The Growing Ambit of the Common Law*

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III

The absorption of administrative law into the common law[134] and the evolution of just and rational notions of contract as the result of the progressive unification of legal and equitable principles[135] are developments of fundamental character which have added new territory to the province of the common law. They are the most significant but not the only indication of the creative impulse which animates the law of England in the post-war period. "The duty of the court is to keep the rules of law in harmony with the enlightened common sense of the nation"; these words of Pollock[136] describe aptly the general tendency of case law during that period.

The readiness to do justice to the social and economic changes of the post-war era, enabled the courts to perform smoothly the normal function of the judicature to assimilate new social phenomena into the existing fabric of the law and to apply the conventional process of legal reasoning to new sets of fact. The constructive attitude the courts adopted to new social phenomena may be illustrated by two examples: in *Tamlin* v. *Hannaford*[137] the Court of Appeal held that a public business corporation charged with the task of owning and managing a nationalized industry did not enjoy the privileges of the Crown; this great and beneficial decision defined, once and for all, the place of that new form of industrial enterprise in the system of English law.[138] Further, in *Re Morgan's*

*Continued from the issues of May 1951, pp. 469-482, and October 1951, pp. 859-872.

[134] (1951), 29 Can. Bar Rev. 469.

[135] (1951), 29 Can. Bar Rev. 859.

[136] Judicial Caution and Valour in (1929), 45 L. Q. R., 293, at p. 295.

[137] [1950] 1 K.B. 18.

[138] See, Nationalization of British Industries, in (1951) Law and Contemporary Problems 568 (Schmitthoff), 588 (Friedmann), 692 (Winter). See further *Ebbw Vale U.D.C.* v. *South Wales Traffic Area Licensing Authority*, [1951] 2 K.B. 366.

Will Trusts,[139] Roxburgh J. held that a specific legacy to a hospital given by a testatrix who made her will before the coming into operation of the National Health Service Act, 1946, but died after that event, was not invalid by reason of the transfer of the hospital into public ownership and administration and was payable to the regional management committee on the terms that it should only be applied to work carried on at the hospital described by the testatrix; that decision, which has been constantly followed[140] unless the will contained an express defeasance clause,[141] favours the continuation of private charity to hospitals despite their transfer into public ownership. This sense of continuity is expressed in the following statement of Vaisey J. in *Re Hunter*:[142]

> The passing of the National Health Service Act, 1946, undoubtedly made a very great and radical change from some points of view in the position of hospitals in general and this infirmary and dispensary in particular; but, although from many points of view the change was fundamental, from the point of view of an ordinary layman interested in the healing and care of the sick in the district in which he lived . . . I do not think that the difference is very great.

On the other hand, the courts, in their desire to do justice between man and the state,[143] checked unwarranted excesses of the executive in a series of cases the best known of which are *Captain Boydell's* case,[144] *Christie* v. *Leachinsky*[145] and *R.* v. *Paddington Rent Tribunal; ex parte Bell London and Provincial Properties*.[146] Illustrations of the application of established principles of law to new sets of fact are too numerous to be listed here.[147]

Applying the test of "enlightened common sense of the nation" postulated by Pollock, it is believed that during the post-war period the English courts successfully discharged the normal func-

[139] [1950] Ch. 637.
[140] *Re Glass*, [1950] Ch. 643 n.; *Re Hunter*, [1951] Ch. 190; *Re Meyers*, [1951] Ch. 534.
[141] *Bland-Sutton's Will Trusts*, [1951] Ch. 498.
[142] On p. 192.
[143] Lord Justice Denning, Freedom under the Law, pp. 67 ss.
[145] *R.* v. *Governor of Wandsworth Prison; ex parte Boydell*, [1948] 2 K.B. 193.
[144] [1947] A.C. 573.
[146] [1949] 1 K.B. 666.
[147] Some notable examples are:
(a) *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.*, [1949] 2 K.B. 528 (measure of damages for breach of contract; extension of the rule in *Hadley* v. *Baxendale* (1854), 9 Exch. 341, and of the test of reasonable foreseeability).
(b) *Longdon Griffiths* v. *Smith*, [1951] 1 K.B. 295 (libel; qualified privilege; joint statement by several persons, some acting innocently and one acting maliciously; the former protected but the latter not; distinction between "independent" and "derived" privilege).
(c) *Bigos* v. *Bousted*, [1951] 1 All E.R. 92 (illegal contracts which are not carried out; parties *in pari delicto* in "frustration" cases but not in "repentance" cases).

tion of the judicature to apply the rule of law to new social and economic facts. But the relatively smooth and speedy adjustment of the common law to social changes of almost revolutionary character — though itself no mean achievement and evidence of great vitality and resilience — is perhaps not more than can be expected of a well functioning modern legal system. More indicative of the progressive spirit which in the post-war period led to a notable extension of the province of the common law is the willingness of the judges to consider novel propositions of law and not to reject them *in limine*. Characteristic of this attitude are the following observations of Croom-Johnson J. in *Best* v. *Samuel Fox & Co. Ltd*:[148]

> It is admitted that a claim of this nature is completely novel. It has not apparently arisen before, and there is no case which indicates that anything of this sort has ever been canvassed before. That has been properly pressed on me at the Bar, but the law of England is a living law. It develops, and must develop, according to changes in the social life and social outlook. It has long since been pointed out that under our system of law the novelty of a claim is no answer to it. In *Chapman* v. *Pickersgill*,[149] Pratt, C.J., in answer to an objection that the action was of a novel description, said: '. . . so it was said in *Ashby* v. *White*.[150] I wish never to hear this objection again.' Some years later, perhaps, I may be permitted to echo his sentiments.

Similar words were used by Denning L.J. in his dissenting judgment in *Candler* v. *Crane, Christmas & Co*:[151]

> This argument about the novelty of the action does not appeal to me. It has been put forward in all the great cases which have been milestones of progress in our law, and it has nearly always been rejected. If one reads *Ashby* v. *White*,[152] *Pasley* v. *Freeman*,[153] and *Donoghue* v. *Stevenson*,[154] one finds that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed.

It is the object of this essay to survey the principal developments of the common law which can be abstracted from the post-war decisions of the English courts. In the preceding parts, two of those developments have been noted, namely, the integration of

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[148] [1950] 2 All E.R. 798, at p. 800; affd [1951] 2 K.B. 639; [1951] 2 All E.R. 116.
[149] (1762), 2 Wils. K.B. 145, at p. 146.
[150] (1703), 1 Bro. Parl. Cas. 62.
[151] [1951] 1 All E.R. 426, at p. 432. The passage quoted in the text is omitted from the report in [1951] 2 K.B. 164.
[152] (1703), 1 Bro. Parl. Cas. 62.
[153] (1789), 3 Term Rep. 51.
[154] [1932] A.C. 562.

administrative law into the common law and the unification of legal and equitable notions in the law of contract; in this part a third tendency will be considered, the increased discretion of the judge in the performance of his judicial duties. It has been evident for some time that the legislature is constantly adding to the discretionary powers of the judge;[155] he is given power to adjust the rights and liabilities of parties to frustrated contracts;[156] he has jurisdiction to apportion the degree of contributory negligence[157] and the responsibility of joint tortfeasors;[158] where a testator has failed to make reasonable provision for a dependant in his will, the judge may step in and make such provision.[159] Complementary to this tendency, but less obvious, is the tendency of case law to relax technical rules which might prevent the judge from reaching, in the case in hand, a decision which he considers just and reasonable. This tendency has produced two notable effects: a considerable modification of the doctrine of precedent and an attempt to extend the inherent jurisdiction of the courts in a manner which raises the fundamental question of the function of the judge in a common law community.

(*1*) The modification of the doctrine of precedent was mainly brought about by the decision of the Court of Appeal in *Young* v. *Bristol Aeroplane Co. Ltd.*[160] There has been considerable controversy on the significance of this decision; Professor Goodhart considers it one of the cases which have made the present phase of the doctrine of precedent "the high water mark of absolutism",[161] while Mr. R. N. Gooderson is not sure whether "the rule laid down in the *Young*-case[160] with its exceptions will in practice hit the golden mean".[162] This diversity of views is understandable. The decision in *Young* v. *Bristol Aeroplane Co. Ltd.* is janus-faced; it extended the absolute rule of precedent by laying down that the Court of Appeal is bound by its own decisions, and, at the same time, formulated the exceptions to that rule so widely that the courts, in subsequent decisions, were able to qualify the strict rule considerably. While originally the strictness of the rule was emphasized, later the importance of the exceptions became evident,

[155] See Dennis Lloyd, Reason and Logic in the Common Law (1948), 64 L.Q.R. 468, at p. 483; W. Friedmann, Law and Social Change in Contemporary Britain (1951), on p. 295.
[156] Law Reform (Frustrated Contracts) Act, 1943.
[157] Law Reform (Contributory Negligence) Act, 1945.
[158] Law Reform (Married Women and Tortfeasors) Act, 1935.
[159] Inheritance (Family Provision) Act, 1938.
[160] [1944] K.B. 718; affd [1946] A.C. 163.
[161] Precedents in the Court of Appeal, in (1947), 9 Camb. L.J. 349.
[162] The Rule in *Young* v. *Bristol Aeroplane Co. Ltd.*, in (1950), 10 Camb. L.J. 432.

until in 1950 a learned contributor to the Law Quarterly Review, who obviously had considerable experience in the practice of the courts, wrote that "it is almost more difficult to prove that a case falls within the rules than to persuade a court that a precedent of which it disapproves falls outside it".[163] *Young* v. *Bristol Aeroplane Co. Ltd.* is probably one of the cases most frequently cited in argument and decision; according to my count, it is quoted in five judgments[164] as authority that the court must follow precedent and in nine others[165] as authority for the contrary view. In 1951, seven years after *Young* v. *Bristol Aeroplane Co. Ltd.*, when the effect of that decision on the doctrine of precedent can be appraised in the retrospective, it appears that the case marks the end of the absolute rule of precedent in English law and a return to the qualified rule. The modern qualifications to the rule assume two forms: a considerable liberty of the Court of Appeal to disregard its own decisions, and a diminishing strictness of the rule the lower the courts are placed in the judicial hierarchy.

In modern times, three phases of the rule of precedent can be distinguished. The first covers the 18th and the beginning of the 19th century; in that period, the rule was subject to certain qualifications, which allowed the judges considerable freedom.[166] In the second period, which includes the later 19th century and the beginning of the 20th century, most of those qualifications were no longer admitted and the rule became absolute.[167] The growth of the absolute principle is noticeable in the development of the rule that the House of Lords is bound by its own decisions;[168] until 1860 that point was doubtful, and only in 1898 was it finally estab-

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[163] (1950), 66 L.Q.R. 435, comment on *Gower* v. *Gower*, [1950] 1 All E.R. 804.

[164] *Police Authority for Huddersfield* v. *Watson*, [1947] K.B. 354, 842; *Hogan* v. *Bentinck West Hartley Collieries Ltd*, [1948] 1 All E.R. 129; *Royal Derby Porcelain Co.* v. *Russell*, [1949] 2 K.B. 417, at p. 418; *Gibson* v. *South American Stores (Gath & Chaves) Ltd*, [1950] Ch. 196; *Re Bland-Sutton's Will Trusts*, [1951] Ch. 498.

[165] *Battersby* v. *Anglo-American Oil Co.*, [1945] 1 K.B. 23, at p. 32; *Fisher* v. *Ruislip-Northwood U.D.C. and Middlesex C.C.*, [1945] 1 K.B. 584, at p. 591; *Wilson* v. *Chatterton*, [1946] K.B. 360; *Moore* v. *Hewitt* (1946), 63 T.L.R. 477; *Gower* v. *Gower*, [1950] 1 All E.R. 804, at p. 806; *Nicholas* v. *Penny*, [1950] 2 K.B. 472; *Younghusband* v. *Luftig*, [1949] 2 K.B. 361; *R.* v. *Northumberland Compensation Appeal Tribunal; ex parte Shaw*, [1951] 1 K.B. 711; *Armstrong* v. *Strain* (1951), 95 Sol. J. 318. See further: *Fitzsimons* v. *Ford Motor Co. Ltd*, [1946] 1 All E.R. 429; *Williams* v. *Glasbrook Bros.*, [1947] 2 All E.R. 884, at p. 885.

[166] Sir William Holdsworth, Case Law (1934), 50 L.Q.R. 180.

[167] Professor A. L. Goodhart in, Case Law — A Short Replication (1934), 50 L.Q.R. 196, at p. 198. An excellent summary of the absolute rule is contained in Goodhart, Precedent in English and Continental Law (1934), 50 L.Q.R. 40, at p. 42.

[168] Lord Wright in, Precedents (1942), 4 U. of Toronto L. J. 247, at p. 249; Goodhart, Precedents in the Court of Appeal (1947), 9 Camb. L. J. 349.

lished.[169] The strictness with which the absolute rule was applied is evident from the following statement of Buckley J. (as he then was) in a judgment given in 1914:[170]

> I am unable to adduce any reason to show that the decision which I am about to pronounce is right. On the contrary, if I were free to follow my own opinion, my own powers of reasoning such as they are, I should say that it is wrong. But I am bound by authority — which, of course, it is my duty to follow — and following authority, I feel bound to pronounce the judgment which I am bound to deliver.

In the third phase, the pendulum began to swing back to the qualified rule; the causes for this development are described by Professor Friedmann,[171] and the general trend is noted by Professor Gower[172] and others. That phase was ushered in by *Young* v. *Bristol Aeroplane Co. Ltd.*

In that case the Court of Appeal had to determine whether a workman who had received compensation under the Workmen's Compensation Act, 1925, knowing that he had an alternative remedy at law, was barred[173] from claiming damages later. Four years earlier,[174] the Court of Appeal had answered that question in the affirmative, but it was argued on behalf of the workman that the court was not bound by its own decisions and could consider the point *de novo*. It became, therefore, necessary for the court to define the application of *stare decisis* to its own decisions. The matter was adjourned from the divisional to the full Court of Appeal, which consisted of Lord Greene M.R., Scott, MacKinnon, Luxmoore, Goddard and du Parq L.JJ. The court decided unanimously that it was bound by its own decisions, subject to three exceptions which were inapplicable in the present case, and dismissed the appeal. It stated its conclusions as follows:[175]

> This court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction.
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> The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarize:–
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> (i) The court is entitled and bound to decide which of the two conflicting decisions of its own it will follow.
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> (ii) The court is bound to refuse to follow a decision of its own which,

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[169] In *London Street Tramways Co.* v. *L.C.C.*, [1898] A.C. 375; see p. 59, *post*.

[170] *Produce Brokers Co.* v. *Olympia Oil Cake Co.* (1915), 21 Com. Cas. 320. See further the observations of Lord Wright in *Lissenden* v. *C. A. Bosch*, [1940] A.C. 412, at p. 431.

[171] Legal Theory (2nd ed., 1949), pp. 337-338.

[172] (1950), 13 Mod. Law Rev. at pp. 484-485.

[173] By s. 29 (1) of the Act.

[174] In *Perkins* v. *Stevenson (Hugh) & Sons Ltd.*, [1940] 1 K.B. 56, and *Selwood* v. *Townley Coal & Fireclay Co. Ltd*, [1940] 1 K.B. 180.

[175] [1944] K.B. 718, at p. 729.

though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords.

(iii) The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam.*

It is now necessary to define these exceptions with such precision as is possible. This task is considerably simplified by the erudite controversy between Professor Goodhart and Mr. Gooderson to which reference was made earlier.[176]

(i) *The exception in case of conflicting decisions of the Court of Appeal.* Where the Court of Appeal holds *affirmatively* that two of its former decisions conflict, it is not bound to follow the earlier[177] or the later[178] decision, but has complete discretion to select which of the two decisions it wishes to follow and which to disregard.[179] The decision by which it makes the choice, including the choice of precedent itself, becomes then binding on the Court of Appeal and, of course, on the lower courts, and cannot be challenged in a subsequent case before the Court of Appeal. This is an important and valuable concession to certainty: the conflict is now resolved; it is not perpetuated and cannot be reopened.

More difficult is the question whether a *negative* ruling of the Court of Appeal, namely, a ruling that two of its former decisions do not conflict, is binding on the court in subsequent cases. *Fisher* v. *Ruislip-Northwood U.D.C.*[180] can be quoted as an authority that the negative ruling is not binding and that the Court of Appeal, in a later decision, can still hold affirmatively that the former decisions were in conflict and can make its authoritative choice. Gooderson[181] observes rightly that it is "unreasonable and unnecessary" to draw a distinction between the affirmative and negative ruling of the Court of Appeal and that in both cases the determination of the Court of Appeal should be binding. In support of his view he refers to a decision of the Court of Appeal in 1948[182] where Lord Greene M.R. said of an earlier case:

> The majority of the court, however, did not think the decisions were inconsistent and so came to the conclusion that they were not put into the position contemplated by *Young* v. *Bristol Aeroplane Co. Ltd.*[160] of having to choose between inconsistent authorities. We are, of course, bound under the principles of *Young* v. *Bristol Aeroplane Co. Ltd.* to accept that decision.

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[176] Footnotes 161 and 162, *ante.*

[177] As the strict rule of precedent would demand, Gooderson, on p. 441.

[178] As might be practical from the point of view of certainty and finality, Goodhart, on p. 352.

[179] *Battersby* v. *Anglo-American Oil Co. Ltd.*, [1945] K.B. 23, at p. 32.

[180] [1945] K.B. 584, at pp. 591 ss.

[181] Gooderson, *supra*, pp. 436-437.

[182] *Hogan* v. *Bentinck Collieries*, [1948] 1 All E.R. 129, at p. 132.

In another report[183] that sentence is followed by this one:

> We cannot go behind their judgment and say there was an inconsistency when they, after consideration, have found there was not.

In the result, two rules emerge: (a) the Court of Appeal has discretion to decide whether two or more of its previous decisions conflict or do not conflict, but having decided that point affirmatively or negatively, it is bound by its decision; and (b) where the Court of Appeal holds that two of its previous decisions conflict, it has discretion to rule which of the two shall be followed and which shall be disregarded, but, having decided that point, it is bound by its decision.

(ii) *The exception in case of inconsistency with a decision of the House of Lords.* This exception applies where the Court of Appeal is of opinion that one of its own decisions, though not expressly overruled by the House of Lords, is inconsistent with a decision of the highest tribunal and is, therefore, *impliedly* overruled. The very great degree of discretion which the Court of Appeal obtains under that exception is indicated in the following observations of Professor Goodhart:[184]

> It is possible to know with certainty when a case has been expressly overruled, but who can say with any confidence whether or not a case has been overruled by implication?

It is not yet definitely settled whether the exception of inconsistency applies only where the original decision of the Court of Appeal is impliedly overruled by a *subsequent* decision of the House of Lords or whether it likewise applies where the original decision of the Court of Appeal is inconsistent with an *earlier* ruling of the House of Lords. The former view is expressed, *obiter*, in *Young* v. *Bristol Aeroplane Co. Ltd.* itself by the Court of Appeal,[185] and Lord Simon in the House of Lords,[186] and is the *ratio* of the judgment of Lord Greene M.R. in *Williams* v. *Glasbrook Brothers Ltd.*,[187] but in subsequent decisions[188] that narrow interpretation was abandoned and the exception of inconsistency was interpreted in the wider sense.

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[183] 40 B.W.C.C. 268, at p. 276.

[184] Goodhart, *supra*, p. 358.

[185] [1944] 1 K.B. 718, at p. 725: "Where this court comes to the conclusion that a previous decision, although not expressly overruled, cannot stand with a subsequent decision of the House of Lords".

[186] [1946] A.C. 163, at p. 169: "Unless the House of Lords has in the meantime decided that the law is otherwise".

[187] [1947] 2 All E.R. 884, at p. 885.

[188] *Fitzsimmons* v. *Ford Motor Co. Ltd.*, [1946] 1 All E.R. 429; *Gower* v. *Gower*, [1950] 1 All E.R. 804, at p. 806; *R.* v. *Northumberland Compensation Appeal Tribunal; ex parte Shaw*, [1951] 1 K.B. 711, at p. 723. See, further, Gooderson, *supra*, pp. 437ss, and the notes in (1946), 62 L.Q.R. 314, and (1950), 66 L.Q.R. 435.

From the point of view of jurisprudence, there is a fundamental distinction between the narrower and the wider interpretation. The former implies that the Court of Appeal can adjust its decision to changing principles of law evolved by the highest tribunal; the latter means that the Court of Appeal has power to correct an erroneous decision of its own. The second proposition appears startling because it seems to imply that the court can sit in error over its own decisions, but on closer examination it is merely the logical result of the first proposition and cannot be separated from it. A ruling of the House of Lords is not of constant value; its value depends on the emphasis placed on it in the light of subsequent developments of life and law. It may first be thought to deal only with a special point and to have little value as a precedent, and for that reason it might not be cited in the Court of Appeal in a case arising shortly afterwards. But later a different value may be attached to it and it may be realised that it contains a great and important principle. It is the duty of the lower courts to keep their decisions in line with those of the higher courts whether the relevance of an authority is recognized earlier or later. It is, therefore, a logical corollary of the rule of precedent that the exception of inconsistency should be interpreted in the wider sense. Moreover, in cases falling within the first and, as will be seen, the third exception, the Court of Appeal has power to correct a previous decision which is wrong and there is no reason why it should not have the same power in cases falling within the second exception.[191]

It is believed that the wider interpretation leads to more satisfactory results than the narrower interpretation and will eventually be adopted by the courts as the true test. In the result, the Court of Appeal has discretion to disregard an earlier decision of its own if it is inconsistent with a later (or possibly an earlier) decision of the House of Lords.

(iii) *The exception in case of a decision per incuriam.* This exception operates as a kind of general clause which enables the Court of Appeal to disregard an earlier decision that does not fall within the scope of the first two exceptions and that it considers wrong. In *Young* v. *Bristol Aeroplane Co. Ltd.* the Court of Appeal[192] refrained from defining a decision *per incuriam*; Lord Greene M.R., who delivered the judgment of the court, observed that two groups of cases did not fall within the third exception, namely, those covered by the first and second exceptions; he then gave an

[191] Gooderson, *supra*, p. 440.
[192] [1944] K.B. 718, at p. 729.

illustration of a decision *per incuriam:* a decision "given in ignorance of the terms of a statute or a rule having the force of a statute" [193] and added: [192]

> We do not think that it would be right to say that there may not be other cases of decisions given *per incuriam* in which this court might properly consider itself entitled not to follow an earlier decision of its own.

He concluded that decisions *per incuriam* "would obviously be of the rarest occurrence". In subsequent cases[194] the view was expressed from the bench that ignorance of the authority of a case might likewise result in a decision *per incuriam,* provided the reviewing court thinks that the earlier decision would have been different if the case had been cited to the court. This view is, for example, expressed by Lord Goddard C.J. in *Police Authority for Huddersfield* v. *Watson:* [195]

> What is meant by giving a decision *per incuriam* is giving a decision when a case or statute has not been brought to the attention of the court and it has given its decision in ignorance or forgetfulness of the existence of that case or statute.

It is the duty of counsel arguing a case at the bar to draw the attention of the court to all relevant cases and statutory provisions; where in a previous case counsel has failed to do so it is open to argue in a later case that the previous decision was *per incuriam.* In practice the matter is often reduced to the question: What authorities were cited to the court in the previous case? The records on that point are not always complete since the arguments are not reported in all sets of law reports. Consequently, unless the authorities are fully considered in the judgment, it is often uncertain whether a decision is *per curiam* or *per incuriam.* This position has given rise to the rule of evidence that a party alleging that a decision is *per incuriam* has the onus of proving his allegation.[196]

In the result, under the third exception, (a) the Court of Appeal has discretion to disregard any earlier decision of its own although it is neither "incidentally" inconsistent[197] with a decision of the House of Lords nor in conflict with one of its own deci-

[193] This means evidently a statutory instrument or other measure of delegated legislation: Goodhart, *supra,* 361.

[194] *Police Authority for Huddersfield* v. *Watson,* [1947] K.B. 842, at p. 847; *Moore* v. *Hewitt,* [1947] 2 All E.R. 270, at p. 272; *Gibson* v. *South American Stores (Gath & Chaves) Ltd.,* [1950] Ch. 177, at pp. 196-197; *Nicholas* v. *Penny,* [1950] 2 K.B. 466, at pp. 472-473.

[195] [1947] K.B. 842, at p. 847.

[196] *Gibson* v. *South American Stores (Gath & Chaves) Ltd.,* [1950] Ch. 177, at pp. 196-197.

[197] This term was used by Asquith L.J. (as he then was) in *Combe* v. *Combe,* [1951] 2 K.B. 215, at p. 226.

sions, provided that, on *ex parte facto* examination, the court is of opinion that the earlier decision was *per incuriam;* (b) even where a party proves that a previous decision was technically *per incuriam,* the Court of Appeal has discretion to hold that the defect did not affect the result and the previous decision will then become a decision *per curiam.*

It is believed that the three exceptions to the rule in *Young* v. *Bristol Aeroplane Co. Ltd.*,[192] as interpreted in subsequent decisions, give the Court of Appeal a very wide freedom to disregard any of its previous decisions whenever it considers that it was wrongly decided. Looking at the essence and not at technicality, it appears to be correct to state that the Court of Appeal is, as a rule, bound by its own decisions but, exceptionally, may disregard an earlier decision if it holds that it was wrongly decided; in that case the court will have no difficulty in classifying the earlier decision under one of the three established exceptions.

The qualifications which have been placed on the principle of *stare decisis* in the Court of Appeal have completely changed the character of that rule in modern English law. The rule of precedent has now become infinitely more elastic and relative but performs still its function of being a stabilising factor in the case law system. It will be seen that nowadays the strength of the rule is relative. It varies in the various courts; it is strongest on the top and weakest at the base of the judicial hierarchy. The full strictness of the rule is thus asserted only after the legal proposition in issue has, in the lower courts, gone through the laboratories of judicial experience and its value has been tested by the process of trial and error. That relativity of strength is the principal feature of the qualified rule in the post-war period; it justifies the statement that *the modern rule of precedent is a rule of relative strength.*

Before the strength of the rule in the various courts is compared, it is necessary to point out that in modern English law the degree of strictness of the rule is determined according to courts and not to causes. Formerly the view was sometimes expressed that a distinction had to be drawn between various causes decided in the same court or courts of co-ordinate jurisdiction; it was said that that distinction was between causes where the decision of the court was final and causes where it was reviewable by way of appeal, and that in one group of cases the court was bound by its own decisions but not in the other.[193] This over-refinement

[193] See the argument of Mr. Gilbert Paul, K.C., in *Young* v. *Bristol Aeroplane Co. Ltd.*, [1944] K.B. 718, at p. 719, and the observations of Lord Goddard C.J. in *Police Authority for Huddersfield* v. *Watson*, [1947] K.B. 842,

has been rejected by the Court of Appeal in *Young* v. *Bristol Aeroplane Co. Ltd.*[199] and by Lord Goddard C.J. in *Police Authority for Huddersfield* v. *Watson.*[200] The degree of strictness of the rule depends, therefore, entirely on the position which the court occupies in the judicial hierarchy and not on the nature of its decision.

The relative character of the modern rule of precedent can be seen from the following survey:

(A) Every court is bound by a decision of a higher court, but a court of first instance has discretion to hold that a decision of the Court of Appeal is incidentally overruled by the House of Lords or that decisions of the Court of Appeal conflict, in which case it may decide which decision it prefers to follow.[200A]

(B) As regards a decision of its own or of a court of co-ordinate jurisdiction,

(1) the *House of Lords* is absolutely bound by its own decisions. Only one exception appears to be admitted to that strict rule: the House need not follow an earlier decision given in ignorance of a statutory provision or in reliance on a statutory provision which has been repealed.[201] As the law stands at present, the House of Lords would even be bound by a decision given in ignorance of an earlier decision of its own.[202]

(2) The *Court of Appeal* is, on principle, bound by a decision of its own or of a court of co-ordinate jurisdiction, but that principle is subject to very wide exceptions.[203]

(3) *A judge of first instance* is not bound by a decision of himself[204] or other judges of co-ordinate jurisdiction but will follow it—in the case of a decision of another judge, as a matter of judicial comity—unless he is convinced that it is wrong.[205] The only exception to that rule exists with respect to the Divi-

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at pp. 847-848. See further W. H. D. Winder, Divisional Court Precedents (1946), 9 Mod. L. Rev. 257, at p. 262.

[199] [1944] K.B. 718, at pp. 725 ss.

[200] [1947] K.B. 842, at p. 847. Cf. the statement in [1947] 2 All E.R. 193, at p. 196.

[200A] Lord Goddard C.J. in *R.* v. *Northumberland Compensation Appeal Tribunal; ex parte Shaw*, [1951] 1 K.B. 711, at p.724.

[201] Lord Halsbury L.C. in *London Street Tramways Co.* v. *L.C.C.*, [1898] A.C. 375, at pp. 380-381. See, further, Lord Wright, Precedents, in (1942), 4 U. of Toronto L. J. 247, at p. 251; A. L. Goodhart, Precedents in the Court of Appeal, in (1947), 9 Camb. L.J. 349.

[202] Lord Wright, *supra*, 252.

[203] See pp. 53-58. *ante.*

[204] In *In Re Lewis's Will Trust; Whitelaw* v. *Beaumont*, [1951] W.N. 591, Vaisey J. invited counsel to criticize an earlier decision by him; the learned judge then held that though there was considerable force in counsel's argument, he would follow his own decision, which so far had stood without judicial challenge.

[205] Lord Goddard C.J. in *Police Authority for Huddersfield* v. *Watson*, [1947] K.B. 842, at p. 848.

sional Court of King's Bench Division, namely, (a) as regards its own decisions, the Divisional Court is in the same position as the Court of Appeal;[206] (b) as regards judges of first instance, it claims that they are bound by its decisions.[205] This exception is due to the peculiar jurisdiction of the Divisional Court; that court has, in fact, adopted the same rules as apply to the Court of Appeal.[207]

(C) The rule of the binding force of precedent does not apply to the Judicial Committee of the Privy Council, which may disregard a previous advice.[208]

The evolution of the relative rule of precedent is of great importance in modern English law. It has turned the old *superstition du cas* into a modern instrument of legal technique which enables the courts to carry out the adjustment of the common law to social and economic changes without endangering the certainty which every legal system must possess. It is one of the great advantages of a case law system that the point of balance between certainty and flexibility is not fixed but can itself be adjusted according to the requirements and temperament of a particular period. The evolution of the relative rule represents such an adjustment; it is believed that that rule introduces the exact modicum of flexibility which is required to make *stare decisis* workable in the post-war era. It is an over-statement to assert that *stare decisis* is a principle rather than a rule";[209] Lord Goddard C.J. reminds us[210] that "if one thing is certain it is that *stare decisis* is part of the law of England", and in fact, in some aspects which particularly apply to the House of Lords,[211] that rule has been strengthened rather than weakened; but the qualifications which have been evolved enable the lower courts to apply the rule with "the flexibility and sensitiveness to realism and facts and social values which have been the pride of the common law".[212] In short, *stare decisis* is still the king-pin of English case law but has ceased to operate "in a purely mechanical manner".[213]

[206] In short, the rule in *Young* v. *Bristol Aeroplane Co. Ltd.* applies: Lord Goddard C.J. in *Younghusband* v. *Luftig*, [1949] 2 K.B. 354, at p. 361.

[207] W. H. D. Winder, *supra*, pp. 269-270.

[208] *Att. Gen. of Ontario* v. *Canada Temperance Federation* (1946), 62 T.L.R. 199, at p. 200.

[209] W. A. Seavey, *Candler* v. *Crane, Christmas & Co.*, Negligent Misrepresentation by Accountants (1951), 67 L.Q.R. 466, at p. 481.

[210] In *Police Authority for Huddersfield* v. *Watson*, [1947] K.B. 842, at p. 848; Lord Cohen, Jurisdiction, Practice and Procedure of the Court of Appeal (1951), 11 Camb. L.J. 3, at p. 13.

[211] See *Jacobs* v. *L.C.C.*, [1950] A.C. 361, at p. 371.

[212] Lord Wright in (1950), 66 L.Q.R. 456; see further A. L. Goodhart, The "I Think" Doctrine of Precedent: Invitors and Licensors (1950), 66 L.Q.R. 374.

[213] G. W. Paton & G. Sawer, *Ratio decidendi* and *Obiter dictum* (1947), 68 L.Q.R. 460, at p. 481.

Further, the relative rule of precedent puts into proper perspective the limits of judicial law-making. It is futile to deny that the judge, when evolving new legal rules, engages in the task of law reform; his task is, in this respect, similar to that of the legislator. There is, however, a fundamental difference: where a court is asked to make a change which would disregard "the importance, I would say the paramount importance, of certainty in the law",[214] the issue raises a question of law reform which is beyond the function of the judge and properly falls within the province of the legislator. The former has to bear in mind the paramount consideration of continuity and certainty of law; the latter may deliberately break that continuity. The common law conception of the office of the judge is that he must not usurp the function of the legislator.[215]

The increased judicial discretion which results from the evolution of the relative rule is only an indication — though a particularly important one — of the greater freedom which English judges assume in post-war days. The same tendency is noticeable in their willingness to admit, where appropriate, quotations from living authors and references to "extraneous" material. Mr. G. V. V. Nicholls[216] concludes his scholarly survey of English authorities as follows:

> Can anyone doubt, after reading those quotations, that the convention that living writers should not be cited is dead in England, even if it is not yet completely buried?

He refers, amongst others, to Lord Justice Denning's statement that "the notion that the works of academic lawyers are not of authority except after the author's death has long been exploded".[217] It may be added that in 1950 the present Lord Chancellor referred in a judgment of the House of Lords to an article in the Law Quarterly Review[218] and that in 1951 we find in the authorities even an occasional reference to *travaux préparatoires*[219] and to a notice published by H. M. Stationery Office.[220] The relaxation of the strict rule of admissible quotations is concomitant to the evolution of the relative rule of precedent.

[214] Lord Simonds in *Jacobs* v. *L.C.C.*, [1950] A.C. 361, at p. 373.

[215] Sir Frederick Pollock, Judicial Caution and Valour (1929), 45 L.Q.R. 293, at p. 295; Lord Cohen, *supra*, p. 13; Lord Jowitt L.C., cited by Professor W. Friedmann, Judges, Politics and the Law (1951), 29 Can. Bar Rev. 819.

[216] Legal Periodicals and the Supreme Court of Canada (1950), 28 Can. Bar Rev. 429, at p. 434.

[217] In a review of Winfield's Law of Tort (1947), 63 L.Q.R. 516.

[218] Lord Simons in *Jacobs* v. *L.C.C.*, [1950] A.C. 361, at p. 370.

[219] *Earl Fitzwilliam's Wentworth Estates Co.* v. *Minister of Town and Country Planning*, [1951] 2 K.B. 284, at p. 310.

[220] *Clifford* v. *Charles H. Challen & Son, Ltd.*, [1951] 1 All E.R. 72, at pp. 73-74.

(2) When the general trend of legal and public opinion favours an increased degree of judicial freedom, when *stare decisis* is relaxed and statutes constantly add to the discretion of the judges, it is not surprising that the courts should attempt to extend the domain of their inherent jurisdiction. Such an attempt has been made in the law of contract, where the courts have asked themselves whether it is their function merely to interpret the contract of the parties and to ascertain their intention or whether they have power "to supplement the defects of the actual contract"[221] by virtue of their inherent jurisdiction and to do what appears to be just and reasonable in the circumstances. Before the cases where this question arose are considered, it is necessary to make some general observations on the notion of the inherent jurisdiction of the courts.

In several branches of law it is recognized that the courts have an inherent jurisdiction which they may exercise in appropriate circumstances. The *locus classicus* of that doctrine is the law of procedure: the courts have inherent jurisdiction to prevent an abuse of their procedure[222] and to punish persons who obstruct, or attempt to obstruct, the administration of justice by committing contempt of court; the latter power of the court stands, in the words of Wilmot J.,[223] "upon the same immemorial usage as supports the whole fabric of the common law". It is interesting to note that Lord St. Leonards L.C. thought[224] that "every court of justice possesses an inherent power to correct an error into which it may have fallen" and that Lord Wright expressed his personal agreement with that view,[225] but there is no doubt that to-day English law does not admit such a sweeping exception to *stare decisis*. In the law of tort, the courts have inherent jurisdiction to develop new grounds of tortious liability;[226] Pratt C. J. observed[227] in 1762 that "torts are infinitely various, not limited or confined", and Lord Macmillan expressed a similar view 170 years later in the famous statement[228] that "the categories of negligence are never closed". Indeed, at present the question is before the court

[221] Lord Wright in *Denny, Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.*, [1944] A.C. 265, at p. 275.

[222] Lord Halsbury L.C. in *Reichel* v. *Magrath* (1889), 14 App. Cas. 665, at p. 668, and Annual Practice, 1951, O. 25 r. 4, note on Inherent Jurisdiction, p. 423.

[223] *R.* v. *Almon* (1765), Wilm. 243, at p. 254.

[224] *Bright* v. *Hutton* (1852), 3 H.L.C. 341, at p. 388.

[225] In Precedents (1942), 4 U. of Toronto L. J. 247, at p. 276.

[226] Sir Percy Winfield, A Textbook of the Law of Tort (4th ed., 1948), pp. 14-18.

[227] *Chapman* v. *Pickersgill* (1762), 2 Wils. K.B. 145, at p. 146.

[228] *Donoghue* v. *Stevenson*, [1932] A.C. 562, at p. 619.

whether the principle in *Donoghue* v. *Stevenson*[228] should be further extended: in *Candler* v. *Crane, Christmas & Co.*[229] the question arose whether an inventor could claim damages against accountants for financial loss caused by their alleged negligence; the investor who intended to subscribe to shares in a company asked the latter to produce a balance sheet; the accountants who prepared the document knew that the investor's decision depended on the state of the balance sheet, but negligently omitted to verify the information given by the company; in the result, the balance sheet did not disclose the precarious position of the company's finances and the investor lost the money invested in the shares of the company. The majority of the Court of Appeal (Asquith and Cohen L.JJ.) dismissed the claim of the investor on the ground that the rule in *Donoghue* v. *Stevenson* did not apply to a negligent mis-statement which resulted only in loss of money but did not cause physical injury to a person or thing, but Denning L.J., in an already famous dissenting opinion, was prepared to extend the rule to the present case, and held that the accountants owed the investor a duty of care and their liability did not depend on the nature of the damage. At the present moment it is still possible that the decision of the Court of Appeal may be subject to further appeal, and all that will be said about it is that the view of Denning L.J. is strongly supported by a very persuasive article of Professor Warren A. Seavey.[230] The clash between the timorous souls and bold spirits which was referred to in that case[231] is not new and has been described by Sir Frederick Pollock, who contrasts the "too daring expounder" with those moved by "pedestrian timidity", and says: "discretion is good and very necessary, but without valour the law would have no vitality at all".[232] Apart from the law of procedure and of tort, the inherent jurisdiction of the court was a foundation of the whole jurisdiction in equity; even to-day the courts will not hesitate to extend the notion of trust to new arrangements; only recently Roxburgh J. ruled[233] that money paid by a solicitor into a separate "clients' account" in accordance with the Solicitors Accounts Rules, 1945,[234] was held by the solicitor upon trust for the clients and that in the case of bankruptcy of the solicitor the money did not vest in the trustee in bankruptcy; in the course of his judgment, the learned judge observed:[234]

[229] [1951] 2 K.B. 164.

[230] *Candler* v. *Crane, Christmas & Co.*, Negligent Misrepresentation by Accountants (1951), 67 L.Q.R. 466, at pp. 472 ss.

[231] See p. 50, *ante*.

[232] Judicial Caution and Valour, in (1929), 45 L.Q.R. 293, at pp. 296-297.

[233] *In Re a Solicitor (1951) M. No. 234*, [1952] 1 All E.R. 133.

[234] Which were made under the Solicitors Act, 1933, s. 1.

> As the principles of equity permeate the complexities of modern life, the nature and variety of trusts ever grows.

That the courts possess inherent jurisdiction in matters of procedure, tort and trust indicates that there is no intrinsic objection, from the point of view of jurisprudence, to the view that they have similar jurisdiction in the law of contract, but this argument is, of course, not conclusive.

In the law of contract, the question whether the courts possess inherent jurisdiction to supplement the arrangement of the parties, became acute in three sets of circumstances: (i) in the proper law of contract; (ii) in the law of frustration; and (iii) when the question arose whether the courts have power to qualify a term of the contract.

(*i*) In the conflict of laws, jurists disagree whether the proper law of the contract is the law intended by the parties or the law of the place with which the contract has the most real connection.[236] The "intention" theory is based on the view that the parties have full autonomy to arrange the terms of their contract as they like; the "connection" theory is founded on the view that the courts have inherent jurisdiction to adjust those terms where they consider it appropriate. It is unnecessary to discuss this theoretical difference of opinion because it is clear beyond doubt that the English courts have accepted the "intention" theory. Lord Atkin said in *Rex* v. *International Trustee*:[237]

> The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expressed the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances.

and Lord Wright rejected the "connection" theory in *Vita Food Products* v. *Unus Shipping Co.*[238] "on grounds of principle"; he said:

> Connection with English law is not as a matter of principle essential. The provision in a contract (for example, of sale) for English arbitration imports English law as the law governing the transaction and those familiar with international business are aware how frequent such a provision

[235] On p. 136.

[236] Professor Willis, Two Approaches to the Conflict of Laws, in (1936), 14 Can. Bar Rev. 1, at p. 9, and Professor R. Graveson, The Proper Law of Commercial Contracts, in Conflict of Laws and International Contracts (Michigan, 1951), pp. 1, 5.

[237] [1937] A.C. 500, at p. 529. See Schmitthoff, English Conflict of Laws (2nd ed., 1948), 101ss.

[238] [1939] A.C. 277, at p. 290.

> is even where the parties are not English and the transactions are carried on completely outside England.

(*ii*) The modern rule of frustration is now well established in the practice of the courts, but eminent judges have expressed disagreement over the theoretical foundation of that rule. Two conflicting views have been propounded: according to one, frustration is essentially a question of construction of the contract, which contains an implied condition that it shall be discharged in the events which happened. According to the other, frustration is a device by which the court reconciles the terms of the contract with the demands of justice. Again we notice a conflict between the doctrine of party autonomy, on which the former view is founded, and of inherent jurisdiction, which is invoked by those favouring the latter view. Lord Wright, in *Denny, Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.*,[239] expressed himself in favour of the view that

> the court has formulated the doctrine by virtue of its inherent jurisdiction, just as it has developed the rules of liability for negligence, or for the restitution or repayment of money where otherwise there would be unjust enrichment.[240] . . . To my mind, the theory of the implied condition is not really consistent with the true theory of frustration.

But in the subsequent decision of the House of Lords in *British Movietonews* v. *London and District Cinemas*[241] this view was emphatically rejected and Lord Simon, with the agreement of the other members of the court, said that[242]

> if the decisions in 'frustration' cases are regarded as illustrations of the power and duty of a court to put the proper construction on the agreement made between the parties . . . , such decisions are seen to be examples of the general judicial function of interpreting a contract when there is disagreement as to its effect.

The *Movietonews* decision must now be taken as representing the authentic view of the English courts. It is significant that here again the theory of party autonomy prevailed over that of inherent jurisdiction.

(*iii*) The conflict between these two theories came to a head in the *Movietonews* case[241] where the question arose whether the court has power to qualify a term of a contract which was so wide as to cover a situation wholly uncontemplated by the parties when they entered into the contract; in that case distributors of news

[239] [1944] A.C. 265, at p. 275.

[240] The exact status of the doctrine of unjustified enrichment in English law is not yet ascertained; *per* Lord Porter in *Reading* v. *Att. Gen.*, [1951] A.C. 507, at p. 513.

[241] [1951] 2 All E.R. 617.

[242] On p. 625.

reels agreed in 1943 to supply owners of a cinema with news reels at ten guineas a week until the cancellation of the Cinematograph Film (Control) Order, 1943. After cessation of hostilities the order remained in force, and was still in force in 1948 when the owners gave the distributors notice to terminate the agreement; in fact, the Order was still in operation in 1949 when proceedings were commenced to determine the validity of the notice. Between 1943 and 1948 there was a complete change of circumstances; the Order was made during the war to meet military needs but was continued to conserve dollars. In 1943, the news reels were mainly supplied by service film units and were all of the same pattern, but in 1948 different news reels made by competitive producers were again obtainable. The Court of Appeal held unanimously[243] that the notice by the owners was valid because the ensuing turn of events was so completely outside the contemplation of the parties that they as reasonable people could not have intended that the contract should apply to the new situation. Denning L.J., who delivered the judgment of the court, said:[244]

> The principle to be applied is not based on a term implied by the parties. It is a qualifying power exercised by the courts.

In the House of Lords this decision was reversed with equal unanimity;[245] the House rejected the notion that there had been an extension of the doctrine of frustration in recent years and Lord Simon, in the passage cited earlier, emphasized that the question was "in all cases alike . . . a question of construction".

Again, the doctrine of inherent jurisdiction was rejected and the rule of unfettered party autonomy was accepted.

On closer analysis it is evident that the situation arising in the conflict of laws is intrinsically different from the frustration and qualification cases. The "connection" theory is rejected as the test of determining the proper law of contract because its application would defeat the express intention of the parties; that theory postulates that if the parties agree that their contract shall be governed by the law of country *X*, but the contract has no "real connection" with that country, their choice of the proper law has to be rejected by the courts. The English courts rightly refuse to carry the doctrine of inherent jurisdiction to that extreme and recognize the express choice of the proper law by the parties, provided that that choice is *bona fide* and legal and does not contra-

[243] [1951] 1 K.B. 190 (Denning and Bucknill L.JJ., and Roxburgh J.).
[244] On p. 202.
[245] [1951] 2 All E.R. 617 (Lords Simon, Simonds, Morton and Tucker).

vene public policy.[246] In the frustration and qualification cases the position is entirely different because the parties have not expressed an intention and, in view of the uncontemplated change in circumstances, could not envisage the course of events; here the task of the courts is to supplement the agreement of the parties and, so to speak, to fill a vacuum. It is believed that the homage which the House of Lords still insists in paying to the sacred principle of party autonomy is unrealistic; there is great strength in Lord Wright's view that "it only pushes back the problem a single stage".[247] Moreover, when assuming "the general judicial function of interpreting a contract",[248] the courts claim and exercise, in fact, inherent jurisdiction in questions of contract, and it is only a matter of degree and not a difference of principle to say that they merely interpret, but do not supplement, the agreement of the parties. It is not intended to criticize the result at which the House of Lords arrived in the *Movietonews* case; it is a matter of judicial opinion whether, on the facts of that case, the change in the subsequent circumstances was of sufficient magnitude to justify the view that the parties should be no longer bound by their agreement. But it is respectfully submitted that it was unnecessary for the decision at which the House arrived to express a view on the juridical question of inherent jurisdiction of the judge in matters of contract and to give apparent support to the view that such jurisdiction does not exist. It is believed that that restrictive attitude is hardly in harmony with the function of the judge in a common law system, who has always to bear in mind that, in the words of Lord Simonds in that case,[249] it is "essential to the life of the common law that its principles should be adapted to meet fresh circumstances and needs".

The growth of the common law depends on the truth of the experience that—to paraphrase Lord Macmillan's famous words—the categories of the common law are never closed.[250]

(Concluded)

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[246] The meaning of this qualification is discussed in Schmitthoff, English Conflict of Laws (2nd ed., 1948) pp. 108-111.

[247] *Denny, Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.*, [1944] A.C. 265, at p. 275.

[248] Lord Simon in *British Movietonews Ltd.* v. *London & District Cinemas Ltd.*, [1951] 2 All E.R. 617, at p. 625.

[249] On p. 627.

[250] *Postscripta:*– (a) *To Part I:* The decision of *R.* v. *Northumberland Compensation Appeal Tribunal; ex parte Shaw* has now been affirmed by the Court of Appeal, [1952] 2 All E.R. 122; (b) *To Part II:* Lord Justice Denning discusses Recent Developments in the Doctrine of Consideration in (1952), 15 Mod. Law Rev. 1.

THE
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