The Growing Ambit of the Common Law*

CLIVE M. SCHMITTHOFF
London

II

During the past seventy years the relationship of the common law to equity has changed considerably. Although the Judicature Act, 1873, did not fuse the two systems of substantive law[58] on which English law is founded, but merely "made a thorough change in procedure",[59] it would be wrong to assume that the effect of the Act was limited to procedure. The common law, as we have seen,[60] extends to three levels: jurisprudence, substantive law and procedure. It is the effect of the reform of 1873 on the jurisprudence of the common law which is not always realized. Maitland had a clear vision of it when he said:[61]

> The bond which kept the various topics of equity together, was the jurisdictional and procedural bond. . . . That bond is now broken by the Judicature Acts. Instead of it we find but a mere historical bond — 'these rules used to be dealt with by the Courts of Chancery'— and the strength of that bond is being diminished year by year. The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law; suffice it that it is a well-established rule administered by the High Court of Justice.

So far as the jurisprudence of the common law is concerned, we are much nearer to Maitland's ἔσσεται ἦμαρ than he was; we have now formidable dicta in favour of the view that, where appropriate, the modern lawyer may disregard the historical origin of a legal rule. In the *High Trees House* case[62] Denning J. (as he then was) observed:[63]

* Continued from the issue of May 1951, pp. 469-482.

[58] Only the provisions of s. 25 affected the substantive law. Except subsection (2), the section is now re-enacted in the Law of Property Act, 1925, ss. 41, 98, 135, 136 and 185, and in the Judicature Act, 1925, ss. 44, 45.

[59] F. W. Maitland, Equity (2nd ed., 1936) p. 148.

[60] (1951), 29 Can. Bar Rev. 469.

[61] F. W. Maitland, *op. cit.*, p. 20.

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

[63] At p. 135.

> At this time of the day, however, when law and equity have been joined together for over seventy years, principles must be re-considered in the light of their joint effect,

and in a later decision[64] the same eminent judge said:

> In my opinion when the signature to a condition, purporting to exempt a person from his common law liabilities, is obtained by an innocent misrepresentation, the party who has made that misrepresentation is disentitled to rely on the exemption. Whether you call that a rule of law or equity, does not matter in these days. We have got too far beyond 1873 to trouble about distinctions of that kind.

The *rapprochement* of law and equity on the jurisprudential level has led to a re-definition of the position of equity in modern law. In the law of real and personal property, the division into legal rights and equitable interests is as strict as ever and the institution of trust, the greatest individual contribution of English law to the jurisprudence of mankind — which would be lost if the substantive rules of law and equity were fused[65] — is more firmly established than ever as, for example, can be seen from the extensive use made by banks of nominee holdings of shares for purposes of security. In the substantive law of property, no attempt is made to unify law and equity. In the other branches of the common law where rules of both systems co-existed before 1873, the jurisprudential *rapprochement* which followed the statutory fusion of procedure has had a marked influence on the substantive law. In those subjects, the equitable rules ceased to be an appendage of the common law and there has become apparent a tendency to unify legal and equitable rules. In some topics unification has already been achieved, in others it is on the way. The significance of this development is that in those branches of law the equitable rules are absorbed by the common law. They do not become obsolete; on the contrary, in accordance with the principle that where they conflict or are at variance with the common law they shall prevail,[66] they are assimilated into the fabric of the common law. Since the common law has retained its vitality and equity, in subjects other than the law of property, has lost its cohesion, the unified law which emerges from the coalescence of law and equity is, in fact, part and parcel of the common law. It is due to the creative spirit and the capacity of assimilation which are characteristic of modern common law that Bacon's ruling in favour of equity has, in the end, led to an expansion of the common law.

[64] *Curtis* v. *Chemical Cleaning and Dyeing Co.*, [1951] 1 K.B. 805, at p. 810; see p. 870, *post.*

[65] *Joseph* v. *Lyons* (1884), 15 Q.B.D. 280, at p. 287.

[66] Supreme Court of Judicature (Consolidation) Act, 1925, s. 44 (re-enacting s. 25 (11) of the Judicature Act, 1873).

The development which is indicated in the preceding paragraphs is particularly noticeable in the law of contract. Here the fusion of law and equity on the jurisprudential levels has led to attempts to unify the law relating to misrepresentation and mistake and to qualify the strictness of the doctrine of consideration; it has further resulted in a stricter interpretation of exemption clauses.

(*1*) The change which has taken place in the law of misrepresentation and mistake is evident when the textbooks written before the new approach are compared with their modern counterparts. The works on contract by Chitty and Anson may serve as an illustration. In Chitty's eighth edition, published in 1868,[67] no mention is made of innocent misrepresentation and there is only a passing reference to mistake, namely, a statement that relief can be obtained in equity in cases of mistake and surprise.[68] In the twelfth edition, published in 1890,[69] a clearer conception of mistake as a matter affecting "assent" begins to emerge,[70] but the law of misrepresentation is still stated in the old terms of "legal" and "moral" fraud, and only in 1930, when the eighteenth edition was published,[71] are the rules on innocent misrepresentation clearly expressed.[72] Anson, whose first edition was published in 1879, gives a full account of mistake in the chapter on reality of consent,[73] but observes with respect to misrepresentation:[74]

> If a misrepresentation is not part of a contract, its truth, except in the excepted cases and apart from fraud, is immaterial.

In subsequent editions, this statement is increasingly modified and in the fifteenth edition, published in 1920,[75] we read:[76]

> We must, thirdly, take note of the effect of the Judicature Act, combined with subsequent decisions, in modifying the rules of common law and expanding those of the Chancery in respect of innocent misrepresentations made prior to the formation of the contract.

The result at which the author of this edition arrives is a reversal of the statement in the first edition; here a succinct and accurate description of the modern law is given:

> We shall see that as a result of this combination and expansion of earlier rules, material misrepresentation is now an invalidating circumstance in all contracts.

---

[67] Edited by Judge J. A. Russell.
[68] On p. 97.
[69] Edited by J. M. Lely and Nevill Geary.
[70] On p. 10.
[71] Edited by W. A. Macfarlane and G. W. Wrangham.
[72] On p. 864.
[73] On pp. 115-127.
[74] P. 132.
[75] Edited by Maurice L. Gwyer.
[76] On p. 179.

While in the law of misrepresentation the process of absorption of equitable principles into the common law can be regarded as completed, particularly as it appears now to be settled that even an executed contract for the sale of land or goods might, in an appropriate case, be rescinded on the ground of innocent misrepresentation,[77] it is doubtful whether the rules relating to mistake have reached similar finality. The strictures of Sir Frederick Pollock[78] on *Bell* v. *Lever Bros. Ltd.*[79] are well known; the ingenuous attempt of Cheshire and Fifoot[80] to classify the subject into cases of common, mutual and fundamental unilateral mistake has failed to produce fundamental principles of general application. The reason for the unsatisfactory state of the law of mistake is, it is submitted, that in that branch of the law the synthesis of law and equity has not yet been achieved. This difficulty is indicated by Denning L. J. in *Solle* v. *Butcher*:[81]

> Much of the difficulty which has attended this subject has arisen because, before the fusion of law and equity, the courts of common law, in order to do justice in the case in hand, extended this doctrine of mistake beyond its proper limits and held contracts to be void which were really voidable, a process which was capable of being attended with much injustice to third persons who had bought goods or otherwise committed themselves on the faith that there was a contract. . . . Since the fusion of law and equity there is no reason to continue this process, and it will be found that only those contracts are now held void where the mistake was such as to prevent the formation of any contract at all.

It is significant that this great judge, who in other cases has advocated the joint approach,[82] in the case of mistake suggests a return to the law as it existed before the jurisprudential *rapprochement* of law and equity. His view was not accepted by the other members of the Court of Appeal and it must be stated with the greatest respect that it places a strained interpretation on some of the older cases and tends to obscure the distinction between misrepresentation and mistake which appears to be firmly established. Denning L. J. suggests that in *Cundy* v. *Lindsay*[83] the "contract" of sale between Lindsay and Blenkarn, the dishonest man, was voidable and not void and that in *Sowler* v. *Potter*[84] the "lease"

[77] *Leaf* v. *International Galleries*, [1950] 1 All E.R. 693.
[78] The Principles of Contract (13th ed., 1950) p. 406.
[79] [1932] A.C. 161.
[80] Law of Contract (2nd ed., 1949) pp. 158-189.
[81] [1950] 1 K.B. 671, at p. 691.
[82] See p. 860, *ante*.
[83] (1878), 2 App. Cas. 459. Denning L.J., in *Solle* v. *Butcher*, [1950] 1 K.B. 671, at p. 691, disapproves of that decision and implies that after the Judicature Acts — the case arose before they came into operation — the decision might have been different.
[84] [1940] 1 K.B. 271.

granted by Ann Robinson, the convicted woman, was merely voidable; the former view is difficult to reconcile with the opinion of Lord Cairns L. C.[85] and in the latter case Tucker J. stated expressly[86] that "there was here such a mistake as to render this lease *void* ab initio".[87]

In the present state of authorities it is believed that only two clear rules on mistake can be regarded as established:

(1) a mistake, in order to be relevant, must, on principle, be a mistake of fact; only in exceptional circumstances, such as those present in *Sebel Products Ltd.* v. *Commissioners of Customs and Excise*,[88] is a mistake of law relevant;

(2) "if mistake operates at all, it operates so as to negative or in some cases to nullify consent".[89]

Although Lord Aitkin observes[90] that "the rules of law dealing with the effect of mistake on contract appear to be established with reasonable clearness", considerable difficulty is experienced when it is attempted to apply the second rule to a case in hand. The difficulty does not lie in the area to which consent extends; it is evident that it must cover all material terms, such as, for example, the identity of the parties, the subject-matter and the nature of the transaction; the difficulty consists in defining with certainty how much of the intention of each party is embodied in the declared consent in the legal sense, and that problem — which is a problem of depth rather than of space — has so far defied definition. It is to be hoped that more detailed rules will emerge on that point when the principles of law and equity have been fully co-ordinated by the courts.

(*2*) The attempt to unify legal and equitable principles has produced considerable changes in the law of consideration. This subject has been moribund for some time but, despite the recommendation of the Law Revision Committee,[91] statutory reform has not been forthcoming. According to Professor Stone,[92] English and American law admits not less than twenty-two exceptions to the doctrine of consideration. In the law of the export trade, the doctrine is habitually disregarded when the question of the liability of banks to sellers under confirmed commercial credits arises.[93]

[85] On p. 465.
[86] On p. 276.
[87] Italics added.
[88] [1949] 1 Ch. 409.
[89] *Per* Lord Atkin in *Bell* v. *Lever Bros. Ltd.*, [1932] A.C. 161, at p. 217.
[90] On p. 217.
[91] Sixth Interim Report, 1937.
[92] The Province and Function of the Law (1946) pp. 541-542.
[93] H. C. Gutteridge, Law of Bankers' Commercial Credits (1932) p. 25; C. M. Schmitthoff, The Export Trade (2nd ed., 1950) p. 152.

How ethereal the requirement of consideration has become may be seen from the decisions of Jones J. in *Brown* v. *Sheen & Richmond Car Sales Ltd.*[94] and McNair J. in *Shanklin Pier Ltd.* v. *Detel Products Ltd.*,[95] where it was held that *A*, who by a misrepresentation induces *B* to contract with *C*, might be liable for that misrepresentation although he is undoubtedly a stranger to the contract between *B* and *C*. The courts hold that consideration is moving from *B* to *A*, that is to say, *A* has entered into a separate contract with *B* in which *A*'s statement assumes the character of a warranty, and *B*, in consideration of that warranty, undertakes to enter into a contract with another person, namely, *C*.[96]

It is submitted that this construction is artificial and that its only justification is that it enables the courts to arrive at a just result. It would be simpler to hold that *A* made a statement which he intended to be binding and to be acted upon by *B*, and that *B* acted on the strength of it, but that straight route is barred by the restrictive interpretation of the *High Trees House*[97] principle which was adopted by the Court of Appeal in *Combe* v. *Combe*[98] and which will be discussed later; the qualification the Court of Appeal placed on that principle makes it still necessary to find some consideration for the promise on which the action is based, though the consideration might be a *scintilla juris*.

The problem under examination arises often in hire-purchase transactions. Thus, in *Brown* v. *Sheen & Richmond Car Sales Ltd.*[99] the defendants, who were motor car dealers, offered a second-hand car to the plaintiff and assured him that the car was in perfect condition and was "good for thousands of trouble free miles". The plaintiff wished to purchase the car on hire-purchase terms and a finance company bought the car from the dealers and then let it to the plaintiff on hire-purchase terms. The car was unsatisfactory and the plaintiff had to spend some £70 to put it into a roadworthy condition. When he claimed that amount from the dealers by way of damages they raised the defence that there was no privity of contract between them and the plaintiff. A similar defence had been successful in *Drury* v. *Victor Buckland Ltd.*[100] but Jones J. distinguished that case from the case before him and held that

[94] [1950] 1 All E.R. 1102.
[95] [1951] 2 All E.R. 471.
[96] See C. M. Schmitthoff, Sale of Goods (1951) pp. 218-219.
[97] *Central London Property Trust Ltd.* v. *High Trees House Ltd*, [1947] K.B. 130.
[98] [1951] 2 K.B. 215.
[99] [1950] 1 All E.R. 1102. It might, however, also arise in other circumstances. See, *e.g.*, *Shanklin Pier Ltd.* v. *Detel Products Ltd.*, [1951] 2 All E.R. 471.
[100] [1941] 1 All E.R. 269.

the dealers were liable. The learned judge founded himself on the fact that in the case before him the hirer relied on an *express* warranty while in *Drury* v. *Victor Buckland Ltd.* the warranty was implied by the Sale of Goods Act, 1893, section 14(1); this distinction, which was followed by McNair J. in *Shanklin Pier Ltd.* v. *Detel Products Ltd.*,[95] cannot, it is submitted, be supported on logical grounds. It is difficult to appreciate why an implied statutory warranty should produce a different effect from an express contractual warranty. The truth of the matter is that Jones J. and McNair J. seized upon this extrinsic feature in order to regain their judicial discretion. In 1950 and 1951, when these cases were decided, the integration of legal and equitable principles had advanced further than in 1940 when *Drury* v. *Victor Buckland Ltd.* was decided, and time had become ripe for a further mitigation of the doctrine of consideration. The decisions of Jones J. and McNair J. reflect the ideas which Denning J. (as he then was) expressed in the *High Trees House* case and are the indirect outcome of that great decision.

When the *High Trees House* case was decided, it was regarded by many as an attempt of the common law to achieve by way of natural growth a reform which the legislator had failed to carry out. In 1951 we have the benefit of an authoritative interpretation of that case in *Combe* v. *Combe*[98] and it is now possible to appraise the *High Trees House* principle with some degree of certainty. It is believed that the significance of this case is twofold: for the first time an eminent common law judge referred to the integration of legal and equitable principles on the jurisprudential level which resulted from the procedural reform of 1873 and, secondly, an attempt was made to introduce a qualifying rule into the substantive law of consideration. As regards the latter, two interpretations were canvassed between 1946[101] and 1951;[102] the wider interpretation was that there was a general principle that

> a promise intended to be binding, intended to be acted on and in fact acted on is binding so far as its terms properly apply;[103]

the narrower interpretation was that such a principle applied only where consideration was present and played only a supplementary or additional rôle, but could not create a new cause of action. If

---

[101] When *Central London Property Trust Ltd.* v. *High Trees House Ltd.*, [1947] K.B. 130, was decided.

[102] When *Combe* v. *Combe*, [1951] 2 K.B. 215, was decided.

[103] Denning J. in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*, [1947] K.B. 130, at p. 136; *Robertson* v. *Minister of Pensions*, [1949] 1 K.B. 227, at p. 231; *Charles Rickards Ltd.* v. *Oppenheim*, [1950] 1 K.B. 616, at p. 623.

the wider interpretation had been accepted, the requirement of consideration would, in course of time, have receded into history, the common law would have adopted as a requirement supporting *nudum pactum* the most advanced and rational test so far devised, and that test would have been evolved by the traditional process of natural growth which in old days led to the evolution of the modern notions of contract and tort from the medieval idea of *assumpsit*. Besides, there was no danger that the principle which Denning J. skillfully extracted from a blend of legal and equitable rules was liable to abuse because it could only be invoked — and these were cardinal conditions — if the promisor intended the promisee to act on the promise and the promisee had, in fact, done so, in other words, prejudiced his position in reliance on the promise. Byrne J. in *Combe* v. *Combe*[104] interpreted the *High Trees House* principle in the wider sense but that interpretation was disapproved by the Court of Appeal,[105] which included Denning L. J., and the narrower interpretation is now the authoritative version. In *Combe* v. *Combe* two spouses entered into a maintenance agreement shortly after a decree nisi was pronounced but before it was made absolute; in that interval the wife's solicitor wrote the husband's solicitor that he understood that the husband was prepared to allow the wife £100 a year free of income tax, and the husband's solicitor confirmed that statement in unequivocal terms. This correspondence took place in February 1943 and in August of the same year the divorce decree was made absolute. The husband, who then was serving in the Army, was not well off and at all material times the wife's income exceeded his. In the words of Byrne J.[106] "the matter was in abeyance from August, 1944, until May, 1945, and there was another gap between June, 1945, and May, 1950, when the wife decided to press her claim and this action was instituted". Byrne J. decided that, apart from a few initial instalments which were barred by the Limitation Act, 1939, the wife was entitled to the arrears of maintenance under the agreement of February 1943. The learned judge held that the husband's promise of maintenance was unsupported by valid consideration because, even if there had been an undertaking by the wife not to apply to the court for maintenance, such an undertaking would have been invalid,[107] but nevertheless his promise was enforceable under the *High Trees House* principle. It may be

[104] [1950] 2 All E.R. 1115.
[105] [1951] 2 K.B. 215.
[106] On p. 1116.
[107] *Gaisberg* v. *Storr*, [1949] 2 All E.R. 411; *Hyman* v. *Hyman*, [1929] A.C. 601.

observed that on the facts of the case two views were possible as to the merits of the wife's claim. Byrne J. formed the view that the wife refrained from taking proceedings earlier because she knew that her former husband was not in good financial circumstances, while the Court of Appeal was particularly impressed with the fact that the wife allowed the instalments of maintenance to accumulate for nearly seven years before taking action. It would have been possible for the Court of Appeal to reverse the decision of Byrne J., without negativing the wider interpretation of the *High Trees House* principle, by finding, on the evidence, that the promise was not "intended to be acted upon".[108] However, the Court of Appeal, including Denning L. J. himself, did not adopt this course but disapproved expressly the legal view which Byrne J. had taken, and held that the *High Trees House* case had to be interpreted in a more restricted sense. Denning L. J., after reviewing recent cases where the principle was applied, observed:[109]

> In none of these cases was the defendant sued on the promise, assurance, or assertion as a cause of action in itself: he was sued for some other cause, for example, a pension[110] or a breach of contract,[111] or possession,[112] and the promise, assurance or assertion only played a supplementary rôle —an important rôle, no doubt, but still a supplementary rôle. That is, I think, its true function. It may be part of a cause of action but not a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill-effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, although not of its modification or discharge.

The fusion of law and equity on the jurisprudential level has, thus, not made obsolete the requirement of consideration for the *formation* of the contract, but has mitigated its ill-effects where a promise is made in connection with the *performance* or *discharge* of the contract. As a result of the fusion the judges have regained a good deal of their judicial discretion, and that in itself is a notable advance. It is too early to say whether the integration of legal and equitable rules of substantive law which increasingly undermines the foundations of the doctrine of consideration will in the end deprive it of its practical effect or whether an act of Parliament will be necessary to carry out the reform.

---

[108] Denning L.J., *obiter*, on p. 221.
[109] On p. 220.
[110] See *Robertson* v. *Minister of Pensions*, [1949] 1 K.B. 227; another rule evolved in this case was disapproved in *Howell* v. *Falmouth Boat Construction Ltd.*, [1951] 2 All E.R. 278, at p. 280.
[111] *Charles Rickards Ltd.* v. *Oppenheim*, [1950] 1 K.B. 616.
[112] *J. F. Perrott & Co. Ltd.* v. *Cohen*, [1951] 1 K.B. 705.

(3) The substantive rules of law and equity are blended perfectly in a branch of the law of contract which has become known as the law relating to exemption clauses. These are contractual provisions exempting a party from, or limiting his, common law or statutory liability. This is a significant extension of the common law which has been brought about by the influx of equitable ideas. Monopolistic and restrictive trade practices which have been at work in Great Britain since the end of the last century,[113] in combination with the post-war scarcity of goods and services,[114] have created an atmosphere where the demand of the supplier to embody an exemption clause into the contract has often become almost irresistible, and it is heartening that the common law, as the result of the fusion of legal and equitable principles in the jurisprudential sphere, leans strongly against exemption clauses and attempts to protect the party who is at a disadvantage in this unequal struggle.[115]

The strict attitude which the law adopts with respect to such clauses is expressed in many modern decisions. Thus, in *Webster* v. *Higgin*[116] Wrottesley L. J. observed that such a clause

> must be strictly and literally construed, and against the person who desires to rely on it,

and the courts have repeatedly held[117] that an express oral condition or warranty may override a printed clause excluding all liability for conditions and warranties. Further, the party who wishes to plead an exemption clause is normally put to strict proof; Denning L. J. observed in *Olley* v. *Marlborough Court Ltd.:*[118]

> People who rely on a contract to exempt themselves from their common law liability must prove that contract strictly. . ... The best way of proving it is by a written document signed by the party to be bound. Another way is by handing him before or at the time of the contract a written notice specifying its terms and making it clear to him that the contract is on those terms. A prominent public notice which is plain for him to see when he makes the contract or an express oral stipulation would, no

---

[113] See *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A.C. 25.

[114] See *Monkland* v. *Jack Barclay Ltd.*, [1951] 2 K.B. 252.

[115] Although this tendency of the common law in itself cannot solve the problem. A statutory attempt to remedy the situation was made by the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948 (11 & 12 Geo. 6 c. 66), and further measures are proposed in a White Paper published in June 1951 (Cmd 8274). See Clive M. Schmitthoff, The Nationalization of Basic Industries in Great Britain, in (1951), 16 Law and Contemporary Problems 573.

[116] [1948] 2 All E.R. 127, at p. 130; see also Scrutton L. J. in *Andrews Brothers Ltd.* v. *Singer & Co.*, [1934] 1 K.B. 17, at p. 23.

[117] *Couchman* v. *Hill*, [1947] 1 K.B. 554; *Harling* v. *Eddy*, [1951] 2 All E.R. 212; *Lee* v. *Gray* (1929) (unreported, quoted *ibid.*, on p. 217).

[118] [1949] 1 K.B. 532, at p. 549.

> doubt, have the same effect. But nothing short of one of these three ways will suffice.

The strict scrutiny to which the courts now subject exemption clauses extends even to clauses contained in documents signed by the party who is to be restricted in his legal rights. That part of the law of exemption clauses has always been regarded as the *sanctum sanctorum*. It is obvious that the contention of a party that he is not bound by a clause which he signed, because he failed to read it, is *prima facie* suspect and that, on principle, such a plea is bound to fail. This is still the law, but the courts admit now to two exemptions to the rule, namely, the plea may succeed where the signature is obtained by fraud or misrepresentation. These exceptions make the rule just and workable and protect the public from fatuous abuse of the rule. The evolution of these exceptions can be traced to three cases, *Parker* v. *South Eastern Railway Co.* (1877);[119] *L'Estrange* v. *Graucob Ltd.* (1934)[120] and *Curtis* v. *Chemical Cleaning and Dyeing Co.* (1951).[121] In the first case, we find the following dictum of Melluish L. J.:[122]

> If it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, *in the absence of fraud*,[123] immaterial that the defendant had not read the agreement and did not know its contents.

It should be noted that Melluish L. J. refers only to fraud, in harmony with the general view prevailing before 1873,[124] but leaves open the question whether fraud is "legal" or "moral" fraud. In *L'Estrange* v. *Graucob Ltd.*, which was decided after the rules relating to misrepresentation were integrated into the common law, Scrutton L. J. stated the principle as follows:[125]

> When a document containing contractual terms is signed, then, in the absence of fraud, *or, I will add, misrepresentation*,[123] the party signing is bound, and it is wholly immaterial whether he has read the document or not.

Scrutton L. J. introduced here — as he pointed out, deliberately as an *addendum* — the second exception in favour of misrepresentation, but the decision was against Miss L'Estrange because, on the facts, the Court of Appeal found that there "was no evidence that

---

[119] (1877), 2 C.P.D. 416; approved in *Richardson, Spence & Co.* v. *Rowntree*, [1894] A.C. 217, at p. 219, and *Hood* v. *Anchor Line (Henderson Brothers)*, [1918] A.C. 837, at p. 846.
[120] [1934] 2 K.B. 395.
[121] [1951] 1 K.B. 805.
[122] On p. 421.
[123] Italics added.
[124] See p. 861, *ante*.
[125] On p. 403.

the plaintiff was induced to sign the contract by misrepresentation".[126] In the third case, *Curtis* v. *Chemical Cleaning and Dyeing Co.*, the facts were as follows. The plaintiff took a white satin wedding dress to the shop of the defendants for cleaning and was handed by the shop assistant a paper headed "receipt" which she was asked to sign. Before doing so, she asked why her signature was required and was told that it was because the defendants would not accept liability for damage by or to beads and sequins with which the dress was trimmed. The plaintiff then signed the document without reading it; it contained a clause stating that articles were accepted on condition that the defendants were not liable for any damage howsoever arising, or for delay. On return there was a stain on the dress and the plaintiff claimed damages. The learned county court judge held that the signature of the plaintiff to the document was obtained by innocent misrepresentation on the part of the shop assistant, that the defendants could, therefore, not rely on the exemption clause and that they had failed to discharge the onus showing that the damage was not due to their negligence, and he awarded the plaintiff £32, 10s. damages. The Court of Appeal affirmed that decision. Applying the principle stated by Scrutton L. J. in *L'Estrange* v. *Graucob Ltd.*,[120] the court agreed with the trial judge that there was an innocent misrepresentation, and in the course of his judgment Denning L. J. made the observations referred to earlier,[127] including the dictum which is so significant in our connection:

> Whether you call that a rule of law or equity, does not matter in these days. We have got too far beyond 1873 to trouble about distinctions of that kind.

A final illustration of the strictness with which the English courts treat exemption clauses may be taken from the law of bailment, where it is now settled that if the bailee commits a fundamental breach of contract the contract is at an end[128] and all special terms, including an exemption clause, go and cannot be relied on thereafter by him. Thus, in *Alexander* v. *Railway Executive*[129] the Executive allowed an unauthorized person to open luggage deposited by the plaintiff at a cloak-room and later misdirected the luggage on the instructions of the unauthorized person, who was a thief. In an action for damages, Devlin J. held that the bailees, by allowing an unauthorized person access to the luggage,

[126] *Per* Scrutton L. J. on p. 404.
[127] See p. 860, *ante*.
[128] Unless the bailor, with full knowledge of all circumstances, elects to affirm it.
[129] [1951] 2 All E.R. 442.

had committed a fundamental breach of contract and, as regards the later loss of the luggage, could not rely on a clause which was printed on the cloak-room ticket and limited their liability.

(*4*) The progressive integration of legal and equitable rules of substantive law is not only noticeable in the common law of contract but also in statutes governing special contracts. Thus, the Sale of Goods Act, 1893, section 52, provides that the court, if it thinks fit, may order specific performance of a contract for the sale of goods. This section, which occurs in the Act in the part regulating the remedies of the seller and the buyer,[130] deals *prima facie* with a procedural matter only, but in *In re Wait*[131] the question arose how far it affected the substantive equitable rights of the buyer. In that case a buyer bought 500 tons of wheat which formed part of a bulk cargo of 1,000 tons that the seller himself had bought from American suppliers and that was still in transit. The buyer paid the price for his 500 tons in advance and, before the ship carrying the 1,000 tons arrived, the seller became bankrupt. As the buyer's portion was never appropriated, the property in the 500 tons which he had bought had not passed to him, nor could he claim specific performance because section 52 provides that that remedy is only available when the goods are specific or ascertained. It was strenuously argued on behalf of the buyer that there was at least an equitable assignment of 500 tons out of the undivided bulk of 1,000 tons and that the buyer could claim that quantity from the trustee in bankruptcy who was still in possession of sufficient wheat to satisfy that claim. The Court of Appeal rejected that argument, with the result that the unfortunate buyer could only claim as an unsecured creditor in the bankruptcy of the debtor. Atkin L. J., *obiter*, rejected the contention that an agreement for the sale of goods may, as regards the transfer of property, in equity have a different effect from that accorded to it by the Sale of Goods Act, 1893. The learned judge said:[132]

> The Code[133] was passed at a time when the principles of equity and equitable remedies were recognised and given effect to in all of our courts, and the particular equitable remedy of specific performance is specially referred to in section 52. The total sum of legal relations (meaning by the word 'legal' existing in equity as well as in common law) arising out of the contract for the sale of goods may well be regarded as defined by the Code. It would have been futile in a code intended for commercial men to have created an elaborate structure of rules dealing with the rights at law, if at the same time it was intended to leave, subsisting

[130] Part V: Actions for Breach of Contract.
[131] [1927] 1 Ch. 606.
[132] On p. 635.
[133] The Sale of Goods Act, 1893.

with the legal rights, equitable rights inconsistent with, more extensive, and coming into existence earlier than the rights so carefully set out in the various sections of the Code.

In the view of Atkin L. J. the Act of 1893 is intended to contain a comprehensive code of the law of sale of goods; so far as it regulates the incidents of the contract of sale, it has fused the legal and equitable rights of the parties. The historical approach to the provisions of the Act would be clearly out of place.

* * *

To sum up, the fusion of law and equity on the procedural level was followed by an integration of these two branches of law on the jurisprudential level. Both developments have had a considerable influence on the substantive law, apart from the law of property. In particular, in the sphere of contract, the common law has extended its borders by a progressive absorption of rules of equitable origin. This process has produced definite and satisfactory results in the law of misrepresentation and of exemption clauses but is not yet completed with respect to mistake and consideration. The tendency of the common law is to unify legal and equitable prescripts and to become a unified law founded on rational rather than historical incidents. Here again, the evolutionary strength of the common law is a potent source of practical law reform.

(To be concluded)

Si Monumentum Requiris, Circumspice

As I view the procession of lawyers who pass before the Supreme Court, I often am reminded of an old parable. Once upon a time three stone masons were asked, one after the other, what they were doing. The first, without looking up, answered, 'Earning my living'. The second replied, 'I am shaping this stone to pattern'. The third lifted his eyes and said, 'I am building a Cathedral'. So it is with the men of the law at labor before the Court. The attitude and preparation of some show that they have no conception of their effort higher than to make a living. Others are dutiful but uninspired in trying to shape their little case to a winning pattern. But it lifts up the heart of a judge when an advocate stands at the bar who knows that he is building a Cathedral. (Robert H. Jackson, Advocacy Before the Supreme Court (1951), 37 A.B.A.J. 801)