance from the soil. If they were to remain unsevered for so long a time that the buyer would derive a substantial benefit from their continued attachment to the soil, the sale was of an interest in land; if no such benefit was contemplated, it was a sale of goods.[19]

But the word 'goods' was defined afresh by section 62 of the Sale of Goods Act 1893.

> Goods ... include emblements and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale.

15 *Inman v Stamp* (1815) 1 Stark 12; *Webber v Lee* (1882) 9 QBD 315; *Tyler v Bennett* (1836) 5 Ad & El 377. See also *Lavery v Pursell* (1888) 39 ChD 508, where it was held that the sale of a house which provided that the house was to be demolished and the materials removed was the sale of an interest in land. For a more comprehensive discussion, see Farrand *Contract and Conveyance* (3rd edn) pp 32-35.

16 *Steadman v Steadman* [1974] QB 161, [1973] 3 All ER 977, CA. This point was not argued in the House of Lords [1976] AC 536, [1974] 2 All ER 977.

17 *Daulia Ltd v Four Millbank Nominees Ltd* [1978] Ch 231, [1978] 2 All ER 557; Harpum and Lloyd Jones [1979] CLJ 31.

18 Per Lord Coleridge CJ in *Marshall v Green* (1875) 1 CPD 35 at 39 and 40.

19 *Marshall v Green* (1875) 1 CPD 35.

Emblements in turn have been defined as 'such vegetable products as are the annual result of agricultural labour',[20] and are to be identified with *fructus industriales*. These, as has already been stated, have always been regarded as goods, and the rest of the statutory definition may thus be taken to include *fructus naturales*. But as a purchaser, save in the most unlikely case, buys the produce of the soil with a view to its ultimate severance, and as severance, at whatever date it is effected, must be effected 'under the contract of sale', the apparent result of the statutory definition is to make every sale of *fructus naturales* a sale of goods. It has been suggested, however, that the definition is confined to the purposes of the Sale of Goods Act and that outside the ambit of this Act the older learning may still prevail. On this assumption an agreement to sell *fructus naturales* may be (a) a contract for the sale of goods within the Sale of Goods Act, and (b) a contract for the sale of an interest in land within the Law of Property Act. If it is thus living a double life, the requirements of section 40 of the latter Act must still be met.[1] Support for this view may be found in dicta of the Court of Appeal in *Saunders v Pilcher*.[2] In this case a fruit grower had bought a cherry orchard 'inclusive of this year's fruit crop'. The decision itself turned upon the meaning and application of the Income Tax Act 1918; but counsel for the taxpayer had pressed the Court with the definition of 'goods' in the Sale of Goods Act. The court declined to consider it. 'The short answer', said Singleton LJ, 'is that the Act has no application to a sale of land.'[3] The statement was admittedly obiter, and the point seems still open to argument.[4]

B THE STATUTORY REQUIREMENTS

> The agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.

Such was the language applied by section 4 of the Statute of Frauds to all the contracts within its scope and which still applies to the 'special promise to answer for the debt, default or miscarriage of another person'. It is substantially repeated by section 40(1) of the Law of Property Act 1925, and may be assumed to govern both contracts of guarantee and contracts affecting interests in land. The efforts of the courts to interpret these words have provoked a wilderness of cases through which it is possible only to indicate the hazardous and inconsequent paths trodden by the unwilling feet of litigants.[5]

1 THE CONTENTS OF THE 'NOTE OR MEMORANDUM'

The agreement itself need not be in writing. A 'note or memorandum' of it is sufficient, provided that it contains all the material terms of the contract.

20 See Chalmers *Sale of Goods Act 1979* (18th edn, 1981) pp 268-69.
1 Megarry and Wade *the Law of Real Property* (5th edn, 1984) pp 474-475. The definition of 'land' in s 205 (ix) of the Law of Property Act 1925, is undoubtedly wide.
2 [1949] 2 All ER 1097.
3 Ibid at 1103.
4 See Hudson 22 Conv (NS) 137; Benjamin's *Sale of Goods* (4th edn, 1992) pp 72-79.
5 Many problems were necessarily worked out on the parts of the Statute now repealed; but these cases will still apply, *pari passu*, to the surviving fragments.

Such facts as the names or adequate identification of the parties,[6] the description of the subject matter,[7] the nature of the consideration,[8] comprise what may be called the minimum requirements. But the circumstances of each case need to be examined to discover if any individual term has been deemed material by the parties; and, if so, it must be included in the memorandum.[9]

There are however a number of qualifications to this principle. First, it appears that a term which will in any case be implied need not be expressed. So, if the parties have agreed that vacant possession should be given on completion, the memorandum will not be defective if it omits this term, since it would in any case be implied. Secondly, if the omitted term is entirely for his favour, a plaintiff may enforce the contract as evidenced by the memorandum and waive the benefit of the omitted term.[10] Conversely, it has been argued that if an omitted term is entirely for the defendant's benefit, a plaintiff should be entitled to submit to the term, that is, to enforce the contract as evidenced in the memorandum plus the omitted term. This exception was applied in *Martin v Pycroft*,[11] denied in *Burgess v Cox*[12] and is now apparently reinstated by *Scott v Bradley*.[13]

Provided, however, that the document relied on by the plaintiff does contain all the material terms, it need not have been deliberately prepared as a memorandum. The courts have accepted as sufficient a telegram, recital in a will, a letter written to a third party,[14] a written offer,[15] and even a letter written by the defendant with the object of repudiating his liabilities.[16] All that is required is that the 'memorandum' should have come into existence before the commencement of the action brought to enforce the contract. Thus in *Farr, Smith & Co v Messers Ltd*[17] an action was started against the defendants in the name of certain plaintiffs, and a statement of defence was filed which set out the terms of the agreement in question. Leave was then given to amend the writ and statement of claim by striking out the original plaintiffs and substituting the plaintiff company. It was held that this new step was in effect the commencement of a new action, and that the original statement of defence, signed by counsel as the defendant's agent, could therefore be regarded as a sufficient memorandum to satisfy the statute.

A document which denies that there is a contract cannot in general be a sufficient memorandum.[18] There is one clear exception to this rule. A written

6 Compare *Potter v Duffield* (1874) LR 18 Eq 4, and *Rossiter v Miller* (1878) 3 App Cas 1124, per Lord Cairns at 1140-1141.

7 Compare *Caddick v Skidmore* (1857) 2 De G & J 52, and *Plant v Bourne* [1897] 2 Ch 281.

8 As a special statutory exception, the consideration need not be stated in a document offered in support of an agreement 'to answer for the debt, default or miscarriage of another person': Mercantile Law Amendment Act 1856, s 3.

9 *Tweddell v Henderson* [1975] 2 All ER 1096, [1975] 1 WLR 1496.

10 *North v Loomes* [1919] 1 Ch 378. In *Hawkins v Price* [1947] Ch 645, [1947] 1 All ER 689, Evershed J said obiter that a plaintiff could not waive a 'material' term but it is not clear why not if it is entirely for his benefit. No doubt most 'material' terms will usually be for the benefit of both parties and therefore outside the exception.

11 (1852) 2 De GM & G 785.

12 [1951] Ch 383, [1950] 2 All ER 1212, criticised Megarry 67 LQR 299.

13 [1971] Ch 850, [1971] 1 All ER 583.

14 See *Godwin v Francis* (1870) LR 5 CP 295; *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84; *Gibson v Holland* (1865) LR 1 CP 1.

15 *Parker v Clark* [1960] 1 All ER 93, [1960] 1 WLR 286.

16 *Buxton v Rust* (1872) LR 7 Exch 279.

17 [1928] 1 KB 397. See also *Grindell v Bass* [1920] 2 Ch 487.

18 *Thirkell v Cambi* [1919] 2 KB 590.

offer will suffice even though it shows on its face that at the time it was written there was no contract.[19] In a more recent group of cases the Court of Appeal has been concerned with a second possible exception. In *Griffiths v Young*[20] the agreement was originally 'subject to contract' and the memorandum so stated.[1] Subsequently the parties agreed that the agreement should become binding at once. It was held that the memorandum was sufficient even though it appeared to state that there was no contract on the ground that the phrase 'subject to contract' was a suspensive condition, which had been lifted. In *Law v Jones*[2] the Court of Appeal (Russell LJ dissenting) took this decision a stage further. In this case the parties made an unconditional oral contract for the sale of land but the solicitors' letters which constituted the only possible memorandum were all marked 'subject to contract'. The majority accepted that a document which denied the existence of a contract would not do but thought that a document marked 'subject to contract' did not so much deny the existence of a contract as contemplate that a contract would in the future come into existence. The validity of this distinction was denied by a differently constituted Court of Appeal in *Tiverton Estates Ltd v Wearwell Ltd*[3] where on substantially similar facts it was held that there was no sufficient memorandum. This decision was generally welcomed since it had been widely thought that the decision in *Law v Jones* would inhibit the progression of normal 'subject to contract' correspondence between conveyancing solicitors.[4] However in yet a fourth Court of Appeal decision *Daulia Ltd v Four Millbank Nominees Ltd*,[5] Buckley and Orr LJJ, who had constituted the majority in *Law v Jones*,[6] suggested that that decision had been misunderstood in *Tiverton Estates Ltd v Wearwell Ltd*[7] and that *Law v Jones* turned on a new unconditional oral contract coming into existence *after* the exchange of the 'subject to contract' correspondence, of which the correspondence might in appropriate cases constitute a memorandum.[8]

2 THE SIGNATURE

Only the person whom it is sought to hold liable on the agreement, or his agent, need sign the memorandum. A plaintiff who has not signed can sue a defendant who has.[9]

19 *Warner v Willington* (1856) 3 Drew 523 at 532; *Reuss v Picksley* (1866) LR 1 Exch 342 at 350.

20 [1970] Ch 675, [1970] 3 All ER 601. The many difficulties in this case are exposed by Prichard 90 LQR 55.

1 Made up by the combination of letters exchanged by the parties' solicitors, joined together under the rules discussed; pp 236-238, below.

2 [1974] Ch 112, [1973] 2 All ER 437.

3 [1975] Ch 146, [1974] 1 All ER 209. The Court of Appeal held that it was not bound by the decision in *Law v Jones* since that decision was inconsistent with the earlier decision of the Court of Appeal in *Thirkell v Cambi* [1919] 2 KB 590. Cf Emery [1974] CLJ 42. The Court of Appeal also thought the *ratio decidendi* of *Griffiths v Young* incorrect, though the case might be correctly decided because of further facts not set out in the text above.

4 Since it would open the door to allegations that there was an oral contract.

5 [1978] Ch 231, [1978] 2 All ER 557.

6 N 2, above.

7 N 3, above.

8 It is not easy to reconcile these decisions with each other but for a valiant attempt see Wilkinson 95 LQR 6. See also *Cohen v Nessdale Ltd* [1982] 2 All ER 97.

9 *Laythoarp v Bryant* (1836) 2 Bing NC 735.

The word 'signature' has been very loosely interpreted. In the first place, it need not be a subscription; that is to say, it need not be at the foot of the memorandum, but may appear in any part of it, from the beginning to the end. In the second place, it need not, in the popular sense of the word, be a 'signature' at all. A printed slip may suffice, if it contains the name of the defendant. This relaxation of the statutory language was well established a hundred years ago and offers a striking instance of the way in which legislation may be overlaid by judicial precedent. Blackburn J said in 1862:[10]

> If the matter were *res integra* I should doubt whether a name printed or written at the head of a bill of parcels was such a signature as the statute contemplated: but it is now too late to discuss that question. If the name of the party to be charged is printed or written on a document intended to be a memorandum of the contract, either by himself or his authorised agent, it is his signature, whether it is at the beginning or middle or foot of the document.

A more modern example of generous interpretation is offered by the case of *Leeman v Stocks*.[11]

> The defendant instructed an auctioneer to offer his house for sale. Before the sale the auctioneer partially filled in a printed form of agreement of sale by inserting the defendant's name as vendor and the date fixed for completion. The plaintiff was the highest bidder, and after the sale the auctioneer inserted in the form the plaintiff's name as purchaser, the price and a description of the premises. The plaintiff signed the form. The defendant then refused to carry out the contract, and the plaintiff sued for specific performance. The defendant pleaded failure to satisfy section 40 (1) of the Law of Property Act 1925, and in particular that he had never signed any document.

It was held that there was a sufficient memorandum to satisfy the statute and that the defendant was liable. It was true that he had not 'signed' it in the ordinary sense of the word. But his agent, acting with his authority, had inserted his name as vendor into the printed form, and this form was clearly designed to constitute the final written record of the contract made between the parties.[12]

In whatever position the 'signature' is found, however, it must be intended to authenticate the whole of the document. If it refers only to certain parties or is a mere incidental or isolated phenomenon, it cannot be relied on by the plaintiff. So in *Caton v Caton*:[13]

> Mr Caton proposed to marry Mrs Henley. He wrote out a document, beginning: 'in the event of a marriage between the under-mentioned parties, the following conditions as a basis for a marriage settlement are mutually agreed on.' Then followed several sentences, each in this fashion: 'Caton to do so and so, Henley to have so and so.' Neither party signed the paper, either personally or through agents, nor was a settlement ever executed.

10 *Durrell v Evans* (1862) 1 H & C 174 at 191.

11 [1951] Ch 941, [1951] 1 All ER 1048.

12 Perhaps illogically a more stringent test has been adopted where a signed memorandum has been altered after signature. *New Hart Builders Ltd v Brindley* [1975] Ch 342, [1975] 1 All ER 1007.

13 (1867) LR 2 HL 127.

It was held that the mere fact that the names appeared in various parts of the document did not make them signatures within the meaning of the statute, for in no single instance did it appear that they were intended to cover the whole of the document.

Where the memorandum is alleged to be signed by an agent, it must be shown that the agent has actual or ostensible authority to sign a memorandum. So, for instance, an estate agent, although undoubtedly for some purposes an agent of the vendor, does not necessarily have authority to sign a memorandum on his behalf.[14] However, if the document has been signed by an agent, it does not matter whether he intends to sign as agent or on his own behalf.[15]

3 THE JOINDER OF SEVERAL DOCUMENTS

The framers of the Statute of Frauds clearly contemplated the inclusion of all the contractual terms in a single document. But here again the judges, in their anxiety to protect honest intentions from the undue pressure of technicality, have departed widely from the original severity of the statute. The reports reveal a progressive laxity of interpretation.

It was already settled by the beginning of the nineteenth century that the plaintiff might rely on two or more documents to prove his case. But at this period it was still necessary that the one document should specifically, and on its face, refer to the other. To introduce oral evidence so as to form a connecting link between them would be to permit the very process which the statute sought to exclude. Thus in *Boydell v Drummond*[16] the defendant had agreed to take a number of Shakespearian engravings, to be published over a course of years. The terms of the agreement were contained in a prospectus which was exhibited in the plaintiff's shop and which the defendant had seen. The defendant, however, had signed only a book, entitled 'Shakespeare Subscribers, their Signatures', which did not refer to the prospectus and which contained no terms at all. The court refused to allow the plaintiff to prove by oral evidence that the book was intended to be read with the prospectus and so to satisfy the statute. Le Blanc J said:[17]

> If there had been anything in that book which had referred to the particular prospectus, that would have been sufficient. If the title to the book had been the same with that of the prospectus, it might perhaps have done. But as the signature now stands, without reference of any sort to the prospectus, there was nothing to prevent the plaintiff from substituting any prospectus and saying that it was the prospectus exhibited in his shop at the time, to which the signature related. The case therefore falls directly within this branch of the Statute of Frauds.

By insisting upon an internal and express reference in one document to the other, the courts, while abandoning the letter, might claim to be promoting the spirit of the statute. But in the latter half of the nineteenth century they took a more uncompromising step. They still excluded oral evidence designed to introduce a second document to which no reference at all was made in the first. But if, without any express reference, the language or form of the

14 *Gavaghan v Edwards* [1961] 2 QB 220, [1961] 2 All ER 477 (criticised Albery 78 LQR 178); *Davis v Sweet* [1962] 2 QB 300, [1962] 1 All ER 92. See as to a solicitor stakeholder *Elias v George Sahely & Co (Barbados) Ltd* [1983] 1 AC 646, [1982] 3 All ER 801.

15 *Elpis Maritime Co Ltd v Marti Chartering Co Ltd, The Maria D* [1991] 3 All ER 758.

16 (1809) 4 East 142.

17 Ibid at 158.

document signed by the defendant indicated another document as relevant to the contract, oral evidence was allowed to identify that other. Thus in *Pearce v Gardner*[18] an envelope and a letter, shown by oral evidence to have been enclosed in it, were allowed to form a joint memorandum within the meaning of the statute. So, too, in *Long v Millar*[19] the plaintiff was allowed to couple a written agreement to buy land, which he had signed, with a receipt for the deposit, which the defendant had signed. The present state of the law is illustrated by the case of *Timmins v Moreland Street Property Ltd.*[20]

> At a meeting between the parties the defendants agreed to buy the plaintiff's freehold property for £39,000. At this meeting the defendants gave to the plaintiff a cheque for £3,900 as deposit on the price. The cheque was made out to X and Co, the plaintiff's solicitors. The plaintiff then gave to the defendants a receipt, which he signed, in which he described the sum of £3,900 as 'deposit for the purchase of [named premises] which I agree to sell at £39,000'. Later the defendants stopped the cheque and repudiated the contract. The plaintiff sued for breach of contract. The defendants pleaded section 40 of the Law of Property Act 1925. The plaintiff sought to read together the cheque which the defendants had signed and the receipt which he himself had signed so as to form a complete memorandum.

The Court of Appeal, with some reluctance, gave judgment for the defendants. The law was thus stated by Jenkins LJ:[1]

> It is still indispensably necessary, in order to justify the reading of documents together for this purpose, that there should be a document signed by the party to be charged, which while not containing in itself all the necessary ingredients of the required memorandum, does contain some reference, express or implied, to some other document or transaction. Where any such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to, or, as the case may be, to explain the other transaction, and to identify any document relating to it. If by this process a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document signed by the party to be charged, then the two documents can be read together so as to constitute a sufficient memorandum for the purposes of section 40.

A plaintiff, therefore, who wishes to use this means of escape from the strict letter of the statute, must prove:

(1) the existence of a document signed by the defendant;
(2) a sufficient reference, express or implied, in that document to a second document;
(3) a sufficiently complete memorandum formed by the two when read together.

In the present case there was a cheque signed by the defendants, and, if this could be read with the receipt, the two documents might have furnished the required memorandum. But the cheque was made payable, not to the plaintiff,

18 [1897] 1 QB 688.
19 (1879) 4 CPD 450. See also *Stokes v Whicher* [1920] 1 Ch 411.
20 [1958] Ch 110, [1957] 3 All ER 265. See also *Elias v George Sahely & Co (Barbados) Ltd* [1983] 1 AC 646, [1982] 3 All ER 801.
1 Ibid at 120 and 276.

but to a firm of solicitors, and there was nothing on it which served to connect it with the property in question. The plaintiff accordingly failed to satisfy the second of the three conditions stated above, and could not overcome the statutory defence.

C THE EFFECT OF NON-COMPLIANCE WITH THE STATUTORY REQUIREMENTS

It is declared in section 4 of the Statute of Frauds, and substantially repeated in section 40(1) of the Law of Property Act, that 'no action shall be brought' upon the agreements involved unless the necessary memorandum is forthcoming. The value to be placed upon these words has varied at different periods and has been diversely assessed at common law and in equity.

1 AT COMMON LAW

It was at first considered by the common law judges that the effect of non-compliance with the Statute of Frauds was to avoid the contract. Thus Blackstone said that, in the five cases covered by section 4, 'a mere verbal *assumpsit* is void';[2] and this doctrine was applied with logical severity in 1837 in the case of *Carrington v Roots*.[3] The plaintiff had made an oral agreement to buy a growing crop of grass, with liberty to enter the land and to cut and remove it. He accordingly brought a horse and cart on to the field. The seller removed the horse and cart and the plaintiff sued him in trespass. The court held that the agreement was caught by the statute, and that the plaintiff could not sue, even in trespass, on any matter arising out of it, as this would be to 'charge' the defendant upon it. In the words of Lord Abinger:

> the meaning of the statute is, not that the contract shall stand for all purposes except that of being enforced by action, but it means that the contract shall be altogether void.[4]

Even at this date, however, doubts were expressed at so rigorous an interpretation,[5] and in 1852, the year after the passage of the Evidence Act, it was abandoned in favour of a more liberal view. In *Leroux v Brown*:[6]

> An oral agreement was made in France whereby the defendant, resident in England, agreed to employ the plaintiff, a British subject resident in France, for a period exceeding one year. The plaintiff sued in England for a breach of the contract.

The action, as it concerned a foreign contract, was subject to the rules of private international law. By the operation of these rules upon this particular case, questions affecting the validity of the contract were governed by French law, questions of procedure by English law. By French law the contract, though oral, was valid. If, therefore, the effect of the Statute of Frauds was to invalidate the oral contracts enumerated in section 4, the plaintiff would succeed;

2 Comm iii, 157-158.
3 (1837) 2 M & W 248.
4 Ibid at 255.
5 See Bosanquet J in *Laythoarp v Bryant* (1836) 2 Bing NC 735 at 255.
6 (1852) 12 CB 801.

French law would govern and the statute be irrelevant. But if the statute affected procedure only, it would govern the case and the plaintiff would fail. The court preferred the latter view and gave judgment for the defendant. Jervis CJ said:[7]

> I am of opinion that the fourth section applies, not to the solemnities of the contract, but to the procedure, and therefore that the contract in question cannot be sued upon here. The contract may be capable of being enforced in the country where it was made, but not in England. ... The statute, in this part of it, does not say that, unless those requirements are complied with, the contract shall be void, but merely that no action shall be brought upon it. ... This may be a very good agreement, though, for want of a compliance with the requisites of the statute, not enforceable in an English court of justice.

The principle of *Leroux v Brown* was affirmed by the House of Lords in *Maddison v Alderson* in 1883.[8] Lord Blackburn said:

> It is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract.

Failure to satisfy the requirements of the Statute of Frauds or of section 40(1) of the Law of Property Act does not, therefore, affect the validity but only the enforceability of the contract. It should be observed, however, that a plaintiff will be caught by the statutory provisions whenever he is forced to rely upon the contract for success in a common law action, even if he does not directly claim damages for its breach. Thus in *Delaney v T P Smith Ltd*:[9]

> The plaintiff in April 1944, made an oral agreement with the defendants' agent to become tenant of the defendants' house as soon as it had been repaired. After the agreement, and before the repairs were completed, the defendants notified the plaintiff that they had decided to sell the house to a third party. The plaintiff then 'made a clandestine entry' into the house and a week later was forcibly ejected by the defendants. He sued them in trespass.

The Court of Appeal held that his action must fail. As the defendants were the owners of the house, the plaintiff had no *locus standi* against them unless he could prove a tenancy agreement. But this he could not do in the absence of a written memorandum. He was in effect 'bringing an action on a contract for the disposition of an interest in land', and he must, in the words of Wynn-Parry J:

> ... satisfy s 40 of the [Law of Property] Act or prove such part performance as will take the case out of the section. If this were not so, then it would follow that a person in the plaintiff's position, who has nothing more than an oral agreement to grant a tenancy, upon which therefore he cannot bring an action either for specific performance or damages, may, if he is able to effect a clandestine entry, on eviction successfully bring trespass ... So to hold would be in my view to defeat the section...

7 (1852) 12 CB 801 at 824.

8 Ibid at 488.

9 [1946] KB 393, [1946] 2 All ER 25. The case, it will be seen, is similar in result to *Carrington v Roots*, p 238, above, though non-compliance with the statute no longer makes a contract void.

From the premise that the effect of non-compliance with the statutory requirements is procedural and not substantive three inferences have been drawn.

In the first place, it is possible to justify the conclusion, already observed,[10] that the memorandum required need not be contemporaneous with the formation of the agreement—a conclusion difficult to sustain if the agreement were void *ab initio*.

It follows, in the second place, that the defendant may treat the statutory requirements as designed to confer a privilege upon him, which he may waive if he so please. The rules of court, indeed, have gone further, and have declared that, if he wishes to avail himself of the privilege, he must expressly plead it.[11]

In the third place, a contract, which fails to satisfy the statutory requirements, while it may not be sued upon at common law, may yet be used in certain circumstances as a defence. If money has been paid or if property has passed in pursuance of such a contract, the transferor will not be allowed to sue for its recovery. As the contract, though unenforceable, is nevertheless valid, the transferee has obtained a good title. Thus in *Thomas v Brown*[12] the parties made an oral contract for the sale of land, under which the purchaser paid a deposit to the vendor. The purchaser then decided not to go on with the transaction and brought an action to recover the deposit. The action failed. The seller, while he could not have sued on the contract, could use it to justify the retention of the deposit. For this purpose, the key question is not whether the person who seeks to rely on the oral agreement is the plaintiff or defendant but whether he is in substance seeking to enforce the oral agreement.[13]

2 IN EQUITY

When the majority of common law judges so patently disapproved of the Statute of Frauds and stigmatised it as a potential instrument of fraud, it is not surprising that equity should take the same view. Within ten years of its enactment successive chancellors were prepared to interfere where it worked manifest injustice. They could not, indeed, grant damages and defy the common law, but they could and did apply their peculiar remedy of specific performance. As early as 1685 such a decree was made to enforce the observance of an unsigned agreement for the sale of land.[14] This equitable intervention was developed in the course of the next two centuries, and has come to be known as the doctrine of part performance. Through its operation a modern litigant, though he is unable to claim damages for breach of a contract which is caught by section 40 of the Law of Property Act and which fails to satisfy its provisions, may yet obtain from the Chancery Division a decree of specific

10 P 233, above.

11 RSC Ord 18, r 8. As to amendment, see *Re Gonin* [1979] Ch 16, [1977] 2 All ER 720.

12 (1876) 1 QBD 714 at 723. The limits within which the oral contract may be used as a defence are discussed by Williams in 50 LQR 532. See also *Wauchope v Maida* [1972] 1 OR 27, 22 DLR (3d) 142. An unenforceable contract will operate to sever an equitable joint tenancy: *Burgess v Rawnsley* [1975] Ch 429, [1975] 3 All ER 142.

13 *Take Harvest Ltd v Liu* [1993] 2 All ER 459.

14 *Butcher v Stapely* (1685) 1 Vern 363; Simpson *History* pp 613-616. It has been plausibly suggested that the statute was only intended to apply at common law but there is no clear evidence for this view. See Yale 73 SS at ciii.

performance. It is necessary to consider in turn the underlying basis of the equitable doctrine, the type of contract to which it applies and the conditions required for its operation.

a Underlying basis of equitable doctrine

Equity judges have had considerable difficulty in justifying their intervention, not, indeed, in common sense, but as a matter of legal principle. They were content at first to interfere in obvious cases of fraud without examining too closely the implications of their action; but even so they were conscious of some embarrassment in reconciling the grant of decrees with the language of the statute. In 1715 Lord Cowper referred to the earlier case of *Halfpenny v Ballet* and 'said he remembered very well that the cause was heard before the Master of the Rolls, and the plaintiff had a decree; but he said, this was on the point of fraud, which was proved in the cause, and Halfpenny walked backwards and forwards in the court and bid the Master of the Rolls observe the statute, which he humorously said, *I do, I do*.'[15] The task of reconciliation was somewhat eased when non-compliance with the statute was understood to render agreements unenforceable and not void. In the words of Cotton LJ in *Britain v Rossiter*:

> To hold that this enactment makes void contracts falling within its provisions, would be inconsistent with the doctrine of the Courts of Equity with regard to part performance in suits concerning land. If such contracts had been rendered void by the legislature, Courts of Equity would not have enforced them; but their doctrine was that the statute did not render the contracts void, but required written evidence to be given of them; and Courts of equity were accustomed to dispense with that evidence in certain instances.[16]

The view that equity simply fulfils the underlying purpose of the statute by replacing one type of evidence by another equally cogent is perhaps as convenient an explanation as it is possible to find; but it has not been accepted without question. Sir Frederick Pollock preferred to rest the equitable intervention on the basis of estoppel and to assume that a defendant, who plainly intimated by his conduct the existence of a contract, could not be allowed to shelter behind the statute.[17] Lord Selborne sought to evade the difficulties by denying that equity, when it applied its doctrine of part performance, was enforcing the contract at all; it was regularising the situation created by acts of the parties outside the contract.

> In a suit founded on such part performance, the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded injustice of a kind which the Statute cannot be thought to have had in contemplation would follow.[18]

Lord Blackburn, on the other hand, abandoned the hope of reconciling the doctrine with the statute and accepted it as a convenient *fait accompli*.[19]

15 *Halfpenny v Ballet* is reported in (1699) 2 Vern 373, and Lord Cowper's remarks are to be found in *Bawdes v Amhurst* (1715) Prec Ch 402.
16 (1879) 11 QBD 123 at 130.
17 *Pollock on Contract* (13th edn) p 521.
18 In *Maddison v Alderson* (1883) 8 App Cas 467 at 475.
19 Ibid at 489. The various views are set out and discussed by Romer J in *Rawlinson v Ames* [1925] Ch 96 at 109-113.

In a sense this doctrinal dispute has been rendered academic by section 40(2) of the Law of Property Act 1925 which provides 'This section ... does not affect the law relating to part performance ...'. However though this gives statutory recognition to the doctrine, interpretation of the doctrine and its scope may still be dependent on views as to its correct historical basis, as to which the statute is wisely silent.

b The scope of the doctrine

The opinion was expressed in *Britain v Rossiter*[20] that the doctrine was applicable only to cases concerning land, and the statement was repeated by Lord Selborne in *Maddison v Alderson*.[1] This restrictive view has not always passed without question. In the words of Kay J:

> The doctrine of part performance of a parol agreement ... though principally applied in the case of contracts for the sale or purchase of land, or for the acquisition of an interest in land, has not been confined to these cases. Probably it would be more accurate to say it applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing.[2]

This distinction was potentially important before 1954 since the doctrine might have been applied, for instance, where a court would grant specific performance of a contract for the sale of goods. Since 1954 the two tests lead to the same result since a contract of guarantee is not one 'in which a court of equity would entertain a suit for specific performance'.

c The nature of the acts required by the doctrine

It is clear that it is not every act of part performance of the contract which will suffice[3] but even after nearly three hundred years it is far from easy to state the appropriate test. Discussion has been dominated, and perhaps bedevilled, by the tests adumbrated by Sir Edward Fry in his classic work on *Specific Performance*.[4] Unfortunately he propounded at least two different tests. Thus at one place he states:[5]

> The acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title.

While two pages later he says:[6]

> The true principle of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract and are consistent with the contract alleged.

Both tests require the act of part performance to point to the existence of the oral contract, thus arising naturally out of the theory that the purpose of part performance is to act as an alternative method of proof but clearly the first formulation is much more demanding than the second.

20 (1879) 11 QBD 123.
1 (1883) 8 App Cas 467 at 480.
2 *McManus v Cooke* (1887) 35 ChD 681 at 697.
3 See eg *New Hart Builders Ltd v Brindley* [1975] Ch 342, [1975] 1 All ER 1007.
4 1st edn (1858); 6th edn (1921).
5 6th edn, p 276; the same definition occurs in the 1st edn, p 174.
6 6th edn, p 278; the same definition occurs in the 1st edn, p 175.

The House of Lords seemed to look with favour on the first test in *Maddison v Alderson*.[7]

> Elizabeth Maddison had been the housekeeper of Thomas Alderson for ten years without being paid the wages due to her. She then told him that she wished to leave and get married. According to her evidence, he promised that if she would stay with him he would devise to her in his will a life interest in his farm. She did in fact remain with him without payment until his death. He left a will designed to fulfil his promise, but it was unattested and void.

She sought specific performance of the alleged oral agreement, but failed. Three of their Lordships said that the acts must be unequivocally referable to some such contract as that alleged[8] but it may well be that the same result would be reached on the second test for as was said *per curiam* when the case was before the Court of Appeal, 'it cannot with any show of reason be contended that such continuance in his service was referable only to an agreement that he would leave her a life estate in his property, or indeed that it was referable to any agreement at all'.[9]

In practice however the courts have adopted the more relaxed test and indeed if the first test were strictly applied it would exclude almost all cases since though, no doubt, there are many acts which point to the existence of some contract, there are few which would not be consistent with two different contracts. So most acts of part performance of a contract to sell a freehold interest in land would be equally consistent with an agreement to give a long lease. It is clear that this degree of equivocation is not fatal.

So in *Kingswood Estate Co Ltd v Anderson*:[10]

> The plaintiffs were the landlords of a house within the Rent Restriction Acts. The tenant was a widow with whom lived her invalid son. To get possession of the house the plaintiffs had to satisfy a court that there was suitable alternative accommodation for her. A flat was found, and it was orally agreed that, if she would leave the house and become the tenant of the flat, that tenancy should continue so long as she and her son lived. Accordingly she moved with her son to the flat. Soon afterwards the plaintiffs gave her four weeks' notice to quit and then sued for possession.

The plaintiffs argued, inter alia, that there was no sufficient act of part performance since the entry into possession, though it might refer to some contract, was equivocal: it was consistent either with a life tenancy or with a weekly tenancy. The Court of Appeal rejected the argument. Upjohn LJ described the case as 'a complete text-book case of part performance'.

Another example is *Wakeham v Mackenzie*.[11]

> X's wife died when he was 72 years old. The plaintiff, a widow aged 67, lived near him in a council flat and had long been a friend of both X and his wife.

7 (1883) 8 App Cas 467. See Williams *Statute of Frauds, Section 4* pp 250-261.

8 Per Lord Selbourne LC, who quoted Fry's first definition with approval: 8 App Cas at 479; per Lord O'Hagan at 485 and per Lord Fitzgerald at 491. Lord Blackburn at 490, would have restricted the doctrine to changes in the possession of land.

9 (1881) 7 QBD 174 at 179.

10 [1963] 2 QB 169, [1962] 3 All ER 593.

11 [1968] 2 All ER 783, [1968] 1 WLR 1175. See also *Rawlinson v Ames* [1925] Ch 96.

> In November 1964, X agreed orally with the plaintiff that if she would move into his house, look after it and him and pay for her share of food and coal, he would in his will leave her the house and its contents. The plaintiff thereupon gave up her flat and moved into X's house. She looked after X and the house and paid her share of food and coal until X died in 1966. X left her nothing in his will. She asked for specific performance of the oral contract.

At first sight these facts bear a resemblance to those in *Maddison v Alderson*. But the evidence offered by the plaintiff in *Wakeham v Mackenzie* was more compelling. 'The acts of part performance in this case—the giving up of the plaintiff's home, the moving into a new home, the acts which the plaintiff performed in looking after the deceased and looking after that home, and putting £2 a week into the common pot—clearly raise an equity in her.'[12] They were explicable only by reference to some contract and were consistent with the particular contract which the plaintiff alleged. The plaintiff was therefore entitled to a decree of specific performance. The case is no doubt distinguishable from *Maddison v Alderson* but it is probably better regarded as evidence of a more relaxed view.

If there is one proposition on which all the books and cases have agreed it is that the payment of money is not by itself a sufficient act of part performance. Two reasons have been given for this: first, that payment of money is completely equivocal both as to whether there is a contract and as to its nature and secondly that the money would be recoverable if the contract was not performed. So Lord Selbourne said in *Maddison v Alderson*:[13]

> It may be taken as now settled that part payment of purchase money is not enough; and judges of high authority have said the same even of payment in full.

This has now been revealed as too simple a view by the decision of the House of Lords in *Steadman v Steadman*.[14]

> The husband and wife were joint owners of a house which had been the family home. The wife left the husband and obtained maintenance orders in favour of herself and the child of the marriage. The husband fell into arrears in paying the wife's maintenance. An oral agreement was reached by which the wife was to transfer her interest in the house to the husband for £1,500; the wife would agree to the discharge of the maintenance order made in her favour; the husband would pay £100 of the arrears and the wife would consent to the discharge of the balance. The agreement was revealed to the justices and the relevant parts of it approved by them. The husband duly paid the £100 and his solicitors sent a draft form of transfer to the wife's solicitors but the wife refused to proceed.

The House of Lords held (Lord Morris of Borth-y-Gest dissenting) that there were sufficient acts of part performance to render the contract enforceable. The precise combination of circumstances in the case was unusual and we must ask what general principles can be derived from it. Unfortunately divergencies of opinion within the majority make this question difficult to answer with confidence. The one proposition that seems clearly established is negative, viz it can no longer be stated that mere payment of money is never a sufficient act

12 Ibid at 787-788, and 1181, respectively.
13 (1883) 8 App Cas 467 at 479.
14 [1976] AC 536, [1974] 2 All ER 977; Wade 90 LQR 433; Emery [1974] CLJ 205; Wallace 25 NILQ 453.

of part performance,[15] but the case certainly does not state the converse, so that the position of a purchaser's deposit or part payment is unclear. Probably the payment of money will continue to be regarded as usually equivocal but as capable of being rendered persuasive by the surrounding circumstances. Both Lord Reid[16] and Lord Salmon[17] suggest that the vendor's inability to repay the money, eg because of bankruptcy, may be relevant.[18]

On other questions there were important differences of opinion. Lord Reid[19] and Viscount Dilhorne[20] thought it sufficient that the acts of part performance should on the balance of probabilities establish that there was some contract between the parties but Lord Salmon thought the acts must establish that there was a contract concerning land.[1] Lord Simon reserved his position on this question.[2] Viscount Dilhorne[3] and Lord Simon[4] thought the oral recital of the agreement before the magistrates an act of part performance but Lord Reid was very doubtful of this.[5] Lord Reid,[6] Viscount Dilhorne[7] and Lord Simon[8] all thought the sending of the draft deed of transfer an act of part performance while Lord Salmon regarded both the statement to the magistrates and the sending of the deed of transfer as part of the surrounding circumstances which explained the payment of the £100.[9] It is no doubt a mistake however to take too schematic a view of the pronouncements on individual acts since it is the complete combination of circumstances which forms the true basis of the decision.

There are at least four reported decisions on the doctrine of part performance since *Steadman v Steadman*, of which the most helpful is *Re Gonin*[10] where Walton J held that in view of the divergence of opinion in the House of Lords it was permissible 'to follow the traditional equity jurisprudence' and hold that the act of part performance must be referable to some contract concerning land.[11]

15 Per Lord Reid [1976] AC 536 at 541, [1974] 2 All ER 977 at 981; per Lord Simon at 565, 1002, respectively; per Lord Salmon at 570, 1006, respectively.
16 Ibid at 541, 981, respectively.
17 Ibid at 571 and 1007, respectively.
18 This would seem to flow from the second reason given for the payment rule, above, rather than the first.
19 Ibid at 541-542 and 981, respectively.
20 Ibid at 553 and 992, respectively.
1 Ibid at 568 and 1005, respectively.
2 Ibid at 562-563 and 1000, respectively.
3 Ibid at 553 and 992, respectively.
4 Ibid at 563 and 1000, respectively.
5 Ibid at 540 and 980, respectively.
6 Ibid at 540 and 980, respectively.
7 Ibid at 553 and 992, respectively.
8 Ibid at 563 and 1000, respectively.
9 Ibid at 572 and 1007, respectively; cf 573 and 1008, respectively.
10 [1979] Ch 16, [1977] 2 All ER 720. See also *Re Windle* [1975] 3 All ER 987, [1975] 1 WLR 1628 (a strong case similar in its combination of several acts to *Steadman v Steadman*) *Sutton v Sutton* [1984] Ch 184, [1984] 1 All ER 168, and *Daulia Ltd v Four Millbank Nominees Ltd* [1978] Ch 231, [1978] 2 All ER 557 where the alleged acts of part performance were not referable to any contract at all.
11 As stated in the text, the majority of the House of Lords had taken the opposite view 2:1 but Walton J analysed the speeches as equally divided by counting in Lord Morris. This raises the very difficult question of the extent to which it is permissible to consider dissenting judgments in analysing the *ratio* of the Court. It is also fair to say that on the facts of *Re Gonin* it is doubtful whether the alleged acts of part performance would have satisfied a more lenient test or even if there was a contract at all.

3 Law of Property (Miscellaneous Provisions) Act 1989, section 2

A fundamental change in the rules for the making of contracts for the sale of interests in land was made by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Whereas section 40 of the Law of Property Act required contracts for the sale of interests in land to be *evidenced* in writing, the 1989 Act requires contracts for the sales of interests in land to be *made* in writing.

Section 2 provides as follows:

(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.

(4) Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order.

(5) This section does not apply in relation to–

(a) A contract to grant such a lease as is mentioned in section 54(2) of the Law of Property Act 1925 (short leases);

(b) a contract made in the course of a public auction; or

(c) a contract regulated under the Financial Services Act 1986; and nothing in this section affects the creation or operation of resulting, implied or constructive trusts.

(6) In this section–

'disposition' has the same meaning as in the Law of Property Act 1925;

'interest in land' means any estate, interest or charge in or over land or in or over the proceeds of sale of land.

(7) Nothing in this section shall apply in relation to contracts made before this section comes into force.

(8) Section 40 of the Law of Property Act 1925 (which is superseded by this section) shall cease to have effect.

It will be seen that this section replaces section 40 of the Law of Property Act but that it is not retrospective. It applies to contracts made on or after 27 September 1989. This section was based on the recommendation of the Law Commission.[12] The Law Commission thought the existing position under section 40 to be unsatisfactory. There was a case for simply abolishing section 40 and leaving it to the parties to decide whether to put the contract in writing, as no doubt the great majority of them would do. However, the Law Commission thought that the overriding consideration was that no change in the law should increase the chances of parties entering into a binding contract for the sale or purchase of land without first taking legal advice. This is a clear cut and understandable policy but it obviously has a price. From time to time, courts will be confronted with an oral agreement for the sale of an interest in land

12 Law Com No 164 (1987); Annand 105 LQR 553.

accompanied by other conduct which makes the case for giving one of the parties a remedy very attractive. The doctrine of part performance could come to the rescue here under section 40 but that doctrine is clearly gone. However, there will be cases in which a court can help by deploying some doctrine such as collateral contract or estoppel.[13] A good example of a case where estoppel arguments might have been raised is *McCausland v Duncan Lawrie Ltd*.[14]

The parties had made a written agreement dated 26 January 1995 under which the vendors agreed to sell and the purchasers agreed to buy a property for £210,000. The purchasers agreed to pay a deposit of £1,000 and the balance of £209,000 on completion. The contractual date for completion was 26 March 1995.

26 March was a Sunday and the vendor's solicitors wrote to the purchasers solicitors suggesting that completion should take place on Friday 24 March. This proposal was accepted by a letter from the purchaser's solicitors but there was no document signed by or on behalf of both parties.

In due course the purchasers failed to complete on 24 March and on the same day the vendor's solicitors sent a completion notice to the purchaser's solicitors. The Court of Appeal held that there had been no effective variation of the original contract. This meant that the trial judge had been wrong to strike out the purchaser's claim for specific performance. This did not exclude arguments based on estoppel being considered at the trial but this would require a careful analysis of the evidence.

It will be seen that the signatures of both parties (or an authorised agent) are required. In the common case of exchange of contracts however, section 2(3) will mean that the contract can become binding as soon as each party has signed his copy. Presumably, however, where the parties have arranged for exchange, the contract will not usually come into existence until the exchange has taken place. Exchange of contracts is to be construed in a technical sense. An exchange of letters each signed by one party will not do.[15]

Section 2(2) contemplates that the necessary documentation may consist in adding documents together. Commentators took different views as to whether the rules developed in relation to section 40 should be applied here or not[16] but the Court of Appeal held in *First Post Homes Ltd v Johnson*[17] that they should not.

The requirement that the contract is signed by both parties has already given rise to a lively dispute in relation to the creation of options. In *Spiro v Glencrown Properties Ltd*[18] the plaintiff granted an option to the first defendant to buy a property in Finchley for £745,000. The purchaser gave a notice exercising the option within the stipulated time limit but in due course failed to complete. The second defendant was the guarantor of the first defendant. Both defendants argued that although the option was granted in writing and signed by both parties the requirements of the statute had not been met because the notice exercising the option had only been signed by one party. Of course, at a common sense level, this argument has no appeal since it would

13 As happened in *Record v Bell* [1991] 4 All ER 471. Bently and Coughlan 10 LS 325.
14 [1996] 4 All ER 995.
15 *Commission for the New Towns v Cooper* [1995] 2 All ER 929, cf *Hooper v Sherman* [1994] CA Transcript 1428.
16 See above, nn 12, 13.
17 [1995] 4 All ER 355.
18 [1991] 1 All ER 600.

defeat the whole purpose of an option if the option grantor was required to sign the document exercising the option as well as the option grantee. Nevertheless, counsel for the defendants put forward a not unpersuasive argument based on many statements by judges which characterised an option as an irrevocable offer, so that there would be no contract until the offer was accepted. However Hoffmann J held that the irrevocable offer analysis was metaphorical and not to be taken literally. Accordingly, he held that the requirements of the section were satisfied.

4 Other rules about form

It may well be that the most widely held lay misapprehension about English law is that a contract needs to be in writing and signed. In fact since the sixteenth century the common law has been signally free of any rules requiring contracts to be made or evidenced in a particular way. The only common law exception was that contracts made by corporations had to be made under seal but that rule was first eroded by exceptions and finally abolished by the Corporate Bodies' Contracts Act 1960.[19]

There are however a considerable number of statutory rules about particular types of contract, requiring them to be made or evidenced in a particular way. A detailed account would be out of place here but we may notice that these cases fell into a number of groups.

(1) *The contract must be under seal.* All leases for three years or more must be under seal.[20] A contract to grant such a lease, however, need only be evidenced in writing[1] and will for many purposes create the same rights between the parties.

(2) *The contract must be in writing.* A bill of exchange must be in writing[2] but this is perhaps not a true case since an oral agreement to the same effect would still be a contract but would not be a bill of exchange. In recent years Parliament has come to regard prescription of formal requirements as a useful tool for consumer protection.[3] The most important example is now the Consumer Credit Act 1974. Under section 61(1) a regulated consumer credit agreement must be in the prescribed form and under section 60 the Secretary of State is required to make regulations as to the form and content of documents.[4] Under section 65 an improperly executed regulated agreement can be enforced against the debtor only on the order of the court but the court is given a wide discretion under s 127 as to enforcement.

(3) *The contract must be evidenced in writing.* The provisions deriving from the Statute of Frauds are the main examples but another is provided by

19 The common law rules continue to apply to contracts made before 29 July 1960. A statement of them may be found in the 8th edn of this work at pp 414–417.

20 Law of Property Act 1925, ss 52, 54(2).

1 Under the Law of Property Act 1925, s 40(1) discussed above.

2 Bills of Exchange Act 1882, s 3(1). As to whether it should be written on paper see *Board of Inland Revenue v Haddock*: Herbert *Uncommon Law* (2nd edn, 1936) p 201.

3 Particularly under the Hire Purchase Acts of 1938, 1964 and 1965.

4 Similar powers under the Hire Purchase Acts have been used to require particularly important information to be put in prominent boxes or special colours. Under the Consumer Credit Act a regulated consumer credit agreement (not exempted by s 74) must not only be in writing but also in prescribed form and signed.

contracts of marine insurance. Here a written policy is normally issued and the Marine Insurance Act 1906[5] renders a policy 'inadmissible in evidence' unless it is embodied in a policy signed by the insurer but the policy is not normally the contract, which is completed when the slip which the broker presents to the insurer is initialled by the latter.[6]

(4) *There are fiscal or criminal sanctions if the contract is not put into writing.* All policies of life insurance are in practice in writing but there is no legal requirement that they should be. However, any insurer who does not issue a stamped policy within a month of receiving the first premium is liable to a fine.[7]

5 Writing, signature and electronic commerce

As we have already said general English contract law does not normally require writing or signature. However English commercial practice has historically relied heavily on the transfer of written (and usually signed) documents. So bills of lading stand at the centre of international sales transactions and millions of cheques are being issued each day to move money between accounts.

Undoubtably the advent of computers and the development of electronic communication represents a major challenge and opportunity in this respect. In the UK the passing of the Electronic Communications Act 2000 gives the 'appropriate minister' wide powers to make orders carrying this process forward.[8]

5 See ss 21, 22, 23 and 24.
6 See per Blackburn J in *Ionides v Pacific Fire and Marine Insurance Co* (1871) LR 6 QB 674 at 685.
7 Stamp Act 1891, as amended by Finance Act 1970, s 32.
8 For a fuller account see Rowland and MacDonald, *Information Technology Law* (2nd edn) pp 308-326.

Chapter 8
Mistake

SUMMARY

1 Introduction[1]

The first fact to appreciate in this somewhat elusive branch of the law is that the word 'mistake' bears a more restricted meaning in professional than in popular speech. A layman might well believe that no force whatever should be allowed to an agreement based on an obvious misunderstanding. The law, however, does not take the simple line of ruling that a contract is void merely because one or both of the parties would not have made it had the true facts been realised. Many examples might be given of situations where a mistake in the popular sense is denied legal significance and where a remedy, if available at all, is granted upon some other ground. If, for instance, A agrees to buy from B a roadside garage abutting on a public highway and, unknown to A but known to B, a bypass road is about to be constructed which will divert the traffic from the garage, A cannot escape from the contract on the ground

1 The literature on mistakes is extensive. See eg Stoljar *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Slade 70 LQR 385; Atiyah 73 LQR 340; Wilson 17 MLR 515; Unger 18 MLR 259; Smith and Thomas 20 MLR 38; Atiyah and Bennion 24 MLR 421; Shatwell 33 Can Bar Rev 164; Atiyah 2 Ottawa L Rev 337; Goldberg and Thomson [1978] JBL 30, 147; Cartwright 103 LQR 594; Phang 9 LS 291; Smith 110 LQR 400.

of mistake.[2] If he has been misled by the statement of B, he may be able to obtain the rescission of the contract, but this will be on the ground, not of mistake, but of a false representation. In the popular sense of the term, indeed, all cases of misrepresentation involve a misunderstanding; but they by no means all raise the legal doctrine of mistake.

The narrow scope allowed to mistake in the English legal system is a fact to be not only noticed but welcomed. In the few cases in which it operates the effect, at least at common law, is said to be that the whole transaction is void from the very beginning. This drastic result may be unobjectionable as far as the parties themselves are concerned, but the reaction upon third parties may be deplorable. From a complete nullity no rights can be derived. Goods may have been sold and delivered on credit by A to B under an apparent contract, and may then be *bona fide* bought and paid for by C. If the original contract between A and B is now declared void for mistake, B has obtained no title to the goods and can pass none. C, though he has acted innocently and in the ordinary course of business, will in principle be liable to A for the full value of the goods.[3] If, indeed, the case can be dealt with not at common law but in equity, so unfortunate a result may be averted. The courts, in the exercise of their equitable jurisdiction to grant a decree *in personam*, may grant specific relief against the consequences of mistake without declaring the contract a nullity. In this way they may protect not only the innocent stranger who has become involved in the sequence of events, but also one of the original parties if the demands of substantial justice are to be satisfied. It follows, therefore, that in any discussion of mistake it will often be found necessary to distinguish its treatment at common law and in equity, with the hope that the jurisdiction of the latter will develop at the expense of the former. In *United Scientific Holdings Ltd v Burnley Borough Council*[4] the House of Lords were strongly of the opinion that common law and equity should no longer be regarded as distinct systems. These observations were not made in the context of contractual mistake, but they were clearly wide enough to embrace that topic. Although their Lordships' observations received a less than ecstatic welcome from distinguished equity lawyers,[5] there may well be much to be said for consolidation of law and equity in this area. Unfortunately, in the complete absence of any relevant authority, it is for the moment quite impossible to say with precision what form this consolidation would take. It seems necessary, therefore, to continue, for the moment, to expound common law and equity separately.

The classification adopted in this chapter must now be explained. If attention is fixed merely on the factual situations, there are three possible types of mistake; common, mutual and unilateral.

In common mistake, both parties make the same mistake. Each knows the intention of the other and accepts it, but each is mistaken about some underlying and fundamental fact. The parties, for example, are unaware that the subject matter of their contract has already perished.

2 Example given by Lord Atkin in *Bell v Lever Bros* [1932] AC 161 at 224.
3 There are, of course, exceptions to the applications of the doctrine *nemo dat quod non habet*; see *Benjamin's Sale of Goods* (4th edn, 1992) paras 7-001-7-113.
4 [1978] AC 904, [1977] 2 All ER 62.
5 Baker 93 LQR 529; Pettit *Equity and the Law of Trusts* (6th edn) pp 9-10.

In mutual mistake, the parties misunderstand each other and are at cross purposes. A, for example, intends to offer his Ford Sierra car for sale, but B believes that the offer relates to the Ford Granada also owned by A.[6]

In unilateral mistake, only one of the parties is mistaken. The other knows, or must be taken to know, of his mistake. Suppose, for instance, that A agrees to buy from B a specific picture which A believes to be a genuine Constable but which in fact is a copy. If B is ignorant of A's erroneous belief, the case is one of mutual mistake, but, if he knows of it, of unilateral mistake.

When, however, the cases provoked by these factual situations are analysed, they will be seen to fall, not into three, but only into two distinct legal categories. Has an agreement been reached or not? Where common mistake is pleaded, the presence of agreement is admitted. The rules of offer and acceptance are satisfied and the parties are of one mind. What is urged is that, owing to a common error as to some fundamental fact, the agreement is robbed of all efficacy. Where either mutual or unilateral mistake is pleaded, the very existence of the agreement is denied. The argument is that, despite appearances, there is no real correspondence of offer and acceptance and that therefore the transaction must necessarily be void.[7]

One type of problem is thus presented by common mistake, and a second by mutual or unilateral mistake. But the distinction between these two latter forms of mistake is still important. Though the problem they pose is the same, the method of approach to it differs. If mutual mistake is pleaded, the judicial approach, as is normally the case in contractual problems, is objective; the court, looking at the evidence from the standpoint of a reasonable third party, will decide whether any, and if so what, agreement must be taken to have been reached. If unilateral mistake is pleaded, the approach is subjective; the innocent party is allowed to show the effect upon *his* mind of the error in the hope of avoiding its consequences.

It is important to note that to have any effect at all, the mistake must be one which exists at the moment the contract is concluded. This is dramatically illustrated by the facts of *Amalgamated Investment and Property Co Ltd v John Walker & Sons Ltd.*[8]

> In this case the plaintiffs were negotiating to buy a commercial property from the defendants. The defendants knew that the plaintiffs intended to redevelop the property and both parties knew that planning permission was needed for this purpose. In their pre-contract enquiries,

6 The distinction between the epithets 'common' and 'mutual', though surprisingly often confused both in and out of the reports, is clearly stated in the *Oxford English Dictionary*. 'Common' is there defined as 'possessed or shared alike by both or all the persons or things in question'. 'Mutual' was, indeed, at one period used as a synonym for 'common'; but according to the *OED*, this is 'now regarded as incorrect' and properly means 'possessed or entertained by each of two persons towards or with regard to the other'. See the more caustic words of Fowler in *Modern English Usage* under 'mutual'.

7 Although the two problems are different in principle, the difference has often been forgotten, especially by those pioneer English writers on contract, Pollock and Anson, who strove to include all types of mistake under the general rubric of *consensus*. It will be seen that the word 'mistake' is being used in two different senses. In common mistake and unilateral mistake, mistake means error, but in mutual mistake, mistake means 'misunderstanding': the parties are at cross-purposes but there is not necessarily an error which can be corrected.

8 [1976] 3 All ER 509, [1977] 1 WLR 164; Brownsword 40 MLR 467.

the plaintiffs specifically asked the defendants whether the property was designated as a building of special architectural or historic interest. On 14 August 1973 the defendants replied in the negative. At that date, the answer was both truthful and accurate but, unknown to the parties (and, because of strange government procedures, without the possibility of their knowledge) the Department of the Environment had it in mind to list the building. On 25 September 1973 the parties signed a contract in which the defendants agreed to sell the building to the plaintiffs for £1,710,000. On 26 September 1973 the Department of the Environment informed the defendants that the building had been included on the statutory list of buildings of special architectural or historic interest, and the list was given legal effect on the following day when signed by the Minister. The evidence was that so listed the building was only worth £210,000.

The plaintiffs claimed that the contract should be rescinded for common mistake.[9] The Court of Appeal rejected this argument on the ground that, for this purpose, the critical date was the date of the contract. At that date, both parties believed the building not to be listed and that was in fact the case.

At one time it was thought important whether the mistake was one of law or of fact, but this distinction is no more.[10]

2 The two categories of cases

A WHERE AGREEMENT HAS BEEN REACHED, BUT UPON THE BASIS OF A COMMON MISTAKE

In this category there is no question of lack of agreement. The exact offer made by A has been accepted by B. It is clear, for instance, that B has accepted A's offer to sell a specific picture for £1,000. It is admitted, however, that both parties wrongly believed the artist to have been Constable. B now contends that owing to this common mistake the agreement cannot be allowed to stand, since the fundamental assumption upon which its very being is based has proved to be false.

The task here is to ascertain what attitude the courts have adopted towards an agreement that neither party would have made had they realised the untruth of what they both honestly believed to be true, and not only true but essential to the making of the bargain. Equity has partly followed the common law in this matter, but has diverged from it in important respects.

1 AGREEMENTS THAT ARE VOID BOTH AT COMMON LAW AND IN EQUITY

The exact significance of the principle laid down at common law and shared by equity is no doubt somewhat controversial, but if what the judges have said

9 There was an alternative plea based on the doctrine of frustration which also failed.
10 See p 724, below.

is interpreted in the light of what they have done it would appear that a common mistake has no effect whatsoever at common law unless it is such as to eliminate the very subject matter of the agreement; in other words, unless it empties the agreement of all content.

This principle has clearly been applied in a number of decisions dealing with what may conveniently and shortly be called cases of *res extincta*. It is well established that if, unknown to the parties, the specific subject matter of the agreement is in fact non-existent, no contract whatever ensues. In the leading case of *Couturier v Hastie*,[11] the question concerned the sale of a cargo of corn supposed at the time of the contract to be in transit from Salonica to the United Kingdom, but which unknown to the parties had become fermented and had already been sold by the master of the ship to a purchaser at Tunis. It was held that the buyer was not liable for the price of the cargo. The case was heard by the Court of Exchequer, the Court of Exchequer Chamber and finally, after a consultation with nine of the judges, by the House of Lords. It was the unanimous view of each court that everything depended upon the construction of the contract. Had the purchaser agreed to buy specific goods or had he agreed to buy an adventure—namely the benefit of the insurance that had been effected to cover the possible failure of the goods to arrive? The former construction was ultimately preferred. Once this had been decided, it followed as a matter of course that the contract was void, for in the nature of things a contract to sell and deliver specific goods presupposes the existence of goods capable of delivery. Both parties contemplated an existing something to be bought and sold. It was not the mistake *per se* that prevented the formation of a contract in *Couturier v Hastie*, and, indeed, the word 'mistake' was never mentioned in any of the judgments. The crucial fact was the absence of the contemplated subject matter, which necessarily emptied the contract of all content. Lord Cranworth said:

> Looking to the contract itself alone, it appears to me clearly that what the parties contemplated, those who bought and those who sold, was that there was an existing something to be sold and bought ... The contract plainly imports that there was something which was to be sold at the time of the contract, and something to be purchased. No such thing existing ... there must be judgment ... for the defendants.[12]

The view adopted in *Couturier v Hastie* had already been taken in the earlier case of *Strickland v Turner*,[13] where:

> X had bought and paid for an annuity upon the life of a person who, unknown to the buyer and seller, was already dead.

It was held that X had got nothing for his money and that the total failure of consideration entitled him to recovery in full.

Six years after *Couturier v Hastie*, the court in *Pritchard v Merchants' and Tradesman's Mutual Life Assurance Society*,[14] again dealt with the case of *res extincta*.

11 (1852) 8 Exch 40; reversed (1853) 9 Exch 102; reversal affirmed (1856) 5 HL Cas 673. See Nicholas 48 Tulane L Rev 946 at 966-972.

12 (1856) 5 HL Cas 673 at 681-682.

13 (1852) 7 Exch 208. See also the somewhat analogous case of *Scott v Coulson* [1903] 2 Ch 249.

14 (1858) 3 CBNS 622.

> The beneficiary of a life insurance policy, which had lapsed owing to the non-payment of the premium, paid to the insurers a renewal premium which was sufficient to revive the policy. The parties, however, were ignorant that the assured had died before the payment was made.

The beneficiary failed to recover the amount due under the policy, since

> ... the premium was paid and accepted upon an implied understanding on both sides that the party insured was then alive. Both parties were labouring under a mistake, and consequently the transaction was altogether void.[15]

It is true that the presence of a mistake was mentioned in the judgment, but it was the special character of that mistake—the erroneous assumption of the assured's continued existence—that enabled the court to pronounce the contract void.

In *Galloway v Galloway*[16] a separation deed between a man and woman was declared a nullity, because it was made on the mistaken and common assumption that they were in fact married to each other. The supposition upon which the parties had proceeded was that the subject matter of the contract, the marriage, was in existence.

Equity was approaching the problem of *res extincta* in much the same way and at the same time as the common law. In one case where A had bought a remainder in fee expectant upon an estate tail and had given a bond for the money, both parties being ignorant that the entail had been barred and the remainder destroyed, Richards CB said:

> If contracting parties have treated while under a mistake, that will be sufficient ground for the interference of a Court of Equity: but in this case there is much more. Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact; am I to be allowed to receive £5,000 and interest, because the conveyance is executed, and a bond given for that sum as the purchase money, when, in point of fact, I had not an inch of that land, so sold, to sell?[17]

The Chief Baron ordered the refunding of all interest paid and the cancellation and re-delivery of the bond.

The principle applicable to the *res extincta* has been extended, at any rate in equity, to the analogous case of what may be called the *res sua*, ie if A agrees to buy or take a lease from B of property which both parties believe to belong to B but which in fact belongs to A.[18] The contract is of necessity a nullity, since B has nothing to sell or convey.[19] As Knight Bruce LJ said in one of the cases: 'It would be contrary to all the rules of equity and common law to give effect to such an agreement.'[20] This is so however only when the *res sua* comprises the whole of the land sold or let.[1]

If we pause here for a moment, it seems clear that the reason why a contract relating to a *res extincta* or to a *res sua* cannot be recognised is not so much the fact of the common mistake as the absence of any contractual subject matter.

15 Ibid at 640, per Williams J. As Byles J pointed out at 645, the premium could have been recovered as having been paid and received under a mistake of fact.
16 (1914) 30 TLR 531; followed in *Law v Harragin* (1917) 33 TLR 381.
17 *Hitchcock v Giddings* (1817) 4 Price 135 at 141.
18 *Bingham v Bingham* (1748) 1 Ves Sen 126; *Cochrane v Willis* (1865) 1 Ch App 58.
19 *Debenham v Sawbridge* [1901] 2 Ch 98 at 109, per Byrne J.
20 *Cochrane v Willis* (1865) 1 Ch App 58 at 63.
1 *Bligh v Martin* [1968] 1 All ER 1157, [1968] 1 WLR 804.

If a contract may be discharged by subsequent impossibility of performance,[2] then *a fortiori* its very genesis is precluded by a present impossibility. In the case both of the *res sua* and the *res extincta*,

> ... the parties intended to effectuate a transfer of ownership: such a transfer is impossible: the stipulation is *naturali ratione inutilis*.[3]

A different view of *res extincta* was taken by the High Court of Australia in *McRae v Commonwealth Disposals Commission*[4] upon the following facts.

> The Commission invited tenders 'for the purchase of an oil tanker lying on Jourmaund Reef, which is approximately 100 miles north of Samarai'. The plaintiff submitted a tender which was accepted. In fact there was no tanker lying anywhere near the latitude or longitude stated by the Commission and no place known as Jourmaund Reef, but the plaintiff did not discover this until he had incurred considerable expense in fitting out a salvage expedition. Though not fraudulent, the employees of the Commission were clearly careless and had no adequate reason for believing that the tanker existed.

The High Court of Australia awarded damages to the plaintiff on the ground that the Commission had implicitly warranted the existence of the tanker.

The first question that arises is whether this decision, though it certainly meets the needs of justice, can be supported on the ground stated by the court. The criticism has been made that it conflicts with the principle derived from a line of cases, of which *Couturier v Hastie*[5] is the most important, that there can be no contract about a non-existent subject matter. The court met this argument by denying that *Couturier v Hastie* established any such principle. It is true that in that case the plaintiff was the seller, and therefore there was no need to rely on the concept of *res extincta* or on the doctrine of mistake to reach the conclusion that a seller who fails to deliver the goods cannot recover the price. The plaintiff could have recovered the price only by showing that the contract was not an ordinary contract of sale of goods, but the sale either of the shipping documents or of the chance that the goods still existed. This he failed to do. It does not necessarily follow that the buyer could not have sued for non-delivery.

On the other hand it would seem that the legislature accepted the conventional view of *Couturier v Hastie* when it enacted that:

> Where there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.[6]

It has, indeed, been argued that this section enacts no rigid rule, but only a rule of construction which can be excluded by evidence of a contrary intention,[7] but there are no words in the section to show that it can be displaced in this way. Even if it be assumed that the section lays down a rigid rule of law, it is still possible to suggest that it is not a complete statement of the common law, and that its scope must therefore be limited to goods which, in its own words, 'have perished

2 Ch 20, below.
3 *Bell v Lever Bros Ltd* [1932] AC 161 at 218, per Lord Atkin.
4 (1951) 84 CLR 377; Cowen 68 LQR 30; Fleming 15 MLR 229.
5 P 255, above.
6 Sale of Goods Act 1979, s 6.
7 Anvah 73 LQR 340.

at the time when the contract was made'. On this assumption, *McRae's* case[8] is outside the language of the section. It seems, however, to be a manifest inelegance to distinguish goods which were once *in esse* but have since perished, and goods which have never existed at all; though the inelegance is not altogether surprising in a statutory provision which in terms applies only to part of a problem. But at least the section, on its literal interpretation, contains nothing to prevent a court from holding that it applies only to 'perished goods'. It is still open to argument that in all other cases it is a question of construction whether (a) the contract is void, or (b) the seller has contracted that the goods are in existence, or (c) the buyer has bought a chance.[9] On the whole, however, it would seem more likely that an English court would regard section 6 of the Sale of Goods Act as a correct statement of the common law and hold that a contract for the sale of non-existent goods is void.

The second question is whether the decision in *McRae's* case can be supported on other grounds according to the law as administered in England.

In a previous edition of this book, it was suggested that the plaintiff could recover on a collateral contract.[10] The defendants, when they invited tenders from the public, promised that the ship existed, and in reliance on that promise the plaintiff offered to buy it. In effect, what the defendants said in their advertisement to the public was: 'In return for any offer you may make we promise that the tanker exists.' The difficulty with this suggestion, however, is that the consideration for a collateral contract is usually the entering into the main contract. If the main contract is void, it might be ruled that the consideration is illusory. As against this, however, a collateral contract was discovered in *Strongman (1945) Ltd v Sincock*,[11] where the main contract was illegal and therefore void.

There are two further grounds upon which the plaintiff might succeed. He might be able to maintain an action for damages either under the Misrepresentation Act 1967, or under the doctrine laid down by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd.* These two possibilities are canvassed at a later stage in this book.[12]

If the problems that have arisen in practice were confined to cases of *res extincta* and *res sua*, it would be superfluous to suggest the existence of an independent doctrine of common mistake. It would be unnecessary to attribute the failure of the contract to the mistake *per se*. The supposed contract would be a nullity in English, as it was in Roman law, simply because there was nothing to contract about. It has, however, been suggested that these cases of *res extincta* and *res sua* are only examples of a wider class based upon a wider principle—that, whenever the parties are both mistaken about some fundamental fact, their mistake will be fatal to the existence of the contract. If this view is supported by authority, then it must be admitted that the common law recognises an independent doctrine of common mistake.

Some judicial statements certainly incline to this view. For instance, Lord Wright, after remarking that in general the test of intention in the formation of contracts is objective, said:

8 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377.

9 Atiyah 73 LQR 340; Atiyah and Bennion 24 MLR 421; and Atiyah 2 Ottawa L Rev 337, where he relies heavily on deductions from the decision in *Financings Ltd v Stimson* [1962] 3 All ER 386, [1962] 1 WLR 1184.

10 For collateral contracts, see pp 69-72, above.

11 [1955] 2 QB 525, [1955] 3 All ER 90; p 442, below.

12 Pp 303-309, below.

> But proof of mistake affirmatively excludes intention. It is, however, essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic.[13]

This statement, however, was made obiter, and it is necessary to see if it is supported by actual authority.

The problem was exhaustively discussed by the House of Lords in *Bell v Lever Bros Ltd*,[14] where the facts were these:

> Lever Brothers, who had a controlling interest in the Niger Company, appointed Bell managing director of the latter company for five years at an annual salary of £8,000. After three years the services of Bell became redundant owing to the amalgamation of the Niger Company with a third company, and Lever Brothers agreed to pay him £30,000 as compensation for the loss of his employment. After they had paid this money, they discovered for the first time that Bell had committed several breaches of duty during his directorship which would have justified his dismissal without compensation. They therefore sued for the recovery of £30,000 on the ground inter alia of common mistake, but failed.

The facts did not raise a case of unilateral mistake, for the jury found that Bell's mind was not directed to his breaches of duty at the time when he made the compensation agreement. According to the argument of Lever Brothers, that agreement was based upon the underlying and fundamental assumption that the parties were bargaining about a service contract which could only be terminated with compensation; but the truth, unknown to both of them at the time, was that the contract might in fact have been terminated without compensation. The parties were dealing with a terminable contract, but they thought that they were dealing with one that was non-terminable. Was this sufficient to annul the contract? The Law Lords assumed that some species of common mistake is capable of making a contract void. The difficulty, however, is to ascertain from their speeches what the character of the mistake must be in order to have this nullifying effect. The language of their Lordships is open to two interpretations.

First, there are certain passages which suggest that a contract is void if the parties have proceeded on a false and fundamental assumption, irrespective of the character of the fact assumed to be true. Lord Warrington, for example, referred to the judgment of Wright J in the court below in these words:

> The learned judge thus describes the mistake invoked in this case as sufficient to justify a Court in saying that there was no true consent—namely, 'Some mistake or misapprehension as to some facts ... which by the common intention of the parties, whether expressed or more generally implied, constitute the underlying assumption without which the parties would not have made the contract they did'. That a mistake of this nature common to both parties is, if proved, sufficient to render a contract void is, I think, established law.[15]

Lord Warrington then cited *Strickland v Turner*[16] and *Scott v Coulson*[17] in support of the proposition.

13 *Norwich Union Fire Insurance Society Ltd v Price* [1934] AC 455 at 463.
14 [1932] AC 161.
15 Ibid at 206.
16 P 255, above.
17 [1903] 2 Ch 249; where a contract for the sale of a life policy was made under the mistaken belief shared by both parties that the assured was alive. The contract was set aside by the court.

Lord Thankerton was more precise and cautious in describing the expression 'underlying assumption', but his description was wide enough to embrace cases other than the non-existence of the subject matter. He said:

> In my opinion it can only properly relate to something which both [parties] must necessarily have accepted in their minds as an essential and integral element of the subject-matter.[18]

He, too, illustrated the proposition by *Strickland v Turner* and *Scott v Coulson* with the addition of *Couturier v Hastie*.

Lord Atkin, after referring to the cases of *res extincta*, continued as follows:

> Mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be.[19]

The second possible interpretation of the speeches, or at least of the decision, is that the only false assumption sufficiently fundamental to rank as operative mistake is the assumption that the very subject matter of the contract is in existence. Thus Lord Atkin, having expressed himself, as we have just seen, in wide terms, offered in a later passage a more restricted view of the case. The test, he now declared, was merely this:

> Does the state of the new facts destroy the identity of the subject-matter as it was in the original state of facts?[20]

It will also be recalled that Lord Warrington and Lord Thankerton, in illustrating what they had in mind by a fundamental assumption sufficient, if untrue, to nullify a contract, cited only the decisions concerned with *res extincta*.

How then is *Bell v Lever Bros Ltd* to be interpreted? Despite the wide language of the speeches, the decision, it is submitted, is no authority for any general doctrine of common mistake, and the second of the two possible interpretations is to be preferred. This submission is supported by the significant fact that, by a majority of three to two, the House of Lords held that the circumstances of the case itself disclosed no operative mistake. If, however, a false and fundamental assumption by the two parties excludes consent, and if an assumption bears this character when, to quote Lord Atkin, 'the new state of facts makes the contract something different in kind from the contract in the original state of facts',[1] or again when 'it relates to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be',[2] how can it reasonably be denied that the test was satisfied in *Bell v Lever Bros Ltd*? If not satisfied there, it is difficult to see how it can ever be satisfied.[3] The contemplated subject matter of the bargain was a service contract of great value to Bell, the actual subject matter was worthless. It was extravagantly different in kind from what the parties

18 [1932] AC 161 at 235.
19 Ibid at 218.
20 Ibid at 227.
1 Ibid at 226.
2 Ibid at 218.
3 The decision of the Privy Council in *Sheikh Bros Ltd v Ochsner* [1957] AC 136, turned solely upon the interpretation of the Indian Contract Act 1872.

originally contemplated, unless the words 'in kind' are to be construed in the narrowest sense.[4]

This submission is fortified by later decisions. *Solle v Butcher*,[5] for instance, shows that, in the view of the Court of Appeal, a common mistake, though clearly fundamental, does not as a general principle nullify a contract at common law, and it therefore favours the narrow interpretation of *Bell v Lever Bros Ltd*. The facts were these:

> A had agreed to let a flat to X at a yearly rental of £250. Both parties had acted on the assumption that the flat, having been so drastically reconstructed as to be virtually a new flat, was no longer controlled by the Rent Restriction Acts. They were mistaken in this respect. The maximum permissible rent was therefore only £140, for after the execution of the lease it was too late for A to serve the statutory notice under which the sum might have been increased to about £250. The tenant, X, after being in possession for some two years, sought to recover the rent he had overpaid.

Presuming that the mistake was one of fact, not of law,[6] this was surely a case where the parties had wrongly assumed a fact of fundamental importance. To recall Lord Thankerton's statement in *Bell v Lever Bros Ltd*,[7] their assumption related 'to something which both must necessarily have accepted in their minds as an essential and integral element of the subject matter'. There are few things more essential in modern conditions than the applicability or non-applicability of the Rent Restriction Acts. A controlled flat carrying a rent of £140 is an essentially different thing from a flat that commands the highest rent procurable in the open market. If, therefore, *Bell v Lever Bros Ltd* is interpreted as deciding that a contract based on a false and fundamental assumption common to the parties is void, the tenant in *Solle v Butcher* should have been entitled at common law to recover the overpaid rent and, indeed, had he so claimed, the whole rent paid, as being money paid without consideration. Yet it was held that the contract was not void *ab initio*. The same conclusion was reached by Goff J in *Grist v Bailey*.[8]

Another significant pointer in the same direction is *Leaf v International Galleries*,[9] where the plaintiff bought from the defendants a picture which they both mistakenly believed had been painted by Constable. Thus the picture without this quality was essentially different from what the parties believed it to be. The plaintiff rested his claim for the recovery of the purchase price not upon mistake but upon misrepresentation, and the Court of Appeal, as a

4 Of course on facts such as *Bell v Lever Bros Ltd* there will often be *some* remedy. The defendants could have been compelled to account for any profit they had made by their breach of duty (no doubt these profits were significantly less than the very generous severance payments which the defendants received). The majority view was that Bell was not under a duty to report his own breaches of duty; in the similar case of *Sybron Corpn v Rochem* [1984] Ch 112, [1983] 2 All ER 707 it was held that each of a number of dishonest senior employees was under a duty to report breaches of duty by other employees engaged in a conspiracy to defraud the employer. See also *Horcal Ltd v Gatland* [1984] IRLR 288.

5 [1950] 1 KB 671, [1949] 2 All ER 1107.

6 Jenkins LJ took the view that it was a mistake of law and therefore to be disregarded; see as to this p 724, below.

7 [1932] AC 161 at 235; p 259, above.

8 [1967] Ch 532, [1966] 2 All ER 875; p 265, below.

9 [1950] 2 KB 86, [1950] 1 All ER 693.

whole, agreed that it could not have been based upon mistake. The mistake, though 'in one sense essential or fundamental',[10] did not avoid the contract.

The views expressed in *Solle v Butcher* and *Leaf v International Galleries* were repeated in two later cases.

In *Harrison and Jones Ltd v Bunten and Lancaster Ltd*,[11]

> The buyers agreed in writing to buy from the sellers '100 bales of Calcutta kapok, Sree brand', equal to standard sample. The seller delivered goods which in all respects answered this description and which were equal to sample. It appeared, however, that both parties had made the contract in the belief that 'Calcutta kapok, Sree brand' was pure kapok and consisted of tree cotton, though the truth was that it contained a mixture of bush cotton and was commercially a quite different and inferior category of goods.

The buyers contended that this common mistake made the contract void, but the contention was rejected by Pilcher J.

> When goods, whether specific or unascertained, are sold under a known trade description without misrepresentation, innocent or guilty, and without breach of warranty, the fact that both parties are unaware that goods of that known trade description lack any particular quality is, in my view, completely irrelevant; the parties are bound by their contract, and there is no room for the doctrine that the contract can be treated as a nullity on the ground of mutual[12] mistake, even though the mistake from the point of view of the purchaser may turn out to be of a fundamental character.

In *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd*:[13]

> The plaintiffs in London received an order from their house in Egypt for 'Moroccan horsebeans described here as *feveroles*'. The plaintiffs, not knowing what 'feveroles' were, enquired of the defendants, who said that the word was a mere synonym for horsebeans, which they were in a position to supply. The plaintiffs thereupon made an oral contract with the defendants for the purchase of 'horsebeans' and the contract, in these terms, was later put into writing. The defendants delivered the horsebeans to the plaintiffs, who in turn sold and delivered them to an Egyptian firm. When they reached Egypt, the Egyptian buyers found that, though horsebeans, they were not 'feveroles' and claimed damages as on a breach of warranty.

The plaintiffs wished in turn to claim damages from the defendants, but were faced with the initial difficulty that their written contract spoke only of 'horsebeans' and these had been duly supplied. They therefore asked for rectification of the contract so as to make it read 'feveroles', and intended, if

10 Ibid at 89 and 694. So too in *Harlington and Leinster Enterprises Ltd v Christopher Hill Fine Art Ltd* [1990] 1 All ER 737, [1990] 3 WLR 13 where both parties wrongly believed the subject matter of the contract to be a painting by Gabriele Munter, a German expressionist. This was in fact a stronger case than *Leaf* since the buyer paid a genuine Munter price whereas the buyer in *Leaf* does not appear to have paid a genuine Constable price.

11 [1953] 1 QB 646, [1963] 1 All ER 903. See also *Diamond v British Columbia Thoroughbred Breeders' Society and Boyd* (1965) 52 DLR (2d) 146 and cf *Naughton v O'Callaghan (Rogers, third parties)* [1990] 3 All ER 191.

12 The facts disclosed what in this chapter is denominated common mistake.

13 [1953] 2 QB 450, [1953] 2 All ER 739.

successful, to claim damages for the defendants' failure to supply this mysterious article. Here it is to be observed that one of the arguments raised by the defendants' counsel was that the contract was void for mistake. That the parties made their contract under the influence of a common mistake was clear: they thought the 'feveroles' was just another name for 'horsebeans'. But the Court of Appeal refused to hold the contract void. Lord Denning LJ asked:

> What is the effect in law of this common mistake on the contract between the plaintiffs and defendants? ... I am clearly of opinion that the contract was not a nullity. It is true that both parties were under a mistake and that the mistake was of a fundamental character with regard to the subject-matter. The goods contracted for—horsebeans—were essentially different from what they were believed to be—'feveroles'. Nevertheless, the parties to all outward appearances were agreed. They had agreed with quite sufficient certainty on a contract for the sale of goods by description, namely, horsebeans. Once they had done that, nothing in their minds could make the contract a nullity from the beginning, though it might, to be sure, be a ground in some circumstances for setting the contract aside in equity.[14]

So in successive editions of this work the authors and the present editor have argued that at common law there was no doctrine of common mistake as such and that a contract would be void only if there was nothing to contract about, either because the subject matter does not exist at the time of the agreement or because the object of a purported sale already belongs to the buyer. This view, however, was rejected by Steyn J in *Associated Japanese Bank (International) Ltd v Crédit du Nord*.[15] In this case a high class fraudster, Jack Bennett, approached the plaintiff bank with a scheme to raise money by the sale and lease back of precision engineering machines. The bank agreed to buy the machines from Bennett for a little over £1 million and to lease them back to him. The plaintiff bank insisted the transaction be guaranteed and the defendant bank became the guarantor. In fact the machines did not exist and Mr Bennett having obtained £1 million disappeared without keeping up the payments on the lease. The plaintiff sought to enforce the guarantee against the defendant, neither bank having bothered to verify the existence of the machines. Steyn J held that the action failed. His principal ground of decision was that, as a matter of construction of the guarantee, it was either an express or implied condition that the machines existed. Alternatively, and of much more interest for present purposes, he would have been prepared to hold that the contract of guarantee was void for common mistake. At first sight this might look like a case of *res extincta* since the machines did not exist but, of course, the subject matter of the contract of guarantee was not the machines but Bennett's obligations to the plaintiff bank. Those obligations certainly existed since Bennett knew very well that the machines did not exist and there was, therefore, no common mistake as between the plaintiffs and Bennett. It is clear that both the plaintiff and the defendant bank believed that the machines existed and that they would not have entered into the transaction if they had not been deceived as to this. On the other hand, even if there is a doctrine of common mistake, as Steyn J certainly thought, it must be narrower than this since parties often enter into undoubtedly binding transactions which they would not have entered into if they had known the true state of the facts. In the present case, the parties presumably would not have

14 [1953] 2 QB 450 at 459–460. On this, see pp 264–267, below.

15 [1988] 3 All ER 902, [1989] 1 WLR 255; Treitel 104 LQR 501; Cartwright [1988] LCMLQ 300; Carter 3 JCL 237; Smith 110 LQR 400.

entered into the transaction if it had been the case that the machines were of little value and they had realised this, but that would surely on no view be a case of operative common mistake.[16]

2 AGREEMENTS IN RESPECT OF WHICH EQUITY WILL GIVE RELIEF

The fact that a contract founded on common mistake is not a complete nullity does not necessarily mean that English law refuses all relief to the parties. In fulfilment of the principles of equity, the court interferes in two respects.

First, it will, if it thinks fit, set aside the contract on such terms as are just whether it is void at common law or not.

Secondly, it rectifies a written contract or deed that does not accurately record the agreement made by the parties.

a Agreements that may be set aside

In general, as we have seen, equity follows the law in the case of the *res extincta* and the *res sua* and regards the contract as a nullity. It either refuses specific performance or sets the contract aside notwithstanding that it has been executed.[17] But in exercising this jurisdiction, the court in its desire to do full justice may impose terms upon either party.

Thus, in *Cooper v Phibbs*:[18]

> X agreed to take a lease of a fishery from Y, although, unknown to both parties, it already belonged to X himself. X filed a petition in Chancery for delivery up of the agreement and for such relief 'as the nature of the case would admit of and to the court might seem fit'.

The House of Lords set the agreement aside, but only on the terms that Y should have a lien on the fishery for such money as he had expended on its improvement. Lord Westbury stated the principle in these words:

> If parties contract under a mutual [sic], mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake.[19]

This principle is clearly wide enough to embrace any contract based on a common and material mistake, even though there is no question of a *res extincta* or a *res sua*. Such, indeed, is the effect of the authorities.[20] *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd*[1] affords an illustration:

16 It should also be noted that the learned judge thought that in order for the doctrine of common mistake to operate the party relying on it must show that his mistake was reasonably based.

17 *Colyer v Clay* (1843) 7 Beav 188; *Cochrane v Willis* (1865) 1 Ch App 58.

18 (1867) LR 2 HL 149; followed in *Jones v Clifford* (1876) 3 ChD 779; *Allcard v Walker* [1896] 2 Ch 369.

19 *Cooper v Phibbs* (1867) LR 2 HL 149 at 170. In the next sentence, however, he said that the agreement 'cannot stand'. It was pointed out in *Bell v Lever Bros Ltd* that in the passage cited in the text, the word 'void' should be substituted for 'liable to be set aside': [1931] 1 KB 557 at 585, per Scrutton LJ and 591, per Lawrence LJ; [1932] AC at 218, per Lord Atkin. There is perhaps some logical difficulty in seeing how a court of equity could set aside on terms a contract which was already void at common law. What exactly the court was doing in *Cooper v Phibbs* is helpfully considered by Matthews 105 LQR 599.

20 Even such an early writer as Story had no doubt on the matter; see his book on *Equity* paras 140, 141.

1 [1895] 2 Ch 273.

In 1889 Lister had mortgaged his mills and the fixtures therein to a bank. In 1890 he converted himself into a limited company which in 1892 went into liquidation. The bank, as mortgagees, claimed to be entitled as against the liquidator to 35 looms in the mills. The question was whether they were fixtures within the terms of the mortgage deed. The agents of the bank and of the liquidator inspected the premises and agreed that the looms were not attached to the mills and were therefore not fixtures; and, on that assumption, they concurred in an order made by the court for their sale by the liquidator. It later appeared that the looms were affixed to the mills at the time when the mortgage was made, and had subsequently been wrongfully separated by some unauthorised person.

The bank now applied to the court to set aside the order on the ground that it represented an agreement based on a common mistake, and the court did set it aside. In the words of Kay LJ:[2]

> It seems to me that, both on principle and on authority, when once the Court finds that an agreement has been come to between parties who were under a common mistake of a material fact, the Court may set it aside, and the Court has ample jurisdiction to set aside the order founded upon that agreement. Of course, if ... third parties' interests had intervened and so on, difficulties might arise; but nothing of that kind occurs here.[3]

In *Solle v Butcher*,[4] the Court of Appeal, as we have seen, denied that the contract was void at law. In the exercise of its equitable jurisdiction, however, it held that the lease must be set aside. To set it aside *simpliciter* would have been inequitable to the tenant since this would require his immediate dispossession, and therefore he was put on terms. He was given the choice of surrendering the lease entirely or of remaining in possession at the full rent that would have been permissible under the Acts had the landlord served the statutory notice upon him within the proper time limit. Denning LJ restated the governing principle in words closely corresponding to those used by Lord Westbury.[5]

In the later case of *Grist v Bailey*:[6]

> The plaintiff agreed to buy the defendant's house subject to an existing tenancy. The value of the house with vacant possession was about £2,250, but the purchase price was fixed at £850 since both parties believed that the tenancy was protected by the Rent Acts. This belief was wrong. In fact, the tenant left without claiming protection.

2 Ibid at 284.

3 It has been objected by Slade (70 LQR 385 at 405) that an agreement cannot be set aside in equity for common mistake and that the *Huddersfield* case is not relevant since it was 'a special case where parties were seeking to set aside a consent order'. But the judges, especially Vaughan Williams J at 276, and Kay LJ at 284, were at pains to insist that the order was only the fulfilment of the agreement and that neither on principle nor on authority could the liability of the agreement to be set aside be affected by its translation into a consent order. This was later stressed by the Court of Appeal in *Wilding v Sanderson* [1897] 2 Ch 534. Further, to deny the general proposition that a contract can be set aside for common mistake is to overlook *Scott v Coulson* [1903] 2 Ch 249; and a multitude of statements by Chancery judges.

4 [1950] 1 KB 671, [1949] 2 All ER 1107, p 261, above.

5 [1950] 1 KB at 693. See also critical notes by ALG 66 LQR 169; and by Atiyah and Bennion, 24 MLR 421 at 440-442.

6 [1967] Ch 532, [1966] 2 All ER 875. See also *Laurence v Lexcourt Holdings Ltd* [1978] 2 All ER 810, [1978] 1 WLR 1128.

> In an action for specific performance brought by the plaintiff, the defendant counterclaimed that the contract be set aside on the ground of common mistake.

Goff J held that, though the mistake did not suffice to nullify the contract at law, it was material enough to attract the intervention of equity. In the circumstances, however, the learned judge felt that it would be improper merely to refuse a decree of specific performance. Instead, he dismissed the plaintiff's action, but only on the terms that the defendant would enter into a fresh contract to sell the house at its appropriate vacant possession price.

In *Magee v Pennine Insurance Co Ltd*,[7] the Court of Appeal followed these authorities, but imposed no terms upon the mistaken party. The facts were as follows:

> The plaintiff acquired a car on hire-purchase terms through a garage and signed a proposal form for its insurance by the defendants for an amount not exceeding £600. The form, which was filled in by the salesman at the garage, contained several innocent misrepresentations. The defendants accepted the proposal and issued a policy which was later renewed for another car acquired by the plaintiff. This car was seriously damaged in an accident. In reply to the plaintiff's claim for £600, the defendants offered by way of compromise to pay him £375. The plaintiff accepted this offer, but the defendants then discovered the existence of the misrepresentations.

In an action brought to recover the £375, the Court of Appeal by a majority held that the compromise agreement, though not void at law, was founded on a common mistake.

It is clear that both parties were mistaken in the sense that, as a result of the misrepresentations, they considered the plaintiff's rights under the policy to be more valuable than they were in fact. On the other hand there was no mistake as to the subject matter of the compromise. Each party correctly understood that the purpose of their agreement was to settle the amount to which the plaintiff was entitled. It would, therefore, seem that on the authority of *Bell v Lever Bros Ltd*, the compromise was not void at common law. But the majority of the Court of Appeal held that the mistake under which the parties laboured was sufficiently fundamental to enable the agreement to be set aside in equity. Winn LJ dissented. He found it impossible to distinguish the facts from those in *Bell v Lever Bros Ltd*.

There is much force in this dissenting judgment unless it can be said that in *Bell v Lever Bros Ltd* the House of Lords confined their attention to the doctrines of the common law.[8] This was certainly not the view of Lord Blanesburgh who expressed his satisfaction that it had been possible to take a view of 'equity and procedure' which shielded the appellants from liability to repay the money received under the compensation agreements.[9] Several equity authorities had been cited by counsel, and Lord Warrington in his dissenting speech stated that the rules on the matter were identical both at law and in equity.[10] Nevertheless, it would be unfortunate if the courts were

7 [1969] 2 QB 507, [1969] 2 All ER 891. Harris 32 MLR 688.
8 Ativah and Bennion 24 MLR 421 at 439-442, 85 LQR 454-456. See also the discussion of compromises of worthless claims, pp 91-92, above.
9 [1932] AC at 200.
10 Ibid at 210.

to lack the power to grant specific relief against the consequences of a common mistake if this is warranted by the requirements of substantial justice, especially where the interest of third parties are affected. It is a particular virtue of such discretion that it enables protection to be given to a stranger, who *bona fide* and for value acquires an interest in the subject matter from one of the original parties. Equity will not interfere to defeat his interest, if he acquires it before its intervention is sought.[11] At common law, on the other hand, if a contract is declared void, a third party, however honest and whatever money he has paid, obtains no right.[12] It will thus be readily understood that a court may be anxious to keep a case outside the scope of the common law and to deal with it in equity. It remains for the House of Lords to resolve the dilemma.[13]

b Rectification of written agreements

Equity, in the exercise of its exclusive jurisdiction, has satisfactorily dealt with cases where, though the consent is undoubted and real, it has by mistake been inaccurately expressed in a later instrument. Suppose that A orally agrees to sell a house, exclusive of its adjoining yard, to B. Owing to a mistake the later formal and written instrument includes the yard as part of the property to be sold, and, what is worse, the subsequent conveyance actually conveys the yard to B.[14] Can A have the written agreement and the deed rectified, or will he be successfully met by the plea that what has been written and signed must stand?

It may be answered at once that in cases of this type, where it is proved that owing to a mistake the written contract does not substantially represent the real intention of the parties, the court has jurisdiction, not only to rectify the written agreement, but also to order specific performance of it as rectified.[15]

> The essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement into harmony with that prior agreement.[16]

It is, however, not the contract itself which is rectified, but the incorrect manner in which the common intention of the parties has been expressed in a later document.

> What you have got to find out is what intention was communicated by one side to the other and with what common intention and common agreement they made their bargain.[17]

11 *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273 at 285-286.
12 *Cundy v Lindsay* (1878) 3 App Cas 459; p 277, below.
13 See also the instructive judgment of the High Court of Australia in *Svanosio v McNamara* (1956) 96 CLR 186, the High Court, without denying the equitable jurisdiction, took a narrow view of when it should be exercised. In *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, Evans LJ certainly assumed that there was an equitable rule wider in scope than the common law rule though neither rule was applied in the case. Whatever the width of the equitable doctrine it does not extend to relieving a party against a bad bargain *Clarion Ltd v National Provident Institution* [2000] 2 All ER 265.
14 *Craddock Bros Ltd v Hunt* [1923] 2 Ch 136. See also *United States v Motor Trucks Ltd* [1924] AC 196.
15 *United States v Motor Trucks Ltd* [1924] AC 196. *Shipley UDC v Bradford Corpn* [1936] Ch 375 at 394-395. The jurisdiction is discretionary but it is not a ground for refusing to exercise the discretion that the application is to correct an error which would otherwise lead to the payment of more tax than necessary. *Re Slocock's Will Trusts* [1979] 1 All ER 358.
16 *Lovell and Christmas Ltd v Wall* (1911) 104 LT 85, per Cozens-Hardy MR.
17 Ibid at 93, per Buckley LJ.

It has long been settled that oral evidence is admissible to prove that the intention of the parties expressed in the antecedent agreement, whether written or not, does not represent their true intention. Thus, rectification forms an exception, but a justifiable exception, to the cardinal principle that parol evidence cannot be received to contradict or to vary a written agreement. The basis of that principle is that the writing affords better evidence of the intention of the parties than any parol proof can supply; but to allow it to operate in a case of genuine mistake would, as Story has said,

> ... be to allow an act originating in innocence to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake to resist the claims of justice under the shelter of a rule framed to promote it. In a practical view, there would be as much mischief done by refusing relief in such cases, as there would be introduced by allowing parol evidence in all cases to vary written contracts.[18]

A question that has long agitated the courts and upon which conflicting dicta are to be found is whether the common intention of the parties must have crystallised into a legally enforceable contract prior to the written document whose rectification is sought. The controversy was not resolved until the decision of the Court of Appeal in *Joscelyne v Nissen*[19] where the facts were these:

> The plaintiff, who shared a house with the defendant, his daughter, proposed to her that she should take over his car-hire business. At an early stage in the ensuing conversations, it was made clear that if the proposal were accepted, she should pay all the household expenses, including the electricity, gas and coal bills due in respect of the part of the house occupied by her father. This oral bargain no doubt disclosed the common intention of the parties, but it could not be described as a finally binding contract. The discussion culminated in a written contract which, on its true construction, placed no liability upon the daughter to pay the household expenses. After honouring the bargain for a time, she ultimately refused to pay the electricity, gas and coal bills, though she continued to take the profits of the business.

In an action brought by the father, it was ordered that the written document be rectified so as specifically to include the daughter's liability for these bills. Her argument that the liability had not been imposed upon her by an antecedent contract was rejected. The court endorsed the view of Simonds J expressed in *Crane v Hegeman-Harris Co Inc*,[20] that

> ... it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties.[1]

18 Story *Equity Jurisprudence* s 155.

19 [1970] 2 QB 86. Baker 86 LQR 303; Bromley 87 LQR 532.

20 [1971] 1 WLR 1390n at 1391, adopting the view of Clauson J in *Shipley UDC v Bradford Corpn* [1936] Ch 375. *Crane v Hegeman-Harris Co Inc* was decided in 1939 and reported in [1939] 1 All ER 662, but this report omits several pages of the judgement.

1 [1939] 1 All ER at 664. For inconsistent dicta, see *Mackenzie v Coulson* (1869) LR 8 Eq 368 at 375, per James V-C; *Faraday v Tamworth Union* (1916) 86 LJ Ch 436 at 438, per Younger J; *Lovell and Christmas Ltd v Wall* (1911) 104 LT 85 at 88, per Cozens-Hardy MR; *W Higgins Ltd v Northampton Corpn* [1927] 1 Ch 128 at 136, per Romer J; *Frederick E Rose v Wm H Pim Ltd* [1953] 2 QB 450 at 461, per Denning LJ.

An antecedent agreement, for instance, is rectifiable notwithstanding that it is unenforceable because of its failure to comply with some statutory provision requiring it to be in writing or to be supported by written evidence.[2] Thus, the result is that 'you do not need a prior contract, but a prior common intention'.

The burden of proving this common and continuing intention lies upon the party who claims that the written contract should be rectified.[3] As regards the standard of proof required, all that can be said is that the claim will fail unless the common intention upon which it is based is proved by *convincing* evidence. It is not necessary that the evidence should be 'irrefragable' as Lord Thurlow once suggested, or that it should settle the question 'beyond all reasonable doubt' as is demanded by the criminal law.[4] If the negotiations leading up to the execution of the written instrument were vague and inconclusive, so that it is impossible to ascertain what the parties really meant, then the writing represents the only agreement that has been concluded, and there is no antecedent and common intention upon which notification can be based.[5]

Moreover, it must be shown that the alleged common intention, though once undoubtedly reached, continued unchanged down to the time when the instrument was reached. Proof that the parties varied their original intention and that the instrument represents what they finally agreed is fatal to a suit for rectification.[6]

Finally, it must be emphasised that the issue relates not to the individual intention of the parties, but to their common intention. If the defendant can satisfy the court that he understood the agreement to be exactly what was stated in the written instrument, rectification will be excluded.[7] There are some old cases in which a mistake by one party has by itself been relied on by the court to justify offering the other party the choice between submitting to rectification or having the whole contract rescinded but these were overruled by the Court of Appeal in *Riverlate Properties Ltd v Paul*.[8] A mistake by one party, which is known to the other party, will suffice to justify rectification however, at least where the knowledge of the other party is tantamount to sharp practice. Even the need for sharp practice was denied in *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd*[9] provided that it would be inequitable to allow one party to take advantage of the other's mistake. It was said to be essential that the one party's mistake is known to the other in *Agip SpA v Navigazione Alta Italia SpA*[10] but this was denied by the Court of Appeal in *Commission for the New Towns v Cooper (GB) Ltd*[11] where Stuart-Smith LJ said:

> I would hold that where A intends B to be mistaken as to the construction of the agreement, so conducts himself that he diverts B's attention from discovering the

2 *United States v Motor Trucks Ltd* [1924] AC 196. A decision dealing with the now repealed s 4 of the Sale of Goods Act 1893.
3 *Tucker v Bennett* (1887) 38 ChD 1 at 9, per Cotton LJ.
4 *Joscelyne v Nissen* [1970] 2 QB 86 at 98, *per curiam*. For Lord Thurlow's remark, see *Shelburne v Inchiquin* (1784) 1 Bro CC 338 at 341; *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505.
5 *C H Pearce Ltd v Stonechester Ltd* [1983] CLY 451.
6 *Marquess of Breadalbane v Marquess of Chandos* (1837) 2 My & Cr 711 (rectification of a marriage settlement).
7 *Lloyd v Stanbury* [1971] 2 All ER 267, [1971] 1 WLR 535.
8 [1975] Ch 133, [1974] 2 All ER 656.
9 [1981] 1 All ER 1077, [1981] 1 WLR 505.
10 [1984] 1 Lloyd's Rep 353.
11 [1995] 2 All ER 929 at 946.

> mistake by making false and misleading statements, and B in fact makes the very mistake that A intends, then notwithstanding that A does not actually know, but merely suspects that B is mistaken, and it cannot be shown that the mistake was induced by any misrepresentation, rectification may be granted. A's conduct is unconscionable and he cannot insist on performance in accordance to the strict letter of the contract; that is sufficient for rescission. But it may also not be unjust or inequitable to insist that the contract be performed according to B's understanding, where that was the meaning that A intended that B should put upon it.

Of course if the document is unilateral, as in a voluntary settlement, it is the intention of the settlor which is important: *Re Butlin's Settlement Trusts.*[12]

B. WHERE AN APPARENT AGREEMENT IS ALLEGED TO BE VITIATED BY MUTUAL OR UNILATERAL MISTAKE

The second category of case is where to outward appearances a contract has been concluded, but one of the parties alleges that his mind was affected by a fundamental mistake of fact and that he never intended to make that precise contract. Here, unlike the case of common mistake, the question of consent is directly raised. It is alleged that despite appearances there is no genuine agreement since there is no corresponding offer and acceptance. X, who admittedly accepted Y's offer to sell certain pearls, now alleges that he thought that he was being offered real pearls, not imitation as in fact they are.

Before considering the manner in which the law deals with such an allegation it is necessary to emphasise that at common law only fundamental mistake is material. This principle was stated by Blackburn J in a passage that has always been regarded as an authoritative statement of the law.[13] A mistake is wholly immaterial at common law unless it results in a complete difference in substance between what the mistaken party bargained for and what in fact he will obtain if the contract is fulfilled; as for example where the buyer intends to buy real pearls and the seller intends to sell imitation pearls. Translated into the familiar rubric of offer and acceptance, this means that the only type of mistake which is ever capable of excluding offer and acceptance is one that prevents the mistaken party from appreciating the fundamental character of the offer or the acceptance. The formation of agreement depends upon the correspondence of offer and acceptance, and if the offer is made in one sense but accepted in another, as in the example of the real and imitation pearls, there is at least ground for arguing that there is no consent and therefore no genuine agreement. The mistaken party can at any rate say—for what it is worth—that he personally did not intend to make the contract which he appears to have made.

But once it is admitted that he accepted and intended to accept the precise offer made to him, he obviously cannot deny the existence of the resulting agreement merely by proving that his acceptance was due to a mistake. The evidence may show, for instance, that in a contract for the sale of land the purchaser intended to purchase *that* land from *that* vendor at *that* price, but that his reason for doing so was his mistaken idea that the land was rich in minerals. In other words, he would not have concluded the bargain had he appreciated the

12 [1976] Ch 251, [1976] 2 All ER 483.
13 *Kennedy v Panama Royal Mail Co* (1867) LR 2 QB 580 at 587.

true position. Nevertheless, there was no fundamental mistake. He understood the true character of the offer, he intended to accept the exact terms proposed by the vendor and therefore it is vain for him to deny the existence of a common intention. This is so even though his inflated view of the value of the land was known to the vendor. In this case, equitable relief may conceivably be available to him[14] but he may not plead that the contract is a nullity. No doubt the motive or reason that persuaded him to conclude the agreement was utterly false, but an agreement intentionally made does not cease to be an agreement merely because it has been actuated by a mistaken motive. This truism was copiously illustrated by Lord Atkin in the following passage.

> A buys B's horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known as the fact is that the horse is unsound. If B has made no representation as to soundness and has not contracted that the horse is sound, A is bound and cannot recover back the price ... A agrees to take on lease or to buy from B an unfurnished dwelling house. The house is in fact uninhabitable. A would never have entered into the bargain if he had known the fact. A has no remedy, and the position is the same whether B knew the facts or not, so long as he made no representation or gave no warranty. A buys a roadside garage business from B abutting on a public thoroughfare; unknown to A but known to B, it has already been decided to construct a bypass road which will divert substantially the whole of the traffic from passing A's garage. Again A has no remedy. All these cases involve hardship on A and benefit to B, as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts—ie, *agree in the same term on the same subject-matter*—they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.[15]

It should also be emphasised that the burden of persuading the court to disturb what to outward appearances is a binding contract falls on the party who alleges the mistake. Moreover, the burden is not light, for the result of holding that there is no contract may seriously prejudice a third party who has in good faith made a bargain relating to the subject matter of the apparent agreement.

1 EFFECT OF MUTUAL AND UNILATERAL MISTAKE AT COMMON LAW

a Mutual mistake

Let us first examine the case of mutual mistake, where each party is mistaken as to the other's intention, though neither realises that the respective

14 Pp 281-283, below.

15 *Bell v Lever Bros Ltd* [1932] AC 161 at 224, per Lord Atkin. The case of *Smith v Hughes* (1871) LR 6 QB 597, illustrates how difficult it may be to decide whether the parties agreed in the same terms on the same subject matter. In *Dip Kaur v Chief Constable for Hampshire* [1981] 2 All ER 430, [1981] 1 WLR 578 a customer approached a supermarket checkout bearing a pair of shoes one with a £6.99 price tag and the other a £4.99 price tag. The customer intended to pay whatever price the cashier rang up but hoped that, as happened, the cashier would ring up £4.99. It was held that the customer has committed no criminal offence as there was a valid contract. *Quaere* whether a court would reason in the same way in a civil case.

promises have been misunderstood. This situation would arise, for instance, if B were to offer to sell his Ford Sierra car to A and A were to accept in the belief that the offer related to a Ford Granada. In such a case, no doubt, if the minds of the parties could be probed, genuine consent would be found wanting. But, the question is not what the parties had in their minds, but what reasonable third parties would infer from their words or conduct.

Applying itself to that task, the court has to determine what Austin called 'the sense of the promise'.[16] In other words, it decides whether a sensible third party would take the agreement to mean what A understood it to mean or what B understood it to mean, or whether indeed any meaning can be attributed to it at all. The promisor may have made his promise in one sense, the promisee may have accepted it in another. There may have been mistake of a fundamental character which caused the one to put a wrong interpretation upon the promise of the other. But it is for the court to decide what, if any, is the interpretation to be put on what the parties have said or done.

In a leading case, Blackburn J explained the attitude of the law. He said:

> If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.[17]

Again in another case, Pollock CB said:

> If any person, by a course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement ... whether the party intends that he should do so or not, it has the effect that the party using that language or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct.[18]

The result is that if, from the whole of the evidence, a reasonable man would infer the existence of a contract in a given sense, the court, notwithstanding a material mistake, will hold that a contract in that sense is binding upon both parties. The apparent contract will stand. Two decisions may be cited by way of illustrations.

In *Wood v Scarth*:[19]

> The defendant offered in writing to let a public house to the plaintiff for £63 a year, and the plaintiff, after an interview with the defendant's clerk, accepted the offer by letter. The defendant intended that a premium of £500 should be payable in addition to the rent and he believed that the clerk had made this clear to the plaintiff. The latter, however, believed that his only financial obligation was the payment of rent.

It was held at *nisi prius* that the apparent contract must stand. The mistake of the defendant could not at law gainsay what would obviously be inferred from the acceptance of his exact offer.

In *Scott v Littledale*:[20]

16 *Lectures on Jurisprudence* Lect 21, note 89.
17 *Smith v Hughes* (1871) LR 6 QB 597 at 607.
18 *Cornish v Abington* (1859) 4 H & N 549 at 556.
19 (1858) 1 F & F 293. The full facts cannot be appreciated unless the earlier case in equity between the same parties (1855) 2 K & J 33, is also considered.
20 (1858) 8 E & B 815.

> The defendants sold by sample to the plaintiff a hundred chests of tea then lying in bond '*ex* the ship *Star of the East*' but later discovered that they had submitted a sample of a totally different tea lower in quality than that contained in the chests.

In an action for non-delivery of the hundred chests, the common law court, though it conceded that the sellers might be entitled to partial relief in equity, refused to declare the contract void. The sellers had no doubt submitted a wrong sample by mistake, but they were precluded by their own conduct from disputing the natural inference that would be drawn from the facts.

Cases may occur, of course, in which it is impossible to impute any definite agreement to the parties. If the evidence is so conflicting that there is nothing sufficiently solid from which to infer a contract in any final form without indulging in mere speculation, the court must of necessity declare that no contract whatsoever has been created.

An illustration of this situation is *Scriven Bros & Co v Hindley & Co*:[1]

> This was an action to recover the price of some Russian tow alleged to have been sold at an auction by the plaintiffs to the defendants. The auctioneer was employed to sell both hemp and tow, and his catalogue specified two separate lots, one comprising 47, the other 176 bales. The catalogue failed to state that the latter contained tow, not hemp. The same shipping mark, indicating what ship had brought the goods to England, was entered against each lot. Samples of each lot were on view, but the defendants did not inspect these as they had already seen samples of the hemp at the plaintiff's show rooms. The defendants, believing that both lots contained hemp, successfully bid an extravagant price for the 176 bales of tow. Witnesses from both sides admitted that in their experience Russian tow and Russian hemp had never been landed from the same ship under the same shipping mark.

Here the plaintiffs intended to sell tow, the defendants intended to buy hemp. The plaintiffs were unaware of the intention to bid for hemp only, for though the auctioneer realised that the defendants had shown a lack of judgment he thought that this merely reflected their ignorance of the market value of tow. Though clearly there was no genuine agreement between the parties, the question was whether the judge should presume the existence of a contract for the sale of tow. This he declined to do. The sense of the promise could not be determined. Owing to the ambiguity of the circumstances it could not be affirmed with reasonable certitude which commodity was the subject of the contract. There was therefore no binding contract.

In the leading case of *Raffles v Wichelhaus*[2] the facts were these:

> A agreed to buy and B agreed to sell a consignment of cotton which was to arrive '*ex Peerless* from Bombay'. In actual fact two ships called *Peerless* sailed from Bombay, one in October, the other in December. It was held that the buyer was not liable for refusal to accept cotton despatched by the December ship.

For procedural reasons the court never decided whether there was a contract or not. All that was actually decided was that it was open to the defendant to

1 [1913] 3 KB 564. Cf *Tamplin v James*, p 281, below; *contra*, Jaffey 10 Bracton LJ 109 at 110.

2 (1864) 2 H & C 906. See Simpson 91 LQR 247 at 268, Simpson 11 Cardozo LR 287

show that the contract was ambiguous and that he intended the October ship. If the case had gone to trial it would then have been open to the jury to hold either that there was no contract or to hold that there was a contract either for the October ship or the December ship. In modern terms this would turn on whether a reasonable man would deduce an agreement from the behaviour of the parties though in 1864 it might well have been thought to turn on whether the parties actually intended the same ship.

b Unilateral mistake

We must now consider the attitude of common law to unilateral mistake, the distinguishing feature of which, as we have seen, is that the mistake of X is known to the other party, Y. It must be stressed that, in this context, a man is taken to have known what would have been obvious to a reasonable person in the light of the surrounding circumstances. Thus in *Hartog v Colin and Shields*:[3]

> An offer was accepted to sell certain Argentine hareskins at a certain price per pound. The preliminary negotiations, however, had proceeded on the clear understanding that the skins would be sold at so much per piece, not per pound, and at the trial expert evidence proved the existence of a trade custom to fix the price by reference to a piece. The value of a piece was approximately one-third of that of a pound.

It was held that the buyer must be taken to have known the mistake made by the sellers in the formulation of their offer.

The majority of cases in which the question of unilateral mistake has arisen have been cases of mistaken identity, and their examination will serve to show the way in which the courts approach the problem.[4]

Suppose that A, pretending to be X, makes an offer to B which B accepts in the belief that A is in fact X. In subsequent proceedings arising out of this transaction, B alleges that he would have withheld his acceptance had he not mistaken A's identity. If this allegation is proved and if B's intention was known to A at the time of the acceptance, there is, as a matter of pure logic, no correspondence between offer and acceptance and therefore there should be no contract. Nevertheless, outward appearances cannot be neglected, and the prima facie presumption applicable to this type of case is that, despite the mistake, a contract has been concluded between the parties. The onus of rebutting this presumption lies upon the party who pleads mistake.[5]

To discharge this burden, he must prove (i) that he intended to deal with some person other than the person with whom he has apparently made a contract; (ii) that the latter was aware of this intention; (iii) that at the time of negotiating the agreement, he regarded the identity of the other contracting party as a matter of crucial importance; and (iv) that he took reasonable steps to verify the identity of that party.

(i) The first of these requirements presupposes a confusion between two distinct entities. If this is not the case there is no operative mistake. Two cases illustrate this point. In *Sowler v Potter*:[6]

3 [1939] 3 All ER 566.

4 See Williams 23 Can Bar Rev 271, 380.

5 Ie upon the offeree in the hypothetical case given above but if the offeror is the mistaken person the onus lies upon him.

6 [1940] 1 KB 271. For a fuller report, see [1939] 4 All ER 478. For a criticism of the decision, see Goodhart 57 LQR 228.

> In May 1938, the defendant, who was then known as Ann Robinson, was convicted of permitting disorderly conduct at a café in Great Swan Alley, EC. In July of the same year she assumed the name of Ann Potter and negotiating under that name obtained a lease of Mrs Sowler's premises in Coleman St, EC. The agent who had conducted the negotiations on behalf of Mrs Sowler stated in evidence that he remembered the conviction of Ann Robinson. 'Therefore', said the trial judge, 'he thought when he entered into this contract with the defendant that he was entering into a contract with some person other than the Mrs Ann Robinson who had been convicted.'

On this interpretation of the facts Tucker J held the lease to be void *ab initio*, since the plaintiff was mistaken with regard to the identity of the tenant.

It may be questioned, with respect, whether this decision was correct. At the time when the agent concluded the bargain, the possibility that the defendant might be Ann Robinson was not within his contemplation, and therefore he could scarcely deny that he intended to grant the lease to the person with whom he had dealt. It is no doubt true that he would not have formed this intention had he appreciated what manner of person the tenant was, but once it was clear that he had that intention in fact the mistaken reason or motive that induced it was not enough to nullify the lease. To apply the words of A L Smith LJ in an earlier case, there was only one entity—the woman known at one moment as Ann Robinson, at another as Ann Potter—and it was with this one entity that the landlord intended to contract.[7] On the other hand the lease was clearly voidable on the ground of fraudulent misrepresentation, for in answer to a request for a reference, the defendant submitted the name of a certain Mr Hopfenkopf, an obvious accomplice in her crafty scheme. This gentleman, according to the finding of the judge, 'deliberately wrote what he knew perfectly well to be untrue for the purpose of deceiving the plaintiff'.[8] The lease was therefore voidable and there was no reason to invoke the law of mistake.[9]

In *King's Norton Metal Co Ltd v Edridge, Merrett & Co Ltd*:[10]

> A man named Wallis, for the purpose of cheating, set up in business as Hallam & Co. He prepared writing paper at the head of which was a faked illustration of a large factory and a statement that Hallam & Co had depots at Belfast, Lille and Ghent. Writing on this paper, he ordered and obtained goods from the plaintiffs which were later bought from him in good faith by the defendants. The plaintiffs had previously sold goods to Wallis and had been paid by a cheque signed 'Hallam & Co'. In an action against the defendants for the value of the goods, the plaintiffs contended that their apparent contract with Hallam & Co was void, since they mistakenly believed that such a firm existed, and that therefore the property in the goods still resided in them.

The contention failed. The plaintiffs, since they could not have relied on the credit of a non-existent person, must have intended to contract with the writer

7 *King's Norton Metal Co Ltd v Edridge, Merrett & Co Ltd* (1897) 14 TLR 98 at 99.
8 This aspect of the case is reported only in [1939] 4 All ER 478.
9 Disapproval of the decision was expressed by the Court of Appeal in *Gallie v Lee* [1969] 2 Ch 17 at 33, per Lord Denning; at 41, per Russell LJ; at 45, per Salmon LJ.
10 N 7, above. See also *Porter v Latec Finance (Queensland) Pty Ltd* (1964) 111 CLR 177.

of the letter, though of course they would not have formed this intention had they known that he was masquerading under an *alias*. They were unable to show that they meant to contract with Hallam & Co, not with Wallis, for there was no other entity in question. The contract was no doubt voidable for fraud, but as it had not been avoided at the time of the sale by Wallis to the defendants, the title of the latter prevailed over that of the plaintiffs.

(ii) To satisfy the second requirement, the mistaken party must prove that the other party was aware of the mistake. This requirement seldom causes difficulty, since in the majority of cases the mistake has been induced by the fraud of that party. In *Boulton v Jones*,[11] however, the matter was by no means clear.

> Jones, who had been accustomed to deal with Brocklehurst, sent him a written order for 50 feet of leather hose on the very day that Brocklehurst had transferred his business to his foreman, the plaintiff. The plaintiff executed the order, but Jones accepted and used the goods in the belief that they had been supplied by Brocklehurst. He refused to pay the price, alleging that he had intended to contract with Brocklehurst personally, since he had a set-off which he wished to enforce against him.

It was held that Jones was not liable for the price, but it is not clear whether the mistake was regarded by the court as unilateral or mutual. If the court was convinced that the plaintiff knew of the set-off and therefore that the order was not intended for him, the contract was clearly vitiated by unilateral mistake and was rightly held void.[12] But on the facts as a whole it is perhaps more reasonable to treat the mistake as mutual. On this interpretation the sense of the promise fell to be determined, and the decision is more difficult to support. A disinterested spectator, knowing nothing of the set-off and looking at the circumstances objectively, would naturally assume the identity of the supplier to be a matter of indifference to the purchaser of such an ordinary commodity as hose piping.

Most of the identity cases, however, have been obvious examples of unilateral mistake and in most the mistake has been due to the fraud of one of the parties. A clear instance is *Hardman v Booth*[13] where the facts were these:

> X, one of the plaintiffs, called at the place of business of Gandell & Co. This firm consisted of Thomas Gandell only, though the business was managed by a clerk called Edward Gandell. X, being fraudulently persuaded by Edward that the latter was a member of the firm, sold and delivered goods to the place of business of Gandell & Co but invoiced them to 'Edward Gandell & Co'. Edward, who carried on a separate business with one Todd, pledged the goods with the defendant for advances *bona fide* made to Gandell & Todd. The plaintiffs now sued the defendant for conversion.

11 (1857) 2 H & N 564, 27 LJ Ex 117. It should be noted that the report of this case given in Hurlstone and Norman is incomplete, and that for a proper understanding of the judgment, reference should be made to the other reports, especially to the Law Journal.

12 Bramwell B seems to have taken this view of the facts, for he said: "It is an admitted fact that the defendant supposed he was dealing with Brocklehurst, and the plaintiff misled him by executing the order unknown to him": (1857) 27 LJ Ex at 119.

13 (1863) 1 H & C 803.

Here no contract of sale ever came into existence, since X's offer was made to Thomas only, and Edward, though he knew this fact, purported to accept it for himself. Edward thus acquired no title to the goods capable of transfer to the innocent defendant, and the latter was liable for conversion.

(iii) Controversy is most frequently provoked by the need to satisfy the third of the requirements—that, at the time of negotiating the agreement, the person labouring under the mistake regarded the identity of the other contracting party as a matter of crucial importance, and that this was apparent from his conduct during the negotiations. The problem arose in an acute form in the case of *Cundy v Lindsay*:[14]

> A fraudulent person named Blenkarn, writing from '37 Wood St, Cheapside', offered to buy goods from the plaintiffs, and he signed his letter in such a way that his name appeared to be 'Blenkiron & Co'. The latter were a respectable firm carrying on business at 123 Wood St. Blenkarn occupied a room which he called 37 Wood St, but in fact its entrance was from an adjoining street. The plaintiffs, who were aware of the high reputation of Blenkiron & Co, though they neither knew nor troubled to ascertain the number of the street where they did business, purported to accept the offer and despatched the goods to 'Messrs Blenkiron & Co, 37 Wood St, Cheapside'. These were received by the rogue Blenkarn, and he in turn sold them to the defendants, who took them in all good faith. The plaintiffs now sued the defendants for conversion.

The case is difficult, for the facts admitted of two different inferences.

First, it might be inferred that, just as in *Hardman v Booth*, the plaintiffs intended to sell to Blenkiron & Co, but that Blenkarn fraudulently assumed the position of buyer. If this represented the true position, an offer to sell to Blenkiron & Co was knowingly 'accepted' by Blenkarn and therefore no contract would ensue.

Secondly, unlike *Hardman v Booth*, it might be inferred that the plaintiffs, though deceived by the fraud of Blenkarn, intended or were at least content to sell to the person who traded at 37 Wood St, from which address the offer to buy had come and to which the goods were sent. If this were the true position, there was a contract with Blenkarn of 37 Wood St, though one that was voidable against him for his fraud.

The second inference was drawn unanimously by three judges in the Queen's Bench Division,[15] but the Court of Appeal and the House of Lords, with equal unanimity, preferred the first view.

Such a conclusion prejudices third parties who later deal in good faith with the fraudulent person. On the view of the facts taken by the House of Lords, the defendants in *Cundy v Lindsay* were of course liable, for there had never been a contract of sale between the plaintiffs and Blenkarn, and Blenkarn therefore possessed no title which he could pass to a third person. On the other hand, had the view of the facts taken by the Queen's Bench Division prevailed, while the contract between the plaintiffs and Blenkarn would have been voidable for the latter's fraud, the defendants would nevertheless have been secure, since they had innocently acquired this voidable title to the goods before it had in fact been avoided by the plaintiffs.

14 (1878) 3 App Cas 459.
15 *Cundy v Lindsay* (1876) 1 QBD 348, per Blackburn, Mellor and Lush JJ.

The problem whether this third requirement has been satisfied has proved even more troublesome where the contract has been made *inter praesentes*, not through the post as in *Cundy v Lindsay*. Three cases concerned with this aspect of the problem invite comparison: *Phillips v Brooks Ltd, Ingram v Little* and *Lewis v Averay*.

The facts of *Phillips v Brooks, Ltd*[16] were as follows:

> A man called North entered the plaintiff's shop and selected pearls of the value of £2,550 and a ring worth £450. He then wrote out a cheque for £3,000 saying, as he did so, 'You see who I am, I am Sir George Bullough', and then gave an address in St James's Square. The plaintiff had heard of Bullough and upon consulting a directory found that he lived at the address given. He then said: 'Would you like to take the articles with you?' North replied: 'You had better have the cheque cleared first, but I should like to take the ring, as it is my wife's birthday tomorrow.' The plaintiff let him do so. North pledged the ring for £350 to the defendant, who had no notice of the fraud.

These facts, as in *Cundy v Lindsay*, admitted of two possible answers. The plaintiff either intended to sell the ring to the person present in the shop, whoever he was, or he intended to sell to Bullough and to nobody else. If the first solution was correct, then a contract of sale had been concluded, though one that was voidable for the fraudulent representation of North that the means of payment would be furnished by Bullough. Being voidable, ie, valid until disaffirmed, a good title to the ring would be acquired by the defendant. If, however, the second solution was correct, then the plaintiff's mistake prevented a contract from arising. Not even a voidable title would pass to North, and the defendant could acquire no right of property whatsoever.

Horridge J adopted the first solution. He drew the inference that the jeweller, doubtless gratified that he had secured Bullough as a customer, intended, come what might, to sell to the person present in the shop. It is submitted, with respect, that this was the correct inference. The jeweller could succeed only upon proof that he intended to contract with Bullough and with nobody else, but in fact the evidence that he tendered scarcely supported this view. Beyond looking up Bullough's address in a directory, he had taken no steps to verify his customer's story and it would seem that he deliberately took the risk of the story being true.

The facts in *Ingram v Little*[17] were these:

> A swindler, falsely calling himself Hutchinson, went to the residence of the plaintiffs and negotiated for the purchase of their car. They agreed to sell it to him for £717, but, on hearing his proposal to pay by cheque, called the bargain off. He therefore told them that he was P G M Hutchinson having business interests in Guildford and that he lived at Stanstead House, Caterham. Upon hearing this, one of the plaintiffs slipped out of the room, consulted the telephone directory at a nearby post office and verified that P G M Hutchinson lived at the Caterham address. Feeling reassured, the plaintiffs, though they

16 [1919] 2 KB 243. The only case concerning mistake *inter praesentes* to reach the House of Lords is *Lake v Simmons* [1927] AC 487 but that case can be regarded as doing no more than decide the meaning of the word 'customer' in an insurance policy. See also *Dennant v Skinner and Collom* [1948] 2 KB 164, [1948] 2 All ER 29; *Citibank Bank plc v Brown Shipley & Co Ltd* [1991] 2 All ER 690.

17 [1961] 1 QB 31, [1960] 3 All ER 332. See Hall [1961] CLJ 86.

had never previously heard of P G M Hutchinson, agreed to sell the car to the swindler. He later sold it to the defendant who acted in good faith.

These facts raised similar problems to those which confronted Horridge J in *Phillips v Brooks Ltd*[18] but, unlike that learned judge, the majority of the Court of Appeal held that the offer of the plaintiffs to sell the car was to be interpreted as made solely to P G M Hutchinson and that the swindler was incapable of accepting it. The plaintiffs therefore succeeded in their claim against the defendant for the return of the car or alternatively for damages.

The facts of *Lewis v Averay*,[19] the most recent decision on the subject, were these:

A rogue, posing as Richard Greene the well-known film actor, called upon the plaintiff and offered to buy his car which was advertised for sale at £450. The plaintiff accepted the offer, and was given a cheque, signed R A Green, for £450. Afraid that the cheque might be worthless, he resisted a proposal that the car should be removed at once. The rogue, by way of showing that he was Richard Greene, produced a special pass of admission to Pinewood Studios bearing an official stamp. Satisfied with this, the plaintiff handed over the log book and allowed the car to be taken away. The cheque had been stolen and was worthless. The rogue, now passing as Lewis, sold the car to the defendant and handed over the log book to him.

The action of conversion by the plaintiff for the recovery of the car or its value failed. The Court of Appeal followed *Phillips v Brooks Ltd*, expressed disagreement with *Ingram v Little*, and held that despite his mistake, the plaintiff had concluded a contract with the rogue. He had failed to rebut the prima facie presumption that he had made a contract with the rogue when he allowed the car to be taken away. The contract was no doubt voidable for fraud, but it could not be avoided now that the car had come into the hands of an innocent purchaser for value.

Between these three cases it is not easy to differentiate; and the task has been complicated by the suggestion now current in judicial and academic circles, though vigorously rejected by Lord Denning MR,[20] that a distinction must be drawn between the identity and the attributes of a person. It is said that a mistake as to attributes, as opposed to identity, will not suffice to enable the contract to be treated as void *ab initio*. The distinction reflects, as in a glass darkly, the views of Aristotle,[1] but whatever its significance in philosophy it is not a safe guide through the crude problems of litigation. If A seeks to escape from his apparent contract with B, he must satisfy the court that he mistakenly identified B with X. He will fail unless he shows that by his behaviour during the process of negotiating the contract he made it abundantly clear that such identification was a matter of crucial importance to him. This he will usually seek to do by showing that his mind was directed to some particular attribute possessed by X but wanting in B. This attribute will vary with the circumstances. In one case it may be credit-worthiness or social standing; in another it may be skill in some vocation. A hypothetical example of the latter was suggested by Pearce LJ in *Ingram v Little*.

18 [1919] 2 KB 243.
19 [1972] 1 QB 198, [1971] 3 All ER 907.
20 *Lewis v Averay* [1972] 1 QB 198 at 206, [1971] 3 All ER 907 at 911.
1 See Bertrand Russell *History of Western Philosophy* (2nd impression, 1947) p 185.

> If a man orally commissions a portrait from some unknown artist who had deliberately passed himself off, whether by disguise or merely by verbal cosmetics, as a famous painter, the imposter could not accept the offer. For though the offer was made to him physically, it is obviously, as he knows, addressed to the famous painter. The mistake in identity on such facts is clear and the nature of the contract makes it obvious that the identity was of vital importance to the offeror.[2]

In short, it is submitted that for legal purposes, 'identity' is not opposed to 'attributes'. Rather, it is made manifest by them. It is tempting, indeed, to suggest that a person's identity is but an amalgam of his various attributes.

(iv) It is not enough for the plaintiff to show that he had made known the importance which he attached to the identity of the other party. In all cases, whether the contract is made *inter praesentes* or *inter absentes*, he must go further and establish that he took all reasonable steps to verify the identity of the person with whom he was invited to deal. This, perhaps, is the heart of the matter. In *Phillips v Brooks Ltd* and *Lewis v Averay* the respective plaintiffs failed because their attempts to test the truth of what they had been told were inadequate. What is surprising is that the same conclusion was not reached in *Ingram v Little*.

It is sometimes said that the distinction between a contract made *inter praesentes* and one made *inter absentes* is one of law. The distinction, however, is merely one of fact. It may, no doubt, be more difficult to rebut the prima facie presumption in favour of the contract where the offer is made to, and accepted by, the person to whom it is orally addressed. But the task of the person labouring under the mistake is different not in kind, but in degree. If in *Cundy v Lindsay* the rogue had appeared in person armed with forged references purporting to come from the respectable Blenkiron & Co the decision would scarcely have gone against the plaintiffs.

The three cases—*Phillips v Brooks Ltd*, *Ingram v Little* and *Lewis v Averay*—are substantially indistinguishable on the facts.[3] In *Lewis v Averay*, the Court of Appeal applied *Phillips v Brooks Ltd*. They doubted the decision in *Ingram v Little* and it would now be dangerous to rely upon it. *Cundy v Lindsay*, as a decision of the House of Lords, is, at common law, unassailable, though it is permissible to regret the inference which their Lordships drew from the facts. The cases as a whole pose the familiar dilemma: which of two innocent parties is to bear a loss caused by the fraud of a third. The common law does not countenance the idea of apportionment. But this idea has already been accepted and applied by the legislature in the doctrine of frustration. By the Law Reform (Frustrated Contracts) Act 1943, the courts are given, within stated limits, the discretion to divide the loss between two innocent parties.[4] This example might well be followed in a further statute and applied to cases of unilateral mistake.[5]

2 [1961] 1 QB 31 at 57.

3 In *Phillips v Brooks Ltd*, the shopkeeper knew of the existence of Sir George Bullough: in *Ingram v Little*, the plaintiffs had never heard of Mr P G M Hutchinson. But if this difference is one of importance, it would seem to tell against the plaintiffs and to throw doubt on the decision.

4 Pp 648-655, below.

5 This suggestion was made by Lawson in *the Rational Strength of English Law* (1951), pp 69-70. It was supported by Devlin LJ in *Ingram v Little* but rejected by the Law Reform Committee in its Twelfth Report (Cmnd 2958, 1966).

2 EFFECT OF MUTUAL AND UNILATERAL MISTAKE IN EQUITY

a Mutual mistake

Equity follows the law in holding that a mutual mistake does not as a matter of principle nullify a contract.[6] In the nature of things, indeed, there is no room for equitable relief, since the court, after considering the mistake and every other relevant fact, itself determines the sense of the promise. In general, therefore, a party is not allowed to obtain rectification or rescission of a contract or to resist its specific performance on the ground that he understood it in a sense different from that determined by the court.

The position is illustrated by the case of *Tamplin v James.*[7]

> James who had been the highest bidder at an auction sale of a public house, resisted a suit for specific performance on the ground that he had made a mistake. At the time when he made his bid he believed that a certain field, which had long been occupied by the publican, was part of the lot offered for sale, though in fact it was held under a separate lease from a third party. There was no misdescription or ambiguity in the particulars of sale.

On these facts specific performance of the contract in the sense understood by the auctioneer was decreed. Baggalay LJ said:[8]

> Where there has been no misrepresentation and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. Were such to be the law, the performance of a contract could seldom be enforced upon an unwilling party who was also unscrupulous.

Again, where a lessor's agent had agreed to grant a lease for seven or fourteen years, which the lessor mistakenly understood to mean a lease determinable at *his* option at the end of seven years instead of at the tenant's option, it was held that specific performance must be decreed against the lessor according to the ordinary and accepted meaning of the words used.[9]

Nevertheless, the particular remedy of specific performance, since it is exceptional in nature, is one that lies very much within the discretion of the courts, and there certainly are cases in which it has not been forced upon a party who has mistaken the admitted sense of a contract. The remedy will not, indeed, be withheld 'merely upon a vague idea as to the true effect of the contract not having been known',[10] but as Bacon VC said in one case:

> It cannot be disputed that Courts of Equity have at all times relieved against honest mistakes in contracts, when the literal effect and the specific performance of them would be to impose a burden not contemplated, and which it would be against all reason and justice to fix, upon the person who, without the imputation of fraud, has inadvertently committed an accidental mistake; and also where not to correct the mistake would be to give an unconscionable advantage to either party.[11]

In the case of mutual mistake, therefore, while equity generally follows the law, it may be prepared, if the occasion warrants, to refuse to grant a decree

6 *Preston v Luck* (1884) 27 ChD 497.
7 (1880) 15 ChD 215; followed in *Van Praagh v Everidge* [1902] 2 Ch 266.
8 *Tamplin v James* (1880) 15 ChD 215 at 217-218.
9 *Powell v Smith* (1872) LR 14 Eq 85.
10 *Watson v Marston* (1853) 4 De GM & G 230, 238, per Turner LJ.
11 *Barrow v Scammell* (1881) 19 ChD 175 at 182.

of specific performance of the contract against the mistaken party.[12] It is not possible, however, to specify the cases in which this remedy will be withheld, for the exercise of any discretionary jurisdiction must inevitably be governed by the particular circumstances of each case. But the guiding principle was stated by Lord Romilly in an instructive case where a freehold estate that was subject to an existing tenancy had been bought by the defendant at an auction under the honest, but mistaken, belief that the rent stated in the particulars of sale referred not to the whole, but only to half of the land. Had he read the particulars carefully he could have discovered the truth.[13] Lord Romilly MR said:

> If it appears upon the evidence that there was, in the description of the property, a matter on which a person might *bona fide* make a mistake, and he swears positively that he did make such mistake, and his evidence is not disproved, this court cannot enforce specific performance against him. If there appear on the particulars no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then I do not think it is sufficient for the purchaser to swear that he made a mistake or that he did not understand what he was about.[14]

In the result, the Master of the Rolls dismissed the bill for specific performance.

In *Paget v Marshall*[15] Bacon VC went further and held that in some circumstances a plaintiff's uncommunicated mistake as to the sense of the contract might be so serious that the defendant could properly be put to his election either to submit to rectification or allow rescission of the whole contract. This case has long been considered of doubtful authority,[16] and since the decision of the Court of Appeal in *Riverlate Properties Ltd v Paul*[17] such a course can only be supported on the ground that the defendant knew the plaintiff's mistake.[18]

b Unilateral mistake

In the case of unilateral mistake it is clear that if one party to the knowledge of the other is mistaken as to the fundamental character of the offer—if he did not intend, as the other well knew, to make the apparent contract—the apparent contract is a nullity and there is no need, indeed no room, for any equitable relief. However, although equity follows the law in this respect and admits that the contract is a nullity, it is prepared to clinch the matter by formally setting the contract aside or by refusing a decree for its specific performance.[19] In *Webster v Cecil*,[20] for instance:

> Cecil, who had already refused to sell his land to Webster for £2,000, wrote a letter to him in which he offered to sell for £1,250. Webster accepted by

12 Compare, for instance, the treatment of *Wood v Scarth*, p 249, above, by a common law court: (1858) 1 F & F 293 and by the Court of Chancery: (1855) 2 K & J 33. For a discussion of equitable relief, see Stoljar 28 MLR 265 at 269-272.
13 *Swaisland v Dearsley* (1861) 29 Beav 430.
14 Ibid at 433-434.
15 (1884) 28 ChD 255.
16 See *May v Platt* [1900] 1 Ch 616 at 623, per Farwell J.
17 [1975] Ch 133, [1974] 2 All ER 656.
18 See pp 267-270 above.
19 *Wilding v Sanderson* [1897] 2 Ch 534; *Re International Society of Auctioneers and Valuers, Baillie's Case* [1898] 1 Ch 110.
20 (1861) 30 Beav 62.

return of post, whereupon Cecil, realising that he had mistakenly written £1,250 for £2,250, immediately gave notice to Webster of the error.

This was operative mistake at common law. Knowledge of the mistake was clearly to be imputed to Webster and in the result Lord Romilly refused a decree of specific performance.[1]

A contract may also be rectified on the ground of unilateral mistake, if the plaintiff proves that it was intended to contain a certain term beneficial to himself, but that the defendant allowed it to be concluded without that term, knowing that the plaintiff was ignorant of its omission. For instance:

> A tender by the plaintiffs for the erection of a school for the defendants provided that the work should be completed in 18 months. The defendants, however, prepared a contract which provided for completion in 30 months, and the plaintiffs executed this contract without noticing the alteration. Before execution by the defendants, one of their officers discovered that the plaintiffs were ignorant of the alteration but they took no steps to disabuse them. The price for the work would have been higher had the tender been based on a period of 30 months.[2]

On these facts, rectification on the ground of common mistake was ruled out, since the parties held different views of what was intended to be inserted in the contract. Nevertheless, the court ordered the contract to be rectified on the ground of unilateral mistake by the substitution of the shorter for the longer period.[3]

In the interesting case of *Taylor v Johnson*[4] the respondent had granted the appellant an option to buy a piece of land of approximately ten acres. In due course the option was exercised and a contract was drawn up. In both the option and the contract the purchase price was stated to be $15,000. The respondent gave evidence that she had mistakenly believed that the purchase price was $15,000 per acre. The evidence suggested that the land was worth $50,000 but that if a proposed rezoning of the land went through, the value would be about $195,000. There was evidence from which the court inferred that the appellant knew of the respondent's mistake and deliberately set out to make it difficult for the respondent to discover the mistake. The majority of the High Court of Australia thought that on these facts the contract was valid at common law but was liable to be set aside in equity. In their joint judgment Mason ACJ, Murphy and Deane JJ said:

> A party who has entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate the first party's entering the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension.

1 In *Garrard v Frankel* (1862) 30 Beav 445 and *Harris v Pepperell* (1867) LR 5 Eq 1, the party aware of the mistake was given the option of having the contract set aside or of submitting to it with the mistake rectified.

2 *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555, [1961] 2 All ER 545.

3 See Megarry 77 LQR 318. See further cases discussed above, p 282.

4 (1983) 151 CLR 422, (1983) 45 ALR 265.

3 Documents mistakenly signed

A group of cases must now be considered which have long been treated as forming a separate category at common law and which may be regarded as an appendix to the general discussion of mistake. These cases occur where a person is induced by the false statement[5] of another, to sign a written document containing a contract that is fundamentally different in character from that which he contemplated. The fraudulent person may be the other party to the apparent contract but more often he is a stranger. The following is a typical illustration of the situation:

> Lord William Neville produces to Clay some documents entirely covered with blotting paper except for four blank spaces that have been cut in it. He says that the hidden documents concern a private family matter and that his own signature requires a witness. Thereupon Clay signs his name in the blank spaces. The truth is that the documents are promissory notes to the value of £11,113 signed by Clay in favour of Lewis. On the faith of these notes Lewis advances money to Lord William Neville.[6]

Such a case as this is affected by mistake in the sense that the first victim of the fraud, the person who signs the document, appears to have made a contract or a disposition of property, though his intention was to append his signature to a transaction of an entirely different character. The category of document actually signed is not what he thought it was. But nevertheless can he rely upon this fact as a defence if he is later sued upon the apparent contract by the second victim of the fraud, as for instance by the man who has given value in good faith for a promissory note?

The rule applicable to such a case has come to be that the mistaken party will escape liability if he satisfies the court that the signed instrument is radically different from that which he intended to sign and that his mistake was not due to his carelessness.

The origin of this rule is to be found in the mediaeval common law relating to deeds.[7] At least as early as the thirteenth century, a deed was regarded as being of so solemn a nature that it remained binding upon the obligor until it had been cancelled and returned to him. It was immaterial that this might cause injustice. In one case, for instance, in 1313, an absolute deed by which the defendant granted £100 to the plaintiffs was accompanied by a contemporaneous deed which relieved him of this obligation if he satisfied a certain condition. The condition was satisfied, but the absolute deed survived, and upon its production the payment of the £100 was enforced.[8] The only defence open to the defendant in such circumstances was to plead that the deed as executed was not his deed in the sense that it did not represent his intention and was not what he had in mind to do. He did not in truth consent to what he had done. In the language of the age, *scriptum predictum non est factum suum.*

In the course of its development, this plea of *non est factum* was made available to a defendant who could not read, whether owing to illiteracy or

5 *Hasham v Zenab* [1960] AC 316 at 335.
6 *Lewis v Clay* (1897) 67 LJQB 224.
7 Fifoot *History and Sources of the Common Law* pp 231-233, 248-249.
8 *Fifoot* pp 232, 244-246, *Esthalle v Esthalle* (1613) YB 6 & 7 Ed 2 Eyre of Kent, vol II (27 Selden Society 21).

blindness, so as to enable him to escape liability upon proof that the written terms of the deed did not correspond with its effect as explained to him before he put his seal to it. In 1582, for instance, in *Thoroughgood's Case*.[9]

> William Chicken, being in arrears with his rent, tendered to his landlord, Thoroughgood, a deed by which he was relieved from 'all demands whatsoever' which Thoroughgood had against him. Thus the dispensation on its face comprised not only arrears of rent, but also the right to recover the land. Thoroughgood was illiterate, but a bystander, affecting to be helpful, seized the deed and said: 'The effect of it is this, that you do release to William Chicken all the arrears of rent that he doth owe you and no otherwise, and thus you shall have your land back again.' After replying, 'If it be no otherwise, I am content,' Thoroughgood sealed the deed. Chicken subsequently sold the land to an innocent purchaser.

Thoroughgood sued in trespass *quare clausum fregit* and recovered his land. It was said by the Court of Common Pleas to be 'the usual course of pleading' that the defendant was a layman and without learning, and that he had been deceived by a distorted recital of the contents of the deed.

The plea, as its language showed, was confined to cases where the defendant was sued on a deed, and at a time when illiteracy was frequent enough to demand special protection, it was unexceptionable. It might have been wiser, therefore, to have discarded it altogether when society became more sophisticated; but in the course of the nineteenth century the courts extended it with little reflection and without warrant to cases of simple contracts, and abandoned the requirement of illiteracy. The justification for these extensions was now said to be want of consent. On this view the contract was a complete nullity. Thus in 1869, in *Foster v Mackinnon*,[10] the following passage occurs in the judgment of a strong court delivered by Byles J:

> It seems plain, on principle and on authority, that if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.[11]

Thus the intention of the mistaken party is the vital factor. In the words of Lord Wilberforce: 'It is the lack of consent that matters, not the means by which this result was brought about.'[12] The document is a nullity just as if a rogue had forged the signer's signature.[13] But fraud that does not induce lack of consent merely renders the contract voidable.[14]

9 (1582) 2 Co Rep 9a.

10 (1869) LR 4 CP 704. Present, Bovill CJ, Byles, Keeting and Montague Smith JJ. For the facts, see p 288, below.

11 Ibid at 711.

12 *Saunders v Anglia Building Society* [1971] AC 1004 at 1026, [1970] 3 All ER 961 at 972.

13 Ibid affirming, *sub nom Gallie v Lee* [1969] 2 Ch 17 at 30, [1969] 1 All ER 1062 at 1066, CA, per Lord Denning MR.

14 See, for example, *Norwich and Peterborough Building Society v Steed (No 2)* [1993] 1 All ER 330.

It will be observed that the judgment of Byles J, which was approved by the House of Lords in *Saunders v Anglia Building Society*[15] (known in the lower courts as *Gallie v Lee*), expanded the scope of the plea *non est factum* in two respects; it extended it to unsealed contracts and to the situation where an educated man, to whom no negligence is attributable, has failed to scrutinise what he has signed.[16] Nevertheless, the judiciary is now agreed that, if the confidence of third parties who normally rely upon the authenticity of signatures is not to be eroded, the plea must be confined within narrow limits. A heavy burden of proof lies upon the party by whom it is invoked. The main difficulty is to define the degree of difference that must exist between the signed contract and that which the mistaken party intended to sign before it can be said that the consent of the signatory was totally lacking. A definitive formula of universal application is scarcely possible. Everything depends upon the circumstances of each case. It will be recalled that the court in *Foster v Mackinnon* required the written contract to be 'of a nature altogether different' from that which the mistaken party believed it to be. In *Saunders v Anglia Building Society* the Law Lords suggested a variety of alternative expressions, such as 'radically', 'fundamentally', 'basically', 'totally' or 'essentially' different in character or substance from the contract intended; but it is doubtful whether these add much to what was said by Byles J. In the comparatively few cases in which the plea has succeeded, the degree of difference between the intention and the act of the signatory has been wide enough to satisfy the most exacting of arbiters. The contract, for instance, has been held void where the signatory's intention was directed to a power of attorney, not to a mortgage;[17] to a guarantee, not to a bill of exchange;[18] to a testification to the fraudulent person's signature, not to a promissory note for £11,113;[19] to a proposal for insurance, not to a guarantee of the fraudulent person's overdraft.[20]

The difficulty that confronts a party who pleads that a contract signed by him is altogether different from what was in his mind is well illustrated by *Saunders v Anglia Building Society*[1] where the facts were as follows:

> The plaintiff, a widow 78 years of age, gave the deeds of her leasehold house to her nephew in order that he might raise money on it. She made it a condition that she should remain in occupation of it until she died. She knew that the defendant, a friend of her nephew, would help him to arrange a loan.
>
> A document was prepared by a dishonest managing clerk which assigned the leasehold not by way of gift to the nephew, but by way of sale to the equally dishonest defendant. Some days later the defendant took this document to the plaintiff and asked her to sign it. She had broken her glasses and was unable to read, but in reply to her request the defendant

15 [1971] AC 1004.

16 As to the meaning of negligence in this context, see pp 289-290, below.

17 *Bagot v Chapman* [1907] 2 Ch 222.

18 *Foster v Mackinnon* (1869) LR 4 CP 704. But the bill was not to be void if, at a new trial, the signatory was found to have been negligent; p 289, below.

19 *Lewis v Clay* (1897) 67 LJQB 224.

20 *Carlisle and Cumberland Banking Co v Bragg* [1911] 1 KB 489, p 289, below. In *Muskham Finance Co v Howard* [1963] 1 QB 904, [1963] 1 All ER 81, the difference between the intention and the act of the signatory was far less pronounced than in the three cases cited above.

1 [1971] AC 1004, [1970] 3 All ER 961. Stone 88 LQR 190.

told her that the document was a deed of gift to her nephew. She therefore executed it. The defendant, who paid no money either to the plaintiff or to her nephew, mortgaged the house to a building society for £2,000, but failed to pay the instalments due under the transaction.

The plaintiff, at the instigation of her nephew, sued the defendant and the building society for a declaration that the assignment was void. She invoked the doctrine *non est factum*, claiming that what she had intended was a gift of the property to her nephew, not its outright sale to the defendant.

The House of Lords, affirming the decision of the Court of Appeal, rejected this claim. The distinction stressed by the plaintiff was no doubt impressive at first sight, but when considered in the light of the evidence it did not establish that the assignment to the defendant was totally different in character and nature from what she had in mind. Three of the Law Lords adopted the view of Russell LJ in the Court of Appeal that the paramount consideration was the 'object of the exercise'.[2] According to the evidence, the object of the plaintiff was to enable the assignee to raise a loan on the security of the property for the benefit of her nephew—an object that would have been attained under the signed document, had the defendant acted in an honest manner.[3]

A question that was canvassed by the House of Lords in this case was whether the distinction between the character and the contents of a document, which had gradually won the recognition of the courts, should be discarded. The effect of this distinction was that if a party appreciated the character and nature of the contract that he had signed, he could not escape liability merely because he was mistaken as to its details or its contents. In *Howatson v Webb*,[4] for instance:

> The defendant held certain property at Edmonton as the trustee and nominee of a solicitor by whom he was employed as managing clerk. After obtaining new employment, he executed certain deeds which, in answer to his request, were described by the solicitor as being 'just deeds transferring that property'. In fact one of the deeds was a mortgage by the solicitor to X as security for a loan of £1,000. The mortgage was transferred by X to the plaintiff, who now sued the defendant under the personal covenant in the deed for the repayment of the sum together with interest.

The defendant pleaded *non est factum*. What he had in mind was an absolute conveyance to a new nominee, not a conveyance to a third party under which he assumed personal obligations. Warrington J, however, held that the mistake affected only the contents of the deed and that therefore the plea failed. 'He was told that they were deeds relating to the property to which they did in fact relate. His mind was therefore applied to the question of dealing with that property. The deeds did deal with that property ... He knew he was dealing with the class of deed with which in fact he was dealing, but did not ascertain its contents.'[5] A Court of

2 [1969] 2 Ch at 40-41, adopted by Viscount Dilhorne, Lord Wilberforce and Lord Pearson. See also, *Mercantile Credit Co Ltd v Hamblin* [1965] 2 QB 242, [1964] 3 All ER 592.

3 This approach, however, ignored the overriding condition that nothing was to interfere with the plaintiff's right to remain in occupation of the house.

4 [1907] 1 Ch 537; affd [1908] 1 Ch 1.

5 [1907] 1 Ch at 549. See also *Bagot v Chapman* [1907] 2 Ch 222 at 227, per Swinfen Eady J. In affirming the decision of Warrington J, in *Howatson v Webb* [1908] 1 Ch 1, the Court of Appeal regarded it as so obviously correct as not to merit considered judgments, and Cozens-Hardy MR remarked that 'it would be a waste of time if I were to do more than say that I accept and approve of every word of his judgment'.

Appeal later explained this decision on the ground that 'the character and class of document was that of a conveyance of property, and Webb knew this'.[6]

In *Gallie v Lee*, Lord Denning MR rejected this distinction in forcible and convincing terms. Among other objections he found it irrational; a mistake as to contents may be no less fundamental or radical than one relating to the character of a contract. The distinction would mean, for instance, that the plea of *non est factum* will not avail a man who signs a bill of exchange for £10,000 having been told that it is for £100, since he fully appreciates the character of the document. Why should the result be different if he believes the document to be a bill of exchange for £1,000, though in truth it is a guarantee for the same sum?[7] Salmon LJ agreed that the liability of a signatory should not be allowed to turn upon 'a relatively academic distinction', but he was content to retain it as affording at least some restraint upon a plea that had become 'a dangerous anachronism in modern times'.[8] In the House of Lords, Lord Reid expressed his dissatisfaction with the distinction,[9] Lord Wilberforce described it as 'terminologically confusing and in substance illogical',[10] while Viscount Dilhorne accepted the criticisms of Lord Denning.[11] The inference is that it has received its quietus.

The final question is whether the plea of *non est factum* will be withheld from a party if the mistake was due to his own negligence. In *Foster v Mackinnon*,[12] the Court of Common Pleas stated in unambiguous terms that a signatory is barred by his negligence from pleading his mistake against an innocent third party who has acted to his loss upon the faith of the document.

> The action before the court was against the defendant, described as 'a gentleman far advanced in years', as indorser of a bill of exchange. It appeared that one Callow took the bill to him and asked him to sign it, telling him that it was a guarantee. The defendant, in the belief that he was signing a guarantee similar to one which he had given before, signed the bill on the back. He looked only at the back of the paper, but it was in the ordinary shape of a bill of exchange, and it bore a stamp the impress of which was visible through the paper. The bill was later negotiated to the plaintiff who took it without notice of the fraud.

The action was first tried by the Lord Chief Justice, who told the jury that if the defendant signed the paper without knowing that it was a bill and under the belief that it was a guarantee, and if he was not guilty of any negligence in so signing the paper, then he was entitled to their verdict. The jury found that the defendant had not been negligent and returned a verdict in his favour. On appeal, the Court of Common Pleas endorsed the direction given by the trial judge, but ordered a fresh trial on the ground that the issue of negligence had not been fully and satisfactorily considered. In the result, therefore, the right of the defendant to sustain the plea of *non est factum* was to depend upon whether he was eventually found to have been guilty of negligence.

6 *Muskham Finance Ltd v Howard* [1963] 1 QB 904 at 912, [1963] 1 All ER 81 at 83, *per curiam*.
7 [1969] 2 Ch at 31-32, [1969] 1 All ER at 1066. See also Salmon LJ at 43-44 and 1078, respectively.
8 Ibid at 44 and 1078, respectively.
9 [1971] AC at 1017, [1970] 3 All ER 961 at 964.
10 Ibid at 1034-1035 and 971, respectively.
11 Ibid at 1022 and 967, respectively.
12 (1869) LR 4 CP 704.

Unfortunately, this ruling that negligence is material was thrown into confusion by the decision of a later Court of Appeal in *Carlisle and Cumberland Banking Co v Bragg*[13] on the following facts:

> A man called Rigg produced a document to Bragg and told him that it was a copy of a paper concerning an insurance matter which Bragg had signed some days previously and which had since got wet and blurred in the rain. Bragg signed without reading the paper. The document was in fact a continuing guarantee of Rigg's current account with the plaintiff bank. The jury found that Bragg had been negligent.

Despite this finding, the Court of Appeal affirmed the decision of Pickford J and held that Bragg was not estopped by his negligence from pleading *non est factum* since *Foster v Mackinnon* was inapplicable in the instant circumstances. This departure from the principle laid down by Byles J in *Foster v Mackinnon* was based upon at least two erroneous grounds.

First, the construction put upon the judgment of Byles J, was that negligence is material only where the signed document is a negotiable instrument. What in fact the learned judge clearly indicated was that the signer of a negotiable instrument would be liable, negligence or no negligence; and that negligence was relevant in relation to documents other than negotiable instruments: for example (as in the actual case before him) to a guarantee.

Secondly, it was said that, even if negligence were relevant, it would not be material unless the defendant owed a duty of care to the plaintiff. This reasoning was demolished by the House of Lords in *Saunders v Anglia Building Society*. No doubt a duty of care is an essential element in a plaintiff's cause of action when he sues in tort for negligence, but it has no place where a defendant is sued on a contract. In that context it has no technical significance, and it just means carelessness. In *Foster v Mackinnon*, for instance, the trial judge rejected the plea of *non est factum* not because the defendant had violated a duty of care owed to his neighbour, but on the simple ground that he had failed to act as a reasonable man. In the words of Lord Wilberforce:

> In my opinion, the correct rule, and that which prevailed until *Bragg's* case, is that, leaving aside negotiable instruments to which special rules may apply, a person who signs a document, and parts with it so that it may come into other hands, has a responsibility, that of the normal man of prudence, to take care what he signs. ... I would add that the onus of proof in this matter rests on him, ie to prove that he acted carefully, and not in the third party to prove the contrary. I consider, therefore, that *Carlisle and Cumberland Banking Co v Bragg* ... was wrong, both in the principle it states and in its decision, and that it should no longer be cited for any purpose.[14]

The same principles apply where a person signs a document, knowing that it contains blanks which the other party will fill in.[15]

13 [1911] 1 KB 489.

14 [1971] AC 1004 at 1027, [1970] 3 All ER at 972-973. Similar statements were made by the other Law Lords. Thus Lord Reid said: 'The plea [of *non est factum*] cannot be available to anyone who was content to sign without taking the trouble to find out at least the general effect of the document ... It is for the person who seeks the remedy to show that he should have it.' Ibid at 1016 and 968-969, respectively.

15 *United Dominions Trust v Western* [1976] QB 513, [1975] 3 All ER 1017; Marston [1976] CLJ 218.

Chapter 9

Misrepresentation, duress and undue influence

SUMMARY

1 Misrepresentation[1]

A INTRODUCTION

Misrepresentation straddles many legal boundaries. More than other topics in the law of contract, it is an amalgam of common law and equity. Equity has,

1 Stoljar *Mistake and Misrepresentation* (1968); Spencer Bower, Turner and Handley *The law of Actionable Misrepresentation* (4th edn, 2000); Greig 87 LQR 179.

for instance, acted to fill *lacunae* created by the narrow common law definition of fraud and to supplement the inadequate common law remedies for misrepresentation. Again misrepresentation has roots both in contract and in tort, and it is impossible to give a coherent account of the subject without discussing both contract and tort together, though the present account will naturally concentrate on the contractual aspect.

Even within the law of contract, the rules relating to misrepresentation cannot be viewed in isolation. They are part of a web of rules (which includes also the rules as to terms of a contract[2] and as to mistake[3]) affecting the nature and extent of contractual undertakings. Although it is convenient for purposes of exposition to discuss these topics in isolation, practical problems often require their simultaneous application.

The basic problem in misrepresentation is the effect of pre-contractual statements. Suppose that A agrees to sell a secondhand car to B for £5000 and in the course of the pre-contractual negotiations he states that it is a 1989 model which has run for only 20,000 miles. After B has bought the car, he discovers that these statements are untrue. What remedies, if any, are available? The initial common law approach to this problem is based on the principle that promissory statements should be ineffective unless they form part of the contract. So the first question to be asked in our hypothetical case is whether A has not merely stated that the car is a 1989 model and has covered only 20,000 miles, but has *contracted* that this is so.[4]

To approach the matter in this way is logical enough, but the result has not been satisfactory. Dissatisfaction might properly have been directed either at the rules determining when a statement is to be treated as forming part of the contract[5] or at the sometimes strange reluctance of the courts to hold apparently serious undertakings to be terms of the contract.[6] But in practice, it has been felt that the solution should take the form of devising remedies, which do not depend on holding such statements to be terms of the contract.

Hence arose the concept of a 'mere representation'—a statement of fact which had induced the representee to enter into the contract but which did not form part of the contract. The common law came to give rescission for fraudulent misrepresentation and to grant damages in the tortious action of deceit. During the nineteenth century, equity also developed a general remedy of rescission for all misrepresentations inducing contracts. The right to rescind, however, was subject to the operation of certain 'bars',[7] and equity could not grant financial compensation for consequential loss except in the restricted form of an 'indemnity'.

2 Pp 134-145, above.

3 Ch 8, above.

4 This approach can be seen to fit in with the rules about consideration (see eg *Roscorla v Thomas* (1842) 3 QB 234, p 83, above) and indeed with the view that the English law of contract is concerned with the enforcement of bargains, since clearly it is more expensive to sell warranted cars than unwarranted cars. See Hepple [1970] CLJ 122 at 131-132.

5 Pp 139-145, above. Both because the rules make results unpredictable and because some of them, especially the parol evidence rule, hinder decisions that an oral statement forms part of the contract.

6 Eg *Oscar Chess v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370. Cf *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 2 All ER 65, [1965] 1 WLR 623, and *Beale v Taylor* [1967] 3 All ER 253, [1967] 1 WLR 1193.

7 Pp 315-319, below.

Until 1963, however, it was held to be a fundamental principle that there could be 'no damages' for innocent misrepresentation'.[8] It was well established that an action for damages based on a pre-contractual statement must show either that the statement was fraudulent or that it was a term of the contract. In 1963, it was decided by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[9] that the principle 'no damages for innocent misrepresentation' had never been fundamental or, at least, was no longer fundamental. In law, however, it is impossible to expunge the heresies (or outworn orthodoxies) of the past and all cases decided before 1963 have to be re-examined in the light thus shed on them.

The decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[10] was a decision in tort and its impact on the law of contract was not easy to assess. Before the courts had had time to solve the problems thus created, Parliament intervened by passing the Misrepresentation Act 1967. This Act did not attempt a radical restatement of the law. It made important changes in the law but at all points it assumes a knowledge of the existing law. This is a dangerous assumption since, in some respects, the pre-Act law was far from clear. The draftsman did not avoid the hazards thus created but compounded them by curious drafting. In the result, though the Misrepresentation Act undoubtedly improves the position of representees as a class, it makes the exposition of the law even more complex.

We shall start our discussion by examining more fully precisely what is meant by misrepresentation and considering the types of misrepresentation. This will be followed by an account of the remedies for misrepresentation and a summary of the effects of the Misrepresentation Act 1967. Finally we shall examine those exceptional cases where the law imposes liability for non-disclosure, and the relationship between misrepresentation and estoppel.

B THE NATURE OF MISREPRESENTATION

A representation is a statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract. A misrepresentation is simply a representation that is untrue. The representor's state of mind and degree of carefulness are not relevant to classifying a representation as a misrepresentation but only to determining the type of misrepresentation, if any.[11]

It has already been observed[12] that while terms of a contract may be of a promissory nature, the concept of a representation is limited to statements of facts. But precedent has given a sophisticated meaning to the notion of a statement of fact and it is therefore necessary to consider in some detail the meaning of representation and also of inducement.

8 *Heilbut, Symons & Co v Buckleton* [1913] AC 30 at 49, per Lord Moulton. Innocent at this stage meant simply non-fraudulent.
9 [1964] AC 465, [1963] 2 All ER 575.
10 Ibid.
11 See pp 301-309, below.
12 See p 292, above.

1 THE MEANING OF REPRESENTATION

A representation means a statement of *fact* not a statement of intention or of opinion or of law.

A representation, as we have seen, relates to some existing fact or some past event. Since it contains no element of futurity it must be distinguished from a statement of intention. An affirmation of the truth of a fact is different from a promise to do something in the future, and produces different legal consequences.[13] This distinction is of practical importance. If a person alters his position on the faith of a representation, the mere fact of its falsehood entitles him to certain remedies.[14] If, on the other hand, he sues upon what is in truth a promise, he must show that this promise forms part of a valid contract. The distinction is well illustrated by *Maddison v Alderson*,[15] where the plaintiff, who was prevented by the Statute of Frauds from enforcing an oral promise to devise a house, contended that the promise to make a will in her favour should be treated as a representation which would operate by way of estoppel. The contention, however, was dismissed, for:

> The doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts.[16]

Despite the antithesis, however, between a representation of fact which is untrue and an unfulfilled promise to do something *in futuro*, it by no means follows that a statement of intention can never be a representation of fact. It at least implies that the alleged intention does indeed exist, and if this is not true there is a clear misrepresentation of an existing fact. The state of mind is not what it is represented to be, and as Bowen LJ observed in *Edgington v Fitzmaurice*.

> The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.[17]

In this case, a company issued a prospectus which invited a loan from the public and stated that the money would be employed in the improvement of the buildings and the extension of the business. This was untrue, since the intention from the first had been to expend the loan upon the discharge of certain existing liabilities. It was held that the prospectus was a fraudulent misrepresentation of a fact. The company had not made a promise which they might or might not be able to fulfil; they had simply told a lie. It will be perceived that both the requirement that the representation be a statement of fact and its qualification in *Edgington v Fitzmaurice* owe much to an origin in fraud. It is difficult to misrepresent the state of one's mind other than dishonestly.

13 *Beattie v Lord Ebury* (1872) 7 Ch App 777 at 804, per Mellish LJ.
14 Pp 309-324, below.
15 (1883) 8 App Cas 467; p 243, above.
16 Ibid at 473. The judgment of Stephen J in the court of first instance ((1879) 5 ExD 293) should be closely studied.
17 (1885) 29 ChD 459 at 483; and see *Angus v Clifford* [1891] 2 Ch 449 at 470, per Bowen LJ and the observations of Lord Wilberforce in *British Airways Board v Taylor* [1976] 1 All ER 65 at 68, [1976] 1 WLR 13 at 17.

The expression of an opinion properly so called, ie the statement of a belief based on grounds incapable of actual proof, as where the vendor of a business estimates the prospective profits at so much a year, is not a representation of fact, and, in the absence of fraud, its falsity does not afford a title to relief. Thus in *Bisset v Wilkinson*,[18] the vendor of a holding in New Zealand, which had not previously been used as a sheep farm, told a prospective purchaser that in his judgement the carrying capacity of the land was two thousand sheep. It was held that this was an honest statement of opinion of the capacity of the farm, not a representation of its actual capacity.

It has never been doubted, however, that an expression of opinion may in certain circumstances constitute a representation of fact, as for instance where it is proved that the opinion was not actually held, or that it was expressed upon a matter upon which the speaker was entirely ignorant.

> It is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion ... But if the facts are not equally well known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion.[19]

Thus, if it can be proved that the speaker did not hold the opinion or that a reasonable man possessing his knowledge could not honestly have held it, or that he alone was in a position to know the facts upon which the opinion must have been based[20] there is a misrepresentation of fact for which a remedy lies. In *Smith v Land and House Property Corpn*,[1] a vendor described his property in August as being 'let to Mr Frederick Fleck (a most desirable tenant) at a rental of £400 a year (clear of rates, taxes, insurance, etc) for an unexpired term of 27½ years, thus offering a first-class investment'. In fact the Lady Day rent had been paid by instalments under pressure and no part of the Midsummer rent had been paid. It was held that the description of Fleck as 'a most desirable tenant' was not a mere expression of opinion. It was an untrue assertion that nothing had occurred which could be regarded as rendering him an undesirable tenant.

Again, if what is really an opinion is stated as a fact, as for instance where company promoters, desiring to magnify the future earning capacity of a mine, publish the forecasts of experts as if they were positive facts,[2] there is a representation in the true sense of the term.

Somewhat akin to the distinction between opinion and fact is the general rule that *simplex commendatio non obligat*. Eulogistic commendation of the *res vendita* is the age-old device of the successful salesman. Thus to describe land as 'uncommonly rich water meadow'[3] or as 'fertile and improvable',[4] is not to make a representation of fact. This principle has in the past been applied in a fashion rather indulgent to salesmen and there is much to be said for

18 [1927] AC 177.
19 *Smith v Land and House Property Corpn* (1884) 28 ChD 7 at 15, per Bowen LJ.
20 *Brown v Raphael* [1958] Ch 636, [1958] 2 All ER 79.
1 (1884) 28 ChD 7.
2 *Reese River Silver Mining Co Ltd v Smith* (1869) LR 4 HL 64.
3 *Scott v Hanson* (1829) 1 Russ & M 128.
4 *Dimmock v Hallett* (1866) 2 Ch App 21.

applying more demanding standards.[5] Certainly a statement which purports to be supported by facts and figures, as for instance that timber trees are 'of an average size approaching a given number of feet,[6] does not cease to be a representation of fact merely because it is expressed in a laudatory vein. The Trade Descriptions Act 1968 extends the criminal liability for false descriptions; but, by section 35, a contract for the supply of goods is not to be 'unenforceable' by reason only of a contravention of the Act.

It is clear that a representation of law cannot found an action merely because it is wrong. But a representation of law is basically a statement of the representor's opinion as to what the law is and it follows that if the representor does not in fact hold this opinion he misrepresents his state of mind and liability should accrue under the principle in *Edgington v Fitzmaurice*.[7] It might further be argued that, as with other statements of opinion, there will be cases where the representor implicitly represents that he has reasonable grounds for his belief. In any case it is difficult to distinguish between representations of fact and law. A representation, for instance, that the drains of a house are sanitary is obviously a statement of fact. It is equally obvious that to state an abstract proposition of law, as for instance that an oral contract of guarantee is not enforceable by action, is a representation of law.[8] The distinction, however, becomes intractable when a statement of fact is coupled, expressly or implicitly, with a proposition of law. It is evident that in practice contracts are much more likely to be induced by mixed statements of this kind than by abstract propositions of law. Suppose that, as in *Solle v Butcher*,[9] a man states that a flat is not an old but a new flat and is therefore outside the Rent Restrictions Act, is this to be regarded as a statement of fact or of law? This particular aspect of the distinction is discussed later.[10]

Can silence constitute misrepresentation?

A representation, whether expressed as a positive assertion of fact or inferred from conduct, normally assumes an active form, but an important question is whether it can ever be implied from silence. To put the enquiry in another form: when, if ever, is it the duty of a contracting party to disclose facts that are within his own knowledge?

The general rule is that mere silence is not misrepresentation.[11] 'The failure to disclose a material fact which might influence the mind of a prudent

5 See the observations of Lord Diplock in *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] AC 731 at 743, [1979] 2 All ER 927 at 933.

6 *Lord Brooke v Rounthwaite* (1846) 5 Hare 298.

7 (1885) 29 ChD 459; Hudson (1958) SLT 16. A misrepresentation as to foreign law is a misrepresentation of fact: *André & Cie SA v Ets Michel Blanc & Fils* [1979] 2 Lloyd's Rep 427.

8 *Beattie v Lord Ebury* (1872) 7 Ch App 777 at 802; *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314 at 323, [1960] 1 WLR 549 at 560. It has been held that a common *mistake* of law has no effect, eg where the parties to a contract each believe that the other is bound to make it, when as a matter of fact neither is so bound: *British Homophone Ltd v Kunz and Crystallate Gramophone Record Manufacturing Co Ltd* (1935) 152 LT 589. Winfield 59 LQR 327; this case was based on the view held by English law for 150 years that there was a fundamental difference between a mistake of law and a mistake of fact. This view was rejected by the House of Lords in *Kleinwort Benson v Lincon City Council* [1998] 4 All ER 513. And see pp 724-727, below.

9 [1950] 1 KB 671, [1949] 2 All ER 1107, p 244, above. See also *Laurence v Lexcourt Holdings Ltd* [1978] 2 All ER 810, [1978] 1 WLR 1128.

10 Pp 724-727, below.

11 *Fox v Mackreth* (1788) 2 Cox Eq Cas 320 at 320 and 321, per Lord Thurlow.

contractor does not give the right to avoid the contract'[12] even though it is obvious that the contractor has a wrong impression that would be removed by disclosure.[13] Tacit acquiescence in the self-deception of another creates no legal liability, unless it is due to active misrepresentation or to misleading conduct. Thus, to take one important example, there is no general duty of disclosure in the case of a contract of sale, whether of goods or of land.

> There being no fiduciary relation between vendor and purchaser in the negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, however, it may be viewed by moralists. But a single word, or (I may add) a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a Court of Equity to refuse a decree for a specific performance of the agreement.[14]

This general rule, of course, is not confined to contracts of sale. In *Turner v Green*,[15] for instance:

> Shortly before two solicitors effected a compromise on behalf of their respective clients, the plaintiff's solicitor was informed of certain legal proceedings which made the compromise a prejudicial transaction for the defendant. He kept the information to himself.

It was held that the solicitor's silence was not sufficient ground for withholding a decree of specific performance.

Silence constitutes misrepresentation in three cases

There are, however, at least three sets of circumstances in which silence or non-disclosure affords a ground for relief. These are, firstly, where the silence distorts positive representation; secondly, where the contract requires *uberrima fides*; thirdly, where a fiduciary relation exists between the contracting parties. Only the first of these will be discussed at this stage.[16]

Silence upon some of the relevant factors may obviously distort a positive assertion. A party to a contract may be legally justified in remaining silent about some material fact, but if he ventures to make a representation upon the matter it must be a full and frank statement, and not such a partial and fragmentary account that what is withheld makes that which is said absolutely false.[17] A half truth may be in fact false because of what it leaves unsaid, and, although what a man actually says may be true in every detail, he is guilty of misrepresentation unless he tells the whole truth. If a vendor of land states

12 *Bell v Lever Bros Ltd* [1932] AC 161 at 227, per Lord Atkin.
13 *Smith v Hughes* (1871) LR 6 QB 597.
14 *Walters v Morgan* (1861) 3 De GF & J 718 at 723-24, per Lord Campbell.
15 [1895] 2 Ch 205.
16 See pp 329-334, below.
17 *Oakes v Turquand and Harding* (1867) LR 2 HL 325 at 242-343. In *Jaques v Lloyd D George & Partners Ltd* [1968] 2 All ER 187 at 190-191, [1968] 1 WLR 625 at 630. Lord Denning MR suggested that an estate agent who tendered a contract to a client for signature, impliedly represented that it contained the usual provision for payment, viz on completion of the sale only, and that failure to reveal that the contract contained a provision for payment more favourable to the estate agent might, without more, amount to a misrepresentation. These remarks were obiter and should be treated with some reserve. Wilkinson 31 MLR 700.

that the farms are let, he must not omit the further fact that the tenants have given notice to quit.[18] If a tradesman accepts a dress for cleaning and asks the client to sign a document, telling him that it exempts him from liability, for damage to beads and sequins, though in fact the exemption extends to 'any damage howsoever arising', he has conveyed a false impression which amounts to a misrepresentation.[19]

Moreover, a party who makes a false statement in the belief that it is true comes under an obligation to disclose the truth should he subsequently discover that he was mistaken.[20] Similarly if he makes a statement which is true at the time, but which is found to be untrue in the course of the subsequent negotiations, he is equally under an obligation to disclose the change of circumstances. This latter issue was raised in *Davies v London and Provincial Marine Insurance Co.*[1]

> A company ordered the arrest of their agent in the belief that he had committed a felony under the Larceny Act 1861. Certain friends of the agent, in order to prevent his arrest, offered to deposit a sum of money as security for any deficiency for which he might be liable. While this offer was under consideration the company, having been advised by counsel that no felony had been committed, withdrew the instructions for arrest. Later in the same day the offer was renewed and it was accepted by the company without disclosing that there could no longer be any question of arrest.

It was held that the contract must be rescinded.

2 THE MEANING OF INDUCEMENT

A representation does not render a contract voidable unless it was intended to cause and has in fact caused the representee to make the contract. It must have produced a misunderstanding in his mind, and that misunderstanding must have been one of the reasons which induced him to make the contract. A false statement, whether innocent or fraudulent, does not *per se* give rise to a cause of action.

It follows from this that a misrepresentation is legally harmless if the plaintiff:

(a) never knew of its existence; or
(b) did not allow it to affect his judgement; or
(c) was aware of its untruth.

Let us take these hypotheses *seriatim*.

(a) A plaintiff must always be prepared to prove that an alleged misrepresentation had an effect upon his mind, a task which he certainly cannot fulfil if he was never aware that it had been made. Thus in one case a shareholder who pleaded that he had been induced to acquire shares by a

18 *Dimmock v Hallett* (1866) 2 Ch App 21.
19 *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805, [1951] 1 All ER 631, p 180, above. See also *Ames v Milward* (1818) 8 Taunt 637.
20 *Davies v London and Provincial Marine Insurance Co* (1878) 8 ChD 469 at 475, per Fry J; *With v O'Flanagan* [1936] Ch 575, [1936] 1 All ER 727.
1 (1878) 8 ChD 469. Cf *Wales v Wadham* [1977] 2 All ER 125, [1977] 1 WLR 199, criticised Phillips 40 MLR 599 and *Argy Trading Development Co v Lapid Developments Ltd* [1977] 3 All ER 785, [1977] 1 WLR 444.

misrepresentation, failed in his action for rescission, since, though false reports concerning the financial state of the company had previously been published, he was unable to prove that he had read one syllable of the reports or that anyone had told him of their contents.[2] Perhaps the most remarkable case on the subject is *Horsfall v Thomas*,[3] where the facts were these:

> A gun containing a defect was delivered to a buyer, and after being fired for six rounds, flew to pieces. It is not quite clear what exact form the defect took, for the case was withdrawn from the jury. The buyer alleged that 'the breach end of the chamber was all soft and spongy, and that a metal plug had been driven into the breach over this soft part'.[4] Bramwell B said that the seller or his workmen 'had done something to the gun which concealed the defect in it'. But one fact which was quite clear was that the buyer had never examined the gun.

To an action brought upon a bill of exchange which the buyer had accepted by way of payment, it was pleaded that the acceptance had been induced by the fraud and misrepresentation of the seller. The Court of Exchequer Chamber unanimously held, however, that even if all the allegations of the buyer could be proved, his plea could not succeed, for since he had never examined the gun, the attempt to conceal the defect had produced no effect upon his mind.[5]

(b) A representee who does not allow the representation to affect his judgement, although it was designed to that end, cannot make it a ground for relief. He may, for instance, have regarded it as unimportant, as in *Smith v Chadwick*,[6] where:

> A prospectus contained a false statement that a certain important person was on the board of directors, but the plaintiff frankly admitted in cross-examination that he had been in no degree influenced by this fact.

He may on the other hand have preferred to rely upon his own acumen or business sense or upon an independent report which he specially obtained. Thus in *Attwood v Small*:[7]

> A vendor accompanied an offer to sell a mine with statements as to its earning capacities which were exaggerated and unreliable. The buyers agreed to accept the offer if the vendor could verify his statements and they appointed experienced agents to investigate the matter. The agents, who visited the mine and were given every facility for forming a judgment, reported that the statements were true, and ultimately the contract was completed.

2 *Re Northumberland and Durham District Banking Co, ex p Bigge* (1858) 28 LJ Ch 50.
3 (1862) 1 H & C 90.
4 Ibid at 94-95.
5 This decision, although a simple illustration of the doctrine that an intention to mislead must be followed by success in order to justify rescission, is not altogether satisfactory on other grounds. Bramwell B, in delivering the judgment of the court, indicated that the manufacturing seller of an article is bound to disclose any latent defect of which he is aware, but if this is the rule, it is a little difficult to see why the facts alleged by the buyer, presuming them to be true, did not make it applicable. It is doubtful, however, whether any such duty is imposed on the seller: see the remarks of Cockburn CJ in *Smith v Hughes* (1871) LR 6 QB 597 at 605, where he dissented from *Horsfall v Thomas*.
6 (1884) 9 App Cas 187 at 194.
7 (1838) 6 Cl & Fin 232.

It was held by the House of Lords that an action to rescind the contract for misrepresentation must fail, since the purchasers did not rely on the vendor's statements, but tested their accuracy by independent investigations and declared themselves satisfied with the result.

It is clear, however, that the right to relief would be endangered if a defendant were free to evade liability by proof that there were contributory causes, other than his misrepresentation, which induced the plaintiff to make the contract, and that his representation was not the decisive cause.

Cranworth LJ asked:

> Who can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed?[8]

The courts, therefore, although denying relief to a plaintiff who entirely disregards the misrepresentation, have consistently held that the misrepresentation need not be his sole reason for making the contract. If it was clearly one inducing cause it is immaterial that it was not the only inducing cause.[9] In *Edgington v Fitzmaurice*,[10] for instance:

> The plaintiff was induced to take debentures in a company, partly because of a misstatement in the prospectus and partly because of his own erroneous belief that debenture holders would have a charge upon the property of the company.

Thus he had two inducements, one the false representation, the other his own mistake, and on this ground it was pleaded, but unsuccessfully pleaded, that he was disentitled to rescission.

In addition to having induced the representee to enter the contract, it is said that the representation must be material.[11] There does not appear to be any 20th century misrepresentation case where the result turns on the precise meaning to be given to this requirement.[12] However, the matter was very fully considered in the leading House of Lords decision in *Pan Atlantic Co Ltd v Pinetop Insurance Co Ltd*[13] In his exhaustive review of the law of misrepresentation and non disclosure, Lord Mustill said that the basic principles were the same and that in both misrepresentation and non disclosure a party who seeks to have a contract set aside must show both actual inducement and materiality, that is, that the subject matter of misrepresentation or non disclosure related to a matter which would have influenced the judgement of a reasonable man.[14]

(c) Knowledge of the untruth of a representation is a complete bar to relief, since the plaintiff cannot assert that he has been misled by the

8 *Reynell v Sprye* (1852) 1 De GM & G 660 at 708.
9 Approved in *Barton v Armstrong* [1976] AC 104 at 119, [1975] 2 All ER 465 at 475.
10 (1885) 29 ChD 459.
11 *Smith v Chadwick* (1882) 20 ChD 27 at 44-45, per Jessel MR.
12 But see *Museprime Properties Ltd v Adhill Properties Ltd* [1990] 36 EG 114
13 [1994] 3 All ER 581; Birds and Hird 59 MLR 285.
14 Many lawyers had not seen this as clearly as Lord Mustill. So, in practice, most reported cases show parties concentrating on actual inducement in misrepresentation cases and on materiality in non disclosure cases. There may be a question whether proof of materiality raises a presumption of actual inducement. In practice this is likely to be much more important in non-disclosure than in misrepresentation cases. See below p 330.

statement,[15] even if the misstatement was made fraudulently. In such a case, 'the misrepresentation and the concealment go for just absolutely nothing, because it is not *dolus qui dat locum contractui*'.[16]

It must be carefully noticed, however, that relief will not be withheld on this ground except upon clear proof that the plaintiff possessed actual and complete knowledge of the true facts—actual not constructive, complete not fragmentary. The onus is on the defendant to prove that the plaintiff had unequivocal notice of the truth. In particular, the mere fact that a party has been afforded an opportunity to investigate and verify a representation does not deprive him of his right to resist specific performance or to sue for rescission.[17] As Lord Dunedin once said:

> No one is entitled to make a statement which on the face of it conveys a false impression and then excuse himself on the ground that the person to whom he made it had available the means of correction.[18]

If, for instance,

> a prospectus misdescribes the contracts made by the promoters on behalf of the company; or
>
> a vendor of land makes a false statement about the contents of a certain lease; or
>
> a vendor of a law partnership misstates the average earnings of the business during the last three years,

it is no answer to a suit for relief to say that inspection of the contracts or of the lease or of the bills of costs was expressly invited but was not accepted.[19]

C TYPES OF MISREPRESENTATION

1 FRAUDULENT MISREPRESENTATION

'Fraud', in common parlance, is a somewhat comprehensive word that embraces a multitude of delinquencies differing widely in turpitude, but the types of conduct that give rise to an action of deceit at common law have been narrowed down to rigid limits. In the view of the common law, 'a charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any court unless it is shown that he had a wicked mind'.[20] Influenced by this consideration,

15 *Jennings v Broughton* (1854) 5 De GM & G 126; *Begbie v Phosphate Sewage Co* (1875) LR 10 QB 491.

16 *Irvine v Kirkpatrick* 1850 7 Bell App 186 at 237, per Lord Brougham.

17 *Redgrave v Hurd* (1881) 20 ChD 1.

18 *Nocton v Lord Ashburton* [1914] AC 932 at 962.

19 The first two instances are given by Jessel MR in *Redgrave v Hurd*, above, at 14; the last represents the facts in the case itself. See also *Central Rly Co of Venezuela (Directors etc) v Kisch* (1867) LR 2 HL 99 at 120. It would seem that it would not normally be contributory negligence to rely on such statements without checking them. *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] 1 All ER 865. Contributory negligence is not available at all as a defence to deceit. *Alliance and Leicester Building Society v Edgestop Ltd* [1994] 2 All ER 38.

20 *Le Lievre v Gould* [1893] 1 QB 491 at 498, per Lord Esher.

the House of Lords has established in the leading case of *Derry v Peek*[1] that an absence of honest belief is essential to constitute fraud. If a representor honestly believes his statement to be true, he cannot be liable in deceit, no matter how ill-advised, stupid, credulous or even negligent he may have been. Lord Herschell, indeed, gave a more elaborate definition of fraud in *Derry v Peek*,[2] saying that it means a false statement 'made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false', but, as the learned judge himself admitted, the rule is accurately and comprehensively contained in the short formula that a fraudulent misrepresentation is a false statement which, when made, the representor did not honestly believe to be true.

The important feature of this decision is the insistence of the House of Lords that the distinction between negligence and fraud must never be blurred. Fraud is dishonesty, and it is not necessarily dishonest, though it may be negligent, to express a belief upon grounds that would not convince a reasonable man.

The facts of *Derry v Peek* were these:

> A company, after submitting its plans to the Board of Trade, applied for a special Act of Parliament authorising it to run trams in Plymouth by steam power. The Act which was ultimately passed provided that the trams might be moved by animal power, or, if the consent of the Board of Trade were obtained, by steam or mechanical power. The directors, believing that this consent would be given as a matter of course, since the plans had already been submitted to the Board of Trade without encountering objection, thereupon issued a prospectus saying that the company had the right to use steam power instead of horses. The respondent took shares upon the faith of this statement. The Board of Trade refused their consent, and the company was ultimately wound up.

It was held by the House of Lords, reversing the decision of the Court of Appeal, that an action of deceit against the directors claiming damages for fraudulent misrepresentation must fail. Lord Herschell said:

> The prospectus was ... inaccurate. But that is not the question. If they [the directors] believed that the consent of the Board of Trade was practically concluded by the passing of the Act, has the plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true.[3]

In testing the honesty of the representor's belief, his statement must not be considered according to its ordinary meaning, but according to its meaning as understood by him.[4] Carelessness is not dishonesty; but, of course, if a man

1 (1889) 14 App Cas 337; Lobban 112 LQR 287.
2 Ibid at 374.
3 Ibid at 379. It should be noted that the decision of the House of Lords was based on the trial judge's finding that the defendants believed their statements to be true. He might well have held that they merely hoped and believed that they would soon become true. Such a finding would have led to judgment for the plaintiffs. See Pollock 5 LQR 410; Anson 6 LQR 72.
4 *Akerhielm v De Mare* [1959] AC 789, [1959] 3 All ER 485; *Gross v Lewis Hillman Ltd* [1970] Ch 445, [1969] 3 All ER 1476; *McGrath Motors (Canberra) Pty Ltd v Applebee* (1964) 110 CLR 656.

is reckless, a court may well be justified in concluding that he could not have been honest. 'There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges.'[5]

Again, if a representor deliberately shuts his eyes to the facts or purposely abstains from their investigation, his belief is not honest and he is just as liable as if he had knowingly stated a falsehood.[6]

Motive is irrelevant in an action of deceit. Once it has been proved that the plaintiff has acted upon a false representation which the defendant did not believe to be true, liability ensues, although the defendant may not have been actuated by any bad motive.[7] The representor is not liable, however, until the representee has acted on the representation and thereby suffered loss.[8]

2 NEGLIGENT MISSTATEMENT AT COMMON LAW

The plaintiffs in *Derry v Peek*[9] formulated their claim as an action in the tort of deceit. But it was assumed at the time, and for seventy years afterwards,[10] that the House of Lords in this case decided that no action would lie for negligent words, at least where reliance on them produced purely financial loss, as opposed to physical damage. All non-fraudulent misrepresentations should be classed together as innocent misrepresentations.

There was, however, an important equitable exception in that by an application of the general doctrine of 'constructive fraud', which is discussed below,[11] an action would lie for negligent misrepresentation if there was a fiduciary relationship between the parties. So in *Nocton v Lord Ashburton*[12] this principle was applied by the House of Lords to negligent advice given by a solicitor to his client.[13]

In 1963 the House of Lords delivered its famous judgment in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[14] in which it held that in some circumstances an action would lie in tort for negligent misstatement. In this case the plaintiffs entered into advertising contracts on behalf of Easipower on terms under which they would themselves be liable if Easipower defaulted. Wishing to check on Easipower's credit, they asked their bank to inquire of the defendants, who were Easipower's bankers. Relying on the replies, they continued to place orders and suffered substantial loss when Easipower went

5 *Derry v Peek* (1889) 14 App Cas 337 at 369, per Lord Herschell.
6 Ibid at 376, per Lord Herschell.
7 *Foster v Charles* (1830) 6 Bing 396; affd 7 Bing 105.
8 *Briess v Woolley* [1954] AC 333, [1954] 1 All ER 909; *Diamond v Bank of London and Montreal Ltd* [1979] QB 333, [1979] 1 All ER 561.
9 (1889) 14 App Cas 337.
10 *Le Lievre v Gould* [1893] 1 QB 491; *Candler v Crane, Christmas & Co* [1951] 2 KB 164, [1951] 1 All ER 426.
11 See pp 336-337, below.
12 [1914] AC 932. On the difficult question of the relationship between fraud at common law and fraud in equity, see Sheridan *Fraud in Equity* pp 12-37.
13 Negligent advice given by a solicitor to his client would normally amount to a breach of an implied term of the contract between them. In *Nocton v Lord Ashburton* the plaintiff did not formulate his claim in contract because of problems of limitation. Before 1873, a plaintiff could not have recovered damages for a claim of this kind but only specifically equitable remedies such as account. Damages were awarded in *Woods v Martins Bank* [1959] 1 QB 55, [1958] 3 All ER 166.
14 [1964] AC 465, [1963] 2 All ER 575.

into liquidation. The House of Lords held that the plaintiffs' action failed since the defendants' replies had been given 'without responsibility'; but they also stated that, but for this disclaimer, an action for negligence could lie in such circumstances. Their Lordships did not however attempt to define with precision the circumstances in which such an action would lie. Detailed consideration of the resultant problems must be left to works on the law of torts[15] but a few observations must be made since it is now possible to argue that a negligent precontractual misrepresentation made by one party to the contract to the other may give rise to an action for damages in tort.

It is clear that the House of Lords did not simply assimilate negligent statements to negligent acts. Liability for negligent statements depends upon the existence of a 'special relationship' between plaintiff and defendant. Such a relationship does not necessarily involve direct contact between the parties. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* itself, the advice was passed through the plaintiff's bank and neither party knew the identity of the other. The defendant knew, however, that the information would be passed to a customer of the inquiring bank and that it was required so that the customer could decide whether to extend credit to Easipower. It would seem probable that the adviser must know in general terms the purpose for which the advice is sought. But where advice is given before entering into a contract between the person giving advice and the person receiving it, this is not likely to be a practical difficulty.

It has been suggested that the duty to take care in giving advice is imposed only on professional men and perhaps only on those professional men whose profession it is to give advice. If such a limitation exists, it would gravely restrict the application of this rule to pre-contractual statements. Though the possibility was extensively canvassed by the Privy Council in *Mutual Life and Citizens' Assurance Co Ltd v Evatt*,[16] later English cases suggest that this difficult case, whatever it decided, is not law in England.[17]

It is important to note that there is nothing in the judgment in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* to suggest that liability can attach only to statements of fact as defined above.[18] It can extend beyond this to other forms of negligent advice, such as the expression of an opinion about the law.

Early decisions after 1963 did little to clarify whether, and if so when, the doctrine in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* might be used to impose liability for negligent pre-contractual statements. It was held that actions would not lie in tort against an architect[19] or a solicitor[20] for negligent advice which was in breach of contract on the theory that a single duty cannot give rise

15 There are many articles discussing the effect of the case on the law both of tort and of contract. These include Honoré 8 JSPTL 284; Stevens 27 MLR 121; Weir [1963] CLJ 216; Gordon 38 ALJ 39, 79; Coote 2 NZULR 263.

16 [1971] AC 793, [1971] 1 All ER 150; Rickford 34 MLR 328. The decision should probably be regarded as turning primarily on what a plaintiff must allege in his pleadings under the unreformed New South Wales procedure. Note that of the three Lords who sat in both *Hedley Byrne & Co v Heller* and *Mutual Life v Evatt*, two were in the minority in the latter case. In *W B Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850, liability was imposed in a purely commercial context.

17 See eg *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5; *Batty v Metropolitan Property Realisations Ltd* [1978] QB 554, [1978] 2 All ER 445.

18 Pp 294-298, above.

19 *Bagot v Stevens, Scanlan & Co* [1966] 1 QB 197, [1964] 3 All ER 577.

20 *Clark v Kirby-Smith* [1964] Ch 506, [1964] 2 All ER 835.

to actions both in contract and tort. This theory was criticised,[1] and was hard to reconcile with numerous decisions allowing actions by servants against masters or by passengers against carriers to be brought indifferently in contract or tort.[2]

It appears now to have been abandoned. More recently cases have held that if a plaintiff can show that all the ingredients of a tortious claim are present, he is not disentitled from pursuing it because he also has a claim in contract. The matter was examined in an exceptionally full and careful judgment by Oliver J in *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp.*[3]

> In this case a father owned a farm, which he let to his son. In 1961 the father agreed to give the son an option to buy the freehold reversion within the next ten years. The defendant solicitors acted for both father and son in the transaction and drew up a formal agreement embodying the terms of the option. They omitted however to register it as an estate contract. In August 1967 the father sold the farm to his wife. In October 1967 the son attempted to exercise the option and discovered for the first time that the property had been sold and the option never registered. In due course the son decided to sue the defendants for professional negligence and issued a writ in July 1972.[4] On the face of it, there was a clear breach of contract but equally this appeared to be well outside the limitation period since the contract had been broken in 1961 when the option had not been registered. The plaintiffs sought to overcome this difficulty in two ways. As regards the claim in contract, they argued that there was a continuing breach until the father's sale in August 1967, when it became impossible to register. Alternatively they argued that there was a claim in tort, arising out of the solicitors' negligence. A tort action if it existed could not have been brought before damage had been inflicted, that is by the father's sale to his wife in 1967, and so a tort action would be still within the limitation period.

Oliver J held for the plaintiffs on both grounds.[5] As regards the claim based on *Hedley Byrne & Co Ltd v Heller & Partners Ltd* he saw no difficulty in this existing alongside a contractual claim. The key question was whether there was a 'special relationship' between plaintiff and defendant and not how that relationship arose. The reasoning of Oliver J was enthusiastically approved by Lord Goff delivering the principal speech in the House of Lords in *Henderson v Merrett Syndicates.*[6]

These cases all concern negligence in the course of performing a contractual duty to take care, but if tortious and contractual obligations can coexist after the

1 Poulton 82 LQR 346, and see *Reid v Traders General Insurance Co, Dares Motors and Myers* (1963) 41 DLR (2d) 148 at 154, per Ilsley CJ. Symmons 21 McGill LJ 79.

2 See eg *Matthews v Kuwait Bechtel Corpn* [1959] 2 QB 57, [1959] 2 All ER 345.

3 [1979] Ch 384, [1978] 3 All ER 571; Stanton 42 MLR 207; Jolowicz [1979] CLJ 54.

4 He shortly afterwards died and the action was taken over by the plaintiffs as executors.

5 He found this principle to be logically implicit in *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5. See also *Batty v Metropolitan Property Realisations Ltd* [1978] QB 554, [1978] 2 All ER 445, cited at a late stage to Oliver J but not fully considered by him. Oliver's J judgment was approved by Lord Denning MR in *Photo Production Ltd v Securicor Transport Ltd* [1978] 3 All ER 146 at 150-151, [1978] 1 WLR 856-862, in a passage not criticised by the House of Lords when reversing the Court of Appeal. See also the decision of the Supreme Court of Canada in *Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481 (Can SC) Havek 1 JCL 43.

6 [1994] 3 All ER 506; [1994] 3 WLR 761.

contract is concluded, it would seem that they can also coexist before the contract is concluded.[7] This view is confirmed by *Esso Petroleum Co Ltd v Mardon*.[8]

> In this case the plaintiffs had let a petrol filling station to the defendant for three years. The station was on a newly developed site and during the negotiations for the lease one L, a dealer sales representative employed by the plaintiff, with over 40 years' experience, had told the defendant that he thought the potential 'throughput' of the station in the third year would be of the order of 200,000 gallons. The defendant suggested that 100,000 gallons might be a more realistic figure but his doubts were quelled by L's expertise and great experience. In the event the throughput in the third year was only 86,502 gallons. At this level the station was uneconomic and the defendant gave up the tenancy. The plaintiffs sued for arrears of rent and the defendant counterclaimed for damages for negligence.

The Court of Appeal held for the defendant.[9] In making statements about the station's prospects during the pre-contractual negotiations, the plaintiffs owed the defendant a duty of care since they had a financial interest in the advice they were giving and knew that the defendant was relying on their knowledge and expertise. Further they were in breach of the duty of care, since L's forecast, although honestly made, failed to take into account the actual configuration of the site as developed.

It does not of course follow from this decision that parties in pre-contractual negotiations always owe each other a duty of care, but it appears that we can now confidently state that if all the ingredients of a duty of care are present, the duty is not excluded by the fact that the parties are in a pre-contractual situation.

Another interesting and difficult problem, which has not yet been before the English courts, concerns the effect of a negligent pre-contractual statement, which is not eventually followed by a contract. As a rule there will be no question of liability since no damage will have resulted but this is not necessarily so. Suppose for instance X, a main contractor who is preparing a tender for building a new office block asked Y, a central heating sub-contractor, for an estimate and that Y carelessly quotes a figure which is too low. Suppose further that relying on Y's figures, X puts in a tender, which again is too low and that one morning X receives in the post two letters, one accepting his tender for the building and the other from Y revoking his quotation. As a matter of offer and acceptance, it is clear that X has made a binding main contract and has no contractual action against Y. It is arguable, however, that he now has a tortious action. It is said that this may be said to be evading the rules of offer and acceptance,[10] but it is thought that this is not so. X's loss does

7 This is how *Woods v Martins Bank* [1959] 1 QB 55, [1958] 3 All ER 166, should now be explained. The possibility might have been raised in *Dick Bentley Productions v Harold Smith (Motors)* [1965] 2 All ER 65, [1965] 1 WLR 623, but the case went on other grounds.

8 [1976] QB 801, [1976] 2 All ER 5; Sealy [1976] CLJ 221. The Court of Appeal also held that Esso had given a contractual warranty that their opinion was carefully formed. See also *Dillingham Construction Pty Ltd v Downs* [1972] 2 NSWLR 49; *Sealand of the Pacific Ltd v Ocean Cement Ltd* (1973) 33 DLR (3d) 625; *Capital Motors Ltd v Beecham* [1975] 1 NZLR 576; *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] 1 All ER 865.

9 The facts took place before 1967 and there was therefore no claim under the Misrepresentation Act 1967 See pp 307-309, below.

10 *Holman Construction Ltd v Delta Timber Co Ltd* [1972] NZLR 1081.

not follow from Y's revocation but from Y's carelessness in fixing the offer figure. If the figure had been carefully calculated, X would usually have been able to go out into the market to engage another central heating contractor at much the same price but if the figure is too low he will not be able to do this. So it is not implausible to argue that the situation is one where Y knew that X would rely on his figure and would suffer loss if it were unreliable and that therefore Y owed X a duty of care.

3 NEGLIGENT MISREPRESENTATION UNDER THE MISREPRESENTATION ACT 1967

In 1962 the Law Reform Committee in its 10th Report recommended that damages should be given for negligent misrepresentation.[11] This recommendation was, of course, based on the law as it was assumed to be before *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, and it may well be that it would have been wise to reconsider it in the light of that decision. Instead it was enacted by the Misrepresentation Act 1967,[12] section 2(1) of which provides that:

> Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

It is clear that the object of this subsection is to impose liability in damages for negligent misrepresentation and to reverse the normal burden of proof by requiring the representor to disprove his negligence, but a singularly oblique technique was adopted for this purpose[13] since the draftsman elected to proceed by reference to the common law rules on fraud. This has led some commentators to talk of a 'fiction of fraud'.[14] Though it would be quixotic to defend the drafting of the section, it is suggested that there is no such 'fiction of fraud' since the section does not say that a negligent misrepresentor shall be treated for all purposes as if he were fraudulent. No doubt the wording seeks to incorporate by reference some of the rules relating to fraud but it does not follow that it has incorporated all of them.[15]

Since in an action based on the Act the representor will have to bear the burden of disproving his negligence, it would seem that a plaintiff will usually formulate his claim under the Act rather than sue at common law for fraud or negligence. But in some cases an action at common law may still be preferred.

Firstly, a plaintiff who relies upon the doctrine in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, need not establish that a misrepresentation *stricto sensu* has been made.[16]

11 Cmnd 1762, paras 17 and 18.

12 1967, s 7.

13 Atiyah and Treitel 30 MLR 369 at 375; Fairest [1967] CLJ 239 at 244-245.

14 Atiyah and Treitel, above.

15 See the illuminating discussion by Mummery J in *Alliance and Leicester Building Society v Edgestop Ltd* [1994] 2 All ER 38 as to the availability of contributory negligence as a defence to claims in deceit and under Misrepresentation Act 1967, s 2(1). The subsection does not impose liability on an agent who makes a misrepresentation. *Resolute Maritime Inc v Nippon Kaiji Kyokai* [1983] 2 All ER 1, [1983] 1 WLR 857.

16 See pp 303-307, above.

Secondly, it may well be that different rules as to remoteness and measure of damages apply to the three forms of action open to the plaintiff.[17] The prospect of recovering heavier damages might spur him to assume the greater burden of proving fraud or negligence.

Thirdly, the statutory action only applies 'where a person has entered into a contract'. If, as will sometimes happen, the effect of the representor's statements is to make the contract void *ab initio* for mistake, it would seem that there would be no action under the statute for there would be no contract. This may be illustrated by considering the case of *McRae v Commonwealth Disposals Commission*.[18] It will be remembered that in this case the defendants sold the plaintiffs a non-existent ship and later argued that they were not liable for loss incurred by the plaintiffs in searching for the ship since there was no contract for lack of subject matter. We have already suggested[19] that an English court might prove unwilling to follow the High Court of Australia's view that there was a contract that the ship existed. If an English court were to hold the contract void in such a situation, it would seem that no action could be brought under the Act. But the plaintiff could still recover in tort at common law by proving that the defendant was either fraudulent or negligent in stating that the ship existed, since it is not a requirement of these actions that the representee shall have entered into a contract but simply that he shall have suffered loss in reliance on the statement. Since the defendants in *McRae v Commonwealth Disposals Commission* were clearly negligent it would seem that the decision in that case can now best be explained by reliance on *Hedley Byrne & Co Ltd v Heller & Partners Ltd.*

The complexities of the interrelationships between these rules are well illustrated by *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd.*[20]

> The defendants were engaged by the Northumbrian Water Authority for a substantial excavation contract. This involved carrying the spoil to sea in seagoing barges and dumping it there. The defendants, although very experienced at excavation work, had no experience of dumping at sea. In order to carry out the contract they needed to charter two seagoing barges and in order to calculate their tender for the contract they needed to know the cost of chartering the barges. One factor in this cost would be the soil carrying capacity of the barges, since this would have an important input on the speed at which the earth could be removed and thereby on the length of the contract. Negotiations took place between the defendants and the plaintiffs, who were the owners of two suitable barges in the course of which the plaintiff's marine manager stated that the payload was 1600 tonnes.[1] This figure was based on his recollection of the deadweight figure of 1800 tonnes given by Lloyds Register. Very exceptionally however, the

17 See pp 320-325, below.
18 (1951) 84 CLR 377.
19 Pp 257-258, above.
20 [1978] QB 574, [1978] 2 All ER 1134; Sealy [1978] CLJ 229; Brownsword 41 MLR 735; Sills 96 LQR 15.
1 This statement was made after the defendant had tendered for the excavation contract and had their tender accepted. This would appear very relevant to the quantum of any claim since much of the defendants' loss flowed from tendering at the wrong figure. The decision of the Court of Appeal was concerned only with liability and not with quantum.

Lloyds Register was wrong. The true deadweight figure given by the barge's German shipping document (which the marine manager had seen) was 1195 tonnes, giving a payload of 1055 tonnes. In due course the defendants chartered the barges from the plaintiffs, but the written contract contained no mention of these figures.

Finding that because of the shortfall in capacity, they were not able to proceed with the work as quickly as they had planned, the defendants ceased to pay the charter hire. The plaintiffs withdrew the barges and sued for outstanding payments and the defendants counter-claimed for damages both under Misrepresentation Act 1967, section 2(1) and at common law.[2]

All the ingredients of liability under section 2(1) were present unless the plaintiffs could prove that 'they had reasonable ground to believe ... that the facts represented were true'. There was no doubt that the marine manager had made the statement honestly and Lord Denning MR thought it was reasonable for him to rely on the Lloyds Register figure. The majority of the Court of Appeal held that it was not reasonable not to refer to the shipping documents on such an important matter. The Court was also divided in its views as to negligence at common law. Lord Denning MR thought that the situation was not one calling for care in the making of the statement and that in any event the marine manager had not been careless. Shaw LJ took the opposite view on both points and Bridge LJ did not reach a concluded view on either.

The case confirms that the statutory action has the advantage that there is no need to establish a duty of care. The majority view also suggests, what had not been clearly perceived before, that is, that the representor may not escape liability, simply by disproving negligence but must affirmatively prove reasonable grounds of belief.[3]

4 INNOCENT MISREPRESENTATION

Before 1963, the phrase 'innocent misrepresentation' was used to describe all misrepresentations which were not fraudulent. Now that two classes of negligent misrepresentation have appeared, the appellation 'innocent' should clearly be restricted to misrepresentations that are made without fault.

D REMEDIES FOR MISREPRESENTATION

1 RELATIONSHIP BETWEEN REMEDIES FOR BREACH OF CONTRACT AND REMEDIES FOR MISREPRESENTATION

As we have already seen,[4] classical doctrine drew a firm distinction between those statements which formed terms of a contract and those which constituted mere representations. The practical effect of this distinction has been diminished by the Misrepresentation Act 1967 but it remains conceptually significant. Before the Act, however, it was not clear whether the same statement could simultaneously be both a term of the contract and a mere representation.

2 They also argued unsuccessfully that the statements as to payload were warranties.
3 Exactly what this means is far from clear. See the helpful analysis by Brownsword 41 MLR 735 at 737.
4 P 292, above.

In discussing this possibility we must consider two separate types of case. The first is where a statement is made during pre-contractual negotiations and the same statement later appears as a term of the (written) contract. In this case one might think that the representee could exercise his remedies for misrepresentation in respect of the first statement and his remedies for breach of contract in respect of the second, but there was some authority for the view that the representation 'merged' with the term so that no remedies would be available for the misrepresentation.[5] All doubts on this question are now resolved by section 1 of the Misrepresentation Act 1967, which provides:

> Where a person has entered into a contract after a misrepresentation has been made to him and–
>
> (a) the misrepresentation has become a term of the contract; ... then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled ... notwithstanding the matters mentioned in paragraph (a) ... [of this section].

This obscurely worded provision means that a misrepresentee may rescind for a misrepresentation, even though the same undertaking has later become a term of the contract.

The second type of case arises where it is possible to argue that a statement, which occurs only once in the history of a transaction may be classified either as a term of the contract or as a representation. If it is classified as a representation, there would be no question of granting the remedies appropriate to a contractual term and if it is classified as a term, there would be no question of granting the remedies for 'mere representations'. In practice, the classification has always been made where the plaintiff claims damages on the ground that the statement is a term of the contract. But in the converse case where the plaintiff claims rescission for misrepresentation, it does not appear ever to have been argued that the remedy should be refused because the statement was properly classified as a term.

A good example is *Leaf v International Galleries*[6] where the plaintiff bought a picture from the defendant, which the latter stated incorrectly to have been painted by Constable. Clearly this statement might well have been held to be a term of the contract if the plaintiff had sought damages, but he wished to return the picture, and therefore sued for rescission for innocent misrepresentation. Though the Court of Appeal was clearly somewhat embarrassed at the possibility of a plaintiff being able to rescind for innocent misrepresentation when the right to reject for breach of condition was lost,[7] the case was decided on the basis that the defendant's statement was a 'mere' representation but that the right to rescind was lost by lapse of time.[8] In other cases, also, the same assumption has been allowed to go unchallenged.[9] Nevertheless it is suggested that in principle the categories of terms and representations are mutually exclusive and that a plaintiff cannot elect to treat

5 *Pennsylvania Shipping Co v Compagnie Nationale de Navigation* [1936] 2 All ER 1167. Cf *Compagnie Française des Chemins de Fer Paris-Orleans v Leeston Shipping Co* (1919) 1 Ll L Rep 235. Fairest [1967] CLJ 239 at 241-242.

6 [1950] 2 KB 86, [1950] 1 All ER 693; p 261, above.

7 [1950] 2 KB at 91, [1950] 1 All ER at 695.

8 See p 315, below.

9 Eg *Long v Lloyd* [1958] 2 All ER 402, [1958] 1 WLR 753. See Atiyah 22 MLR 76, where the argument in the text is forcefully put. See also *Naughton v O'Callaghan (Rogers, third parties)* [1990] 3 All ER 191.

a term as a representation. If this is so, it would follow that section 1 of the Misrepresentation Act 1967 had no application to such a case, since it is not one in which a misrepresentation has become a term, but one in which a statement has always been a term.[10]

2 RESCISSION

It is a fundamental principle that the effect of a misrepresentation is to make the contract voidable and not void.[11] This means that the contract is valid unless and until it is set aside by the representee.[12] On discovering the misrepresentation the representee may elect to affirm or to rescind the contract.

A contract is affirmed if the representee declares his intention to proceed with the contract or does some act from which such an intention may reasonably be inferred.[13]

A contract is rescinded if the representee makes it clear that he refuses to be bound by its provisions. The effect then is that the contract is terminated *ab initio* as if it had never existed. In the words of Lord Atkinson:

> Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties *in statu quo ante* and restores things, as between them, to the position in which they stood before the contract was entered into.[14]

An election, once it has been unequivocally made, whether in favour of affirmation or of rescission, is determined for ever.[15] It cannot be revived. If the representee elects to rescind the contract, the general rule is that within a reasonable time he must communicate his decision to the representor, for the latter is entitled to treat the contractual *nexus* as continuing until he is informed of its termination.[16] This general rule, however, is subject to two exceptions.

Firstly, if the result of the misrepresentation is that possession of property is delivered to the representor, the recaption of the property by the representee is itself a communication of the rescission.[17]

10 The thesis in this section is also important in connection with the provisions of the Misrepresentation Act as to exemption clauses—see pp 326-328, below.

11 In exceptional cases, as in that of mistaken identity a misrepresentee may cause a mistake which may entitle the misrepresentee to treat the contract as void. But this is the result of the mistake and not of the misrepresentation.

12 *Newbigging v Adam* (1886) 34 ChD 582 at 592.

13 See p 315, below.

14 *Abram Steamship Co v Westville Shipping Co Ltd* [1923] AC 773 at 781. Unfortunately the word 'rescission' is also often used to describe the position where a party elects to treat a contact as discharged because of a breach of one of the essential terms. But there the contract is not rendered void *ab initio*: *Mussen v Van Diemen's Land Co* [1938] Ch 253 at 260, [1938] 1 All ER 210 at 215, per Farwell LJ. The *further* liability of either party to perform the outstanding contractual obligations is terminated, but causes of action that have already arisen by virtue of the breach remain remediable by an action for damages. See *R V Ward v Bignall* [1967] 1 QB 534 at 548, [1967] 2 All ER 449 at 455, per Diplock LJ. It would clearly add greatly to clarity if the word rescission were confined to the present remedy. This has been emphasised in a number of recent decisions pp 604-606, below.

15 *Clough v London and North Western Rly Co* (1871) LR 7 Exch 26 at 35, *per curiam*.

16 *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525, [1964] 1 All ER 290.

17 Ibid.

Secondly, if the representor disappears so effectively that it is impossible to find him, the requirement of communication will be satisfied if the representee records his intention to rescind the contract by some overt act that is reasonable in the circumstances. This was recognised for the first time in *Car and Universal Finance Co Ltd v Caldwell*[18] on the following facts:

> The defendant sold and delivered a car to X in return for a cheque that was dishonoured the next day, by which time both the car and X had disappeared. The defendant immediately notified the police and the Automobile Association and requested them to find the car. While the search was proceeding, X sold the car to M Ltd motor dealers, who had notice of X's defective title. Ultimately, M Ltd sold the car to the plaintiffs who bought it in good faith.

It was held that the defendant, by setting the police and the Automobile Association in motion, had sufficiently evinced his intention to rescind the contract. As soon as he made this clear, the ownership of the car reverted to him, and therefore the later sale by M Ltd vested no title in the plaintiffs, the innocent purchasers.[19]

Rescission, even though enforced by a court, is always the act of the defrauded party in the sense that it is his election which effectively destroys the contractual *nexus* between him and the other party.[20] It follows that rescission is effective from the date it is communicated to the representor and not from the date of any judgment in subsequent litigation. Nevertheless, the representee may fortify his position by bringing an action for rescission in equity, a step that is desirable if the fraudulent party ignores the cancellation of the contract and if there is a possibility that innocent third parties may act on the assumption that it still exists.

As we have seen, the effect of rescission is to nullify the contract *ab initio*. An essential requirement of this remedy, where the contract has been partly

18 N 16, above.

19 In this case the car was not sold by the rogue X directly to the innocent purchaser. It was first sold by him to M Ltd who had notice of his defective title, and later sold to the innocent purchaser. In *Newtons of Wembley Ltd v Williams* [1965] 1 QB 560, [1964] 3 All ER 532, the facts were similar except that there was a direct sale by the rogue to the innocent buyer, and it was held that the latter acquired a good title by virtue of the Factors Act 1889, s 9.

This distinction between the effect of a direct and an indirect sale after the contract between the rogue and the true owner has been rescinded is a reproach to the law (see Cornish 27 MLR 472 at 477). The Law Reform Committee, however, has recommended in its 12th Report that until notice of rescission of a contract is communicated to the other contracting party (ie in the instant example, to the rogue) an innocent purchaser from the latter shall be able to acquire a good title (Cmnd 2958 (1966)). If statutory effect is given to this recommendation, the distinction between a direct and an indirect sale will virtually disappear, for it will usually be impossible for the true owner to communicate with the rogue before the sale to the innocent purchaser.

It would seem that the exception to the general rule recognised in *Caldwell's* case concerning communication of rescission, applies equally to a case of innocent misrepresentation, though it is difficult to envisage circumstances in which the problem would arise, since an innocent person, unlike the rogue in *Caldwell's* case, would have no occasion to abscond: [1965] 1 QB at 551-552, per Sellers LJ. Upjohn LJ left the question open: ibid at 555. In *MacLeod v Kerr* 1965 SC 253, the Court of Session took the opposite view to *Car and Universal Finance Co Ltd v Caldwell*.

20 *Abram Steamship Co v Westville Shipping Co* [1923] AC 773 at 781.

or wholly performed, is therefore the restoration of the parties to their original positions. In the language of the law, *restitutio in integrum* is essential.[1]

Common law, unlike equity, provides no action for rescission. But it has always recognised that a contract is automatically terminated if the representee elects to rescind rather than to affirm it, provided that the restoration of the *status quo ante* is feasible. In this latter respect, however, common law is at a disadvantage as compared with equity. The remedial procedure at its command is not sufficiently flexible and comprehensive to enable the process of restoration to be effected according to the exigencies of each particular case. The court is restricted to saying that there can be no rescission unless the parties can be restored to the exact positions that they formerly occupied.[2]

The courts of equity, however, soon developed a suit for rescission, and since their remedial procedure was far more elastic than that of the common law, they were able to take a more realistic view of *restitutio in integrum*. In the words of Lord Blackburn, the court, in the exercise of its equitable jurisdiction, 'can take account of profits and make allowance for deterioration. And I think the practice has always been for a court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract.'[3] Therefore, if satisfied that the misrepresentation has been made, it annuls the contract and then makes such consequential orders as may be necessary in the particular circumstances to restore as far as possible the *status quo ante* of both parties.

At one time equity followed the common law in limiting relief to cases of fraudulent misrepresentation but this was seen to be too harsh a view. The rule gradually established was that where a party was induced to enter into a contract by the innocent misrepresentation of the other party, he was entitled to escape from his obligations by electing to rescind the contract. To render this election effective, he must make his intention clear by word or act to the other party, or institute a suit for rescission, or plead the misrepresentation as a defence to a suit for a specific performance.[4] It was early decided that an innocent misrepresentation was a good ground for refusal of specific performance, but for a considerable period the view prevailed that a greater degree of misrepresentation, in fact fraudulent misrepresentation, was necessary to justify a suit for rescission.[5] This illogical distinction was later abandoned, and it was established by the middle of the nineteenth century that, whether the misrepresentation was fraudulent or not, the representee was entitled to rescind the contract, and if it was written to have it delivered up for cancellation.[6]

The result of this development was that, by the middle of the nineteenth century, rescission has become a general remedy for misrepresentation though damages were available only for fraudulent misrepresentation.

1 See p 316, below.
2 *Clarke v Dickson* (1858) EB & E 148 at 155. *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1278.
3 3 App Cas at 1278-1279. See also *Spence v Crawford* [1939] 3 All ER 271.
4 *Rawlins v Wickham* (1858) 3 De G & J 304; *Torrance v Bolton* (1872) 8 Ch App 118.
5 *Cadman v Horner* (1810) 18 Ves 10.
6 *Cooper v Joel* (1859) 1 De GF & J 240; *Re Liverpool Borough, Bank Duranty's Case* (1858) 26 Beav 268; *Torrance v Bolton* (1872) 8 Ch App 118; *Wauton v Coppard* [1899] 1 Ch 92.

Rescission might often be a completely effective remedy, but this would not always be the case. If a farmer bought a cow, represented, incorrectly, to be free from tuberculin, and it infected the rest of his herd, it would comfort him little to be able to return the cow. If the representation was fraudulent there was no problem since an action for damages could be brought. If it were not fraudulent, the question arose whether the right to rescind could be manipulated so as to restore the representee entirely to the *status quo ante*. It was held that to do this *in toto* would be to give damages; but the courts drew a subtle distinction between an award of damages and the grant of an indemnity and held that the representee must be indemnified against obligations incurred as a result of the representation.

To what obligations, then, does the indemnity relate? The answer is that the plaintiff must be indemnified, not against all obligations even though they may be correctly described as having arisen under, or out of or as a result of the contract but only against those necessarily *created by* the contract.[7] The burden must be one that has passed to the representee as a necessary and inevitable result of the position which he assumed upon completion of the contract.

If, for example, A procures the dissolution of his partnership with B and C on the ground of innocent misrepresentation, he nevertheless remains personally liable for partnership debts contracted while he was a member of the firm. His position as partner was created by the contract and it is the inevitable and automatic result of having occupied this position that he is now burdened with liability for debts. Hence they are a proper subject for indemnity.

The distinction between what is true indemnity and what is equivalent to damages is neatly illustrated by *Whittington v Seale-Hayne*:[8]

> The plaintiffs, who were breeders of prize poultry, were induced to take a lease of certain property belonging to the defendants by an oral representation that the premises were in a thoroughly sanitary condition. This representation was not contained in the lease that was later executed, and so was not a term of the contract. The premises were in fact insanitary. The water supply was poisoned, and in consequence the manager of the poultry farm became seriously ill, and the poultry either died or became valueless. Moreover the Urban District Council declared that the house and premises were unfit for habitation and required the plaintiffs to renew the drains.

In their action for rescission the plaintiffs, while admitting that owing to the absence of fraud they could not recover damages, contended that they were entitled to an indemnity against the consequences of having entered into the contract. These consequences were serious, since they included the following losses: value of stock lost, £750; loss of profit on sales, £100; loss of breeding season, £500; rent and removal of stores, £75; medical expense, £100. It was held that the claim for the plaintiffs in respect of these losses was in effect a claim for damages, and that their right to an indemnity was limited to what they had expended upon rates and to the cost of effecting the repairs ordered by

7 *Newbigging v Adam* (1886) 34 ChD 582 at 594 per Bowen LJ; the other judges, Cotton and Fry LJJ, gave a wider scope to indemnity, but it is believed that the narrower test stated by Bowen LJ is correct. Such was the view of Farwell J in *Whittington v Seal-Hayne* (1990) 82 LT 49.

8 (1900) 82 LT 49.

the Council. The obligation to pay rates and to effect the repairs were obligations which the plaintiffs were required to assume by the contract; but the contract created no obligation to erect sheds, to appoint a manager or to stock the premises with poultry.

The practical importance of the distinction between indemnity and damages has been reduced by recent developments which have extended the right to damages.[9] Further, as we shall see,[10] the Misrepresentation Act 1967, section 2(2), gives the court a general power to grant damages in lieu of rescission. But there will remain cases in which the representee has no *right* to damages and in which the court will decide not to use its *power* to grant damages. In such cases the distinction will still be operative.

3 LIMITS TO THE RIGHT OF RESCISSION

It is a paradoxical result of the history of this branch of the law that rescission should be regarded as the second best alternative to damages. In fact, it is in many ways a much more drastic remedy and it is natural therefore that restrictions have been placed upon its availability. The right to rescind is lost (i) if the representee has affirmed the contract; (ii) in certain circumstances by lapse of time; (iii) if *restitutio in integrum* is no longer possible, or (iv) if rescission would deprive a third party of a right in the subject matter of the contract which he has acquired in good faith and for value. We shall now consider these limits *seriatim* and then discuss the changes made by the Misrepresentation Act 1967.

a Affirmation of the contract

Affirmation is complete and binding when the representee, with full knowledge of the facts and of the misrepresentation, either declares his intention to proceed with the contract or does some act from which such an intention may reasonably be inferred.[11] The Reports contain many examples of implicit affirmation by shareholders. A person who applies for and obtains shares upon the faith of a prospectus containing misrepresentation is entitled to rescind the allotment and to recover the price paid; but if after learning of the misrepresentation he attempts to sell the shares or pays money due upon the allotment or retains dividends paid to him, he loses his right of rescission, since these acts show an intention to treat the contract as subsisting.[12] They are acts of ownership over the shares wholly inconsistent with an intention to repudiate the allotment.

9 Under *Hedley Byrne & Co Ltd v Heller & Partners Ltd* and Misrepresentation Act 1967, s 2(1).

10 P 320, below.

11 *Clough v London and North Western Rly Co* (1871) LR 7 Exch 26 at 34, *Seddon v North Eastern Salt Co Ltd* [1905] 1 Ch 326 at 334; *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 at 550, [1964] 1 All ER 290 at 293. The difficult case of *Long v Lloyd* [1958] 2 All ER 402, [1958] 1 WLR 753, would seem to have been decided on the ground that the plaintiff's conduct amounted to an affirmation of the contract: see especially [1958] 1 WLR 761. The *ratio decidendi*, however, is not clear; see Ativah 22 MLR 76; Odgers [1958] CLJ 166. It appears that the representee must know not only of facts entitling him to rescind but also of his right to rescind *Peyman v Lanjani* [1985] Ch 457, [1984] 3 All ER 703. Affirmation may bar the right to rescind but leave intact any right to damages, *Production Technology Consultants v Bartlett* [1988] 1 EGLR 182, 25 EG 121.

12 *Re Hop and Malt Exchange and Warehouse Co, ex p Briggs* (1866) LR 1 Eq 483; *Scholey v Central Rly Co of Venezuela* (1868) LR 9 Eq 266, n.

b Lapse of time

Lapse of time without any step towards repudiation being taken does not in itself constitute affirmation, but it may be treated as evidence of affirmation, and it was said in a leading case that when the lapse of time is great 'it probably would in practice be treated as conclusive evidence' of an election to recognise the contract.[13] Everything depends upon the facts of the case and the nature of the contract. In particular it is material to consider whether the representor has altered his position in the reasonable belief that rescission will not be enforced, or whether third parties have been misled by the inactivity of the representee.[14]

In principle, lapse of time can only be evidence of affirmation if it comes after the representee has discovered that he is entitled to rescind. But in *Leaf v International Galleries*,[15] it was held that a contract for the sale of goods could not be rescinded on the basis of a non-fraudulent misrepresentation when five years had elapsed between the sale and discovery of the truth. It was said that 'it behoves the purchaser either to verify or, as the case may be, to disprove the representation within a reasonable time, or else stand or fall by it'.[16] It may be doubted whether this reasoning would apply to a fraudulent representation.

c Restitutio in integrum *impossible*

Part of the consequential relief to which a representee is entitled upon rescission is the recovery of anything that he may have paid or delivered under the contract. It is, however, a necessary corollary of this right that he should make a similar restoration of anything obtained by him under the contract. Otherwise the main object of rescission, which is that the parties should both be remitted to their former position, would not be attained. A buyer, for instance, who avoided a contract for misrepresentation, would not be able to recover the price in full while retaining the goods. This would be inequitable as well as inconsistent with the object of rescission.

> Though the defendant has been fraudulent, he must not be robbed, nor must the plaintiff be unjustly enriched, as he would be if he both got back what he had parted with and kept what he had received in return. The purpose of relief is not punishment, but compensation.[17]

The rule is, therefore, that rescission cannot be enforced if events which have occurred since the contract and in which the representee has participated make it impossible to restore the parties substantially to their original position. The representee must be, not only willing, but also able, to make *restitutio in integrum*.

This doctrine finds its most common application when the things delivered to the representee under the contract have been radically changed in extent or character by him or with his consent. Thus if a partnership in which the representee was induced to take shares is converted into a limited liability company, rescission is excluded, since the existing shares are wholly different in nature and status from those originally received.[18] Rescission is equally

13 *Clough v London and North Western Rly Co* (1871) LR 7 Exch 26 at 35.
14 *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 at 240; *Aaron's Reef v Twiss* [1896] AC 273 at 294.
15 [1950] 2 KB 86, [1950] 1 All ER 693.
16 Ibid at 92 and 696, respectively, per Jenkins LJ.
17 *Spence v Crawford* [1939] 3 All ER 271 at 288-289, per Lord Wright.
18 *Clark v Dickson* (1858) EB & E 148; *Western Bank of Scotland v Addie* (1867) LR 1 Sc & Div 145.

impossible if the subject matter of the contract is a mine that has been worked out[18] or operated for a substantial time,[20] or if it comprises goods that have been consumed or altered by the buyer.[1]

The rule requiring restoration is not, however, enforced to the letter if the result will be unfair. Thus property transferred by the defendant may have deteriorated in the hands of the plaintiff, so that it cannot be restored in its original state. Nevertheless, provided that its substantial identity remains, its restoration will be ordered on the terms that the plaintiff pay compensation for its deterioration. It is considered fairer on equitable principles that the defendant should be compelled to accept compensation than to keep the full profit of his wrongdoing.[2]

d Injury to third parties

The right of the representee to elect whether he will affirm or disaffirm a contract procured by misrepresentation is subject to this limitation, that, if before he reaches a decision an innocent third party acquires for value an interest in the subject matter of the contract, the right of rescission is defeated.[3]

The most frequent instance of this limitation is where goods have been obtained from their owner by fraud. If the fraud makes the contract void at common law on the grounds already discussed in the chapter on Mistake,[4] no title passes to the fraudulent person and the latter can pass none to any third party, however innocent this third party may be. If, however, the contract is voidable only, then the title so obtained by the fraudulent person is valid until it has been avoided, and any transfer of it made before avoidance to an innocent third party for valuable consideration cannot be defeated by the owner.[5] An apt illustration of the rule is *White v Garden*[6] where the facts were these:

> Parker bought fifty tons of iron from Garden by persuading him to take in payment a bill of exchange which had apparently been accepted by one Thomas of Rochester. Parker resold the iron to White, who acted in good faith, and Garden made delivery in one of his barges at White's wharf. Garden, upon discovering that the bill of exchange was worthless since there was no such person as Thomas of Rochester, seized and removed part of the iron that was still in the barge.

Garden was held liable in trover. The title to the iron had passed to Parker under a contract that was temporarily valid and, while still undisturbed, had been passed to an innocent purchaser. It was not a case of operative mistake, since Garden intended to contract with Parker. It must be added that a third

19 *Vigers v Pike* (1842) 8 Cl & Fin 562.
20 *Attwood v Small* (1838) 6 Cl & Fin 232; *Clarke v Dickson*, n 18, above.
1 *Clarke v Dickson*, (1858) EB & E 148 at 155, per Crompton J.
2 *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 457, pre Rigby LJ; adopted in *Spence v Crawford* [1939] 3 All ER 271 at 279-280. See also *Newbigging v Adam* (1886) 34 ChD 582; *Adam v Newbigging* (1888) 13 App Cas 308.
3 *Clough v London and North Western Rly Co* (1871) LR 7 Exch 26 at 35.
4 Ch 8, above.
5 *White v Garden* (1851) 10 CB 919; *Babcock v Lawson* (1879) 4 QBD 394, affd (1880) 5 QBD 284; *Phillips v Brooks Ltd* [1919] 2 KB 243; *Stevenson v Newnham* (1853) 13 CB 285 at 302, per Parke B.
6 (1851) 10 CB 919.

party, if he is to acquire an indefeasible title under a voidable contract, must not only act *bona fide*, but also give consideration.[7] In one case for instance:

> A debtor and his surety persuaded the creditor to accept from the debtor a transfer of a mortgage which the debtor knew to be imaginary but which the surety believed to be valid. Later, at the solicitation of the surety and in reliance on the transfer which he believed to be genuine, the creditor released the surety from further obligation.[8]

It was held that the creditor was entitled to rescind the release and to be restored to his rights against the surety, since the latter, though honest, had given no consideration for his release.

Another type of case where the remedy of rescission is affected by the existence of third party rights, concerns the winding-up of companies. A person who is induced to become a shareholder by reason of a false representation is entitled to rescind the contract as against the company, which means that he can divest himself of the shares and recover what he has paid. But this right is lost if its exercise will prejudice the creditors of the company. The established rule is, therefore, that the commencement of winding-up proceedings completely bars the right of a shareholder to avoid the contract under which he obtained his shares.[9]

e Effect of Misrepresentation Act 1967

The law relating to limits to the right of rescission was substantially amended by section 1 of the Misrepresentation Act 1967 which provides:

> Where a person has entered into a contract after a misrepresentation has been made to him, and–
> (a) the misrepresentation has become a term of the contract; or
> (b) the contract has been performed;
> or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Act, notwithstanding the matters mentioned in paragraphs (a) and (b) of this section.

The effect of this provision is that the only limits to the right of rescission are now the four already mentioned. The purpose of the section can only be understood by examining the pre-existing law. We have already discussed paragraph (a).[10] Paragraph (b) was designed to abolish two previous rules, or perhaps more accurately, one rule and one supposed rule, viz: the rule in *Wilde v Gibson* and the rule in *Seddon v North Eastern Salt Co Ltd.*

In *Wilde v Gibson*,[11] the House of Lords held that a conveyance of land could not be avoided after completion on the basis of an innocent misrepresentation by the vendor about a defect in title, viz the existence of a right of way. Lord Campbell said that 'where the conveyance has been executed ... a court of equity will set aside the conveyance only on the ground of actual fraud'.[12] It can be seen that there is much to be said for this rule, since it is the normal practice of purchasers to employ solicitors who carry out a full investigation

7 *Scholefield v Templer* (1859) 4 De G & J 429 at 433-443, per Lord Campbell.
8 Ibid.
9 *Oakes v Turquand and Harding* (1867) LR 2 HL 325.
10 Pp 309-310, above.
11 (1848) 1 HL Cas 605.
12 Ibid at 632-633.

of title. These considerations would not apply so strongly to physical defects in the property though the employment of surveyors is becoming more common and would have little weight in the case of sale of goods or shares or the performance of other contracts.

Despite these considerations, Joyce J in *Seddon v North-Eastern Salt Co Ltd*[13] treating Lord Campbell's statement in *Wilde v Gibson* as one of general application, purported to lay down a rule that 'the court will not grant rescission of an executed contract for the sale of a chattel or chose in action on the ground of an innocent misrepresentation'.[14] This rule was clearly based on a misunderstanding of the rationale of *Wilde v Gibson*; it ignored contrary earlier authority[15] and it was not even necessary for the decision in *Seddon's* case itself, since the representee had affirmed the contract. Yet it succeeded in muddying the waters for the next sixty years. It was applied in *Angel v Jay*[16] to an executed lease induced by an innocent misrepresentation that the drains were not defective and it was restated by McCardie J in *Armstrong v Jackson*.[17] In three cases in the 1950s[18] the Court of Appeal had an opportunity to confirm or overrule *Seddon's* case but in each case the opportunity was spurned and the decision went on other grounds, though in the first two of the cases Denning LJ declared that the rule did not exist.

If the authority of the rule in *Seddon's* case was doubted, its injustice was almost universally accepted. In its 10th Report,[19] the Law Reform Committee agreed with this verdict and recommended the abolition of the rule in *Seddon's* case. The Committee thought however that the rule in *Wilde v Gibson* should be retained in the interests of finality and that it should apply both to defects in title and to physical defects and to sales and long leases of land.[20]

It will be seen that Parliament has abolished both rules so that it is now possible for a representee to seek rescission of any type of contract including one for the sale of land even though it has been performed. It would seem that this change has created the possibility of considerable hardship to an owner-occupier who sells his house and uses the purchase money to buy another. Such a vendor will normally only be able to repay the purchase price by selling his new house and rearranging a mortgage on his old house. It is clear that justice does not always require these heavy burdens to be imposed on an innocent representor-vendor and it is important therefore in considering the practical effect of section 1(b) of the Act to bear in mind that under section 2(2) the court now has a general power to give damages in lieu of rescission.[1] It would seem that this type of case might well be one where the court would choose to exercise this power.

13 [1905] 1 Ch 326.
14 Reporter's headnote. See [1905] 1 Ch 332-333.
15 See Hammelmann 55 LQR 90. But cf Howard 26 MLR 272.
16 [1911] 1 KB 666.
17 [1917] 2 KB 822 at 825.
18 *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107; *Leaf v International Galleries* [1950] 2 KB 86, [1950] 1 All ER 693; *Long v Lloyd* [1958] 2 All ER 402, [1958] 1 WLR 753.
19 Cmnd 1782, paras 3 to 13 (1962).
20 The committee recommended drawing a line between long and short leases by using the test provided by s 54(2) of the Law of Property Act 1925.
1 See p 315, above.

4 DAMAGES

We have seen that as the law has finally developed, any misrepresentation gives rise to a right in the representee to rescind. The right to damages, on the other hand, is not universal but depends on showing that the representor's statement is either fraudulent or negligent in the senses set out above.[2] However the Misrepresentation Act 1967 made a further important change by conferring on the court a general power to grant damages in lieu of rescission. By section 2(2) of the Act it is provided that:

> Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled by reason of the misrepresentation to rescind the contract, then, if it is claimed in any of the proceedings arising out of the contract that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of the opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause the other party.

Thus, the victim of an innocent misrepresentation may be awarded damages instead of, but not in addition to, rescission if the court in its discretion considers it equitable to do so.

For subsection 2(2) of the Act to operate, the facts must be such that the representee 'would be entitled by reason of the misrepresentation, to rescind the contract'. In previous editions of this work, it was argued that these words meant that the remedy of rescission must still be available for the plaintiff at the time of the action and that if he had lost the right of rescission, for instance because *restitutio in integrum* was no longer possible or because an innocent third party had acquired an interest in the subject matter of the contract then the exercise of the judicial discretion to give damages under section 2(2) of the Act was at an end. However, this reasoning was rejected by Jacob J in *Thomas Witter Ltd v TBP Industries Ltd.*[3] In this case, Jacob J held that it was not necessary that the right to rescind should be available at the time the court gave judgment. He thought that judicial discretion would exist if the right to rescind had ever existed or at the least that the right to rescind existed when the representee first sought to rescind. On the facts of the case, it was not necessary to choose between these alternatives. Jacob J relied on his interpretation of the legislative history of this part of the Misrepresentation Act but other interpretations of the Parliamentary discussions do not point so clearly to his conclusion.[4]

Under section 2(2) of the Act, rescission and damages are alternatives; but if the representee has a right to damages because of the representor's fraud or negligence, he may sue for damages either instead of or as well as rescinding. In these cases rescission and damages are in no sense mutually exclusive though clearly the amount of damages to which the representee will be

2 See pp 301-308, above.

3 [1996] 2 All ER 573.

4 See Beale 111 LQR 385 and His Honour Judge Jack QC in *Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] CLC 735. The Court of Appeal appear to have taken the opposite view in *Sindall v Cambridgeshire County Council* [1994] 3 All ER 932 which had not been reported when *Thomas Witter Ltd v TBP Industries Ltd* was decided in 1994 and was not cited to Jacob J. See also *The Lucy* [1983] 1 Lloyds Rep 188.

entitled will be effected by whether or not he has successfully rescinded. In some cases rescission will repair all the loss the representee has suffered but in other cases he will have suffered consequential loss.[5]

In any case, whenever the representee seeks damages, it will be necessary to decide upon what principles damages are to be assessed. It appears not improbable that different rules apply to each of the possible heads of claim and it is therefore necessary to consider them *seriatim*. But before doing so a basic distinction must be drawn between damages in contract and damages in tort. This distinction is important for two reasons. First, the purpose of damages is different in contract and in tort. In contract the object of damages is to put the injured party as nearly as may be in the position he would have enjoyed if the contract had been performed; in tort it is to restore the injured party to the position he occupied before the tort was committed. This difference in approach will mean that sometimes a greater sum can be obtained in contract than in tort and sometimes a greater sum in tort than in contract though in other cases it may make no difference.[6] Secondly, the test of remoteness of damage in tort is generally foreseeability at the moment of breach of duty; in contract it appears that some higher degree of probability than is embraced by the word 'foreseeable' is required and it is clear that the relevant moment is that of the making of the contract.[7]

We will now consider each of the possible claims for damages in turn.

a For fraudulent misrepresentation

It is clear that the claim for damages for fraudulent misrepresentation is a claim in tort. So the general governing rule is that the plaintiff should be restored to the position he would have been in if the representation had not been made.[8] It is sometimes deduced from this that a plaintiff in an action for deceit cannot recover damages for loss of profit. That this is too simple a view is shown by the decision of the Court of Appeal in *East v Maurer*.[9] In this case, the first defendant owned two ladies hairdressing salons. In 1979 the plaintiffs bought one of them for £20,000. During the negotiations, the first defendant said that he did not intend to work at the second salon except in emergencies and intended to open a salon abroad. In fact, he continued to work at the

5 See eg the example of the infected cow, p 314, above. In these cases the plaintiff is rescinding the contract and pursuing a claim in tort. A plaintiff cannot normally rescind the contract for initial invalidity and at the same time seek damages for breach of that contract. See Albery 91 LQR 337.

6 Suppose for instance that X buys and pays for a set of dining-room chairs represented incorrectly to be Chippendale and that he is unable to rescind. Then if A is the actual price, B the value of a genuine set of Chippendale chairs of this type and C the actual value of the chairs bought then prima facie the amount recoverable in contract would be B-C and in tort A-C. Only if A and B are the same will the amount recoverable in tort and contract be the same. If A is greater than B, the plaintiff should try to formulate his claim in tort. If B is greater than A he should try to formulate it in contract. In either case there may also be claims for consequential loss, which will be governed by the rules of remoteness stated in the text.

7 For fuller discussion of these problems in contract, see pp 658-697, below, and for tort, see Salmond and Heuston *The Law of Torts* (20th edn) pp 515-540; Winfield and Jolowicz *Tort* (14th edn) pp 147-188 and 632-675; Street *The Law of Torts* (9th edn) pp 249-264.

8 *McGregor Damages* (15th edn) paras 1718-1722. Winfield and Jolowicz *Tort* (14th edn) p 289.

9 [1991] 2 All ER 733.

second salon and this was extremely damaging to the business since many of his customers in the first salon moved to the second salon. Since the first defendant had not contracted that he would not work in the second salon, the plaintiffs could not recover the profits they would have made if they had not had to face his competition. However, the Court of Appeal held that if the plaintiffs had not bought the business at all, they would have invested money in another hairdressing business which would have been profitable. However, the appropriate sum to compensate for this loss was based on an assessment of what profit the plaintiffs would have made in another business, granted their relative lack of experience, rather than on an assessment of the profits which the first defendant had been making in the old business. There is authority moreover for the view that in considering what consequential loss can be recovered, the test of remoteness is not the normal one of foreseeability. In *Doyle v Olby (Ironmongers)*,[10] the Court of Appeal held that 'the defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement ... it does not lie in the mouth of the fraudulent person to say that [the damage] could not reasonably have been foreseen'.[11]

An interesting question arose in *Smith New Court Securities Ltd v Scrimgeour Vickers*.[12] In this case, the plaintiffs had been induced to buy a parcel of shares in Ferranti at 82.25p per share by a fraudulent misrepresentation made by an employee of the defendants. At the time of the contract, the shares were trading in the market at about 78p per share. However, unknown to both parties and by reason of a wholly unconnected fraud, the shares were grossly overvalued. Ferranti had been the victims of a major fraud by an American confidence trickster who had sold a worthless business to them. On discovering the fraud, the plaintiffs might have elected to rescind the contract but instead they chose to dispose of the shares through the market at prices ranging from 49p to 30p per share. If the plaintiffs had elected to rescind, they would have avoided the whole of the loss but the Court of Appeal held that, in an action for damages, the plaintiffs could only recover the difference between the contract price and the market price at the date of the contract, that is 4.25p per share, and not the difference between the contract price and what the shares were actually worth at the date of the contract (in the Court's valuation

10 [1969] 2 QB 158 [1969] 2 All ER 119.

11 Ibid at 167 and 122, respectively. The Court of Appeal relied on the discussion in Mayne and McGregor *Damages* (12th edn) paras 955-957. Cf the critical discussion by Treitel 32 MLR 556. At one time it was not clear whether exemplary damages might be recovered in deceit. *Mafo v Adams* [1970] 1 QB 548, [1969] 3 All ER 1404; *Denison v Fawcett* (1958) 12 DLR (2d) 537, but there were clear statements that they could not in *Cassell & Co Ltd v Broome* [1972] AC 1027, [1972] 1 All ER 801, per Lord Hailsham LC at 1076, 828, respectively, and per Lord Diplock at 1131, 874, respectively. See also *Archer v Brown* [1985] QB 401, [1984] 2 All ER 267. The topic of exemplary damages was considered by the Law Commission in its Report *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247) (1997) which recommended the retention of exemplary damages and indeed some extension of the possibility. The Government (Hansard (H C Debates) 9 November 1999 Col 502) indicated that it was right to defer a decision on further legislation. The whole question should now be reconsidered in the light of the decision of the House of Lords in *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2001] 3 All ER 193 that exemplary damages might be available for the tort of misfeasance in public office. The reasoning of at least some of the speeches in this case supports the view that there may be circumstances in which exemplary damages may be recovered in deceit.

12 [1994] 4 All ER 225.

44p per share). The House of Lords disagreed and held that the plaintiffs could recover the whole of their loss.[13] In the words of Lord Steyn

> The legal measure is to compare the position of the plaintiff as it was before the fraudulent statement was made to him with his position as it became as a result of his reliance on the fraudulent statement.[14]

b For negligent misstatement at common law

Here again it is clear that the claim is one in tort and so the tortious rules apply. Furthermore, since the action lies in negligence, there can be no doubt that any problems of remoteness are to be resolved by applying the foreseeability test. In *Esso Petroleum Co Ltd v Mardon*,[15] the Court of Appeal applied the same test to damages for breach of warranty and for negligence but this was because the warranty was that the forecast was carefully made and not that it was correct.

In *South Australia Asset Management Corpn v York Montague Ltd*[16] a number of cases were considered in which the claimants had lent money to enable property developers to buy commercial properties at the height of a property boom. The borrowers were unable to repay the loans when the boom collapsed and the claimants sought to argue that they had only lent the money relying on negligent valuations of the property by defendant valuers. In those cases where negligence was established, the claimants argued that they would not have entered into the transaction at all but for the negligent valuation and that they should therefore recover all the loss that they had suffered. This argument was accepted by the Court of Appeal but rejected by the House of Lords which held that the claimants could only recover that part of the loss which foreseeably followed from the careless valuation and not that part which flowed from collapse of the property market.[17]

c Under the Misrepresentation Act 1967

Neither section 2(1) nor section 2(2) of the Misrepresentation Act 1967 contains any statement of the test to be applied in assessing damages under them. The only dim clue is provided by section 2(3) which states:

> Damages may be awarded against a person under subsection (2) of this section whether or not he is liable to damages under subsection (1) therefore, but where he is so liable any award under the said subsection (2) shall be taken into account in assessing his liability under the said subsection (1).

This perhaps suggests that less may be recovered under section 2(2) than under section 2(1) and this would not be irrational since the defendant needs to be at fault for the action to succeed under section 2(1) but not under section 2(2). It still leaves unresolved the tests to be applied.

13 [1996] 4 All ER 769.

14 In *Clef Aquitaine SARL v Laporte Materials (Barrow) Ltd* [2000] 3 All ER 493 the claimant as a result of the defendant's fraud entered into two long term distribution agreements. The agreements were profitable but not as profitable as they would have been if the truth had been revealed at the time the contract was made. The Court of Appeal held that the claimant could recover damages to compensate for the loss of this extra profit.

15 [1976] QB 801, [1976] 2 All ER 5. Discussed pp 305-306, above.

16 [1996] 3 All ER 365

17 It will be seen that this rule is considerably less favourable to the claimant than that laid down for deceit above p 322. A further complication in these valuation cases is that the valuer may plausibly argue that the claimant's lending policy was partly to blame and that this amounts to contributory negligence. See *Platform Home Loans Ltd v Oyston Shipways Ltd* [1999] 1 All ER 833.

It has been suggested[18] that damages under section 2(1) should be calculated on the same principles as govern the tort of deceit. This suggestion is based on a theory that section 2(1) is based on a 'fiction of fraud'. We have already suggested that this theory is misconceived.[19] On the other hand the action created by section 2(1) does look much more like an action in tort than one in contract and it is suggested that the rules for negligence are the natural ones to apply.[20]

However, although it is thought that this approach is correct in principle the earliest cases to arise were against it. In *Jarvis v Swans Tours Ltd*[1] Lord Denning MR said[2] 'it is not necessary to decide whether they were representations or warranties; because, since the Misrepresentation Act 1967, there is a remedy in damages for misrepresentation as well as of breach of warranty', and in *Watts v Spence*[3] Graham J gave damages for loss of bargain under section 2(1) of the Misrepresentation Act 1967. In neither case however does the difference between damages in contract and in tort appear to have been in the forefront of the argument.

More recently Ackner J in *André & Cie SA v Ets Michel Blanc & Fils*[4] considered the matter more fully and held that the tortious measure was the correct one to apply. In *Naughton v O'Callaghan (Rogers, third parties)*[5] the plaintiff bought a thoroughbred yearling colt at the Newmarket sales in September 1981. It was described in the catalogue at 'Lot 200. A chestnut colt named Fondu' and as having a sire called Nomalco whose dam was Habanna whose sire in turn was Habitat. Habitat was establishing a good reputation as a sire of winners and class horses and Habanna was a good class horse which had won two races. The plaintiff paid 26,000 guineas for the horse. Some two years later, after Fondu had unsuccessfully taken part in six races, it was discovered that Fondu was not the son of Habanna at all but of Moon Min. On these facts the plaintiff might plausibly have argued that it was a term of the contract that Fondu's dam was Habanna. However, although it was clear by the time of the action that the horse was worth much less than the 26,000 guineas paid for it in 1981, the evidence was that in 1981 Fondu would have reached a figure near to 26,000 guineas even if the pedigree had been correctly stated in the catalogue. The plaintiff therefore formulated his claim as one for misrepresentation. On this basis, he recovered the training fees and the cost of keeping the horse between the date of the purchase and the date when he discovered its true pedigree.

In the most recent decision of the Court of Appeal in *Royscot Trust Ltd v Rogerson*,[6] the Court enthusiastically embraced the fiction of fraud and purported to grant damages based on a deceit measure on the grounds that the words were clear. Of course, in construing the terms of a statute, words are

18 Atiyah and Treitel 30 MLR 369 at 373-374. But cf Treitel *The Law of Contract* (10th edn) pp 335-337.
19 P 307, above.
20 Taylor 45 MLR 139; Cartwright [1987] Conv 423; Wadsley 54 MLR 698.
1 [1973] QB 233, [1973] 1 All ER 71. See also *Gosling v Anderson* (1972) 223 Estates Gazette 1743.
2 Ibid at 237 and 78, respectively.
3 [1976] Ch 165, [1975] 2 All ER 528, criticised Baker 91 LQR 307.
4 [1977] 2 Lloyd's Rep 166 at 181. Ackner J's judgment was affirmed by the Court of Appeal [1979] 2 Lloyd's Rep 427 but this point was not considered. See also *McNally v Welltrade International* [1978] IRLR 497. *Chesneau v Interhome Ltd* [1983] CLY 988.
5 [1990] 3 All ER 191.
6 [1991] 3 All ER 294.

clear if the interpreter has no doubt even though other people may think the words bear a different meaning. Of course, anyone who thought the words were not clear would want to consider whether it was sensible to have the same rule for fraudulent and non fraudulent misrepresentation or, indeed, whether the draftsman in 1967 would have been clear about a rule whose principal authority was a decision of the Court of Appeal in 1969. In fact, in appears very doubtful whether the decision of the Court of Appeal would have been different if they had applied the negligence rule, since they held the critical event to be reasonably foreseeable.[7]

As far as section 2(2) is concerned, it is pertinent to stress that damages under this subsection are given in lieu of rescission. It seems probable, therefore, that in the case of innocent misrepresentation, the Act does not disturb the rule that financial relief for consequential loss should be limited to an indemnity. It is suggested therefore that in assessing damages under section 2(2), the guiding rule is to produce, as nearly as maybe, the same effect as could be obtained by rescission plus indemnity and not to recoup consequential loss which would fall outside this limited relief. Thus on facts such as those in *Whittington v Seale-Hayne*[8] it would seem that a plaintiff whose claim to damages rested solely on section 2(2) would not be compensated for such items as the value of stock lost. This was in substance the view taken by Jacob J in *Thomas Witter Ltd v TBP Industries Ltd.*[9] The matter was also discussed by the Court of Appeal in *William Sindall plc v Cambridgeshire County Council*[10] though *obiter* since the Court was agreed that there had in fact been no misrepresentation. The Court were agreed that, if there had been a misrepresentation, it would have been an appropriate case to give damages in lieu of rescission since to rescind would have been to transfer back to the representor not only the loss flowing from the subject matter of the misrepresentation (the absence of a sewer) but also the whole loss caused by a quite independent collapse in the property market. Both Hoffmann and Evans LJJ agreed that damages under section 2(2) were different from damages under section 2(1). Hoffmann LJ said:

> Damages under section 2(2) should never exceed the sum which would have been awarded if the representation had been a warranty. It is not necessary for present purposes to discuss the circumstances in which they may be less.[11]

E REVIEW OF EFFECTS OF MISREPRESENTATION ACT 1967[12]

Our discussion has involved very frequent references to the Misrepresentation Act 1967 but it is perhaps worthwhile now to attempt to look at the Act as a whole.

Although there can be little doubt that the general effect of the Act will be to improve the lot of representees as a class, this has been achieved at the

7 In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769, p 322, above both Lord Browne-Wilkinson and Lord Steyn went out of their way to say that they were expressing no view about the correctness of *Royscot*.
8 (1900) 82 LT 49. See p 314, above.
9 [1996] 2 All ER 573.
10 [1994] 3 All ER 932
11 [1994] 3 All ER 932 at 955.
12 Ativah and Treitel 30 MLR 369; Fairest [1967] CLJ 239.

cost of making an already complex branch of the law still more complicated. At least three factors have contributed to this. The first was the general policy decision to proceed by a limited number of statutory amendments to the common law. This means that the Act can only be understood if the previous law has been mastered and since the previous law was often far from clear the Act has been erected on an uncertain base. Secondly, the Act was based on the view of the common law taken by the Law Reform Committee in 1962, which was overtaken by the decision in *Hedley Byrne & Co Ltd v Heller & Partners.*[13] This has meant the creation of two different kinds of negligent misrepresentation with different rules and an uncertain relationship. Thirdly, these defects in approach were compounded by drafting which is frequently obscure and sometimes defective.[14]

An important example of the type of problem created by the Act is the meaning of the phrases 'after a misrepresentation has been made to him' (which occurs three times in sections 1 and 2) and 'any misrepresentation made by him' (which occurs in section 3). The Act does not define 'misrepresentation' and the question has been raised whether these words are apt to extend to situations where the law imposes a duty of disclosure.[15] It would seem reasonably clear that the Act extends to those cases where silence is treated as assertive conduct, as where it distorts a positive assertion made by the representor or where the representor fails to reveal that an earlier statement made by him is no longer true.[16] It is much more debatable whether the word 'misrepresentation' is wide enough to cover cases of non-disclosure *stricto sensu*,[17] such as contracts *uberrimae fidei*, but even here it might be argued that failure to disclose the existence of a material fact is equivalent to affirmation of its non-existence. Similar difficulties may arise from the failure to define the meaning of 'rescission' in the Act.[18]

We have already dealt at length with the effects of sections 1 and 2 of the Act. Both are concerned to improve the representee's remedies for misrepresentation, section 1 by removing possible limits to the right of rescission and section 2 by widening the possibility of obtaining damages. Apart from section 5, which deals with problems of retrospectivity, the other enacting sections of the Act are sections 3 and 4. Section 4 made some changes in the Sale of Goods Act designed to render the buyer's right to reject for breach of condition less liable to defeasance. Section 3 calls for further discussion.

MISREPRESENTATION AND EXEMPTION CLAUSES

In its original form section 3 provided:

> If any agreement (whether made before or after the commencement of this Act) contains a provision which would exclude or restrict–

13 [1964] AC 465, [1963] 2 All ER 575.

14 See Atiyah and Treitel, above, and the critical remarks of the New Zealand Contracts and Commercial Law Reform Committee in their Report on Misrepresentation and Breach of Contract (1967). See now Contractual Remedies Act 1979 (New Zealand).

15 Atiyah and Treitel 30 MLR 369-370; Hudson 85 LQR 524.

16 Pp 297-298, above.

17 See pp 328-334, below.

18 Atiyah and Treitel 30 MLR 370-371.

(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
(b) any remedy available to another party to the contract by reason of such a misrepresentation;
that provision shall be of no effect except to the extent (if any) that, in any proceeding arising out of the contract, the court or arbitrator may allow reliance on it as being fair and reasonable in the circumstances of the case.

In 1977, section 8 of the Unfair Contract Terms Act provided for an amended version, which now reads:

3. If a contract contains a term which would exclude or restrict–
(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
(b) any remedy available to another party to the contract by reason of such a misrepresentation;
that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does.

It will be seen that the major change has occurred in the final portion of the section where the requirement of reasonableness under section 11(1) of the Unfair Contract Terms Act 1977[19] has been substituted for the wider phrasing adopted in the original. This might have, but in fact did not, make a difference in *Howard Marine and Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd*,[20] the facts of which have already been discussed. In that case the plaintiffs, in addition to arguing that they were not liable either for negligence at common law or under section 2(1) of the Misrepresentation Act 1967, contended that their liability was in any case excluded by a provision in the charterparty that 'the charterer's acceptance of handing over the vessel shall be conclusive evidence that they have examined the vessel and found her to be in all respects ... fit for the intended and contemplated use by the charterers and in every other way satisfactory to them'. The crucial question then was to what extent was it reasonable to allow reliance on it, and this permitted consideration of post-contract events;[1] today the question would be whether such a term was a reasonable term to insert in the contract.

In either form the section goes beyond the Law Reform Committee's recommendations which would simply have barred the exclusion of liability for fraudulent and negligent misrepresentation.[2] The section does not go well with the rules relating to clauses excluding liability for breach of contractual terms.[3]

Although since 1977, the court may have power to treat such a clause either as totally ineffective or as subject to the reasonableness test, it will only do so where the contract is of a kind which falls within the scope of the Act.[4] The Misrepresentation Act however is quite general in scope so that its provisions will apply even to misrepresentations, which induce a contract, which is itself outside the scope of the Unfair Contract Terms Act. Furthermore it is often

19 See p 204, above.
20 [1978] QB 574, [1978] 2 All ER 1134.
1 The Court of Appeal held (Lord Denning MR dissenting) that it was not.
2 Cmnd 1782, paras 23-24.
3 Pp 171-219, above.
4 See pp 197-199, above.

arguable whether a statement is properly classified as a term or a representation and, as we have seen,[5] there is no clear decision as to whether it is open to a plaintiff to treat a contractual term as a representation. If this is permissible, a plaintiff may by formulating his claim in misrepresentation, deprive of effect a clause which would have excluded liability for breach of contract.[6]

Although section 3 is clearly aimed both at clauses which exclude liability and at those which restrict remedies, it contains no definition of its ambit in either area. Yet it is well known that the line between clauses excluding and defining liability is very fine and such common commercial occurrences as non-cancellation or arbitration clauses would seem to fall within the literal scope of (b). These difficulties are well illustrated by *Overbrooke Estate Ltd v Glencombe Properties Ltd.*[7]

> The plaintiffs instructed auctioneers to sell a property. The particulars of sale stated that 'neither the auctioneers nor any person in the employment of the auctioneers has any authority to make or give any representation or warranty'. The defendants, who were the highest bidders at the auction, alleged that three days before the auction, they had asked the auctioneers questions about the development plans of the local authorities, to which they had received inaccurate answers.

Brightman J held that even if the defendants could prove these allegations, they would constitute no defence. It was clear that the defendants had the particulars of sale and therefore knew or ought to have known that nothing told them by the auctioneers could bind the plaintiffs. Section 3 of the Misrepresentation Act 1967 was irrelevant since the provision in the particulars of sale did not constitute an exemption clause, but was a limitation on the apparent authority of the auctioneers. This decision appears impeccable but one may suspect that if the draftsman had foreseen it, he would have proceeded differently.[8]

On the other hand the Court of Appeal in *Cremdean Properties Ltd v Nash*[9] held that what was to be treated as a representation for the purposes of the section was to be approached in a broad and reasonable way, so that it would not do to make what would ordinarily be classified as a representation accompanied by a statement that it was not to be treated as a representation.

F NON-DISCLOSURE

We have already seen that English law draws a clear distinction between misrepresentation and non-disclosure.[10] Apart from exceptional cases where silence amounts to assertive conduct,[11] there is no general duty to disclose information that would be likely to affect the other party's decision to conclude the contract. To this rule there are two important exceptions.

5 Pp 309-310, above.
6 As to reasonableness see pp 204-209, above and *Walker v Boyle* [1982] 1 All ER 634, [1982] 1 WLR 495 and *South Western General Property Co v Marton* [1983] CLY 1736, 263 Estates Gazette 1090.
7 [1974] 3 All ER 511, [1974] 1 WLR 1335. Coote [1975] CLJ 17.
8 Cf Consumer Credit Act 1974, s 56(3).
9 (1977) 244 Estates Gazette 547.
10 P 296, above.
11 Pp 297-298, above.

1 CONTRACTS *UBERRIMAE FIDEI*

In certain contracts where, from the very necessity of the case, one party alone possesses full knowledge of all the material facts, the law requires him to show *uberrima fides*. He must make full disclosure of all the material facts known to him, otherwise the contract may be rescinded.[12] It is impracticable to give an exact list of these contracts, nor can it be said that the extent of the duty of disclosure is constant in each case. We will deal somewhat fully with the contract of insurance and then more briefly with contracts for the purchase of shares and with family arrangements.

Contracts of insurance provide the outstanding example.[13] These are generally sub-divided into two classes according as they are designed to meet a marine or a non-marine risk, for the law with regard to the former has been codified by the Marine Insurance Act 1906. It has been established, however, since at least the eighteenth century, that every contract of insurance, irrespective of its subject matter, involves *uberrima fides* and requires full disclosure of such material facts as are known to the assured. As Lord Mansfield demonstrated in *Carter v Boehm*,[14] insurance is a contract upon speculation where the special facts upon which the contingent chance is to be computed lie generally in the knowledge of the assured only, so that good faith requires that he should not keep back anything which might influence the insurer in deciding whether to accept or reject the risk. A fact is material if it is one that would affect the mind of a prudent insurer even though its materiality is not appreciated by the assured.[15] In the words of Bayley J:

> I think that in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is, whether any particular circumstance was in fact material? and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to shew that the party neglecting to give the information thought it material. But if it be held that all material facts must be disclosed, it will be in the interest of the assured to make a full and fair disclosure of all the information within their reach.[16]

The duty of disclosure in the case of marine insurance is prescribed as follows in the Marine Insurance Act:

> Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.[17]

Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.[18]

12 Where there is a duty to disclose, non-disclosure makes the contract voidable and not void. *Mackender v Feldia AG* [1967] 2 QB 590, [1966] 3 All ER 847.

13 Hasson 32 MLR 615; Achampong 36 NILQ 329.

14 (1766) 3 Burr 1905 at 1909. Exceptionally a contract of guarantee, eg a fidelity guarantee, may rank as a contract of insurance: *London General Omnibus Ltd v Holloway* [1912] 2 KB 72. Blair 29 MLR 522 at 524-536.

15 *London Assurance v Mansel* (1879) 11 Ch D 363. *Lambert v Co-operative Insurance Society* [1975] 2 Lloyd's Rep 485.

16 *Lindenau v Desborough* (1828) 8 B & C 586 at 592.

17 Marine Insurance Act 1906, s 18(1).

18 Ibid, s 18(1).

Thus, for example, the assured must inform the underwriter that the ship is overdue[19] or has put into an intermediate port for repair;[20] that the insured goods are to be carried on deck, a place where it is not usual to stack them;[1] or that the cargo is to be taken on board at a particular port where loading is a hazardous operation.[2]

The question in each case is whether the fact would have been material in influencing the mind of a prudent insurer, not whether loss has resulted from the undisclosed fact. Thus, where the assured concealed a report that the ship when last seen was in a position of danger, though as a matter of fact she survived on this occasion only to be captured later by the Spaniards it was held that the policy could be avoided for non-disclosure.[3]

There has been much discussion as to what exactly is meant by 'influencing the mind of a prudent insurer'. Clearly, this test is satisfied if it is shown that the prudent insurer would have refused the proposal or would only have accepted it at a higher premium or subject to an excess. However, the Court of Appeal, in *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd*[4] went further and held that a fact was material if a prudent insurer would like to have known it though the evidence showed that the prudent insurer would in fact have accepted the proposal on standard terms. This view was much criticised but it was accepted as correct by the majority of the House of Lords in *Pan Atlantic Insurance Co Ltd v Pinetop Insurance Co Ltd*.[5] There was a powerful dissenting judgment by Lord Lloyd with whom Lord Templeman agreed. The House of Lords went on, however, to say that the insurer must show not only that the information not disclosed was material in this sense, but also that it was in fact so induced to enter into the contract. This restates what had certainly been lost sight of for the best part of 100 years in relation both to misrepresentation and to non disclosure: there are two separate tests of materiality and actual inducement. In practice, decisions on misrepresentation have concentrated on actual inducement and decisions on non disclosure on materiality. In practice, once materiality is established, the significance of the requirement of inducement will turn largely upon whether there is a presumption and, if so, of what strength, that actual inducement can be deduced from materiality. This is because the insured will have little or no information as to what may or may not have induced the insurer. If the insurer has actually to give evidence as to inducement, a skilful cross-examination by the counsel for the insured may leave the court unconvinced. If there is a presumption, the insured may be able to avoid giving evidence and thereby denying the insured the chance of cross-

19 *Kirby v Smith* (1818) 1 B & Ald 672.
20 *Uzielli v Commercial Union Insurance Co* (1865) 12 LT 399.
1 *Hood v West End Motor Car Packing Co* [1917] 2 KB 38.
2 *Harrower v Hutchinson* (1870) LR 5 QB 584.
3 *Seaman v Fonereau* (1743) 2 Stra 1183. In its 5th Report, the Law Reform Committee suggested that it would be practicable to frame a new statutory definition of 'material' on the following lines: 'For the purposes of any contract of insurance no fact shall be deemed material unless it would have been considered material by a reasonable insured'; Cmnd 62 (1957), p 7. See now the more comprehensive proposals for reforming contracts in the Law Commission's Report of October 1980 (Law Com No 104). It now appears likely that there will not be legislation to implement this report.
4 [1984] 1 Lloyd's Rep 476.
5 [1994] 3 All ER 581.

examination. In the *Pan Atlantic* case, Lord Mustill thought there was a presumption but Lord Lloyd did not agree.[6]

A similar duty of disclosure exists in the case of non-marine insurances. Whether the policy is taken out of life, fire, burglary, fidelity or accidental risk, it is the duty of the assured to give full information of every material fact: and it has been held by the Court of Appeal that the definition of 'material' contained in the Marine Insurance Act 1906, namely every circumstance 'which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk', is applicable to all forms of insurance.[7] It has thus been held in each of the following cases that the policy was vitiated for non-disclosure:

> In a proposal for fire insurance, the assured stated that no proposal by him had previously been declined by any other company; in fact, another company had previously refused to issue a policy in respect of his motor vehicle.[8]
>
> In applying for a fire insurance policy, the proposer omitted to mention that a fire had broken out next door upon the day of the proposal.[9]
>
> In a proposal for a policy insuring the repayment of a loan, the proposer failed to divulge that, owing to the financial debility of the borrower, the interest had been fixed at 40 per cent.[10]

The duty of disclosure thus imposed by law is confined to facts which the assured knows or ought to know. 'The duty', said Fletcher-Moulton LJ, 'is a duty to disclose, and you cannot disclose what you do not know.'[11] Thus if the question—'Have you any disease?'—is put to an applicant for a life assurance policy, and he answers in the negative, fully believing his health to be sound, the resulting contract cannot be rescinded upon proof that at the time of his answer he was suffering from malignant cancer. The duty, however, may be enlarged by the express terms of the contract, and in fact insurers have taken extensive, perhaps indeed unfair, advantage of this contractual freedom. In practice they almost invariably require the assured to agree that the *accuracy* of the information provided by him shall be a condition of the validity of the policy. To this end it is common to insert a term in the proposal form providing that the declarations of the assured shall form the basis of the contract. The legal effect of this term is that if his answer to a direct question is inaccurate, or if he fails to disclose some material fact long forgotten or even some fact that was never within his knowledge, the contract may be avoided despite his integrity and honesty of purpose. Nay more, his incorrect statement about a matter that is nothing more than a matter of opinion is sufficient to avoid the

6 See also *St Paul Fire & Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1996] 1 All ER 96; Birds and Hird 59 MLR 285.

7 *Locker and Woolf Ltd v Western Australian Insurance Co Ltd* [1936] 1 KB 408. As to the burden of proof, see *Slattery v Mance* [1962] 1 QB 676, [1962] 1 All ER 525.

8 *Locker and Woolf Ltd v Western Australian Insurance Co Ltd*, above.

9 *Bufe v Turner* (1815) 6 Taunt 338.

10 *Seaton v Heath* [1899] 1 QB 782. See also *Woolcott v Sun Alliance and London Insurance Ltd* [1978] 1 All ER 1253, [1978] 1 WLR 493.

11 *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 at 884, per Fletcher-Moulton LJ.

policy. Thus, for instance, one of the commonest questions put to a person who applies for a life insurance is 'Have you any disease?', a matter which, even for a doctor, is often a subject of mere speculation or opinion.

> But the policies issued by many companies are framed so as to be invalid unless this and many other like questions are correctly—not merely truthfully—answered, though the insurers are well aware that it is impossible for anyone to arrive at anything more certain than an opinion about them. I wish I could adequately warn the public against such practices on the part of insurance offices.[12]

The courts view this practice with distaste and they do what they can to mitigate its severity by imposing a strict burden of proof upon insurers.[13]

The above account has talked of disclosure by the insured. It is natural to talk in this way since it is usually the insured who will know facts which would have affected the judgement of the insurer if they had been disclosed. However, it is clear that in principle, the duty of disclosure lies equally on the insurer. This was one of the important questions which arose in *Banque Financière de la Cité SA v Westgate Insurance Co Ltd.*[14] In this case a Mr Ballestero persuaded syndicates of banks to lend his companies many millions of Swiss francs. The loans were secured partly by gemstones (which later turned out to be virtually valueless) and partly by credit insurance policies covering failure by the borrowing companies to repay the loans. Insurance policies were issued by the defendant insurers and contained clauses which excluded liability in the event of fraud. Mr Ballestero disappeared with the money and the plaintiff lenders sought to recover it from the defendant insurers. On the face of it they could not do so because the policies excluded recovery in the event of Mr Ballestero's fraud. But the plaintiffs argued that they would not have entered into the transaction if the defendant insurers had made, as they should have done, a full disclosure of a material fact. This was that the insurers knew that the insurance policies had been procured by an employee of the insurance broker falsely representing that the full amount of the loan was insured when he only held a cover note valid for 14 days.

These facts raised a series of issues. The first issue was whether the insurers were in general under a duty of disclosure to the plaintiffs. All the courts which considered the question held that the duty of disclosure between insurer and insured was reciprocal. The next question was whether the particular information about the dishonest behaviour of the employee of the insurance broker should have been revealed by the insurers to the insured. It is clear that the duty is not to reveal all information but to reveal material information. When considering disclosure by the insured, it is well established that the test of materiality relates to what would affect the judgment of a reasonable insurer either to refuse the policy or to accept it only on special

12 Ibid at 885, per Fletcher-Moulton LJ. See Hasson 34 MLR 29 and the Report of the Law Commission (Law Com no 104) and also the statement of practice of the British Insurance Association (discussed Birds 40 MLR 677).

13 *Bond Air Services Ltd v Hill* [1955] 2 QB 417, [1955] 2 All ER 476; *West v National Motor and Accident Insurance Union Ltd* [1955] 1 All ER 800. For other respects in which the scales are weighted against the insured, see the 5th Report of the Law Reform Committee (1957), Cmnd 62.

14 [1990] 1 QB 665, [1987] 2 All ER 923, per Steyn J (*Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd*) [1989] 2 All ER 952, CA; affd [1990] 2 All ER 947, [1990] 3 WLR 364, HL.

terms (such as charging a higher premium or requiring the insured to pay the first part of any loss himself). In disputed cases this can be resolved by expert evidence as to the behaviour of reasonable insurers. It is difficult, if not impossible, to see how expert evidence could be given as to the behaviour of the reasonable insured. Both Steyn J and the Court of Appeal thought that there had been a failure to disclose material facts in the present case though they applied a somewhat different test. Steyn J thought that the insurer should reveal facts which would affect the judgement of the reasonable insured so far as good faith and fair dealing required. The Court of Appeal took a somewhat narrower view. In particular they did not think that an insurer need reveal to the insured that other reputable insurers would cover the risk at lower premiums. They thought that 'the duty falling on the insurer must at least extend to disclosing all facts known to him which are material either to the nature of the risks sought to be covered or to the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk for which he seeks cover with that insurer'. The House of Lords took a completely different line on this issue. They thought that the plaintiffs' loss did not arise from the insurer's non-disclosure but from the fraud of Mr Ballestero, which was wholly independent of that. They thought that even if the agent of the insurance brokers had behaved entirely properly and honestly the banks would still not have been protected since then they would have had insurance policies subject to a fraud exception, which is exactly what they ended up with in any case.[15] In the result, therefore, the House of Lords did not have to express a view on how the materiality test should be expressed. Nor did they have to consider a third question on which Steyn J and the Court of Appeal took different views. This was as to the nature of the remedy which would be available to the plaintiffs. It is well settled that in general the remedy for non-disclosure is to set the contract aside. But it would have helped the plaintiff bankers not at all to set the contract of insurance aside (or rather it would only have helped them to recover their premiums) since setting the contract aside would simply mean that they were not protected. There is an obvious lack of reciprocity in practice here between insurer and insured. Steyn J would have been willing to give the insured a remedy in damages arising from non-disclosure by the insurer but the Court of Appeal rejected this, partly on the grounds that voidability as the only remedy was well established by authority and partly on the grounds that it would be to impose a liability in damages for behaviour which might be totally without fault, since the duty of disclosure was strict and not negligence based.

Contracts to take shares in companies

A contract to take shares in a company is often made on the faith of the prospectus issued by the promoters. It has long been recognised that the document is a fruitful source of deception, for persons who desire to foist an undertaking upon the public are not usually remarkable either for the accuracy of their representations or for the industry with which they search for

15 At first instance it appears to have been accepted that if the lenders had known of the dishonesty of the insurance broker's employee, they would not have gone through with the loan transactions. See also *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck* [1991] 3 All ER 1 as to the legal effect of a promissory warranty given by the insured that a ship will not enter a high risk area without notice.

facts that might usefully be disclosed. There are a number of statutes which have provisions affecting liability in this respect[16] and the Companies Act 1985, section 56, contains a list of matters that every prospectus must contain. The result of the statutory provisions, especially when taken together with the extra legal controls operated by the Stock Exchange, is that a contract to take shares has become closely akin to one which is *uberrimae fidei*.[17]

Family arrangements

The expression 'family arrangements' covers a multitude of agreements made between relatives and designed to preserve the harmony, to protect the property or to save the honour of the family.[18] It comprises such diverse transactions as the following: a resettlement of land made between the father as tenant for life and the son as tenant in tail in remainder; an agreement to abide by the terms of a will that has not been properly executed, or to vary the terms of a valid will; the release of devised property from a condition subsequently imposed by the testator; or an agreement by a younger legitimate son to transfer family property to an illegitimate elder son.

Equity, though always anxious to sustain family arrangements, insists that there should be the fullest disclosure of all material facts known to each party, even though no inquiry about them may have been made. The parties must be on an equal footing.

Thus, in *Gordon v Gordon*,[19] a division of property, based upon the probability that the elder son was illegitimate, was set aside nineteen years afterwards upon proof that the younger son had concealed his knowledge of a private ceremony of marriage solemnised between his parents before the birth of his brother; and in *Greenwood v Greenwood*[20] an agreement to divide the property of a deceased relative was avoided on the ground that one of the parties failed to disclose information which he alone possessed concerning the amount of the estate.

2 CONSTRUCTIVE FRAUD

In cases where the representor had no honest belief in the truth of his statement, equity has long had a concurrent jurisdiction with the common law. The court to which a plaintiff would resort before the Judicature Act would depend upon whether the remedy he sought was on the one hand the recovery of damages for deceit or on the other rescission and an account of profits. Equity, however, in the exercise of its exclusive jurisdiction has from early days given a more extended meaning to the word 'fraud' than has the common law, and has developed a doctrine of *constructive fraud*. Lord Haldane said in a leading case:

> But in addition to this concurrent jurisdiction, the Court of Chancery exercised an exclusive jurisdiction in cases which, although classified in that Court as cases

16 Companies Act 1985, especially ss 56, 57, 66, 67, 68, 69; Prevention of Fraud (Investments) Act 1958; Protection of Depositors Act 1963; Financial Services Act 1986; Gower *Modern Company Law* (4th edn) pp 366-393.

17 There was authority for a duty of disclosure at common law. *Central Rly Co of Venezuela (Directors etc) v Kisch* (1867) LR 2 HL 99 at 113. Cf *Aaron's Reefs Ltd v Twiss* [1896] AC 273 at 287.

18 See generally, White and Tudor's *Leading Cases in Equity* vol 1, pp 198 ff.

19 (1821) 3 Swan 400.

20 (1863) 2 De GJ & Sm 28.

> of fraud, yet did not necessarily import the element of *dolus malus*. The Court took upon itself to prevent a man from acting against the dictates of conscience as defined by the Court, and to grant injunctions in anticipation of injury, as well as relief where injury had been done.[1]

It is not unnatural that a principle of jurisdiction defined in such expansive terms should have been gradually applied to a wide field of human activities and to what at first sight appear to be a welter of unrelated items;[2] but one important example pertinent to the present discussion is where, owing to the special relationship between the parties, a transaction may be voidable in equity for non-disclosure. 'Under certain circumstances a duty may arise to disclose a material fact, and its non-disclosure may have the same effect as a representation of its non-existence.'[3] Whenever the relation between the parties to a contract is of a confidential or fiduciary nature, the person in whom the confidence is reposed and who thus possesses influence over the other cannot hold that other to the contract unless he satisfies the court that it is advantageous to the other party and that he has disclosed all material facts within his knowledge.[4]

Such a confidential relationship is deemed to exist between persons connected by certain recognised ties, such as parent and child, principal and agent,[5] solicitor and client, religious superior and inferior, and trustee and beneficiary. But the courts have always refused to confine this equitable jurisdiction to such familiar relations. They are prepared to interfere in a contract wherever one party deliberately and voluntarily places himself in such a position that it becomes his duty to act fairly and to have due regard to the interests of the other party. In a leading case, Lord Chelmsford stated the general principle in these words:

> Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.[6]

These words were spoken in a case where X, an extravagant undergraduate much pressed by his Oxford creditors and anxious to extricate himself from his financial embarrassment, sought the advice of Y. Having recommended the sale of the undergraduate's Staffordshire estate, Y offered to buy it himself for £7,000 without disclosing that, owing to the existence of subjacent minerals, X's interest was worth at least double that amount. The offer was accepted and the conveyance executed, but some years later the sale was set aside by the court at the insistence of X's heir. Y was constructively fraudulent in the sense that he wrongfully exploited to his own advantage the commanding position in which he stood.

1 *Nocton v Lord Ashburton* [1914] AC 932 at 952.
2 See eg the extended meaning of fraud given by Lord Hardwicke in *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125 at 155.
3 Ashburner *Principles of Equity* (2nd edn) 285. For a classification of relationships, see Sealy [1962] CLJ 69, [1963] CLJ 119.
4 *Moody v Cox and Hatt* [1917] 2 Ch 71 at 88, per Scrutton LJ.
5 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n, [1942] 1 All ER 378.
6 *Tate v Williamson* (1866) 2 Ch App 55 at 61.

G RELATIONSHIP BETWEEN MISREPRESENTATION AND ESTOPPEL[7]

It not infrequently happens that A enters into a contract with B on the faith of a misrepresentation made by X. Here, unless X is the agent of B, there can be no question of a remedy against B and since there will normally be no contract between A and X,[8] many of the remedies discussed in this chapter will be unobtainable. One cannot rescind a contract that does not exist and actions under the Misrepresentation Act 1967 only lie where the representation 'has been made ... by another party' to the contract. X can certainly be sued in tort if he is fraudulent and in some cases an action may now lie for negligence under *Hedley Byrne & Co Ltd v Heller & Partners*.[9]

In some such cases, assistance may be obtained from the doctrine of estoppel by representation. This was stated by Lord Macnaghten as follows:

> It is ... a principle of universal application, that if a person makes a false representation to another and that other acts upon that false representation the person who has made it shall not afterwards be allowed to set up that what he said was false and to assert the real truth in place of the falsehood which has so misled the other.[10]

It would appear that the constituents of a representation for estoppel by misrepresentation are the same as for actionable misrepresentation.[11] The main obstacle to a wide use of this principle is that it is said that estoppel is not in itself a cause of action.[12] If this is right, it follows that the plaintiff who wishes to employ the principle of estoppel must formulate some independent cause of action which would have succeeded had the estoppel statement been true. He may then rely on estoppel to defeat a defence which would otherwise be available to the defendant, since evidence to prove the untruth of the statement will be inadmissible.

This possibility is neatly illustrated by *Burrows v Lock*.[13] The facts were these:

> X was entitled to a sum of £288 held on his behalf by a trustee, A. He assigned part of this to Y by way of security, notice of the assignment being given to A. Ten years later he purported to assign the whole of the £288 to Z in return for valuable consideration. Before completing this transaction, Z consulted A, who having forgotten the previous assignment to Y, represented that X was still entitled to the full sum of £288.

Z later filed a bill against A, who was held liable for so much of the trust fund as had previously been assigned to Y. Here Z had an independent cause of action, for had the representation of the trustee been correct he would have been entitled to the whole sum of £288 against the trustee, for the effect of

7 Spencer Bower and Turner *The Law Relating to Estoppel by Representation* (3rd edn, 1977); Ewart on *Estoppel*; Ativah *Essays on Contract*, Essay 10; Jackson 81 LQR 84, 223.

8 Unless the court discovers a 'collateral' contact with X.

9 [1964] AC 465, [1963] 2 All ER 575.

10 *Balkis Consolidated Co v Tomkinson* [1893] AC 396 at 410, citing Lord Cranworth in *Jorden v Money* (1854) 5 HL Cas 185 at 210, 212.

11 Spencer Bower and Turner *The Law Relating to Estoppel by Representation* (3rd edn, 1977) pp 29 ff.

12 This is certainly the orthodox view. See especially *Law v Bouverie* [1891] 3 Ch 82. Cf the views of Ativah and Jackson, n 7, above.

13 (1805) 10 Ves 470. Sheridan *Fraud in Equity* pp 31-36. Cf *United Overseas Bank v Jiwani* [1977] 1 All ER 733.

the assignment would have been that the trustee held the £288 on behalf of Z. In fact the trustee held part of the fund on trust for Y, but he was estopped from setting this up to defeat the claim of Z.

The possibility of formulating an action for damages for negligent misstatement will have reduced but not removed the importance of this more devious route to damages. In addition it should be noted that cases may arise where estoppel will operate as a defence and here of course there will be no need to formulate an independent cause of action.

2 Duress and undue influence[14]

Since agreement depends on consent, it should follow that agreement obtained by threats or undue persuasion is insufficient. Both common law with a limited doctrine of duress and equity with a much wider doctrine of undue influence have acted in this area. It is clear that in equity the effect of undue influence is to make the contract voidable, but it is disputed whether the effect of duress at common law is to make the contract void or voidable. The question would be important if questions of affirmation or third party rights were involved but there is no satisfactory modern authority. The majority of writers state that duress makes the contract voidable[15] but this has been vigorously controverted.[16] There are a number of modern cases which discuss whether duress renders a marriage void or voidable and it is sometimes assumed that the rule is the same for marriage and for contract.[17] But even if this assumption is correct, it does not provide a clear answer since the cases do not agree[18] and in none of them was it necessary to decide the question.

Both common law and equity agree that a party cannot be held to a contract unless he is a free agent, but the contribution made by common law to this part of the subject has been scanty. It is confined to the avoidance of contracts obtained by duress, a word to which a very limited meaning has been attached. Duress at common law, or what is sometimes called *legal duress*, means actual violence or threats of violence to the person, ie threats calculated to produce fear of loss of life or bodily harm.[19] It is a part of the law which nowadays seldom raises an issue.

14 Winder 56 LQR 97, 8 MLR 97, 4 Conv (NS) 274; Winfield 60 LQR 341.

15 See eg Pollock *Principles of Contract* (13th edn) p 179, citing the second rule in *Whelpdale's Case* (1604) 5 Co Rep 119a, 77 ER 289.

16 Lanham 29 MLR 615.

17 *Parojcic v Parojcic* [1958] 1 WLR 1280 at 1283.

18 See eg *Parojcic v Parojcic*, above; *Buckland v Buckland* [1968] P 296, [1967] 2 All ER 300, Manchester 29 MLR 622; *Singh v Singh* [1971] 2 All ER 828 at 830. An elaborate historical survey by Tolstoy 27 MLR 385, shows that the rule was originally that the marriage was void. For marriage the question was resolved by the Nullity of Marriage Act 1971, s 2 (c) (now Matrimonial Causes Act 1973, s 12(c)) whereby the effect of duress is to render the marriage voidable. In *DPP for Northern Ireland v Lynch* [1975] 1 All ER 913 at 938, [1975] AC 653 at 695, Lord Simon of Glaisdale stated that duress made contracts voidable though this was clearly obiter. The whole of this case repays study for its analysis of the operation of duress. See further the debate Ativah 98 LQR 197; Tiplady 99 LQR 198 Ativah 99 LQR 353. As a matter of criminal law *Lynch* was overruled in *R v Howe* [1987] AC 417, [1987] 1 All ER 771, a case which has received a less than ecstatic welcome from commentators, see eg Milgate [1988] CLJ 61.

19 Co Litt 253b. For a modern example see *Friedeberg-Seeley v Klass* [1957] CLY 1482, 101 Sol Jo 275.

That a contract should be procured by actual violence is difficult to conceive, and a more probable means of inducement is a threat of violence. The rule here is that the threat must be illegal in the sense that it must be a threat to commit a crime or a tort.[20] Thus to threaten an imprisonment that would be unlawful if enforced constitutes duress, but not if the imprisonment would be lawful.[1] Again a contract procured by a threat to prosecute for a crime that has actually been committed,[2] or to sue for a civil wrong,[3] or to put the member of a trade association on a stop-list,[4] is not as a general rule voidable for duress. But it may be void as being contrary to public policy, as for example where it is in effect an agreement tending to pervert the course of justice.[5] It must be established that the threats were a reason for entering into the contract but it need not be shown that they were the only or even the main reason. Once it has been proved that unlawful threats were made, it is for the threatener to show that they were not a reason for the other party contracting.[6]

For duress to afford a ground of relief, it must be duress of a man's person, not of his goods.[7] In *Skeate v Beale*,[8] for instance, a tenant agreed that if his landlord would withdraw a distress for £19 10s in respect of rent, he would pay £3 7s 6d immediately and the remainder, £16 2s 6d, within one month. To an action to recover £16 2s 6d the tenant pleaded that the distress was wrongful, since only £3 7s 6d was due, and that the landlord threatened to sell the goods at once unless agreement was made. This plea was disallowed. But it has been held that money paid under duress of goods may be recovered.[9] Clearly these two rules are difficult to reconcile.[10]

Equity had concurrent jurisdiction with the courts of common law with regard to duress, but by an application of its comprehensive doctrine of constructive fraud,[11] it exercised a separate and wider jurisdiction over contracts made without free consent. It developed a doctrine of undue influence.[12] This doctrine is accurately stated by Ashburner:

> In a court of equity if A obtains any benefit from B, whether under a contract or as a gift, by exerting an influence over B which, in the opinion of the court, prevents B from exercising an independent judgment in the matter in question, B can set aside the contract or recover the gift. Moreover in certain cases the relation between A and B may be such that A has peculiar opportunities of exercising influence over B. If under such circumstances A enters into a contract with B, or receives a gift from B, a court of equity imposes upon A the burden,

20 Cf *Ware and De Freville Ltd v Motor Trade Association* [1921] 3 KB 40.
1 *Cumming v Ince* (1847) 11 QB 112; *Biffin v Bignell* (1862) 7 H & N 877; *Smith v Monteith* (1844) 13 M & W 427.
2 *Fisher & Co v Appolinaris Co* (1875) 10 Ch App 297.
3 *Powell v Hoyland* (1851) 6 Exch 67.
4 *Thorne v Motor Trade Association* [1937] AC 797, [1937] 3 All ER 157.
5 Pp 417-419, below.
6 *Barton v Armstrong* [1976] AC 104, [1975] 2 All ER 465.
7 *Atlee v Backhouse* (1838) 3 M & W 633 at 650, per Parke B.
8 (1840) 11 Ad & El 983.
9 *Astley v Reynolds* (1731) 2 Stra 915; *T D Keegan Ltd v Palmer* [1961] 2 Lloyd's Rep 449.
10 Goff and Jones *The Law of Restitution* (3rd edn) pp 206-222. Beatson [1974] CLJ 97, shows that the duress of goods doctrine owes its existence to a factual overlap with the rule that a compromise of a doubtful claim is valid.
11 P 334, above.
12 See especially White and Tudor *Leading Cases in Equity* vol 1, pp 203 ff; Hanbury and Maudsley *Modern Equity* (13th edn, 1989) pp 788-794. Sheridan *Fraud in Equity* pp 87-106.

if he wishes to maintain the contract or gift, of proving that in fact he exerted no influence for the purpose of obtaining it.[13]

The only rider to make to this statement is that an intention by A to benefit himself personally is not essential to justify rescission of a contract. It is enough that in the exercise of his influence he has not made the welfare of B, to the exclusion of all other persons, his paramount consideration.[14]

Unconscionable bargains

Historically this area of equity has embraced not only the present doctrine of undue influence and the special rules about disclosure, discussed above,[15] but also rules about unconscionable bargains.[16] As is often the case however, the term 'unconscionable bargains' bears a much narrower meaning in equity than in lay usage. The typical transaction, assumed by the older authorities, involved an improvident arrangement by an expectant heir to anticipate his inheritance—a situation unlikely to occur often today with the virtual disappearance of strict settlements. Though there are old cases under this rubric which turn on the infirmity of one of the parties,[17] it has been doubted whether an English court would now set aside a transaction merely because one of the parties were poor, ignorant or weak-minded.[18] A Northern Ireland court did so however in *Buckley v Irwin*[19] and there are several Canadian decisions to the same effect.[20]

Unconscionability has been much more vigorously developed in the law of Australia.[1] Perhaps the most striking example is *Commercial Bank of Australia Ltd v Amadio*.[2] In this case, Amadio Builders had an overdraft account with the Commercial Bank of Australia. Vincenzio Amadio was the managing director of the company. Vincenzio's parents, though neither poor nor illiterate, were relatively old and not very fluent in written English. They greatly admired Vincenzio whom they thought of as a very successful businessman. In fact, the company was insolvent and heavily in debt to the bank. The bank, in co-operation with Vincenzio, helped to conceal the company's difficulties from the public by selective dishonour of the company's cheques. In due course, the bank proposed to close the company's account unless security was provided by way of a mortgage on property owned by Vincenzio's parents. The parents were persuaded to sign the appropriate papers by the manager at a visit to their house. Vincenzio told his parents that the guarantee would be for six months

13 *Ashburner on Equity* (2nd edn) p 299; see also *Allcard v Skinner* (1887) 36 ChD 145 at 181 and 183, per Lindley LJ.

14 *Bullock v Lloyds Bank Ltd* [1955] Ch 317, [1954] 3 All ER 726.

15 Pp 334-335, above.

16 See Sheridan *Fraud in Equity* pp 125-145; Goff and Jones *The Law of Restitution* (3rd edn) pp 257-267. The special statutory rules about money lending contained in the Money-Lenders Acts 1900 and 1927 were substantially a strengthening of equitable doctrine in a particularly vulnerable area. They have now been replaced and extended by the Consumer Credit Act 1974, ss 137-140.

17 Eg *Evans v Llewellin* (1787) 1 Cox Eq Cas 333.

18 Treitel *Law of Contract* (3rd edn) p 351. Cf 10th edn, pp 383.

19 [1960] NI 98.

20 See eg *Knupp v Bell* (1968) 67 DLR (2d) 256; *Marshall v Canada Permanent Trust Co* (1968) 69 DLR (2d) 260; *Mundinger v Mundinger* (1968) 3 DLR (3d) 338; Enman 16 Anglo-American LR 191.

1 Carter and Harland, *Contract Law in Australia* Chapter 15.

2 (1983) 151 CLR 447.

only and have an upper limit of $50,000. Both these statements were , to his knowledge, untrue. The branch manager did tell the parents that the guarantee was not limited to six months. The parents received no independent advice. In due course, the company went insolvent, owing the bank nearly £240,000 and the bank sought to enforce the mortgage. In the High Court, it was held that the transaction should be set aside on the grounds that the bank's behaviour was unconscionable. An English court might well have reached the same conclusion on these facts by the application of the rules of undue influence.[3]

In *Portman Building Society v Dusangh*[4] a father borrowed money on mortgage from the claimants so as to fund a loan to his son who was planning to buy a supermarket. The father was 72, retired, illiterate in English and spoke it poorly. No fraud or undue influence on the part of the son was alleged and the son was not in financial difficulties at the time of the loan. The father, the son and the building society were all represented by the same solicitor. In due course, the supermarket failed, the building society sought to enforce the mortgage and the father argued that the transaction was unconsionable. The possibility of attacking such a transaction as unconsionable was not excluded but on the facts the transaction was held not to be unconsionable.

Economic duress

In the past English law, unlike American law,[5] has not used these fertile doctrines to deal with the general problem of inequality of bargaining power. This battle has been fought on other fronts.[6] A prophetic exception however may be found in the judgment of Lord Denning MR in *D & C Builders Ltd v Rees*,[7] where he held that the plaintiffs' consent to acceptance of part payment in full satisfaction of a debt 'was no true accord. The debtor's wife held the creditor to ransom. The creditor was in need of money to meet his own commitments and she knew it.'[8] This case involved not the creation of a contract through improper pressure, but its discharge.[9]

In the eighth edition of this work we suggested that it was possible that one day a bold court might use this statement as a springboard for a new development. This prophecy has been fulfilled, with perhaps surprising speed, by the judgment of Lord Denning MR in *Lloyds Bank Ltd v Bundy*.[10]

3 See pp 345-353, below.

4 [2000] 2 All ER (Comm) 221

5 See the masterly survey by J P Dawson 45 Michigan L Rev 253.

6 See pp 171-219, above. English law has been in some danger of treating exemption clauses as the only manifestation of unequal bargaining power.

7 [1966] 2 QB 617, [1965] 3 All ER 837. Discussed p 106, above. See Winder 82 LQR 165; Cornish 29 MLR 428.

8 Ibid at 625 and 841, respectively. See also *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep 98.

9 See Reynolds and Treitel 7 Malaya L Rev 1 at 21-23.

10 [1975] QB 326, [1974] 3 All ER 757. See also per Lord Diplock in *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 623, [1974] 1 WLR 1308 at 1315; *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 All ER 237, [1975] 1 WLR 61. Though these two latter cases concern the application of the restraint of trade doctrine (pp 449-466 ff, below) they contain observations of general application. See too the dictum of Brightman J in *Mountford v Scott* [1974] 1 All ER 248 at 252 (not reported in [1975] Ch 258); affd on other grounds [1975] Ch 258, [1975] 1 All ER 198. 'The Court would not permit [an] educated person to take advantage of the illiteracy of the other.'

The defendant was an elderly farmer, whose home and only asset was a farmhouse, which had belonged to the family for generations. The defendant, his son and a company of which the son was in control all banked at the same branch of the plaintiff bank. The company ran into difficulties and the defendant guaranteed its overdraft up to £1,500 and charged his house to the bank for that sum. Later he executed a further guarantee for £5,000 and a further charge for £6,000. As the farmhouse was worth only £10,000 he was advised by his solicitor that that was the most he should commit to the son's business. However the company's difficulties persisted and in December 1969 a newly appointed assistant manager of the branch told the son that further steps must be taken. The son said that his father would help. The assistant manager went to see the father at his farmhouse taking with him completed forms for a further guarantee and charge up to a figure of £11,000. He told the father that the bank could only continue to support the company if he executed the guarantee and charge and the father did so. In May 1970 a Receiver was appointed of the company and the bank took steps to enforce the guarantee and charge.

The Court of Appeal set aside the guarantee and charge. The father looked to the bank for financial advice and placed confidence in it. Since it was in the bank's interest that the father should execute the new guarantee, the bank could not discharge the burden of giving independent advice itself. It was incumbent on the bank therefore to see that the father received independent advice on the transaction and in particular on the affairs of the company. This they had failed to do.

This reasoning was well within the scope of the traditional statements of the doctrine and Cairns LJ and Sir Eric Sachs so decided the case. Lord Denning MR, however, conducted a broad review of the existing law and concluded:

> Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases.[11]

This statement was neither approved nor disapproved by the other members of the Court and therefore does not technically form part of the *ratio decidendi* of the case. The same could no doubt be said of many historic pronouncements in English law, such as Lord Atkin's speech in *Donoghue v Stevenson*.[12] Although

11 Ibid at 339 and 765, respectively.
12 [1932] AC 562. See Pollock's *Law of Torts* (15th edn) pp 326-333.

a general reception of notions of inequality of bargaining power into English law would probably generate a need for sub-rules and qualifications. It is submitted that it would on balance be a fruitful source for future development of the law.[13]

It is now clear that in his judgments in *D & C Builders Ltd v Rees* and *Lloyd's Bank Ltd v Bundy* Lord Denning was suggesting the introduction into English law of not one but two new doctrines, economic duress and inequality of bargaining power. So far the former suggestion has fallen on much more fertile ground than the latter. In delivering the advice of the Privy Council in *Pao On v Lau Yiu Long*[14] Lord Scarman observed that 'there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must always amount to a coercion of will, which vitiates consent'.[15]

Since the Privy Council was quite clear that there had in fact been no coercion of the will, this statement was not surprisingly of the most guarded kind and more weight should perhaps be attached to the judgment of Mocatta J in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd*.[16]

The defendants, a firm of shipbuilders, had agreed to build a tanker for the plaintiffs, who were shipowners. The price was agreed at US $30,950,000 payable in five instalments. After the plaintiffs had paid the first instalment the international value of the dollar suffered a sharp decline and the defendants demanded an increase of 10 per cent in the price and threatened not to complete the ship if this was not forthcoming. Unknown to the defendants, this threat was particularly powerful as the plaintiffs had made a profitable contract to charter the ship on completion. The plaintiffs although advised that the defendants had no legal claim therefore agreed to pay the extra money demanded, and paid the remaining four instalments plus 10 per cent and in due course received delivery of the tanker. Some eight months later they claimed repayment of the excess over the originally agreed price. Mocatta J held[17] that in principle this was a case of economic duress, since the threat not to build the ship was both wrongful and highly coercive of the plaintiffs' will but he also held that the plaintiffs had lost their right to set the contract aside by affirmation. The House of Lords in *Universe Tankships of Monrovia v International Transport Workers Federation*,[18] a difficult labour law case, clearly assumed that there was a doctrine of economic duress which would render the contract voidable because one party had entered into it as a result of economic pressure which the law regards as illegitimate.

CTN Cash and Carry Ltd v Gallaher Ltd[19] contains an interesting discussion of the proper limits of economic duress.

13 Cf Sealy [1975] CLJ 21; Carr 38 MLR 463. Tiplady 46 MLR 601.

14 [1979] 3 All ER 65 at 79, [1979] 3 WLR 435 at 451.

15 See also Lord Scarman's observations in *Burmah Oil Co Ltd v Bank of England* [1979] 3 All ER 700 at 729-730, [1979] 3 WLR 722 at 754-755.

16 [1979] QB 705, [1978] 3 All ER 1170; Adams 42 MLR 557; Goote [1980] CLJ 40. See also *The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293.

17 He also held that there was technical consideration for the contract in the provision by the defendants of an increased letter of credit to guarantee repayments of the price if the ship was not completed.

18 [1983] 1 AC 366, [1982] 2 All ER 67. See also *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1982] ICR 654; affd [1984] ICR 419; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] QB 833, [1989] 1 All ER 641.

19 [1994] 4 All ER 714.

In this case, the defendants were distributors of cigarettes and the plaintiffs ran a cash and carry business from six warehouses in towns in the north of England. The plaintiffs were accustomed to buying cigarettes from the defendants. There was no long running contract and each purchase was a separate transaction. Further, the defendants from time to time gave credit and they had given credit on previous occasions to the plaintiffs, but had never undertaken to do so on a regular basis, so that they had absolute discretion to withdraw credit facilities at any time.

In November 1986 the manager of one of the plaintiff's warehouses placed an order for cigarettes with the defendants. Unfortunately, owing to a mistake, the cigarettes were delivered to the wrong warehouse. When the mistake was discovered, it was agreed that the defendants would move the cigarettes to the right warehouse but, unfortunately, before this was done, the whole of the cigarettes, worth some £17,000, were stolen from the first warehouse. The parties disagreed about the results of this. Each party thought that the theft was at the risk of the other party. By the time the case reached the Court of Appeal, it was clear that the plaintiffs were right and that the goods were still at the risk of the defendants while they were in the wrong warehouse awaiting transport to the right warehouse. However, this was not clear in 1986, nor in 1988 when the parties' negotiations for settlement went a stage further. Sometime in 1988 or 1989 a representative of the defendants made it clear to the plaintiffs that if they did not pay the £17,000 for the stolen cigarettes all credit facilities would be withdrawn. The plaintiffs decided that paying for the cigarettes was the lesser of two evils and accordingly did so. In the present action, the plaintiffs sought to get the money back on the grounds that they had only paid it as a result of economic duress.

The Court of Appeal held that the plaintiffs' claim failed. It was accepted that the plaintiffs had only paid the money, which was not owing, because of the threat to remove credit facilities and that this was a threat which was in the circumstances highly coercive. The Court of Appeal, however, thought that the threat was not in the circumstances improper.

One view would be that one can make any threats one likes as long as carrying them out would be lawful. On this view, the only question would be whether the defendants were entitled to withdraw the credit facilities. There was no doubt that they were and this analysis would have provided a very simple answer. However, it is important to underline that the Court of Appeal did not answer the question in this way. They accepted that there could be circumstances in which a threat to do something which one was actually entitled to do was improperly coercive. They thought that the line between improper and proper threats, where the threat was to do something which could lawfully be done, was difficult to draw but that the present case was clearly on the proper side of the line. The primary reason for this was that, at the time when the defendants made the threat, they thought that the £17,000 was in fact due to them. In other words, they were using the threat as a means of getting money which they believed to be due to them and not as a means of extorting money which they knew not to be due to them. Accordingly, the plaintiffs' claim failed.

It is important to note that in the present case the plaintiffs claimed only on the ground of economic duress. It is conceivable that there is some other ground on which the plaintiffs were entitled to have the money repaid: for instance, that it was money paid under a mistake. It is impossible to be sure

of this because such a claim was not pleaded and therefore the facts which could have been relevant to deciding whether it could succeed were not examined.

The notion of inequality of bargaining power is clearly much wider since it does not necessarily depend on improper conduct by the stronger party. So far it has been approached by English courts with considerable caution.[20] In a number of cases where counsel have sought to rely on this the court has concluded on the facts that there was nothing more than hard but fair bargaining.[1]

The most important case is *National Westminster Bank plc v Morgan*.[2] In this case the Morgan's family home, which was owned jointly by Mr and Mrs Morgan, was mortgaged to a building society. The husband, an optimistic but unsuccessful businessman, was unable to meet the mortgage repayments and the building society had started proceedings for possession. The bank were approached to help and agreed to refinance the mortgage. The bank manager visited the Morgans in their home with the relevant papers. Mrs Morgan made it clear to the bank manager that she had no confidence in her husband's business schemes. The bank's standard documents did, in fact, cover bank lending to the husband for his business but the bank manager assured Mrs Morgan that this was not the case. Mrs Morgan signed the documents but later sought to set the charge aside on the ground of undue influence. She failed at first instance, succeeded in the Court of Appeal and failed in the House of Lords.

The case presents a number of difficulties. First, it is clear that Mrs Morgan's signature was obtained by the bank manager's misrepresentation as to the effect of the documents but no reliance was placed on this because by the trial no money was outstanding on business borrowing by Mr Morgan who was now dead.[3] Secondly, the differences between the Court of Appeal and the House of Lords seem to rest as much on their analysis of the facts as on their view of the law. The Court of Appeal had relied not on the judgment of Lord Denning MR in *Lloyds Bank Ltd v Bundy* but on the judgment of Sir Eric Sachs in the same case. Lord Scarman in delivering the leading judgment in the House of Lords described the views of Sir Eric Sachs[4] as 'good sense and good law'. For him the decisive consideration was that the transaction carefully analysed was not disadvantageous to the Morgans since it enabled them to stay in their home on terms not inferior to those that they had enjoyed under their building society mortgage.

If, as Lord Scarman emphasised, each case turns on a meticulous examination of its own facts, the decision does not prevent another court on

20 It has been much more enthusiastically received in Canada, see eg *Morrison v Coast Finance* (1965) 55 DLR (2d) 710; *Black v Wilcox* (1976) 70 DLR (3d) 192; *Davidson v Three Spruces Realty Ltd* (1977) 79 DLR (3d) 481; *Harry v Kreutziger* (1978) 95 DLR (3d) 231; *A & K Lick-A-Check Franchises Ltd v Cordiv Enterprises Ltd* (1981) 119 DLR (3d) 440 and in Australia, see eg *Commercial Bank of Australia v Amadio* (1983) 57 ALJR 358 (Hardingham 4 Oxford JLS 273).

1 *Multiservice Book Binding Ltd v Marden* [1979] Ch 84, [1978] 2 All ER 489; *Burmah Oil Co Ltd v Bank of England* (1981) unreported (Hannigan [1982] JBL 104); *Alec Lobb (Garages) Ltd v Total Oil (GB) Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173.

2 [1985] AC 686, [1985] 1 All ER 821.

3 For a case where a mortgagor succeeded on misrepresentation but failed on undue influence, see *Cornish v Midland Bank plc* [1985] 3 All ER 513.

4 [1975] QB 326 and 347, [1974] 3 All ER 757 and 772.

another day from deciding that the stronger party has 'crossed the line' but it does discourage expansive statements of broad principle in this area.[5] What we can say is that there is no case in English law in which a court has explicitly found that the parties were in a relationship of unequal bargaining power; that the stronger party unfairly took advantage of his superior bargaining power but that nevertheless the contract should stand. It may be asserted with modest confidence that it will be a long time before such a case appears. If this is correct, one may perhaps ask why Lord Denning's judgment in *Lloyds Bank v Bundy* excited so much suspicion. One answer would be a characteristically English suspicion of broad general principles. Another would be misunderstanding. What Lord Denning said might have been significantly more acceptable if he had rather said that 'the categories of unfairness are never closed'. It is not an essential part of the approach in the *Bundy* case that all existing categories should be swept away. An alternative would be to recognise the continued usefulness of the existing categories but to postulate the possibility of a residuary category where the court might intervene even though what had transpired could not readily be slotted in to any of the existing categories.

Historically, courts have divided contracts which may be rescinded[6] for undue influence into two categories: those where there is no special relationship between the parties and those where a special relationship exists. A refinement of this classification was approved by the House of Lords in *Barclays Bank plc v O'Brien*.[7] In this case, the following classification was approved:

> *Class 1: actual undue influence.* In these cases it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction which is impugned.
>
> *Class 2: presumed undue influence.* In these cases the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. In class 2 cases therefore there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned: once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice. Such a confidential relationship can be established in two ways, viz:
>
> *Class 2A.* Certain relationships (for example solicitor and client, medical advisor and patient) as a matter of law raise the presumption that undue influence has been exercised.
>
> *Class 2B.* Even if there is no relationship falling within class 2A, if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In a class 2B case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer

5 Cf *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281.
6 Rescission is the usual but not necessarily the only remedy. See *Mahoney v Purnell* [1996] 3 All ER 61.
7 [1993] 4 All ER 417.

> without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned.[8]

In both categories 1 and 2B, someone who seeks to set the transaction aside cannot rely simply on the relationship with the other party being one where equity presumes undue influence. The difference is that in category 1 undue influence is being shown with respect to the particular transaction whereas in category 2B undue influence is being deduced from the fact that the relationship, although raising no presumption of undue influence, can be shown in fact to be one where one party was accustomed to giving way to the other. This can perhaps be best understood by taking as an example a relationship of husband and wife. It is clear that there is no presumption of undue influence between husband and wife and therefore the relationship will never fall within category 2A. However, it is certainly the case that in some marriages one partner always does what the other party wants. If this can be shown, then we are in category 2B. Alternatively, it may be shown that in relation to the particular transaction one partner has been overborne by the other. It is easy to see that in such a situation the disadvantaged party may well argue in the alternative that the situation is in category 2B, or category 1. There is no reason why both allegations might not be successful.[9]

a No special relationship between the contracting parties

Here it must be affirmatively proved that one party in fact exerted influence over the other and thus procured a contract that would otherwise not have been made. The courts have never attempted to define undue influence with precision, but it has been described as 'some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating and generally, though not always, some personal advantage obtained by'[10] the guilty party. Examples are: coercing the mind of a person of weak intellect by a claim to possess supernatural powers;[11] taking advantage of a lady who suffers from religious delusions[12] or who is convinced of the truth of messages from the dead transmitted through a spiritualistic medium,[13] playing on the fears of a son concerning the state of his father's health.[14]

A leading case on the subject is *Williams v Bayley*[15] where the facts were these:

> A son gave to his bank several promissory notes upon which he had forged the endorsement of his father. At a meeting between the three parties, the banker made it reasonably evident that if some arrangement were not reached the son would be prosecuted. This impression was conveyed in such expressions as: 'We have only one course to pursue; we cannot be parties to compounding a felony': 'This is a serious matter, a case of transportation for life.' The effect of these expressions upon the father is shown by his somewhat despairing words: 'What be I to do? How can I help

8 Ibid at 423.
9 *Re Craig, Menezes v Middleton* [1971] Ch 95, [1970] 2 All ER 390.
10 *Allcard v Skinner* (1887) 36 ChD 145 at 181, per Lindley LJ.
11 *Nottidge v Prince* (1860) 2 Giff 246.
12 *Norton v Relly* (1764) 2 Eden 286.
13 *Lyon v Home* (1868) LR 6 Eq 655.
14 *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389, [1937] 2 All ER 657.
15 (1866) LR 1 HL 200.

myself? You see these men will have their money.' In the result the father agreed in writing to make an equitable mortgage to the bank in consideration of the return of the promissory notes.

This agreement was held to be invalid on the ground that undue pressure had been exerted. The bankers had clearly exploited the fears of the father for the safety of his son, and had thus brought themselves within the equitable principle that, where there is inequality between parties and one of them by taking an unfair advantage of the situation of the other forces an agreement upon him, the transaction will be set aside.[16]

b Where a confidential relationship exists between the parties

Here, the equitable view is that undue influence must be presumed, for the fact that confidence is reposed in one party either endows him with exceptional authority over the other or imposes upon him the duty to give disinterested advice. The possibility that he may put his own interest uppermost is so obvious that he comes under a duty to prove that he has not abused his position.[17] Whether a confidential relationship exists or not, the question is always the same—was undue influence used to procure the contract or gift? But the burden of proof is different. If B seeks to avoid a contract with A, then in the absence of any confidential relationship, the entire onus is on B to prove undue influence, but if he proves the existence of such a relationship, the onus is on A to prove that undue influence was not used. A must rebut the presumption of undue pressure.

The special relationships that raise a presumption in favour of undue influence include those of solicitor and client,[18] doctor and patient,[19] trustee and *cestui que trust*,[20] guardian and ward,[1] parent and child,[2] religious adviser and disciple;[3] but do not include husband and wife.[4] Whether they include parties engaged to be married does not admit of a simple answer since the decision of the Court of Appeal in *Zamet v Hyman*.[5] The *ratio decidendi* of that case is far from clear, but perhaps a fair interpretation of the judgments is that the presumption will not arise unless the transaction is patently and strikingly unfavourable to the party who seeks its avoidance.[6] We will now illustrate the operation of the principle by considering the case of religious adviser and disciple.

It may well be that the origin of the strict law relating to undue influence is the hostility which the courts have always shown towards spiritual tyranny, for as Lindley LJ said in a leading case: 'The influence of one mind over another is very subtle, and of all influences religious influence is the most

16 Ibid. at 216, per Lord Chelmsford.
17 *Allcard v Skinner* (1887) 36 ChD 145 at 181.
18 See White and Tudor's *Leading Cases in Equity* vol 1, pp 232-234.
19 *Radcliffe v Price* (1902) 18 TLR 466; *Re CMG* [1970] Ch 574, [1970] 2 All ER 740.
20 *Ellis v Barker* (1871) 7 Ch App 104.
1 *Hylton v Hylton* (1754) 2 Ves Sen 547.
2 *Lancashire Loans Ltd v Black* [1934] 1 KB 380.
3 Pp 348-349, below.
4 *Bank of Montreal v Stuart* [1911] AC 120 at 126. *Domenco v Domenco and Ignat* (1963) 41 DLR (2d) 267. But see *Backhouse v Backhouse* [1978] 1 All ER 1158, [1978] 1 WLR 243.
5 [1961] 3 All ER 933, [1961] 1 WLR 1442. See Megarry 78 LQR 24.
6 The court did not appear to agree with the stricter view of Maugham J in *Re Lloyd's Bank Ltd* [1931] 1 Ch 289.

dangerous and the most powerful, and to counteract it courts of equity have gone very far.'[7] The facts of *Allcard v Skinner*, the case from which these words are taken, bear this out.

> In 1868 the plaintiff, a woman about 35 years of age, was introduced by her spiritual adviser, one Nihill, to the defendant, who was the lady superior of a Protestant institution known as 'The Sisters of the Poor'. Nihill was the spiritual director and confessor of this sisterhood. Three years later the plaintiff became a sister and took the vows of poverty, chastity and obedience. The vow of poverty was strict, since it required the absolute surrender for ever of all individual property. The plaintiff remained a sister for eight years until 1879 during which time she gave property to the value of about £7,000 to the defendant. She left the sisterhood in 1879 by which time all but £1,671 of the money given had been spent by the defendant upon the purposes of the institution. The plaintiff took no action until 1885, but in that year she sued for the recovery of the £1,671 on the ground that it had been procured by the undue influence of the defendant.

The Court of Appeal found as a fact that no personal pressure had been exerted on the plaintiff and no unfair advantage taken of her position, but that the sole explanation of the gift was her own willing submission to the vow of poverty. Notwithstanding this, however, the court held that her gifts were in fact made under a pressure that she could not resist and that, so far as they had not been spent with her consent on the purposes of the institution, they were recoverable in principle when the pressure was removed by her resignation from the sisterhood.[8] Not only had there been no independent advice, but there was no opportunity of obtaining it, for one of the rules of the sisterhood said: 'Let no Sister seek advice of any extern without the Superior's leave.'

Nevertheless the plaintiff did not recover, for it was held that her claim was barred by her laches[9] and her acquiescence after she had left the sisterhood. Admittedly the claim was not one to which the Statutes of Limitation applied, and no doubt the general principle of equity is that delay alone is not a bar to relief. Nevertheless it has always been held that for a person to remain inactive for a long period with a full appreciation of what his rights are, materially affects the question whether he ought to obtain relief. Moreover in the present case there was evidence of acquiescence of the plaintiff. She had been surrounded by advisers for the last five years, she had taken care to revoke a will previously made in favour of the sisterhood, she had ceased to be a Protestant and had joined the Church of Rome, and the reasonable inference was that having considered the question of claiming relief she had determined not to challenge the validity of her gifts.

In contrast with *Allcard v Skinner* may be mentioned *Morley v Loughnan*,[10] where an action, brought six months after the donor's death to recover £140,000 extorted from an epileptic by a Plymouth Brother, was successful.

A contract procured by undue influence cannot be rescinded after affirmation, express or implied, as is seen from *Allcard v Skinner*, nor against persons who acquire rights under it for value and without notice of the facts,[11]

7 *Allcard v Skinner* (1887) 36 ChD 145 at 183.
8 Ibid at 186.
9 Laches is the neglect of a person to assert his rights.
10 [1893] 1 Ch 736.
11 *Bainbrigge v Brown* (1881) 18 ChD 188.

but it may be avoided against purchasers for value with notice[12] and also against volunteers, ie persons who give no consideration, though they may be unaware of the undue influence. In the lofty words of Wilmot CJ:

> Whoever received ... [the gift], must take it tainted and infected with the undue influence and imposition of the person procuring the gift: his partitioning and cantoning it out amongst his relations and friends, will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it.[13]

The onus is on the party in whom confidence is reposed to show that the party to whom he owed the duty in fact acted voluntarily, in the sense that he was free to make an independent and informed estimate of the expediency of the contract or other transaction.[14] It has been said in several cases that the only way in which the presumption can be rebutted is proof that the person to whom the duty of confidence was owed received independent advice before completion of the contract, and one judge at least has stated that the giving of advice does not suffice unless it has actually been followed.[15] On the other hand, the Privy Council has emphasised that if evidence is given of circumstances sufficient to show that the contract was the act of a free and independent mind, the transaction will be valid even though no external advice was given.[16]

> Their Lordships are not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted; nor are they prepared to affirm that independent legal advice, when given, does not rebut the presumption, unless it be shown that the advice was taken. It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption.[17]

Their Lordships then added, however, that facts which indicate that the donor was a free agent cannot be disregarded 'merely because they do not include independent advice from a lawyer'.

It is not every fiduciary relation that raises the equitable presumption of undue influence. As Fletcher-Moulton LJ once observed, fiduciary relations are many and various, including even the case of an errand boy

12 *Maitland v Irving* (1846) 15 Sim 437; *Lancashire Loans Ltd v Black* [1934] 1 KB 380.
13 *Bridgeman v Green* (1755) Wilm 58 at 65.
14 *Allcard v Skinner* (1887) 36 ChD 145 at 171.
15 *Powell v Powell* [1900] 1 Ch 243 at 246, per Farwell J.
16 *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127; approved by Lawrence LJ in *Lancashire Loans Ltd v Black* [1934] 1 KB 380 at 415.
17 [1929] AC 127 at 135. The case concerned a gift, which in the present connection is on the same footing as a contract. An aged and wholly illiterate woman made a gift of land to her nephew who managed her affairs. A lawyer gave her independent and honest advice prior to the execution of the deed, but he did not know that the gift included practically all her property and he did not explain that a will would be a wiser method of benefiting the nephew. The gift was set aside. Cf *Re Brocklehurst's Estate*, *Hall v Roberts* [1978] Ch 14, [1978] 1 All ER 767.

no is bound to bring back change to his master, and to say that every kind of fiduciary relation justifies the interference of equity is absurd. 'The nature of the fiduciary relation must be such that it justifies the interference.'[18] On the other hand equity has not closed the list of persons against whom the presumption is raised. There are certain special relations where undue influence is invariably presumed, but they do not cover all the possible cases, for the basis of the doctrine is that 'the relief stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another'.[19]

In his speech in *National Westminster Bank plc v Morgan* [1985] AC 686, [1985] 1 All ER 821, Lord Scarman not only rejected a general doctrine of inequality of bargaining power but also reformulated the test of undue influence. The method and terms of this reformulation are puzzling since it relied principally on a previously little known Indian appeal to the Privy Council and appeared to require as an element of undue influence, at least where there is no special relationship between the contracting parties, that the contract should be manifestly disadvantageous to one party and that one party should be under the domination of the other. Such a strong formulation was quite unnecessary for the decision of the *Morgan* case since in effect the House of Lords was saying that it was a perfectly straightforward case of lender and borrower with no special features. It is extremely difficult to find the tests of manifest disadvantage or domination in the previous 300 years of history of the undue influence doctrine.[20] In *CIBC Mortgages v Pitt*[1] the House of Lords clearly rejected any requirement of manifest disadvantage as far as a category 1 case is concerned. Lord Browne-Wilkinson said that actual undue influence was a species of fraud and that it had never been suggested that victims of fraud must not prove that the transaction was manifestly disadvantageous.[2] Lord Browne-Wilkinson expressed his views about category 1 in words which were in effect an open invitation to Counsel to reargue the correctness of the manifest disadvantage requirement in regard to categories 2A and 2B.[3]

There have been a series of cases in recent years in which there have been plausible arguments that undue influence (or fraud or misrepresentation or duress) have been practised in connection with a borrowing transaction but it has been disputable whether the undue influence should be attributed to the lender. A useful starting point is *Avon Finance Co Ltd v Bridger*.[4] Here the defendants were an elderly couple who had bought a house for their retirement

18 *Re Coomber, Coomber v Coomber* [1911] 1 Ch 723 at 728-729.

19 *Huguenin v Baseley* (1807) 14 Ves 273 at 286, per Sir S Romilly, *arguendo*, adopted by Lord Cottenham; *Dent v Bennett* (1839) 4 My & Cr 269 at 277. Examples are: *Tate v Williamson* (1866) 2 Ch App 55; *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127; *Tufton v Sperni* [1952] 2 TLR 516.

20 This is clearly stated in the decision of the Court of Appeal in *Goldsworthy v Brickel* [1987] Ch 378, [1987] 1 All ER 853. The Court of Appeal thought that it was not 'necessary for the party to whom the trust and confidence is reposed to dominate the other party in any sense in which that word is generally understood'.

1 [1993] 4 All ER 433.

2 The same might be said of common law duress. See *Barton v Armstrong* [1976] AC 104.

3 *Barclays Bank v Coleman* [2000] 1 All ER 385 makes it clear that manifest disadvantage is still a requirement for presumed undue influence in the High Court and Court of Appeal pending possible reconsideration by the House of Lords. It also contains a useful consideration of when a loan to a husband is manifestly disadvantageous to a wife.

4 [1985] 2 All ER 281 (actually decided in 1979).

for £9,275. The arrangements for buying the house had been entirely in the hands of their son, who was a chartered accountant, in whom they placed total but misplaced confidence. The purchase price was provided by a mortgage for £5,000, by a loan of £1,775 from the defendants and by £2,500 provided by the son. In order to provide this £2,500, the son had borrowed £3,500 from Avon Finance on the security of his parents' house. In order to do this, he had obtained his parents' signature to the documents by telling them that they were in connection with the building society mortgage of £5,000. The son failed to keep up his payments to the finance company who thereupon sought to enforce their security against the defendants. Clearly in this case there was fraud as between the son and his parents, but did this affect the rights of the plaintiffs? The Court of Appeal held that it did. A number of different reasons were given in the judgments. Perhaps the most important reason is that the plaintiff had appointed the son as their agent to get his parents to sign the loan documents. As a result, the son's fraud (and undue influence) were to be attributed to the finance company. In the circumstances, the finance company ought at least to have dealt directly with the parents and perhaps also to have taken steps to see that the parents had independent advice. This analysis based on asking whether the lenders had made the person who exercised the undue influence or fraud, misrepresentation or duress, their agent for the purpose of the transaction, was followed in a whole series of Court of Appeal decisions.[5]

This analysis was rejected by the House of Lords in *Barclays Bank v O'Brien*.[6] In this case the husband, who was a shareholder in a manufacturing company, wanted to increase the overdraft which the company had with the plaintiff bank. It was agreed that the overdraft would be increased to £135,000 reducing to £120,000 after three weeks. The husband offered as security a personal guarantee to be secured by a second charge over the matrimonial home which was jointly owned by himself and his wife. The manager quite properly gave instructions for the preparation of the necessary documents and for the bank's staff to explain the documents to both husband and wife and to explain the need for independent legal advice if there was any doubt. However, these instructions were not followed by the bank's staff and both the husband and the wife signed the documents without reading them. The wife alleged that the husband had put her under undue pressure to sign and that she had succumbed to that pressure and also that her husband had misrepresented to her the effect of the legal charge. She said that although she knew she was signing the mortgage she believed that security was limited to £60,000 and would only last three weeks. The trial judge had refused to set the transaction aside but the Court of Appeal unanimously allowed the appeal. Scott LJ thought it was wholly artificial to enquire whether the husband was the agent of the bank, since any such agency was wholly fictional. On the other hand, he thought that as a matter of policy married women who provided security for their husband's debts and others in an analogous position, such as elderly parents on whom pressure might be brought to bear by adult children, would be treated as a specially protected class so that the transaction might be set aside under general equitable principles.

5 *Kingsnorth Trust Ltd v Bell* [1986] 1 All ER 423; [1986] 1 WLR 119. *Coldunell Ltd v Gallon* [1986] QB 1184, [1986] 1 All ER 429. *Midland Bank plc v Shephard* [1988] 3 All ER 17; *Bank of Baroda v Shah* [1988] 3 All ER 24; *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923, [1992] 4 All ER 955, [1989] 2 WLR 759.

6 [1993] 4 All ER 417.

The House of Lords agreed with Scott LJ that the analysis in terms of agency was artificial and misleading. Lord Browne-Wilkinson rejected the notion that there was a special equity in favour of wives. He thought that the key to the problem was the doctrine of notice so that:

> ... where a wife has agreed to stand surety for her husband's debts as a result of undue influence or misrepresentation, the creditor will take subject to the wife's equity to set aside the transaction if the circumstances are such as to put the creditor on enquiry as to the circumstances in which she agreed to stand surety.

In applying this principle, it is clearly relevant that the surety is the spouse of the debtor, since husbands and wives behave in financial matters in ways which are different from those which parties acting at arm's length would do. A lender who finds a wife standing surety to a husband's business borrowing should therefore have very much in mind the serious possibility that the wife has been misled or over persuaded and ought to take reasonable steps to satisfy himself that the wife's agreement has been properly obtained. If he does not do so, he can be treated as having constructive notice of the wife's rights.

A second decision of the House of Lords in *CIBC Mortgages v Pitt*[7] needs to be read together with *Barclays Bank v O'Brien*. The two cases were heard by the same five Lords of Appeal and in each case the single reasoned speech was that of Lord Browne-Wilkinson. Nevertheless, the facts are significantly different and some important additional issues not addressed in *O'Brien* are considered.

> Mr and Mrs Pitt owned in 1986 the family home in Willesden which was then valued at some £270,000, subject to a building society mortgage for £16,700. In 1986 Mr Pitt told Mrs Pitt that he wished to raise money on the house to buy shares on the stock market. Mrs Pitt was not convinced that this would be a good idea but she was then subjected by Mr Pitt to what the trial judge held to be actual undue influence, as a result of which she agreed to the suggestion.
>
> Mr Pitt got in touch with the plaintiffs and told them that he wished to raise a mortgage on the house for the purpose of buying a holiday home. He raised a loan for £150,000 for repayment over 19 years. The money was said to be available for paying off the existing mortgage and the balance 'to be used to purchase a second property without the applicants resorting to any additional borrowing'. Clearly, this involved Mr Pitt misleading the plaintiffs but Mrs Pitt signed all the papers without reading them. The plaintiffs' solicitors acted for Mr and Mrs Pitt as well as for the plaintiffs in respect of the transaction. Mrs Pitt signed all the mortgage documents without reading them. No-one suggested that she should get independent advice and she did not do so.
>
> In fact, Mr Pitt not only did not intend to spend the balance of the mortgage money on a holiday home; he did not intend simply to buy shares on the Stock Exchange. What he did was to buy shares and then use the shares as collateral for further loans to buy further shares and so on. He thereby acquired a vast number of shares and very substantial indebtedness. Apparently, at one stage, he was indeed a paper millionaire but he never realised any of the gains on the shares. When, in October 1987, the stock

7 [1993] 4 All ER 433.

market crashed, he was left in a hopelessly exposed position. The banks, who had advanced money against the shares, sold them. Mr Pitt was unable to keep up the payments due on the charge on the family home. At the time of trial in July 1992, the total sum outstanding on the charge was nearly £209,000 which, by this time, was said to be greater than the value of the house.

The trial judge held that there had been no misrepresentation by Mr Pitt to Mrs Pitt; that Mr Pitt had been guilty of actual undue influence; that the transaction was manifestly disadvantageous to Mrs Pitt and that Mr Pitt had not acted as the agent of the plaintiffs. The Court of Appeal reversed the judge's decision that the transaction was manifestly disadvantageous to Mrs Pitt. As stated above, the House of Lords held that manifest disadvantage was not a requirement in a case of actual undue influence.

Mrs Pitt could certainly set aside the transaction as against Mr Pitt. However, of course, the practical question is whether she could set aside the transaction as against the plaintiffs. In this respect, the House of Lords thought the situation substantially different from *O'Brien*. For a wife to mortgage her share of the family home in order to underwrite borrowings by the husband alone in respect of his business was of itself a sufficiently suspect transaction to require the lender to warn of the desirability of independent advice. For a husband and wife to jointly borrow money on the home for a joint purpose like buying a holiday home was not a transaction which in itself in any way aroused suspicion. So, someone in the position of Mrs Pitt could only overturn the transaction if they could show either actual notice or some event putting the lender on enquiry.

This raises very interesting questions which were not discussed in detail as to what would be required to put the lender on equiry. Presumably, if Mr Pitt had told the lender of his intention to pursue a speculative programme on the Stock Exchange, the risks to the wife would have been sufficiently obvious to require the lender to urge her to take independent advice. Suppose he had told the lenders what he is alleged to have told Mrs Pitt, that is that he intended to use the money to buy shares. Although Mr Pitt had told Mrs Pitt that this proposal would lead to an increase in her standard of living, it is difficult to see how this could in fact have been true since there would only have been a net increase in the family income if the dividends from the shares exceeded the sums necessary to service the mortgage. Taking into account the mortgage interest rates at the time of the transaction, such results could only have been obtained by investing in extremely risky shares. Would this be sufficient to require the bank to suggest the desirability of independent advice?

These two decisions of the House of Lords have been considered in an apparently endless flow of Court of Appeal decisions. The Court has held that where a bank ought to see that the 'wife'[8] is separately advised, it will usually be sufficient for the bank to show that it had seen that advice had been given and that it need not investigate to see what the advice was.[9]

8 Of course the person who ought to be advised is not always a wife but this is by far the most common position.

9 See *Massey v Midland Bank plc* [1995] 1 All ER 929; *Banco Exterior Internacionale v Mann* [1995] 1 All ER 936; *Barclays Bank plc v Thomson* [1997] 4 All ER 816; and *Royal Bank of Scotland plc v Etridge (No 2)* [1998] 4 All ER 705.

There may however be cases where it is clear that no competent solicitor could possibly have advised the transaction. In *Crédit Lyonnais Bank Nederland NV v Burch*[10] the defendant was employed in a relatively junior position by a tour operating company dominated by a Mr Pelosi, on whom the defendant relied heavily though there was no sexual or emotional relationship between them. The company wished to increase its overdraft from £250,000 to £270,000 and the bank required security. The defendant had an equity of some £70,000 in her flat and she was persuaded by Mr Pelosi to agree to granting a second charge over the flat to secure all company borrowing both past and future. The Court of Appeal thought the transaction so spectacularly disadvantageous that it should be struck down. Millett LJ said that independent advice 'is neither always necessary nor always sufficient'.

10 [1997] 1 All ER 144.