omission of an employee. Approval was given to the statement of Henry J. that " . . . the only type of killing of which the [criminal] law takes cognisance is a killing of one human being by another directly or indirectly . . . . "

Priority of Charge

In *Re (C. L.) Nye Ltd.* [1970] 3 W.L.R. 158 the English Court of Appeal had an application, from the liquidators of a company in voluntary winding up, which raised the following questions: (i) does the power to rectify the register of charges given by our section 108 enable the court to order the deletion of a whole registration? (ii) is a charge void against the liquidator of a company under our section 103 if submitted within twenty-one days of an erroneous date but more than twenty-one days after the actual date? (iii) is the certificate of registration provided for by our section 105 conclusive although a wrong date is included? The answers, given to these questions were, respectively: (i) No—only an omission or misstatement may be corrected; (ii) No; (iii) the certificate of registration of the charge was conclusive and so the charge was valid and effective and binding on the liquidator. But, if there had been evidence that any other person had given credit to the company between the dates when the charge should have been, and the date when it was, registered then the maxim that no one can take advantage of his own wrong would have applied and the answer above would have been different.

Rights and Duties of a Receiver

The court had in *Airlines Airspares Ltd.* v. *Handley Page Ltd.* [1970] Ch. 193 to consider the rights and duties of a receiver appointed by debenture holders. The plaintiffs sought an injunction to restrain a sale by the receiver of a company of certain operations over which the plaintiffs had commission rights. The receiver had, in view of the proposed sale, refused to adopt the plaintiffs' contract.

Graham J. declined the injunction and said (*ibid.*, 198):

> . . . is a receiver and manager, appointed by the debenture holders, in a stronger position, from the legal point of view, than the company itself, in respect of contracts between unsecured creditors and the company? Assuming that the company on the authority of *Southern Foundries* (1926) *Ltd.* v. *Shirlaw* [1940] A.C. 701, cannot put it out of its own power to perform contracts it has entered into, can a receiver in effect do so on its behalf if, at the same time, he has made it clear that he is not going to adopt the contract any way and, if, as is, in my judgment, the case here, the repudiation of the contract will not adversely affect the realisation of the assets or seriously affect the trading prospects of the company in question, if it is able to trade in the future?

He adopted a passage in *Buckley on the Companies Acts* (13th ed.) 244, and answered this question in the affirmative.

M. V. Rockel

CONTRACT

Fundamental Breach

The English Court of Appeal has in the last year twice had the opportunity to consider the doctrine of fundamental breach as pronounced by the House of Lords in *Suisse Atlantique Societe d'Armament Maritime S.A.* v. *N. V. Rotterdamsche Kolen Centrale* [1967]

1 A.C. 361. On both occasions the Court has maintained that there is still a principle that normally the effect of an exclusion clause is nullified, when the party seeking to rely on that clause has committed a breach going to the root of the contract.

In *Harbutt's Plasticine Ltd.* v. *Wayne Tank & Pump Co. Ltd.* [1970] 2 W.L.R. 198 the defendants specified and contracted to install equipment for storing and dispensing molten stearine. This equipment, which was found to be wholly unsuitable for its purpose, caused a fire which destroyed the factory. The defendants, when sued for the loss of the factory, pointed to an exemption clause in the contract, which purported to limit their liability to a mere fraction of the loss involved.

The doctrine of fundamental breach was developed in the following manner. Lord Denning M.R. posed the question: "When a contract is brought to an end by a fundamental breach by one of the parties, can the guilty party rely on an exclusion or limitation clause so as to avoid or limit his liability for the breach?" (*ibid.*, 210). Following *Suisse Atlantique, supra,* and *Karsales* v. *Wallis* [1956] 1 W.L.R. 934 the Court determined that in cases where the breach does not automatically bring the contract to an end, but has to be accepted by the innocent party as doing that, when it is so accepted, the innocent party can sue for the breach and the guilty party cannot rely on the exemption clause. There was no reason why the position should not be the same when the breach is of such a fundamental nature as to bring the contract automatically to an end.

Lord Denning then asked "were the breaches by the defendants and the consequences of them so fundamental as to bring the contract to an end, and thus disentitle the defendants to rely on the limitation clause?" (*ibid.*, 211). It had been argued that in determining whether a breach is fundamental or not, one must look at its quality, not at the results. This the Court rejected, and following *Hong Kong Fir Shipping Co.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26 stated per Lord Denning, "one must look not only at the breach, but also at the results of it" (*ibid.*, 211). The Court determined that the breaches by the defendants, and the consequences of them, were of such a fundamental nature as to bring the contract to an end, thus preventing the defendants from relying on the limitation clause.

What conclusions can be drawn from this decision? It is suggested that the Court of Appeal has to a large extent reverted to the position that existed before *Suisse Atlantique.* The accepted opinion then was that an exclusion clause formed part of the contract, the consideration being the performance by the protected party of his side of the bargain. The exclusion clause thus stood and fell with the contract. This approach, it is submitted, is difficult to accept in that it is inconsistent with the rule in the law of torts of *volenti non fit injuria*—a rule which precludes a party from suing for damages which, or the risk of which, he has previously agreed to accept. If voluntary agreement to accept liability is a defence in tort, on what rational grounds can it be claimed not to be a defence to negligent breach of contract?

A further difficulty arising from the decision in *Harbutt's Plasticine,* is that parties negotiating for supply of goods and services will find it increasingly difficult to predict the consequences of their agreement. In such transactions, it is important for the parties to be able to apportion their liability (often in the form of insurance policies) in a binding agreement prior to the breach, rather than to have to wait till it occurs,

and have the Court say with whom the fault of the loss lies. This, it is suggested, could be done at the time of contracting, by expressing such rules as to liability in the form of a separate collateral agreement: an independent contract, which would stand regardless of a fundamental breach of the primary contract.

This criticism of the Court in overriding a reasonable attempt by the parties to regulate the risk of their contract does not apply in the second case of *Farnworth Finance Facilities Ltd.* v. *Attryde* [1970] 1 W.L.R. 1053. For here the exclusion clause was repugnant to the main purpose of the contract—to supply the defendant with a road-worthy machine.

The first defendant bought a new motor-cycle on a hire-purchase agreement, which provided that the vehicle was supplied "subject to no conditions or warranties, express or implied". The motor-cycle developed faults which the manufacturers appeared unable to repair, so the defendant repudiated his contract with the finance company. He had never affirmed the contract for he had at all times attempted to get the defects remedied, and had never accepted the contract unless such were done. As Lord Denning states: "A man only affirms a contract when he knows of the defects and by his conduct elects to go on with the contract despite them" (*ibid.*, 1059). The Court held that such defects, likely to cause an accident, were sufficiently fundamental, to preclude the plaintiffs from relying on the printed conditions purporting to exclude their liability. The defect went to the very root of the contract and was thus a fundamental breach.

"There is," said Lord Denning, "a rule of construction that normally an exclusion clause should not be construed as applying to a situation created by fundamental breach" (*ibid.*, 1058). Fundamental breach is defined in *Suisse Atlantique* as a breach of a contract, producing something so different from what the parties envisaged, that it may be termed a fundamental breach. This occurred in *Farnworth Finance.* The purpose of the contract was to provide the defendant with a road-worthy machine, which the motor-cycle was not. The application of the fundamental breach doctrine in this situation therefore, is quite justified. But can the same be said of *Harbutt's Plasticine*? The answer is surely that it cannot. The very situation which the parties contemplated arose. Yet the Court of Appeal, in adopting the rule of construction of fundamental breach, overrode the parties' reasonable attempt to apportion their liability under the contract.

These two cases therefore, indicate the acceptance in the Court of Appeal of the doctrine of fundamental breach, as pronounced by the House of Lords in *Suisse Atlantique,* but *Harbutt's Plasticine* also serves to emphasise the danger, of too wide an application of the doctrine—a danger so clearly envisaged in *Suisse Atlantique* by Lord Hodson and Lord Wilberforce, when they suggested that every contract, indeed every type of clause, raises individual problems which cannot be resolved by broad general rules of law, such as the doctrine of fundamental breach.

Rectification of a Written Agreement

It is now a well established principle of law, that if owing to a mistake the written contract does not substantially represent the real intention of the parties, the court has equitable jurisdiction to rectify that written agreement. In *Joscelyne* v. *Nissen* [1970] 2 Q.B. 86 the Court of Appeal

considered what is required, before a contractual instrument can be rectified by the court.

A contract was signed in which the father agreed to transfer his car-hire business to his daughter. One of the terms of the agreement was that he was to reside in the house, from which the business was being carried out, "free of all rent and outgoings of every kind in any event". After a dispute, the daughter refused to continue to pay the fuel bills, which by the written agreement she was not obliged to do. However such undertaking had prior to the written contract, been orally given and accepted.

The two lines of argument before the Court were: rectification of a written instrument cannot be obtained unless it is in accord with a completed antecedent concluded oral contract; and the contrary view, that if in the course of negotiation a firm accord has been expressly reached on a particular term of the proposed contract, and both parties continue with the intention that the language of the written contract should include this term, it matters not that the accord was not part of an antecedent concluded oral contract.

The Court of Appeal undertook a review of the judicial history as regards this point of law. In support of the first argument was a number of obiter statements in such cases as *MacKenzie* v. *Coulson* (1869) L.R. 8 Eq. 368, *Lovell-Christmas Ltd.* v. *Wall* 104 L.T. 85, *Craddock Bros.* v. *Hunt* [1923] 2 Ch. 136, and in *U.S.A.* v. *Motor Trucks Ltd.* [1924] A.C. 196, 200, where the Earl of Birkenhead, in delivering the opinion of the Judicial Committee of the Privy Council, said:

> the plaintiff must show that there was an actually concluded agreement antecedent to the instrument which is sought to be rectified; and secondly, that such agreement has been inaccurately represented in the instrument.

As to the contrary argument, the Court considered the judgment (again obiter, as the case was decided on construction of the instrument) of Clauson J. in *Shipley U.D.C.* v. *Bradford Corp.* [1936] Ch. 375, in which he indicated that he was unable to accept the above obiter statements as being correct law. Simonds J. in *Crane* v. *Hegeman-Harris Co. Inc.* [1939] 1 All E.R. 662, 664, concurred with this dictum and in the course of his judgment stated:

> I am clear that I must follow the decision of Clauson J. in *Shipley U.D.C.* v. *Bradford Corp.* the point of which is that, in order that this court may exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify. . . . it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement.

These, then, were the two conflicting lines of judicial authority confronting the Court of Appeal. Their task was plain, they had to resolve the uncertainty which they did, by applying the law as stated in *Crane* v. *Hegeman-Harris, supra.* A completed antecedent concluded contract is not required, provided a firm accord was reached in the course of negotiation, and the intention of the parties was that this accord should be continued in the written contract.

Indivisible Contract and Specific Performance

In Loan Investment Corporation of Australasia v. *Bonner* [1970] N.Z.L.R. 724 the Privy Council had to consider an agreement which provided both for a sale of land and a loan of money. The opinion of

the Judicial Committee is more clearly understood if the steps in their reasoning are divided as follows:—

1. The contract was a composite one, containing two transactions which were combined in it—one was the sale and purchase of land at a price of £13,300, the other a loan of £11,000 without security for a term of ten years at 7½%. Each was a principal transaction, and neither was subordinate to the other. But, having regard to the intention of the parties as inferred from the provisions of the contract and the surrounding circumstances, the contract was entire and indivisible.

2. The fact that the composite contract included a long-term unsecured loan was not sufficient reason, in itself, to treat the loan as something different, merely because it was connected with a sale of land, when specific performance is sought.

3. An order for specific performance is a discretionary remedy. There were, the Committee found, some firmly established rules regarding the exercise of the discretion—a mere contract for loan of money will not be specifically enforced, whereas one for sale and purchase of land will. But these rules did not cover the situation in question, for the Board had to consider a composite contract in which the long-term unsecured loan was not ancillary to the sale of land, but was a principal transaction in itself.

4. There was an obvious objection in principle to granting specific performance of an unsecured loan in that it would have a one-sided operation, creating a position of inequity. The borrower would obtain the whole advantage of the contract.

5. However, the Board determined that the composite contract in question was predominantly in the nature of a commercial bargain. The loss incurred by the respondent's wrongful refusal to carry out his part of the bargain could be met by the remedy of damages, and consequently damages were considered to be a sufficient and suitable remedy, and the special remedy of specific performance was thus refused.

Sir Garfield Barwick, gave a dissenting judgment in which he argued that there was but one transaction—a contract for sale and purchase of land, one of the terms of which being that the £11,000 be regarded as a deposit. The reasons suggested by the majority for denying specific performance, had no validity he declared, when considered in the light of this interpretation of the agreement.

Legislation

Illegal Contracts Act 1970

This Act represents not only a codification, but also a reform of the law relating to illegal contracts. The following general observations can be made:—

1. An illegal contract is any contract that is illegal at law or in equity, whether the illegality arises from the creation or performance of the contract; and includes a contract which contains an illegal provision, whether that provision is severable or not.

2. A contract lawfully entered into does not become illegal or unenforceable merely because its performance is in breach of any enactment, unless the enactment expressly so provides or its object clearly so requires.

3. Every illegal contract is of no effect, and no person is entitled to any property under a disposition made by or pursuant to such contract; with the proviso that any disposition of property made by or through a party to an illegal contract for valid consideration, is valid, if the person to whom the disposition was made, was not a party to the contract, and had no notice that the property was the subject of an illegal contract.

4. The Court has in its discretion power to grant relief to any party to an illegal contract, or to any person claiming through such party, provided it considers to do so would be in the public interest.

5. The Act binds the Crown.

6. The Act applies to contracts made both before and after the comencement of the Act, except that the provision that an illegal contract be of no effect applies only to contracts made after the Act.

G. G. Hall

CRIMINAL LAW

Mens Rea

R. v. *Strawbridge* [1970] N.Z.L.R. 909 re-affirmed the existence of an intermediary class of statutory offence as suggested by Lord Pearce in *Sweet* v. *Parsley* [1970] A.C. 132 as a "sensible half-way house", which, while not creating a strict liability, does not place upon the prosecution the conventional burden of affirmatively establishing a guilty mind on the part of the accused. In this type of case *mens rea* may be presumed but if there is evidence that the accused believed on reasonable grounds that his act was innocent he is entitled to be acquitted.

The argument concerning *mens rea* in relation to drug offences and strict liability, seems to have come full circle since Edward J.'s conclusions in *R.* v. *Ewart* (1905) 25 N.Z.L.R. 709. Although his statement in that case that the burden of proof had passed to the accused went a little too far, it is true to say that if the accused can indicate some evidence which creates reasonable doubt that he did not have a guilty mind then he may be entitled to an acquittal. The decisions in *Strawbridge* seems to culminate a line of argument on this question since *Ewart's* case.

The decision is particularly significant in the way it avoids the imagined difficulty presented by *Woolmington* v. *D.P.P.* [1935] A.C. 462. In so doing North P. said (*ibid.*, 915):

> . . . in New Zealand we have never interpeted *Woolmington's* case as going any further than determining that the burden of proof at the end of and on the whole of the case lay on the Crown. With the exception of statutory offences of an absolute nature we have however distinguished between cases where the offence consists in "knowingly" doing an act and cases where the word "knowingly" has been omitted. In the former class of case the Crown must prove knowledge on the part of the accused before it can be said that a *prima facie* case has been made out. In the latter class of case, on the other hand, knowledge of the wrongful nature of the act will be presumed in the absence of any evidence to the contrary.

Since the accused alone would know the belief upon which he acted he should be granted the opportunity to explain his grounds for such belief and if the jury considers this reasonable, it might acquit him.