MISREPRESENTATION AND BREACH OF CONTRACT

REPORT OF THE CONTRACTS AND COMMERCIAL LAW REFORM COMMITTEE

Presented to the Minister of Justice in March 1967.

ANALYSIS OF REPORT

REPORT ON MISREPRESENTATION AND BREACH OF CONTRACT

Introduction

1.1 In July 1964 the Law Revision Committee, having before it the Tenth Report of the English Law Reform Committee on Innocent Misrepresentation, set up a subcommittee to inquire into the law relating to misrepresentation. The minutes of that meeting recorded the agreement of members that there was need for a change in the law and an expression of opinion that the topic might call for a radical approach and that changes necessary might not be limited to those in the United Kingdom committee's report.

The subcommittee comprised Professor D.E. Allan, then Professor of Commercial Law at the Victoria University of Wellington, Mr B.J. Cameron, Chief Advisory Officer of the Department of Justice, Mr W. Iles, Assistant Law Draftsman, Mr C.W. Ogilvie, Advisory Officer of the Department of Justice, Mr C.I. Patterson, Barrister and Solicitor and Mr W.S. Shires, Barrister and Solicitor, all of Wellington.

The subcommittee took as the starting point of its studies the Report of the English Committee. After a careful examination however they came to the conclusion that the remedies proposed in that Report were altogether inadequate if the law was to be put on a really satisfactory basis. In an interim report in March 1965 the subcommittee advised the Law Revision Committee of its view that the English report should not be given effect to in New Zealand and that the subject should be approached in a much more fundamental way. The Committee agreed that the subcommittee should continue its work on the broad lines it had suggested.

At the end of 1965 the Minister of Justice set up the Law Revision Commission which, together with a number of specialist law reform committees, replaced the Law Revision Committee. It was subsequently arranged that the subcommittee should make its report to the Contracts and Commercial Law Reform Committee.

We received the subcommittee's report in January 1967 and have given it a careful examination. The fact that three members of the subcommittee are also members of our committee

has had the advantage of making the fruits of the very thorough and prolonged study given to the subject by the subcommittee directly available to us.

1.2 We now present our own report. While there has been a natural divergency of opinion among our members we are agreed that the existing law is unsatisfactory and that the changes recommended in England and now given effect to by the Misrepresentation Act 1967 do not go far enough and carry their own disadvantages.

Some of us feel that what is needed is to escape altogether from traditional categories and rules that hinder the Courts in determining the true bargain between contracting parties. Others consider that these rules and these distinctions do play a valid and useful role in the law and doubt the wisdom of dispensing with them. We speak with one voice however in recommending that the law be placed on a more rational and sensible basis and in particular that there should be a reformation of remedies for breach of contract and for misrepresentation inducing a contract.

1.3 In making our own report, we have been pleased to adopt verbatim a number of sections of the subcommittee's report. These we have incorporated herein without further acknowledgement. We have decided this in order to present our own report as a comprehensive survey and presentation of the reforms we consider necessary.

General Observations

2. Our law of contract derives from the law of England. It can therefore draw upon centuries of litigation and exposition. This vast experience has known every artifice of the cunning and every muddlement of the dolt. Therefore it is to be respected. Changes should be made only after mature consideration and upon plain proof of need.

But the common law has never been immutable. As McCardie J. said in Prager v. Blatspiel Stamp and Hencock Ltd [1924] 1 K.B. 566 -

> "The object of the common law is to solve difficulties and adjust relations in social and commercial life. It must meet, so far as it can, sets of facts abnormal as well as usual. It must grow with the development of the nation. It must

face and deal with changing or novel circumstances. Unless it can do that it fails in its function and declines in its dignity and value." (ibid, 570).

Many of our present rules were established in the burgeoning commercial life of the eighteenth century. Lord Mansfield, the Chief Justice of the King's Bench from 1756 to 1787, has been judicially described as the founder of the commercial law of England. One rule to which we must devote a good deal of attention, known as the "parol evidence rule" was settled by 1709 (Phipson on Evidence 10th Ed. para. 1764).

Any jurist of those formative times would marvel at the strains imposed upon his creatures today. The telephone, rather than the note of hand and the personal visit, is the modern medium of negotiation. Rarely are deeds and agreements solemnly drafted appropriate to the particular case; commonly standard forms printed in minute characters propounded by one party to the other form "the contract". Offers and affirmations are made by advertisement through the medium of the press, radio and television. Many every-day contracts are made without words at all, in the supermarket and by self-service machinery.

Contracts occupy an essential place in our commercial life. Modern wealth consists not so much of goods laid up in store, of full barns, expansive acres and numerous flocks, but of scrip, shares, debentures and investments, leases and mortgages, cheques and promissory notes, bank and deposit accounts, in short, of "bundles of promises". The modern farmer knows this as well as the businessman.

The things in trade have also changed. In addition to things of obvious quality and function, of oats, corn and barley, modern commerce deals with things whose quality and function cannot readily be tested before purchase and, in many cases, ultimate use, such as cake mixers, motor cars and electric batteries.

The law has not been unresponsive to these changes, but there has been no re-examination of the rules as a whole in these new circumstances.

Such legislation as there is has been in the nature of expedient. The Contracts Enforcement Act 1956 simply

repealed certain long standing requirements of writing. Notwithstanding the promise held out by its short title, it does not settle the means of enforcing contracts; indeed it does not begin to define the rules as to the enforceable expression of agreement. Yet it has proved to be a useful reform.

With some outstanding exceptions, the Courts have largely concerned themselves with the interpretation of terms used by the parties in their culminating agreement. In some fields, notably hire-purchase, there is a process of attrition. A new phrase is printed, the Court interprets it adversely to the vendor, a different phrase, a new interpretation, and so on. One begins to wonder, despite Humpty Dumpty's thesis, whether the word is not master after all? We feel entitled to ask whether the Courts are aided or fettered in the quest for justice between contractors by rules designed for another age. And we propose to examine these rules in some detail.

3. Outline of this Report

Accordingly we proceed as follows:-

Firstly We discuss the principle that the existence and terms of a contract are to be ascertained by objective tests, and reaffirm this as the only sound basis of a modern law of contract.

Secondly We attempt to state the various ways in which the present law classifies the communications between parties dealing for a contract, and say something of the remedies available in these cases.

Thirdly We touch on the reforms made in England by the Misrepresentation Act 1967 and demonstrate that they do not come to grips with what we conceive to be the essence of the problem.

Fourthly We discuss whether and if so in what manner the law should be changed to enable the Courts to proceed directly to ascertain and enforce real bargains between the parties and whether the distinction between representations inducing a contract and terms of a contract should be maintained.

Fifthly We re-examine the remedies available in Courts with particular reference to (a) the principles which should

govern therights of the party to cancel a contract, and (b) clauses commonly referred to as "exception" clauses.

Agreements at Law - the Common Intention

4.1 The law of contract freely employs a catchword to describe an essential element of a legally enforceable bargain: the parties must have a "common intention". There is a robustly straightforward dictum attributed to Holt C.J. in 1689 that "An affirmation at the time of sale is a warranty, provided it appear on evidence to be so intended". But what is meant by "intended". Must there be complete mental accord, or is it sufficient that there should be ostensible concurrence?

4.2 From the earliest times the Courts have adhered fairly constantly to the principle that the existence and terms of a contract are to be ascertained by objective tests; in general the Courts have refused to enquire into the states of mind of the contracting parties. Brian C.J. observed in 1477 "It is common learning that the thought of man shall not be tried, for the Devil himself knoweth not the thought of man". Lord Blackburn's speech in the House of Lords upon Brogden v. Metropolitan Railway Co. (1877) 2 App. Cas. 666 H.L. traces this principle. Lord Macnaghten applied it in Keighley, Maxted & Co. v. Durant [1901] A.C. 240, 247, [1900-3] All E.R. Rep. 40, when he said "It is, I think a well established principle in English law that civil obligations are not to be created by, or founded upon, undisclosed intentions". Lord Denning recently observed in Oscar Chess Ltd v. Williams [1957] W.L.R. 370, [1957] 1 All E.R. 325, 328, "It is sometimes supposed that the tribunal must look into the minds of the parties to see what they themselves intended. That is a mistake. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice." A striking recent example of ostensible agreement amounting to a contract notwithstanding differing intentions is Galbraith v. Mitchenhall Estates Ltd [1965] 2 Q.B. 473, [1964] 2 All E.R. 653 wherein a workman who wanted a caravan was held to the terms of what is known in law as a simple hire agreement signed by him which he mistakenly assumed, through no fault of the finance company with whom he dealt, was a hire purchase agreement. The protection of the Hire Purchase Act was thus not available to him. Dell v. Beasley [1959] N.Z.L.R. 89 may also be cited.

4.3 It is important to note that the evidence must show an apparent contract. The leading case of Raffles v. Wichelhaus

(1864) 2 H. & C. 906, (1864) 159 E.R. 375, rests on this ground. There was an agreement for the purchase of a cargo described as "ex Peerless from Bombay". There were two ships of that name which both sailed from Bombay about the same time. It was held that there was no contract. We respectfully adopt Cheshire and Fifoot's view of the case in their treatise on the Law of Contract (Northey's 2nd N.Z. Ed. p.193) that "The description of the res vendita was such that it pointed equally well to two different cargoes, and since there were no circumstances which would clearly indicate to a disinterested spectator the one rather than the other, it became impossible to determine the sense of the promise."

4.4 Smith v. Hughes (1871) L.R. 6 Q.B. 597, [1861-73] All E.R. Rep. 632, shows what can happen when the state of mind of the parties is treated as relevant. Smith wanted to sell some new oats. He offered them to Hughes, giving him a sample. Hughes agreed to buy them next day, but later he refused to take delivery because they were new, whereas, he said, he had intended to buy old oats. The evidence conflicted as to whether the words "new" or "old" were used in the bargaining. The Judge asked two questions of the jury, namely -

(a) Whether the word "old" had been used in the bargaining;

(b) Whether Smith believed that Hughes believed that Hughes was contracting to purchase old oats.

The Judge instructed the jury that if either question was answered "yes", the jury must find for Hughes. They found for Hughes. Smith appealed to the Court of Queens Bench, which ordered a new trial. As Lord Atkin observed in Bell v. Lever Bros. Ltd [1932] A.C. 161, 222, [1931] All E.R. Rep. 1, it is not quite clear whether the Court of Queens Bench considered that if Hughes' contention was correct the parties were not ad idem, (which would be of considerable interest in the present context) or that there was a contractual condition that the oats were old. Lord Atkin further observed that he was inclined to think that the true analysis of the case was that there was a contract.

Sir Alexander Cockburn's judgment in Smith v. Hughes contains the following (p.602) -

> "It is to be regretted that the jury were not required to give specific answers to the questions so left to them. For it is quite possible that their verdict may have been given for [Hughes] on the first ground; in which case there would, I think, be no doubt as to the propriety of the

> Judge's direction; whereas it is possible that the verdict of the jury - or at all events of some of them - may have proceeded on the second ground ... We must assume that [Hughes] believed the oats to be old oats, and that [Smith] was conscious of the existence of such belief, but did nothing directly or indirectly to bring it about, simply offering his oats and exhibiting his sample, remaining perfectly passive as to what was passing in the mind of the other party. The question is whether, under such circumstances, the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of the opinion that it will not."

Blackburn J. said (p.606) -

> "In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality. And I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound unless the vendor was guilty of some fraud or deceit upon him, and that mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for whatever may be the case in a Court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake not induced by the act of the vendor."

4.5 Lord Denning said in Solle v. Butcher [1950] 1 K.B. 671, 691 -

> "Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of Bell v. Lever Bros. Ltd. The correct interpretation of that case, to my mind, is that once a contract has been made, that is to say, once the parties whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake."

4.6 It came as a surprise to practitioners in this field that Lord Denning should have apparently resiled from views so firmly stated by him more than once, when he delivered his judgment in the Court of Appeal in Dick Bentley Productions Ltd v. Harold Smith Motors Ltd [1965] 2 All E.R. 65. He said that an inference that a statement is a warranty may be rebutted by proof that the maker "was in fact innocent of fault in making it and that it would not be reasonable in the circumstances for him to be bound by it" (ibid. 67). It appears to have been his intention to set up a subjective test of

agreement.

Bentley's case may be compared with De Lassalle v. Guildford [1901] 2 K.B. 215, 221, where Sir A.L. Smith M.R., after citing the dictum of Holt C.J., said "In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not." In other words, the state of mind of the person to whom the statement was made was treated as decisive in determining whether the statement is a contractual term. This view was rejected by the House of Lords in Heilbut Symons and Co. v. Buckleton [1913] A.C. 30, [1911-13] All E.R. Rep. 83. Lord Moulton, after quoting the words of Sir A.L. Smith M.R. cited above, said -

> "With all deference to the authority of the Court that decided that case, the proposition which it thus formulates cannot be supported. It is clear that the Court did not intend to depart from the law laid down by Holt C.J. and cited above, for in the same judgment that dictum is referred to and accepted as a correct statement of the law. It is, therefore, evident that the use of the phrase 'decisive test' cannot be defended. Otherwise it would be the duty of a judge to direct a jury that if a vendor states a fact of which the buyer is ignorant, they must, as a matter of law, find the existence of a warranty whether or not the totality of the evidence shows that the parties intended the affirmation to form part of the contract; and this would be inconsistent with the law as laid down by Hold C.J. It may well be that the features thus referred to in the judgment of the Court of Appeal in that case may be criteria of value in guiding a jury in coming to a decision whether or not a warranty was intended; but they cannot be said to furnish decisive tests, because it cannot be said as a matter of law that the presence or absence of those features is conclusive of the intention of the parties. The intention of the parties can only be deduced from the totality of the evidence, and no secondary principles of such a kind can be universally true." (ibid, 50).

4.7 Even if Lord Denning's proposition in Bentley's case had strong judicial support, we would advise against it because we consider that it would play havoc with commerce and convert every case in contract into a metaphysical disquisition quite unacceptable for the regulation of affairs. With all respect, statements cannot be allowed to come in and go out of contracts according to the hidden thought of one of the parties, however blameless he may be.

The creation of a legally binding agreement does not require the subjective meeting of minds. We regard this as a cardinal rule necessary to the efficient conduct of affairs. There is no room in our law of contract for the mental reservation. Indeed the experience is not uncommon in the negotiation of the complex agreements fashionable today that one party will assent to the language propounded by the other party for the sake of having the contract, deliberately leaving his private misgivings for debate after the contract has been signed.

Recommendation

4.8 We therefore recommend that it should be affirmed that the question whether a given statement is or is not a term of the contract is to be decided without regard to the supposed state of mind of any party undisclosed to the other at the time of contracting, but is to be decided according to the conduct of the parties, on their words and behaviour.

4.9 The discussion on this recommendation leads into the topic of mistake. This is also in a confused state. It is included in the subjects for consideration by this Committee.

5. The Classification of Statements

5.1 Traditionally the law has not regarded every statement made by way of inducement to negotiate, or made during negotiations, as part of the contract. There is a complex classification.

Statements which are not terms of the contract are classified as -

(1) Invitations to treat.
(2) "Puffs" or commendations.
(3) Statements of opinion.
(4) Statements of law.
(5) The supply of information.
(6) Representations of fact inducing the contract. If these are false, they are further classified as -
    (a) Innocent misrepresentations,
    (b) Negligent misrepresentations,
    (c) Fraudulent misrepresentations.
(7) Statements of intention.
(8) Indpendent or collateral contracts.

Statements which are terms of the contract have been classified as -

(9) Fundamental terms.

(10) Conditions.
(11) Warranties.

A given statement made by one party to another in the expectation of making a contract may therefore fall into one or more of some thirteen classes.

The law recognises that persons may effectively disclaim responsibility for their statements. Furthermore, the Courts have recognised that the parties are free to make agreements which are binding in honour only.

Finally the law recognises that the culminating agreement, especially when it is written, may not express the true bargain, because of some mistake in expression or transcription, for which the Courts afford the remedy of rectification.

5.2 The importance of this classification emerges on a consideration of the remedies available to an aggrieved party. The remedies judicially applied in contract cases are -

(a) The award of damages. This is the traditional remedy of the common law which is available to compensate -
  (i) Breach of a term of the contract.
  (ii) Fraud.

(b) Injunction to restrain breach of contract, which is granted in the discretion of the Court only in limited circumstances.

(c) The decree for specific performance of the contract, which is granted in the discretion of the Court only in limited circumstances.

(d) Rescission, whereby the Courts recognize the right of an aggrieved party to bring the contract to an end. A party may rescind:
  (i) For misrepresentation by another party which led the former into the contract.
  (ii) For breach of a condition by another party to the contract.
  (iii) Where the other party manifests an intention not to be bound by the contract.

(e) Declaration. By the Declaratory Judgments Act 1908 procedures are provided whereby a declaration of the rights and liabilities of the parties to a contract may be obtained from the Supreme Court.

5.3 There are settled rules stipulating or limiting the remedies available according to the classification mentioned in paragraph 5.1. We give the following broad outline.

Invitations to Treat

5.31 Statements which are no more than invitations to treat carry no remedy for falsity.

Thus a shopkeeper who marks his goods at a certain price does not bind himself to sell at that price, or to sell at all. Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd [1953] 1 Q.B. 401, [1953] 1 All E.R. 482.

Puffs

5.32 Courts have readily left room for "mere puffs" or commendations, on which no reasonable man would rely. Modern advertising abounds in these, e.g. a popular motor spirit is said to "put a tiger in your tank" and a household cleaner is reported as "cleaning with the power of liquid lightning". These can readily be seen for what they are, mere "chaffer on the market-place", and the Courts attach nothing to them. But the boundary between palaver and affirmation is not clear. For example, the description of a business as a "gold mine" was held to be more than a mere puff; it was a representation (Senanayake v. Cheng [1966] A.C. 63; [1965] 3 All E.R. 296).

Opinions

5.33 Statements of opinion, for example of worth or value do not in general support a remedy if they turn out to be wrong, so long as the opinion was honestly held by the person who gave it. Thus in Bissett v. Wilkinson [1927] A.C. 177, [1926] All E.R. Rep. 343, the Privy Council on appeal from New Zealand held that a contract for the sale of a sheep farm could not be rescinded by the purchaser on the grounds that the vendor's statements about the carrying capacity of the farm were misrepresentations, because in the circumstances the statements could only be regarded as the expression of an opinion which the vendor honestly held.

However their Lordships approved the following

observations of Bowen L.J. in Smith v. Land and House Property Corporation (1884) 28 Ch. D. 7, 15 -

> "... it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."

Thus the present law appears to be -

(a) If the statement is merely the expression of an opinion honestly held, no relief is available if the opinion is wrong;

(b) But if the opinion is not honestly held by the contracting party who expressed it, i.e. if it is fraudulent, the party misled may have relief by way of rescission of the contract and by way of damages for deceit;

(c) And if statements of fact are expressed or implicit in the opinion, these amount to representations if they induced a contract between the parties;

It is possible that if the statement was made negligently in the course of a special relationship, the law of tort may carry relief on the principles adumbrated in Hedley Byrne v. Heller & Partners [1964] A.C. 465, [1963] 2 All E.R. 575. This aspect of the law of negligence is not at all developed.

Statements of Law

5.34 Statements of law are usually put in a separate class with the observation that if they prove to be false, a contract between the maker and the person to whom it is made is not voidable (Anson's Law of Contract 22nd Ed. 210). This view is sometimes put on the footing that statements of law are really statements of opinion.

The trouble is that statements of law often entail statements of fact. Thus in Solle v. Butcher [1950] 1 K.B. 671; [1949] 2 All E.R. 1107 the mistaken belief of both parties that a flat was not subject to the English Rent Restriction Acts was held to be a mistake of fact and a lease was set aside. Lord Denning said that a misrepresentation as to private rights is equivalent to a misrepresentation of fact for the purpose of obtaining relief in equity (ibid, 695; 1121).

It is often said that certain classes of receipts are tax-free, but it does not appear to have been decided whether this is a statement of fact or a statement of law.

In Hirschfeld v. London, Brighton and South Coast Railway Company (1876) 2 Q.B.D. 1; [1874-80] All E.R. Rep. 1191 it was suggested that a fraudulent representations as to the legal effect of a deed may be relied upon to set the deed aside, but the case was decided on other grounds.

This class of statements assumes an increasing importance following the enactment of economic restraints. The Hire Purchase and Credit Sales Stabilisation Regulations 1957 (S.R. 1957/170) apply to certain classes of goods. It is not easy to determine whether a given article is within those classes. Is a statement that the article is not within one of the classes a statement of fact, opinion or law?

The present position appears to be that a statement of a general proposition of law or a statement of the legal effect of facts which are stated as a distinct and severable statement, or which are known to both parties, is classed as a statement of opinion (see para. 5.33), but a statement of fact does not become a statement of law merely because it involves an inference or proposition of law, it is a representation. (See Spencer Bower and Turner on Estoppel by Representation p.36 et seq),

Information

5.35 It happens that one of the contracting parties may offer the other information about the subject matter of the contract which, in the circumstances, is not to be taken as of legal consequence. There may be an express disclaimer, as there was in Hedley Byrne and Co. Ltd v. Heller and Partners Ltd [1964] A.C. 465; [1963] 2 All E.R. 575, or the Court may be able to find that when the statement was made the parties were not contemplating a contract, with the consequence that the statement has no legal effect in the law of contracts. Frederick E. Rose (London) Ltd v. William H. Pim Jnr & Co. Ltd [1953] 2 Q.B. 450 may be regarded as an example of this class. Rose and Company had an inquiry for "feveroles". They did not know what these were, so they asked Pim and Company. The representatives of Pim and Company said they were horsebeans. Later Rose and Company agreed to buy horsebeans from Pim and Company and resold them as feveroles. They were not feveroles, but "feves", a different class of horsebean. The English Court of Appeal held that an action by Rose and Company against Pim and Company for rectification of the contract failed on the grounds that Pim and Company's definition of feveroles was not part of the contract for horsebeans.

This class is therefore of importance where the relationship of the parties extends over a period of time, so that the problem arises of determining what communications induced or became part of the contract, and what did not.

Representations

5.36 Representations of fact form the major class of statements outside the contract which are of legal consequence. They are classified as innocent, fraudulent, and lately, negligent.

But to have significance in the law of contract they must possess two common features -

First the representor must be taken to have intended that the representation should be acted upon;

Second the representation must induce the repre-

sentee to enter into a contract with the representor.

The distinction between a representation inducing a contract and a term of the contract becomes of importance when the statement in question has not been carried into the culminating agreement. If it has, it is a term of the contract; if it has not, it may be either a representation of a term of a contract comprising the culminating agreement and other points of agreement along the way to it. Where the culminating agreement is in writing, the distinction can readily be discerned, especially if the parties have agreed that the writing records the entirety of their contract. But where the culminating agreement is oral, the distinction is not easily drawn in practice.

Oscar Chess Ltd v. Williams [1957] 1 W.L.R. 370, [1957] 1 All E.R. 325 is an example wherein a statement made in the negotiations about the very subject matter of a culminating oral contract was held to be a misrepresentation, not a binding undertaking. Williams traded in a Morris motor car to Oscar Chess Limited who were motor dealers. The registration book showed the car to have been first registered in 1948. Williams honestly believed it was a 1948 model, and he so described it to the plaintiff company's salesman. The salesman thought it was a 1948 car too. He made an allowance calculated for a 1948 model. In fact it was a 1939 model, for which the market value was much less. Oscar Chess Limited sued Williams for damages and succeeded in the County Court. Williams appealed and the English Court of Appeal held that his statement of the model of the car was, in the circumstances, merely an innocent misrepresentation for which damages could not be given. The celebrated ruling of Holt C.J. believed to have been given in 1688 that "An affirmation at the time of sale is a warranty, provided it appear on evidence to be so intended" is closely examined in this case.

The separate jurisdictions which existed before jurisdiction in equity was conferred on the High Court by the Judicature Act 1873 account for much that

appears anomalous in this branch of law. The concept of misrepresentation inducing a contract flourished in Chancery where it could lead to the grant or refusal of equitable relief, whereas in the common law Courts it appears to have signified nothing unless the representation became a term of a contract, or was fraudulent in the sense required to support the common law action for deceit (see Lord Herschell's speech in Derry v. Peek (1889) 14 App. Cas. 337, 359; [1886-90] All E.R. Rep. 1).

The common law Courts redressed the victim of a fraudulent misrepresentation by giving him damages in an action for deceit. And the equitable jurisdictions aided the victim of any misrepresentation by granting or withholding equitable relief. Hence the Court of Chancery could order rescission of a contract induced by misrepresentation whether innocent or fraudulent. Lord Herschell expressed the rule in Derry v. Peek by saying "Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand." (ibid. 359). And in such a case Chancery would order restitution and hold the party misled entitled to an indemnity from the misleading party. (Newbigging v. Adam (1888) 13 App. Cas. 308; [1886-90] All E.R. Rep. 975.)

Moreover the Courts of Equity would refuse the decrees of specific performance if the party against whom those decrees were sought had been led into the contract by misrepresentation. (Lamare v. Dixon (1873) L.R. 6 H.L. 414.)

But the Courts of Equity did not award damages. Consequently innocent misrepresentation did not sound in damages, a position affirmed by Lord Moulton in Heilbut Symons & Co. v. Buckleton [1913] A.C. 30, [1911-13] All E.R. Rep. 83, by saying "It is, my Lords, of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made." (ibid. 51)

Very recent decisions suggest a new refinement. In Hedley Byrne & Co. Ltd v. Heller & Partners [1964] A.C. 465; [1963] 2 All E.R. 575 the House of Lords expressed the view that damages may be awarded for negligent misrepresentation. And in Dick Bentley Productions Ltd v. Harold Smith Motors Ltd [1965] 2 All E.R. 65 the English Court of Appeal appear to have subscribed to the view of Lord Denning that a prima facie inference that a given statement is a warranty (sounding in damages) may be rebutted if the maker shows that he was innocent of fault in making it and that it would not be reasonable in the circumstances for him to be bound by it.

Wilson J. considered the idea of negligent misrepresentation in Jones v. Still [1965] N.Z.L.R. 1071 where he said -

> "A dishonest misrepresentation is fraud and has always in modern times been actionable irrespective of any special skill possessed by the representor, but there appears to be no case in which an honest misrepresentation has given an action for damages, even if negligent, except where a duty to take care in making the representation arises from contract, fiduciary relationship, or the representee's reliance on the special skill (which includes specialist knowledge or training) possessed by the representor. To extend liability to persons lacking such special skill seems to me to be contrary to the law as laid down in Derry v. Peek (1889) 14 App. Cas. 337, [1886-90] All E.R. Rep. 1. " (ibid, 1074).

Future cases may demonstrate further overlapping of the areas of contract and tort, but concerned as we are with the field of contract, the enforcement of undertakings, we incline to the view that negligence is irrelevant. All the authorities except Bentley's case seem to sustain this view.

For the purposes of this rudimentary summary we may therefore state the present law as to the consequences of a misrepresentation of fact inducing a contract but not itself contractual as follows -

(a) If fraudulent, the aggrieved party may elect to rescind or affirm the contract, successfully resist any claim to enforce it (except where he has affirmed it), and obtain damages.

(b) If not fraudulent, the aggrieved party may elect to rescind or affirm the contract and successfully resist any claims to enforce it (except where he has affirmed it) but he cannot recover damages (except, possiblv, where he can prove that the misrepresentation was made negligently).

It is important to note that these remedies are not governed by the gravity of the misrepresentation, except to the extent that this may be taken into account in considering whether the misrepresentation did induce the misled party to enter into the contract.

It is also of consequence to note that the party misled by an innocent misrepresentation must either go on or rescind; there is no intermediate relief. Furthermore, the misrepresentor, however innocent, must lose the contract if the misrepresentee elects to rescind.

The rigour of these rules is mitigated to a degree by certain "bars to rescission" which we discuss in paragraph 6 of this report, but it is as well to note it in passing.

Statements of Intention

5.37 Statements of intention which do not become part of the contract present difficult problems.

They are representations that the maker has the intention he avers. But unless they become part of a contract, they cannot operate to prevent the maker from changing his mind.

A leading example of statements of this class is given in Jorden v. Money (1854) 5 H.L.C. 185; [1843-60] All E.R. Rep. 350.

Money owed Charles Marnell £1200 and executed a bond to secure that sum. On Marnell's death his sister, then unmarried, was an executrix and sole legatee. She told Money that she abandoned and never intended to enforce the bond. She repeated those statements when Money was contemplating marriage, and Money claimed that he contracted marriage and that his wife's property was settled upon him on the faith of

them.

Later Miss Marnell married Jorden. She and Jorden set about enforcing the bond. Money then filed suit in Chancery for a declaration that the bond had been abandoned and that a judgment obtained on it was satisfied and released by Mrs Jorden's representations. The Master of the Rolls granted an injunction restraining Mr and Mrs Jorden from enforcing the judgment. They appealed, but the Court of Appeal in Chancery was equally divided, so the injunction stood. Mr and Mrs Jorden appealed to the House of Lords, which allowed their appeal, leaving them free to enforce the bond. Lord Cranworth said (ibid, 214; 356) that the doctrine we now describe as estoppel by representation "does not apply to a case where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do."

The difficulties in the way of one who seeks to rely on a statement of intention which does not become part of a contract are more fully discussed in Spencer Bower and Turner on Estoppel by Representation p.30.

Collateral or Independent Contracts

5.38 Statements made in the course of negotiating one contract may themselves constitute an independent contract. "It is evident both on principle and on authority" said Lord Moulton in Hailbut Symons & Co. v. Buckleton [1913] A.C. 30, 47, [1911-13] All E.R. Rep. 83, "that there may be a contract the consideration for which is the making of some other contract." This concept is most helpfully reviewed by K.W. Wedderburn "Collateral Contracts" 1959 Cambridge Law Journal 58 where an interesting aspect of Mouat v. Betts Motors Limited [1959] N.Z.L.R. 15; [1958] 3 All E.R. 402 is discussed.

Lord Denning observed in Oscar Chess Ltd v. Williams (supra) that there have been many cases where the Courts have found an oral warranty collateral to a written contract, having explained that by "warranty" he meant a binding promise.

De Lassalle v. Guildford [1901] 2 K.B. 215; [1900-3] All E.R. Rep. 495 is often cited to exemplify this class of statements. De Lassalle was about to take a lease of a house. He signed the counterpart, but before it was handed to the landlord Guildford, De Lassalle required an assurance from Guildford that the drains were in good order. Guildford said he would give his word that the drains were in good order, and the lease and counterpart were exchanged. The drains were not in good order. The English Court of Appeal reversing Bruce J. held that there was a warranty collateral to the lease and awarded De Lassalle £75 damages. But it is to be noted that Sir A.L. Smith M.R., who delivered the judgment of the Court of Appeal put the case on the footing that the lease did not record the entirety of a single contract. The true position, as the Court held, was that there was one contract, partly written and partly oral, the term about the drains being an oral term.

The high water mark of these cases is City and Westminster Properties (1934) Ltd v. Mudd [1959] 1 Ch. 129; [1958] 2 All E.R. 733. Mudd had been a tenant of the plaintiff company's shop for many years. He lived and carried on business there. In negotiating a new lease, the landlord sought to insert a clause prohibiting "lodging, dwelling or sleeping" on the premises. Mudd would not agree to this, but after some exchange of phrases, did agree to, and signed, a lease for 14 years which restricted the use of the premises to "showrooms, workrooms and offices only". He signed after an assurance from the landlord that if he signed in that form the landlord would not object to his continuing residence there. But some 6 years later the landlord claimed forfeiture of the lease on the very ground that Mudd was residing on the premises in breach of the covenant. It is instructive to follow the reasoning of Harman J. as he then was. First he found on the true interpretation of the lease that residence was prohibited, rejecting the exchange of drafts as a guide to interpretation. So he held there was a breach of covenant. He rejected Mudd's counterclaim for rectification of

the lease to insert a proviso permitting personal residence by Mudd. Even if both sides did in fact intend that Mudd should be allowed to reside there, there was clearly no common intention, so he held, to insert a provision to that effect in the lease "for the very clear reason that the plaintiffs wished to avoid the mischief of the Rent Restriction Acts." Next he held that the landlord had not waived the breach so as to release Mudd from compliance after objection. Then he held that the landlord was not estopped from insisting upon the covenant, as this was not a case of a "representation made after contractual relations existed". But in the end, he found that there was a promise made by the landlord to the tenant that if the tenant would sign the landlord's document, the landlord would not enforce the covenant against Mudd personally. This was "a clear contract" from which the plaintiff could not be allowed to resile. So he dismissed the landlord's claim for forfeiture of the lease.

Wedderburn comments that if this case is to be accepted it is the strongest application of the collateral contract doctrine which our Courts have yet entertained.

The device of erecting two contracts where one would suffice has found judicial favour in four main situations -

(a) Where the parties have written one agreement but have agreed separately that their writing will have qualified effect. (Mudd's case).

(b) Where a requirement of law that all the terms of the contract must be written would lead to the avoidance of the bargain of the parties if regarded as a single contract, e.g. Jameson v. Kinmel Bay Land Co. Ltd (1931) 47 T.L.R. 593.

(c) Where the insertion of the so-called "collateral" promise in the "main contract" would make it illegal, e.g. Mouat v. Betts Motors Ltd [1959] N.Z.L.R. 15 (compare Campbell Motors v. Storey Ltd [1966] N.Z.L.R. 584.)

(d) Where the "main contract" contains an exemption clause, e.g. Webster v. Higgin [1948] 2 All E.R. 127.

Those who knew the Land Sales restrictions may speculate that a payment "under the table" in consideration of the entering into of a contract of sale may have been lawful, whereas an agreement to pay a given price whatever the Land Sales Committee might approve was not.

The remedy for breach of a "collateral contract" caused by insistence upon the "main contract" presents a problem. In Mudd's case the Court refused performance of the main contract. Whether this kind of "specific performance" of the collateral contract is tenable seems to require further consideration. Was Mudd entitled to damages for breach of the "collateral contract"?

Wedderburn concludes his study by observing that "In a society in which people are daily led to enter into written contracts which they do not understand on the basis of oral promises which they do understand, the value of this weapon of justice is likely to increase". We do not favour the extension of this devious device and prefer to strike at the roots of the injustice, the obstacles to enforcing oral terms.

For the purposes of this summary, however, we have said sufficient to outline the notion and point out its possibilities.

Terms of Contracts

5.39 At last we come to consider those statements and promises which become terms of the contract. These have been called fundamental terms, conditions and warranties. Traditionally these three classes have been regarded as comprising the content of a contract. But as we shall show, the classification is not exhaustive and the categories are not mutually exclusive.

"Fundamental" terms

There has been a great deal of judicial discussion of recent years about the concept of a fundamental term, which has been laid at rest so far as the English common law is concerned by the decision of the House of Lords in Suisse Atlantique etc. v. N.V. Rotterdamsche

etc. [1966] 2 All E.R. 61. Until this decision, the view was widely held, and has been sustained by the English Court of Appeal, that the party in breach of a fundamental term was not entitled to the benefit of an exemption clause in the contract. Parker L.J. had expressed this view in Karsales (Harrow) Ltd v. Wallis [1956] 1 W.L.R. 936, [1956] 2 All E.R. 866 very neatly (with respect) when he said "In my judgment, however extensive the exception clause may be, it has no appliation if there has been a breach of a fundamental term." (ibid, 871)

The facts in the Suisse case were these. Certain shipowners claimed damages for loss of profits from their charterer. They claimed the charterer had repudiated the contract by inordinate delays in turning the ship around. The charter party fixed agreed demurrage, but the shipowners claimed they were not limited to the agreed amount and asked for more. They argued that the charterer's breach amounted to a fundamental breach which precluded the charterer from relying on the demurrage clauses. The House rejected their arguments, holding that as the shipowners had, with knowledge of the breach, elected to affirm the charter-party, they continued to be bound by the demurrage clauses.

This decision illustrates the rule that after a breach, which amounts to a repudiation of the contract, described as a "fundamental breach", the party not in breach has a free election. He may bring the contract to an end by "accepting the repudiation" and may sue for damages, in which event he will not thereafter be bound by an exemption clause unless it has been agreed in terms to cover this eventuality, or he may affirm the contract and go his way upon it (as White and Carter (Councils) Ltd. did in their contract with McGregor ([1961] 3 All E.R. 1178)) in which event he will be bound by all its terms.

In the course of their judgments, their Lordships, notably Lord Reid, affirm that the parties are free to contract out of common law liability. The question in all cases is whether, on the true construction of their contract, they have done so. We will discuss this subject in considering remedies for breach.

One must now conclude that a fundamental term is neither more nor less than a condition.

Conditions and Warranties

It is a curious fact that there is little uniformity of view as to the meaning of the term "condition" and "warranty" at common law (see e.g. Ansons Law of Contract 22nd Ed. 119 et seq, Cheshire and Fifoot's Law of Contract (Northey's 2nd N.Z. Ed.) 117 et seq, and Salmond and Winfield's Law of Contracts 1st Ed. 33 et seq). As terms of a contract, a condition is regarded as "going to the root of the contract" whereas a warranty "goes only to part of the consideration", is "subsidiary", or "collateral to the main purpose". Traditionally a condition is defined as a term which if unfulfilled allows a party who is not in default to rescind the contract, and a warranty is defined as a term breach of which is remediable in damages only. The circular and therefore useless nature of these traditional definitions has only lately been realised. (Indeed see Anson's definition of Condition p. 119).

The traditional approach to the question whether the breach of a particular term justified rescission or sounded only in damages postulated a governing intention common to the parties when they made their contract. So often, however, the parties, intent upon performance when they make their bargain, never contemplate breach. The task of imputing an intention which they did not have, but must for legal purposes be presumed to have had, is in most cases wholly unreal.

This vexed subject has been illuminated by the judgments of the English Court of Appeal in Hongkong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd [1962] 2 Q.B. 26 [1962] 1 All E.R. 474.

Their Lordships demonstrate that it is not possible to decide the legal consequences of a breach solely on a consideration of the term broken, unless the parties have expressly stipulated the consequences of breach of that term. Where they have not so stipulated, the nature of the breach is as significant as the supposed importance of the term.

The Plaintiff shipowners chartered the vessel "HongKong Fir" to the Defendant for twenty-four months. The charter party provided that she was to be "in every way fitted for ordinary cargo service". During the first four months of the charter there were break-downs and delays caused by breach of this term by the shipowners which put the vessel off hire for about five weeks. She had sailed from Liverpool to U.S.A. thence to Japan. She was then laid up in Japan for some fifteen weeks while major repairs were made at a cost to the shipowners of £37,500, and became fully seaworthy with a competent crew some seven months after the charter began. The charterer repudiated the contract on account of the owner's breach, and the owners sued for damages. Salmon J. affirmed by the Court of Appeal, held that the proved breach by the owners did not entitle the charterer to terminate the contract, and awarded the owners £158,729 damages.

Diplock L.J. said (p.70) that there are many contractual undertakings of a complex character which cannot be categorized as "conditions" or "warranties" in the sense employed in the late 19th century. "Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a 'condition' or a 'warranty'." (ibid 70).

This reasoning cannot, it would seem, be applied to the sale of goods, because the 19th century definitions are entrenched in the Sale of Goods Act 1908. By section 13 (2) it is enacted that -

> "Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may

be a condition, though called a warranty in the contract."

Apart from this provision, the meaning of the term "condition" is not defined in the Act, except that certain stipulations implied by the Act are termed "conditions".

The term "warranty" is specifically defined in section 2 as follows -

> "'Warranty' means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated."

A buyer may elect to treat a seller's breach of condition as a breach of warranty (section 13 (1)). Where the buyer has accepted the goods or has obtained the property in them, he must treat a seller's breach of condition as a breach of warranty unless there is a term of the contract to the contrary (section 13 (3)).

We have the benefit of a very full exposition of the effect of these provisions by Salmond J. in Taylor v. Combined Buyers Ltd. [1924] N.Z.L.R. 627.

So, in summary,

(a) The parties may expressly stipulate the consequences of breach of their contract or any term thereof, and, the Courts will give effect to the stipulation unless it offends against other rules of legal policy (e.g. is penal).

(b) Where the parties do not expressly so stipulate:

  (i) On contracts except for the sale of goods, the Court will determine whether the particular breach justified cancellation of the contract, or sounded only in damages, having regard to the nature of the term, the nature of the breach and the consequences of the breach.

  (ii) On contracts for the sale of goods, the Court is bound by statute to decide whether the particular breach justified cancellation of the contract or sounded only in damages according to the construction of the contract.

Bars to Rescission

6. In the foregoing summary we have referred to the right to rescind for misrepresentation. It is to be noted that this right may be lost in certain circumstances, viz. -

(a) If the party entitled to rescind, with knowledge of the misrepresentation, affirms the contract. Long v. Lloyd [1958] W.L.R. 753, [1958] 2 All E.R. 402 shows that an affirmation of the contract may consist of taking the benefit of something provided under the contract.

(b) Lapse of time. Leaf v. International Galleries [1950] 2 K.B. 86; [1950] 1 All E.R. 693.

(c) Rights of third parties intervening. It is said that if third parties bona fide and for value acquire an interest in the subject matter of the contract, the right of rescission is defeated. (Cheshire and Fifoot's Law of Contract, Northey's 2nd N.Z. Edition 235, Clough v. London and North Western Rail Co. (1871) L.R. 7 Exch. 26 [1861-73] All E.R. Rep. 646, and the speech of Lord Blackburn in Erlanger v. New Sombrero Phosphate Co. (1878) 3 App. Cas. 1218, [1874-80] All E.R. Rep. 271. But the case law does not seem to have been fully worked out, at all events in the field of hire-purchase law. It is a commonplace that dealers assign their hire purchase contracts to finance companies, but it does not appear to have been decided whether such an assignment will bar a hire-purchaser's right to rescind for misrepresentation.

(d) Rescission is not permitted if restitution is impossible. The Court looks for substantial restitution; it seeks to do what is just in practice. Spence v. Crawford [1939] 3 All E.R. 271.

(e) There is some uncertainty where the contract has been completed. On the sale of land, it is settled that a party misled cannot, after completion, rescind for innocent misrepresentation. This notion regarding innocent misrepresentation has been applied to a sale of shares (Seddon v. North Eastern Salt Co. Ltd [1905] 1 Ch. 326), [1904-7] All E.R. Rep. 817. Moreover, we must emphasize that our Court of Appeal has held that a contract for the sale of goods cannot be rescinded for innocent misrepresentation (Riddiford v. Warren) (1901) 20 N.Z.L.R. 572).

Criticism of Existing Law

7.1 The summary we have attempted enables us to state the criticisms most often directed against the rules there outlined. These are -

(a) The rules are too complex and correspondingly difficult to apply in practice. Especially is this so in relation to the representation-term distinction, and the condition-warranty distinction. Some writers assert that they are useless for commercial purposes. No two lawyers can begin to agree upon the classification of any given statement. Cynics remark that Judges themselves must choose the remedy they consider just then find an appropriate legal basis for it.

(b) Because of the confused state of the law, it is difficult for an innocent party to decide whether he has an option to rescind or affirm, and he tends to and is often advised to, equivocate (e.g. Schwarcz v. Ede discussed in paragraph 7.2.)

(c) Rescission for innocent misrepresentation is not always available. Where it is available the party misled is constrained either to sacrifice the bargain or to go without a remedy. This is a hard choice for him and in many cases some financial adjustment would bring about a more proper settlement. In other cases rescission will impose a liability upon the misleading party which is altogether disproportionate to the importance of his assertion. This would be avoided by the payment of suitable compensation. Where rescission is not available the situation is even less satisfactory.

(d) Especially in cases of sale of goods, but in other cases too, the principles upon which a party is entitled to cancel for breach of a term of the contract are vague and unreal.

(e) The unrestricted liberty to "contract out" preserved by the Suisse case has been abused and is open to abuse by standard printed clauses, notably in hire purchase contracts (e.g. Lowe v. Lombank Ltd [1960] 1 W.L.R. 196, [1960] 1 All E.R. 611).

The restrictions on the right to rescind for innocent misrepresentation are said to be too severe, especially in the loss of the right after completion.

7.2 There are many cases exemplifying these criticisms. During our investigations, it so happened that a case which aptly illustrated them arose and some of us attended the hearing of the appellate stage of this litigation in the Supreme Court. We refer to Schwarcz v. Ede (Plaint No. 7893/64 in the Magistrate's Court, Wellington; M.15/65 Supreme Court Wellington). Mr Schwarcz desired to buy a house. A land agent took him to property which the agent had been instructed to sell. This property had legal access from a street, but this access was very steep. Mr Schwarcz and the agent approached the house by another route, an easy path leading to a group of houses including the house under inspection. Before they entered the house, the agent told Mr Schwarcz that this path was vested in the City Council as a public path. After the inspection, Mr Schwarcz decided to purchase the property. He signed a written offer to purchase which described the property by its legal description without reference to the path. The offer provided -

> "4. I admit that I have purchased the said property in reliance upon my own judgment and not upon any representation or warranty made by you or your agent."

The offer was accepted. A few days later Mr Schwarcz ascertained that in fact part of the path was the property of a Mr Brennan, a neighbour, who had allowed the vendor and others to use it. Mr Schwarcz immediately informed the agent, who suggested that Mr Schwarcz should try to obtain an easement of right of way from Mr Brennan. He tried, but without success. Ultimately Mr Schwarcz's solicitors informed the vendor that Mr Schwarcz would not complete unless he could obtain a right of way over the path. The vendor's solicitors replied by calling on Mr Schwarcz to complete "the contract", fixing a time for settlement and making time of the essence. Mr Schwarcz did not complete. The vendor kept the deposit of £400, and resold the property for £100 more than the price agreed by Mr Schwarcz.

Mr Schwarcz sued for the return of his deposit. He argued that there was a fraudulent misrepresentation by the agent; alternatively that the agent's statement about the path was a condition of the contract, submitting that clause 4 did not apply to conditions. On these submissions he claimed to recover damages. Vendor argued that there was no more than innocent misrepresentation, but that Schwarcz had lost the right to rescind, even if available in the face of clause 4, by his delay during his negotiations with Mr Brennan. The learned Magistrate held there was an innocent misrepresentation

but that Mr Schwarcz had not exercised his right to rescind, and that he had lost this right by not electing to rescind prior to the time for settlement. "The Plaintiff (by requiring the vendor to provide the right of way) was and had been contending for something to which he was not entitled by the contract, and in order to maintain that position he elected not to exercise a right of rescission arising out of misrepresentation". His Worship volunteered but rejected the suggestion that the agent's statement constituted a collateral contract. Finally His Worship observed that "At the time of the conversation the parties had not turned their minds to a contractual relationship and that when they did reach the stage at which a contract was contemplated nothing was said upon this subject." He gave judgment for the defendant.

Mr Schwarcz appealed to the Supreme Court. This Court held that there was an innocent misrepresentation and that Mr Schwarcz had rescinded by stating that he would not complete unless the right of way was forthcoming from Mr Brennan. His Honour then turned to clause 4. He held that in the present case there was misdescription substantial and material which rendered the subject matter of the contract different from that which by virtue of the representation the purchaser was entitled to expect. "The representation, in my opinion, amounts to a condition. It is more than a warranty for which damages would be reasonable compensation. Clause 4 in the contract protects the vendor only against misrepresentation and breach of warranty ... I do not think the expression 'representation or warranty' is sufficient to cover the present misrepresentation, which in substance amounts to a misdescription". The appeal was allowed, and Mr Schwarcz got his deposit back, if anything remained after meeting his costs.

From these simple facts, see how the law constrained the Courts to run through the gamut of classification from a statement without contractual intention through misrepresentation both innocent and fraudulent, in passing to ruminate upon the concept of a collateral contract, to the result that there was a misdescription amounting to a breach of condition.

Reform in Other Jurisdictions

8. We are unaware of any proposals for reform of the scale

required to meet the criticisms mentioned in paragraph 7.1.

We have studied section 2 of the American Uniform Commercial Code and we will comment on this more particularly when we report on the revision of our own Sale of Goods Act 1908. In the present investigation we have derived considerable help from sections 2-202 and 2-209.

The major official study of relevance is the Tenth Report of the United Kingdom Law Reform Committee, which we discuss in paragraph 9.

We have noted the constitution of the United Kingdom Law Commission by the Law Commissions Act 1965 and studied its First Programme and its First Annual Report. The first item of the Commission's programme is the codification of the law of contract. The Commission has expressed the intention to reform as well as codify. This major undertaking will be of great importance to all legal systems, including our own, which are based on English law.

United Kingdom Reforms

9.1 The United Kingdom Law Reform Committee in its Tenth Report did not approach the matter as broadly as we desire to do. Its terms of reference were limited to misrepresentation. Nevertheless, its recommendations go to a number of the criticisms mentioned in paragraph 7, so we set out the recommendations here -

(1) Contracts for the sale or other disposition of an interest in land should not be capable of being rescinded after execution. An exception should, however, be made for leases to which section 54(2) of the Law of Property Act 1925 applies, viz. those taking effect in possession for a term not exceeding three years, and these should be treated in the same way as contracts not affecting land.

(2) All other contracts should be capable of being rescinded after execution but the other bars to rescission should remain as at present.

(3) Where the court has power to order rescission (whether before or after the execution of the contract) it should have a discretion to award damages instead of rescission if it is satisfied that damages would adequately compensate the plaintiff, having regard to the nature of the representation and the fact that the injury is small compared with what rescission would involve.

(4) Where a misrepresentation is made independently and is later incorporated in the contract the plaintiff should have the same right to rescission (or to damages in lieu of rescission) as he would have had in respect of the original misrepresentation.

(5) Where a person has, either by himself or his agent, induced another to enter into a contract with him (including a contract relating to land) by an untrue representation made for the purpose of inducing the contract he should be liable in damages for any loss suffered in consequence of the representation unless he proves that up to the time the contract was made he (or his agent, if the representation was made by him) believed the representation to be true and had reasonable grounds for his belief.

(6) In the case of any hire-purchase agreement to which a finance company is a party, where negotiations for the agreement are conducted by a dealer he should, notwithstanding any agreement to the contrary, be deemed to be the agent of the finance company for the purpose of any representations in respect of the goods which are the subject-matter of the agreement.

(7) It should not be possible to exclude liability to damages or rescission for any misrepresentation made with the intention of inducing a contract unless the representor can show that up to the time the contract was made he had reasonable grounds for believing the representation to be true.

(8) It is suggested that some of the remedies available under the Sale of Goods Act, 1893, are unsatisfactory and will become still more so if the foregoing recommendations are adopted; and it might therefore usefully be considered whether -

(i) acts amounting to acceptance within the meaning of section 35 of the Act of 1893 should not be held to do so until the buyer has had an opportunity of examining the goods as contemplated by section 34;

(ii) the right to reject specific goods for breach of condition should depend not on the passing of the property in the goods to the buyer but on his acceptance of the goods.

9.2 Recommendations 6 and 8 are concerned with particular subject matter and will require detailed consideration in our review of the law of the sale of goods. Of them we will say no more than that at present some of us do not approve Recommendation 6, but we are in agreement with Recommendation 8.

The other recommendations propose a substantial assimilation of the remedies for misrepresentation and breach of contract. We agree with that approach, and with the removal of certain bars to rescission. We do not agree with the means proposed to achieve these objects.

9.3 The U.K. Report has led to the enactment of the Misrepresentation Act (1967 Ch. 7) in March. The text of this important statute is given in Appendix A to our report. With two exceptions it follows very closely the recommendations of the English Committee. These exceptions are as follows -

(1) A provision denying the right to rescind a contract which had been performed if the contract was for the creation or transfer of an interest in land (other than a lease for three years or less) was dropped from the Bill during its passage through the House of Lords. The result is that Recommendation (1) of the United Kingdom Committee has not been given effect to.

(2) Clause 3 of the Bill as introduced followed Recommendation (7) in prohibiting any provision that would exclude or restrict liability for misrepresentation "unless it is proved that the person making the representation had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true". The reference to negligence was subsequently omitted and the clause as enacted reads as follows -

> "3. If any agreement (whether made before or after the commencement of this Act) contains a provision which would exclude or restrict -
>
> (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
>
> (b) any remedy available to another party to the contract by reason of such a misrepresentation;
>
> that provision shall be of no effect except to the extent (if any) that, in any proceedings arising out of the contract, the court or arbitrator may allow reliance on it as being fair and reasonable in the circumstances of the case.

9.41 Our major objections to these developments are -

Firstly they will compound complexity by adding to the problems of classification the difficulties inherent in any discretionary remedy. (Recommendation (3); Section 2 (2)).

Secondly they introduce the concept of negligence which in our view has no place in the law of contract. (Recommendation (5); Section 2 (1), and Recommendation (7), cf. Section 3).

Thirdly, they do not deal with the anomaly whereby rescission is available for a minor misrepresentation which as a term of the contract, would carry an award of damages only.

Fourthly, Recommendation (4), which has been enacted in the United Kingdom as part of section 1 cannot, in our view, be supported.

9.42 Further to our first objection, we are of opinion that, as far as possible, the decision of disputes under contracts should not be a matter of discretion. There should be known rules so that the parties may be encouraged and enabled to settle their differences out of Court.

It is true that the rules must be in general terms, thus leaving much room for debate which can be kept in bounds only by the rule itself; but the debate upon the exercise of judicial discretion can be endless.

9.43 Our second objection is against the intrusion of the concept of negligence. The law of contract has as its basic aim the enforcement of undertakings, using the term "undertaking" in a broad sense to include representations. It is beside the point whether an undertaking was given on reasonable grounds or not; it suffices that it was given. It seems to us that the proper as well as the traditional approach is to look not at whether there was any fault on the part of the representor but at the expectations of the representee that naturally arise from the undertaking.

The concept of negligence itself is difficult to apply. To increase the turgid depths discussed in paragraph 5 dismays us.

Already the notion has caused confusion. In Dick Bentley Productions Ltd v. Harold Smith Motors Ltd [1965] 2 All E.R. 65 the English Court of Appeal seems to have taken negligence as the test whether a statement was a representation or a warranty. Mr Bentley purchased a Bentley motor car from the defendant motor dealers, who told him the car had done only 20,000 miles since it had been fitted with a replacement engine and gearbox. The statement was incorrect. Mr Bentley did not attempt to rescind the contract. He claimed damages, alleging that statement was either a warranty or a fraudulent mis-

representation. The charge of fraud was dismissed, but the Court of Appeal held the statement a warranty and gave damages. Lord Denning, with whom Dankwerts L.J. concurred, said -

> "Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty ... But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it and that it would not be reasonable in the circumstances for him to be bound by it." (ibid 67).

The learned editor of the All E.R. observes in his note to this case that the passage cited is in accord with recommendation (5) of the United Kingdom Report. Plainly it is not. Lord Denning was formulating a basis for distinguishing warranties from representations (with which, with respect, we do not agree). The United Kingdom Recommendation suggests that damages should be awarded for negligent misrepresentation.

Our view is that the development of the concept of negligence should proceed as part of the law of tort, and that the law of contract should be kept strictly to its function of allocating responsibility according to agreement.

9.44 Our third objection is that a misrepresentation which, if it was a term of the contract, would be a warranty sounding only in damages, will continue to give a right of rescission subject to the discretion conferred by section 2 (2). The Committee itself adverted to this (paragraph 26 - Tenth Report) but said that as the Court will have a discretion to award damages instead of rescission the matter will be of small importance in practice. With respect, we do not agree that it will be of small importance. It will depend upon the relief the plaintiff wants. If he wants rescission, he must be advised under the United Kingdom provisions that the defendant will no

doubt argue that the alleged representation was a term of the contract, or a collateral contract, sounding only in damages. So the first task of the advisers and the Court will be to classify the statement according to the present rules in order to see whether rescission is available. If it is, they will then proceed to decide whether rescission is or is not appropriate.

We desire to eliminate this circuitous route.

.45 Our fourth objection refers to Recommendation 4 which is implemented by section 1. These cannot be supported, in our opinion. They concern representations first made independently and later incorporated in the contract. Most affirmations of fact incorporated in a contract as terms begin as representations. The United Kingdom report would allow rescission for these, subject to the Court's discretion to substitute damages. Suppose a plaintiff wants rescission. At present he mounts a two-pronged attack to show either a misrepresentation or a condition. Now in the United Kingdom there will be a third prong - a warranty which began as a representation. The whole course of negotiations will be in issue regarding these terms of the contract, as they are in a misrepresentation case. The defendant, who wants to pay damages rather than lose the contract, will be side-stepped in his usual defence that the matter is simply a warranty, and will have to rely on the discretion of the Court.

The end results can surely be achieved by a more direct process.

9.5 For these reasons we must differ from the United Kingdom Recommendations (1) to (7) inclusive and advise that neither they, nor the provision of sections 1 and 2 of the Misrepresentation Act should be adopted here. Sections 3 and 4 will be the subject of our further consideration.

Our Recommendations - General

10. We regret that we have not been able to achieve unanimity upon the full measure of reform necessary to meet the criticisms we have mentioned. We are divided in our concepts, but united in the objective.

10.1 Some of us are of opinion that the distinction between a representation and a term is unreal, and that both should be regarded as part of the agreement enforceable at law. Those of us who are of that opinion would abolish the parol evidence rule to allow the Courts to ascertain by direct means the true agreement between the parties.

10.2 Others are of opinion that the distinction is real, the reality residing in the position that a representation is, ex hypothesi, not an agreed term. Those of us who are of that opinion are not strongly opposed to the abolition of the parol evidence rule and observe that the abolition of the rule will not affect the real distinction they see between representations and terms.

10.3 Others again are of the view that whether the distinction is real or unreal, the parol evidence rule ought not to be abolished. If this view prevails, the distinction between representations and terms will necessarily remain in relation to contracts in writing.

Notwithstanding these conceptual differences, we are all of opinion that the remedies for misrepresentation and breach of contract should be assimilated by adopting the code we propound in paragraphs 16 to 19 inclusive.

Views of Some Members

11.1 Those of us who support 10.1 would adopt the unanimous recommendations of the subcommittee. These were:-

(a) That it should be affirmed without circumlocution that in ascertaining the existence and terms of a contract the Court will have regard not merely to the culminating expression of agreement between the parties but will take into account all relevant prior communications between them with a view to finding whether they were in agreement, and if so, the terms of their bargain.

(b) That recommendation should apply to signed written agreements as well as oral agreements, provided that writings signed by the party to be charged should be received as prima facie evidence of his agreement to the terms contained therein.

(c) That it should also apply notwithstanding that the writing may contain a declaration that the writing records the entirety of the bargain or to the like effect. In such a case, the Court should receive relevant extrinsic evidence to ascertain whether, notwithstanding the declaration, there were in fact extrinsic points of agreement comprised in the bargain. If there were, the writing and such points of agreement should comprise the contract.

(d) That all legal requirements of writing (e.g. the Contracts Enforcement Act 1956 and the Moneylenders Act 1908) should be reviewed to ensure that extrinsic evidence will be admissible where writing is required. merely to prove the existence of the transaction.

(e) That at this stage the rule in North Eastern Rail Co. v. Hastings [1900] A.C. 260 should not be disturbed, but it may call for review if these proposals are adopted.

(f) That the parol evidence rule should be abolished.

(g) That express rules should be enacted regarding assignees to the following effect:-

(i) That the terms of a contract ascertained in accordance with recommendation (a) should be enforceable by or against any assignee of the contract or any assignee of the benefit or burden thereof, unless otherwise provided by the contract;

Provided that the assignee should not be liable in damages, whether by way of set-off, counterclaim or otherwise in a sum exceeding the value of the performance of the assigned contract to which he is entitled by virtue of the assignment, unless otherwise agreed by the assignee or provided in the assigned contract.

(ii) An assignee should have, by statute, an indemnity from the assignor against losses incurred by the assignee arising out of any term of the assigned contract which was not disclosed to the assignee at the time of assignment, unless otherwise agreed.

(iii) Nothing in this recommendation should affect the law as to negotiable instruments.

11.2 In support of that course, those of us argue:-

(a) That in fact our Courts proceed in the way recommended if the case is pleaded in a manner adequate to exhaust the heads of classification mentioned in paragraph 5.

(b) That the recommendations accord with the reality of the bargaining process.

(c) That adoption of the recommendations will open the way to a direct approach tothe problems of mistake, selection of remedies and exemption clauses.

(d) That the parol evidence rule is tautological; extrinsic evidence will not be admitted in derogation from the writing if the writing records the bargain, a condition which can only be tested by the examination of extrinsic evidence.

(e) That no greater uncertainty will arise under these recommendations than already exists. The probe for reality will be unimpeded by subtle distinctions of law and accidents of pleading.

These arguments were developed by the subcommittee in some detail and those who wish to examine them further may turn to their report. They have also been expounded in an article by Professor D.E. Allan (who was a member of our subcommittee), published in 2 University of Tasmania L.R. 227 and presented as a paper at the Fourteenth Legal Convention of the Law Council of Australia held in July 1967: (1967) 41 A.L.J. 274. The discussion following the presentation of this paper is of particular interest as illustrating the diversity of views on this problem.

Views of Other Members

12.1 Some of us do not agree with so radical departure from existing principles of the law of contract as would be involved in the merging of representations and terms and the abolition of the parol evidence rule is neither desirable nor feasible. They consider that the argument for the assumilation of misrepresentation and terms is based on invalid premises, and doubt whether in any event it would be effected by doing away with the parol evidence rule. One member of our group is not strongly opposed to abolishing the parol evidence rule on the

supposition that it would leave standing the distinction between representations and terms. Others consider that the harmful results of abolition would far outweigh any advantages it might have.

12.2 They deal first with the case where the Court is faced with the issue - contract or no contract. If it is contended in the proceedings that the parties were never ad idem because of the existence of mistake (including the non est factum type of situation) duress, undue influence, or any other relevant cause, then as the law now stands the Court may hear evidence of and have regard to relevant prior communications. Unless this contention is raised prior communications are not relevant in determining the issue contract or not. It follows that the suggestion put forward in paragraph 11 would add nothing to the present law so far as they relate to the ascertainment whether a contract exists.

12.3 They now turn to consider the situation where what is in question is the terms of a contract the existence of which is not disputed.

12.31 The principal object of abolishing the parol evidence rule would be to facilitate the removal of the representation/term distinction with its uncertainties and its contrasting remedies. It is possible, and in their opinion desirable, to assimilate the remedies for misrepresentation and breach of contract. This would remove the main criticism levelled at the present law. But they consider that the distinction between representations and terms is a real and not a formal one, that the abolition of the parol evidence rule might not do away with it, and that if it did, or if in some other way the distinction were unequivocably abolished, the results would be undesirable.

12.32 In their view the difference between a term and a mere representation amounts to much more than formal incorporation into the culminating agreement. To become a term a representation must not only be intended to induce a contract and in fact induce it. It must also be intended to form part of that contract; to be part of the bargain and part of the consideration for it. Even if the parol evidence rule were abolished the Courts would still have to ask of any representation; "did the representor undertake legal responsibility for the

truth of his statement? Was he paid (i.e. was there consideration) for that responsibility?" They believe that the mere abolition of the parol evidence rule could not by itself convert representations which by definition were not intended to be contractual into terms of a subsequent contract.

12.4 On the other hand they consider (subject to reservations by one of this group) that the abolition of the parol evidence rule, even recognising its occasional uncertainties and ambiguities, would have a most unfortunate effect in the field of commerce.

12.41 Of the countless contracts which are made daily only a minute fraction come before the Courts. If there is one principle which the businessman and the man in the street understand it is that what the parties have put in writing is binding. Where writing is lacking it is simply a question of "my word against yours". This is of course an over-simplification from a legal point of view but it illustrates what this group regards as the decisive importance that the commercial community and the ordinary layman attaches to the defining and clarifying quality of writing.

12.42 Even setting this aside there are in their view strong arguments against any relaxation of the present rules governing the admissibility of oral statements where the terms of a written contract are in question. Contracts between businessmen in particular are frequently bulky documents, the end product of a long process of bargaining in which each party has received legal and technical advice. To allow the whole course of negotiations to be traversed in order to ascertain the terms of such a contract seems both unreasonable and impracticable. From the point of view of principle it seems to this group that where a party by executing a document or in some other manner acknowledges "this is our bargain" then it is to this expression of agreement alone that the Courts should be permitted to look. From the point of view of practice they consider there would be no certainty before any issue was litigated as to precisely what the terms of a contract were. Moreover if litigation did follow its length and expense could be much greater.

This group is deeply impressed with the frustrations that would be faced by persons, negotiating as equals, who desire their writing to constitute the bargain and the whole bargain. If the suggestion for enabling the Court to look behind the writing despite the most explicit declaration or the most solemn form were adopted there would be no means whatever of giving effect to their wish.

12.43 In the past, this group avers, the Courts have tended to apply two standards of interpretation to contracts, depending on whether they can fairly be regarded as commercial or not. The ordinary rule is that every contract is to be interpreted individually, in the light of all the surrounding circumstances. No decision on the interpretation of one document is authority for the interpretation of a later one. In the field of commercial documents however the Courts have in the interest of certainty treated earlier interpretation as binding. In this context the circumstances surrounding the formation of the contract have been accorded little weight. Experience suggests to this group that commercial contracts ought to be treated in this special way and that where they are concerned certainty is to be preferred.

13.1 Damages for Innocent Misrepresentation

We are all agreed that innocent misrepresentation should be remediable by an award of damages. We consider that the high and emphatic authority to the contrary, (e.g. Lord Moulton's speech in Heilbut Symons & Co. v. Buckleton [1913] A.C. 30) [1911-13] All E.R. Rep. 83 should now be reversed, for the following reasons:-

(a) Rescission alone is often too drastic a remedy; forfeiture of the contract is at times unwanted by the aggrieved party, and is often too extravagent a penalty upon the misrepresentor.

(b) An award of damages is a more businesslike solution to many cases.

13.2 The United Kingdom Committee recommended, and the United Kingdom Legislature has now enacted, that damages shall not be awarded if the misrepresentor proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true. We do not agree

with this qualification. In our opinion, damages should be available for all misrepresentations.

13.3 Recommendation

Accordingly we recommend that it should be enacted that a party to a contract who is induced to enter into it by misrepresentation (whether innocent or fraudulent) of another party shall be entitled to damages from such other party as if the representation had been a term of the contract. In this context the terms "representation" and "misrepresentation" are intended to have their common law meanings.

14. Rescission for Misrepresentation

Upon the adoption of recommendation 13.3 it will be necessary to deal with the existing right of rescission. We consider that this right should be abridged to conform to the principles which we propose to apply to cancellation for breach of a term.

Remedies

15.1 We now pass to consider the present detailed recommendations upon the very important topic of remedies for misrepresentation and breach of contract. We have already indicated our view that this is where the law is least satisfactory and that general reformulation rather than piecemeal improvement is called for.

At the beginning we place on one side the remedies of specific performance, injunction and declaration of right. In our view the principles on which these remedies are applied are satisfactory. We have heard little criticism of them and we have no recommendations to make concerning them.

We concern ourselves therefore essentially with the remedies of rescission and damages. As the English Law Reform Committee and the United Kingdom Parliament have recognised, the lack of remedy in innocent misrepresentation where rescission is for one reason or another unavailable is a serious anomaly in the common law. We are satisfied that damages as well as rescission should be available as a remedy for misrepresentation, whether fraudulent or innocent. This has been brought about in England by section 2 of the Misrepresentation Act 1967.

In our view however it is illogical and unsatisfactory to stop at that point.

(a) If damages are to be available for both breach of warranty and innocent misrepresentation there is no reason why rescission should be available for a minor innocent misrepresentation and not for a more important breach of warranty. There would be need to create a new category of innocent misrepresentation too minor to justify rescission. But as we have shown the existing categories are already numerous and anomalous enough and we would not wish to recommend a further complication.

(b) The difficulty in deciding whether contractual terms of middle importance are conditions or warranties is notorious.

In our opinion the most satisfactory solution to these problems is to provide a single set of remedies for breach of terms of contract, (whether they are conditions or warranties) and for misrepresentations which induce the making of a contract (whether they are fraudulent or innocent). The existing categories would remain but they would lose much if not all of their practical importance.

If there is to be a common set of remedies for misrepresentation inducing the making of a contract and for breach of terms of the contract it is necessary to decide what these remedies should be, and we proceed to examine the present law and to make recommendations on this question. If our proposed assimilation of remedies is to be complete however it will be necessary to provide specifically that the measure of damages should be the same - namely that at present provided for breach of a contractual term.

15.2 The main problems which concern us are:-

(a) On what principles should an aggrieved party be entitled to rescind instead of or in addition to having damages?

(b) To what extent and on what principles should the law permit exception, exemption and limitation clauses?

Selection of Remedy

16.1 We have already noted that the victim of misrepresentation has an election either to rescind or affirm the contract. A similar election exists in cases of breach of a term of contract (Heyman v. Darwins Ltd. [1942] A.C. 356), [1942] 1 All E.R. 337.

We recommend that the remedies of rescission for misrepresentation and acceptance of repudiation should be replaced by the remedy of "cancellation". This will apply only to cases of misrepresentation and breach of contract, and there will be preserved the existing remedy of rescission in other cases, for instance mistake, undue influence and duress, where it is now available. The use of different terms should also be convenient in expounding the law.

16.2 The United Kingdom approach to the selection of the appropriate remedy relies upon judicial discretion. We have already advised against this in paragraph 9.42.

Recommendation

16.3 Accordingly we recommend that the existing right of a party aggrieved by breach of contract or misrepresentation to choose between the available remedies should be retained.

17.1 At present, as we have seen, the parties are at liberty to stipulate which of the terms of their contract will if broken justify rescission, and which, if broken, will be redressed by damages. Traditionally, the parties must be taken to have made this classification in respect of every term of the contract, but in practice an express classification is seldom found.

Recommendation

17.2 We recommend that it should be affirmed that the parties to a contract may expressly designate the remedies for misrepresentation or breach.

18.1 Where there is no designation of the kind mentioned in paragraph 17.2, the principle governing the choice between cancellation and damages must be prescribed by law.

18.2 We reject the view that the choice should be governed by postulating an agreement on the matter between the parties

where none existed in fact. In most cases, the problem is neither solved nor soluble by debating whether a term is a "condition" or a "warranty" (cf. Diplock L.J. in Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kiseu Kaisha Ltd. [1962] 2 Q.B. 26 at p.71, [1962] 1 All E.R. 474).

18.3 We are of the opinion, with respect, that the true basis of choice has been found by the English Court of Appeal in the Hongkong Fir case, notably in the following observations of Upjohn L.J. (p.64) -

> "In my judgment the remedies open to the innocent party for breach of a stipulation which is not a condition strictly so called, depend entirely upon the nature of the breach and its foreseeable consequences. Breaches of stipulation fall, naturally, into two classes. First there is the case where the owner by his conduct indicates that he considers himself no longer bound to perform his part of the contract; in that case, of course, the charterer may accept the repudiation and treat the contract as at an end. The second class of case is, of course, the more usual one and that is where, due to misfortune such as the perils of the sea, engine failures, incompetence of the crew and so on, the owner is unable to perform a particular stipulation precisely in accordance with the terms of the contract try he never so hard to remedy it. In that case the question to be answered is, does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words, is the whole contract frustrated? If yea, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only."

Diplock L.J. put the test as follows (p.66) -

> "...does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?"

18.4 We are further of opinion that the same test should be applied to representations. Consequently, the victim of a misrepresentation should no longer be able to rescind (or to use the term we propose "cancel") the contract for relatively unimportant misrepresentations.

Recommendation

18.5 Accordingly we recommend that the following rules should be enacted:-

(a) Whenever a party to a contract manifests his intention to another party that he will no longer be bound by the contract, the other party may either affirm or cancel the contract.

(b) Subject to any express provision of the contract, whenever there is a breach of contract or a misrepresentation whether innocent or fraudulent, the party aggrieved thereby may (unless with knowledge of the breach or misrepresentation he has affirmed the contract) cancel the contract if:-

(i) the party in breach, or the representor, has not commenced performance of his obligations, or

(ii) the effect of the breach or misrepresentation is to deprive the party aggrieved substantially of the benefit of the contract;

but not in any other case.

Rule (a) above is declaratory of the present law. It does not purport to alter the decision in White & Carter (Councils) Ltd. v. McGregor [1961] 3 All E.R. 1178, which some regard as anomalous but any examination of the problems created by that decision is outside the present enquiry.

(c) Whenever a contract is cancelled under rule (a) or (b) -

(i) Any obligations under the contract which are still executory need not be performed; and

(ii) All rights based on prior breach or performance survive, and

(iii) The cancelling party retains any right to damages available to him for breach of the contract or for misrepresentation.

(d) Where a contract has been cancelled, the Court may on the application of either party make an order for restoration of property to the extent that restoration is just and practicable and upon such terms as the Court thinks just.

(e) No order for restoration shall be made under rule (d) -

(i) of any property in which a third party has in good faith and for value acquired an interest, or

(ii) of any property if any party has so altered his position in relation to that property (whether before or after cancellation) that having regard to all the

relevant circumstances it would be inequitable to any party to order restoration thereof.

(f) Neither cancellation nor an order for restoration will disentitle the party who cancels to such further or other relief by way of damages or otherwise as may be appropriate in the circumstances.

(g) In order to cancel in accordance with these rules it is not necessary to employ any particular form of words provided that the party having the right to cancel communicates his election so to do. Communication may be dispensed with if it is not reasonably practicable.

19. Assignees

19.1 We have considered the application of these rules after assignment of the benefit of the contract.

19.2 The subcommittee was divided in its approach to the problem, but produced a unanimous recommendation: we accept it.

19.3 The United Kingdom Committee appear to have assumed that the intervention of third parties operates as a bar to rescission. In paragraph 10 they said -

> "Delay in seeking rescission (either by itself or because it raises an implication that the contract has been affirmed) will continue to operate as a bar, and so will any change of circumstances making restitutio in integrum impossible, such as the intervention of rights of third parties."

But the Committee did not, it seems, regard assignment as relevant where damages are claimed.

19.4 Our researches have shown that the United Kingdom Committee's statement as to the effect of assignment must be treated with reserve. There is the maxim that the assignee of a chose in action takes subject to equities. While it is true that the maxim has been most often employed to resolve cases of competing assignments (e.g. Mangles v. Dixon (1852) 3 H.L. Cas. 702, [1843-60] All E.R. Rep. 770), it has been applied to furnish the basis of rescission adversely to an assignee from a misrepresentor (Graham v. Johnson (1869) L.R. 8 Eq. 36, see also Stoddart v. Union Trust Ltd. [1912] 1 K.B. 181). Most text-writers confuse the two problems; indeed an American author (Professor Grant Gilmore "The Assignee of Contract Rights and his Precarious Security" 74 Yale Law Journal 217) has observed (p.243) -

"The anonymous author of the article on assignment in Corpus Juris seems to have been the first commentator to have discerned that there was a problem worth discussing. He wrapped the problem up neatly in two sentences, although his second sentence seems to take back most of the assurance which the first sentence apparently confers on happy assignees of contract rights:

'Where there has been an absolute assignment in good faith and for a valuable consideration of the whole interest of the assignor in a chose of action, the assignor's control over it ceases immediately after the assignment and notice, and he can do nothing thereafter to prejudice or defeat the rights of the assignee. It has been held, however, that the assignment of money to become due under an executory contract is subject to the right of the anticipatory debtor to do whatever appears to be reasonably necessary to enable the assignor to perform the contract, and is also subject to the right of the original parties to rescind or modify the contract where such right is exercised in good faith, and not with intention to defraud the assignee.'"

He proceeds to discuss the provisions of the Uniform Commercial Code, and concludes with the observation in a footnote (p.261) that the English treatises, like their American counterparts, ignore the problem of contract modification after an assignment of proceeds.

Of the English treatises, we cite the following passage from Cheshire and Fifoot's Law of Contract (Northey's 2nd Ed.) p.428 -

"It is, of course, true that if a contract is voidable against the assignor by reason of his fraud or other misconduct, it is equally voidable against the assignee ..."

an observation made in the course of discussing Stoddart v. Union Trust Ltd. [1912] 1 K.B. 181.

Reference may also be made to 4 Halsbury's Laws of England (3rd Ed.) 507, Salmond & Williams on Contracts (First Ed.) 472, Anson's Principles of the English Law of Contract 22nd Ed. 398, Treitel on Contracts (First Ed.) 233.

It should not escape notice that one of the cardinal features of negotiable instruments is that a holder for value does not take subject to equities, a position now being eroded by the notion that instruments given as collateral to a contract may be found to be subject to the terms of the contract. (R.M. Goode and Jacob S. Ziegel "Hire Purchase and Conditional Sale" British Institute of International and Comparative Law, 111).

19.5 In the absence of a settled body of judicial authority, we have had to approach this important problem on general grounds. On the one hand, it may be said that the obligor should not be heard to resile from a writing signed by him, because by signing the writing he has aided the assignor to mislead the assignee.

On the other hand, it may be said that the rights of the obligor should not be abridged by the introduction of an assignee; that it is up to the assignee to ascertain, by enquiry from the obligor if necessary, just what the bargain is.

On either view we are agreed that ultimate responsibility must rest with the assignor. On the first view, the obligor would retain a remedy in damages against the assignor but have none against the assignee; on the second view the assignee should be indemnified by the assignor.

The problem therefore seems to us to amount to this: who, as between obligor and assignee should bear the risk of insolvency or disappearance of the misrepresenting assignor? We believe the assignee should do this. However, we could not expose an assignee to claims for damages of unlimited amount in a situation of which he may have been unaware. In the ordinary case, the assignee is not a guarantor of the assignor's obligations. In protecting the obligor's rights to set up as against an assignee the real bargain made with the assignor, we must not enlarge those rights by providing the obligor with another prospective defendant merely by reason of the assignment. Hence we suggest a limitation upon the assignee's liability. The liability of the assignor to the obligor would remain unaffected.

19.6 We would not at this stage recommend an abridgement of the right of the parties to stipulate that no representations or terms unrecorded in signed writings shall be set up against an assignee. Such clauses, known as "cut-off" clauses, have been said to be open to abuse in other jurisdictions (Goode and Ziegel, op. cit. 111), but at this stage we consider that the proscription of such clauses should be considered only against a background of local practical experience. We are unaware of any problem in this country, and should it arise appropriate legislation could speedily be brought into effect.

19.7 We think that commercial life now demands the certainty of established rules in this field; and that rule cannot be left to the accidents of litigation for settlement. The law should not remain obscure merely because those affected have not been prepared to finance a leading case.

19.8 We therefore recommend that express rules should be enacted as part of the reforms we propose declaring -

(a) That the remedies recommended in paragraphs 13.3 and 18.5 should be enforceable by or against any assignee of the contract or any assignee of the benefit or burden thereof, unless otherwise provided by the contract;

Provided that the assignee should not be liable in damages, whether by way of set-off, counterclaim or otherwise in a sum exceeding the value of the performance of the assigned contract to which he is entitled by virtue of the assignment, unless otherwise agreed by the assignee or provided in the assigned contract.

(b) An assignee should have, by statute, an indemnity from the assignor against losses incurred by the assignee arising out of any term of the assigned contract or any misrepresentation which was not disclosed to the assignee at the time of assignment, unless otherwise agreed.

(c) Nothing in this recommendation should affect the law as to negotiable instruments.

20. Exception Clauses

20.1 In his speech in Suisse Atlantique etc. v. N.V. Rotterdamsche etc. [1966] 2 All E.R. 61 Lord Reid said (p.76) -

> "Exemption clauses differ widely in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and if he did read them, he would probably not understand them. If he did understand and object to any of them, he would generally be told he could take it or leave it. If he went to another supplier, the result would be the same. Freedom of contract must surely imply some choice or room for bargaining. At the other extreme is the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a quid pro quo or other good reason ... This is a complex problem which intimately affects millions of people, and it appears to me that its solution should be left to Parliament. If your Lordships reject this new rule (that an exemption clause necessarily does not avail against breach of a fundamental term, which their Lordships did reject) there will certainly be a need for urgent legislative action but that is not beyond reasonable expectation."

20.2 The subcommittee made a careful study of the function of exemption clauses in contracts and made a recommendation based upon the premise that the problems created by exemption clauses are really problems of interpretation of the agreement of the parties. We agree with this approach but we are divided upon the question whether any general reform should be enacted, and those of us who favour a general enactment are further divided as to the nature thereof. We see at least four ways of tackling the problem:-

20.21 Some of us approve of section 3 of the United Kingdom enactment and would recommend its adoption here. Others are opposed to it on the grounds that the enactment obtrudes the determination of a third party, namely the court or the arbitrator, into the consensual process of setting up a contract; that the court or arbitrator will be called on to do what for centuries they have had neither power nor desire to do, namely to remake the contract of the parties; and that under this enactment it will be difficult for the parties to know whether reliance on an exemption clause in their contract will be permissible and it will be difficult for the parties to settle cases out of court.

20.22 An alternative approach which is also favoured by some of this committee is that no general rule can satisfactorily be laid down applicable to all contracts and that it is preferable to correct particular abuses by the enactment of specific legislation affecting the particular class of contract. There is already a considerable body of legislation directing or proscribing the incorporation of certain terms into particular classes of contracts. We are all agreed that legislation of this kind will continue to be necessary and desirable, but some of us consider that it can never be sufficient.

20.23 A third approach arises from the fact that most of the problems generated by exception clauses concern what are called in French "contrats d'adhesion". These are contracts, usually but not necessarily in printed standard forms, the terms of which are propounded by one party to the other on a "take it or leave it" basis without any real opportunity for negotiation or bargaining. This is the direction from which the problem has

recently been dealt with in Israel, which in 1964 enacted a Law of Standard Contracts. We think it inappropriate at this stage to do more than mention this Law. It empowers the Courts to invalidate certain conditions in a contract for the supply of goods or services unless they have been approved by a special tribunal. The Law applies to conditions fixed beforehand by the supplier for use in any contracts with persons not designated when they were originally formulated.*

We doubt whether this approach would be found satisfactory in New Zealand although we wish to give further consideration to it before dismissing it altogether.

20.24 The fourth approach is, in substance, that recommended by the subcommittee, namely that a general rule should be enacted directing the court or tribunal towards the problem of interpretation of contracts containing these clauses, and authorising the court or tribunal to accept extrinsic evidence for the purpose of interpretation of such clauses.

20.3 In the preceding paragraphs of this Report we have reviewed, and suggested quite far reaching reforms of the principles upon which liability will attach to representations inducing contracts and to terms of contracts. To the extent that exemption clauses are regarded as disentitling reliance upon general principles of liability, the reform of the law regarding exemption clauses must be dependant upon the nature of those general principles. The question of legal policy raised by exemption clauses is, in our view, to determine whether and if so to what extent the law should intervene to prevent the exclusion of the general principles of liability. We agree with respect with Lord Reid that this is a complex problem. We have decided that the proper course is to reserve our opinion upon it until a decision is made whether or not to implement the recommendations contained in this Report.

21. "Unconscionable" Terms

21.1 We have considered whether there should be a rule that if the Court as a matter of law finds the contract or any clause

* See (1965) 81 L.Q.R. 31; (1965) 14 I.C.L.Q. 1410; (1966) 66 Columbia Law Review 1340.

of the contract to have been unconscionable at the time it was made the Court should refuse to enforce the contract, or enforce the remainder of the contract without the unconscionable clause, or so limit the application of the unconscionable clause as to avoid an unconscionable result, with the parties having an opportunity to present evidence as to its commercial setting, purpose and effect to aid the Court in making the determination.

21.2 This suggestion is based upon section 2-302 of the Uniform Commercial Code. It has the extra-judicial support of Lord Denning (The Road to Justice p.91).

21.3 However, we are of opinion that our other recommendations will meet the problem generally, and that particular abuses can best be met by particular legislation. With respect, we regard Lord Denning's analogy with a bylaw as irrelevant and misleading, inasmuch as the excission of a clause of a contract and the enforcement of the rest may confer benefits upon parties for which they have neither stipulated nor paid.

22. The Incorporation of Unsigned Writings

We have given particular consideration to the situation where one party to a contract propounds the contents of unsigned writings as terms on which he is prepared to contract. This situation has given rise to a number of decisions, often referred to as the "ticket cases". The present law is that such writings form part of the contract if reasonable steps have been taken to bring the unsigned writings to the notice of the parties charged before or at the time of, but not after contracting. (Thompson v. London Midland and Scottish Rail Co. [1930] 1 K.B. 41, [1930] All E.R. Rep. 474; Producer Meats (North Island) Ltd. v. Thomas Borthwick and Sons (Australasia) Ltd. [1963] N.Z.L.R. 869, reversed on appeal on another point [1964] N.Z.L.R. 700).

This is one instance where terms imposed by one party are binding on the other whether or not he has had a real opportunity to acquaint himself with them. It was suggested by the subcommittee that the contents of unsigned writings in these circumstances should be terms of the contract if the party to be charged with them had notice of the existence of such writings and had an opportunity, reasonable in all the circumstances in which the contract was made, to read the terms contained therein before contracting. The requirement that

there should be a reasonable opportunity to read the writings would be an addition to the present law.

The objection can be made however that this approach is impracticable, illusory and fails to go to the heart of the problem, which is not so much the incorporation of unsigned writings as the fairness or otherwise of their provisions.

We set out those criticisms that appear to us to have most force -

(a) The change suggested would not be of any real benefit to the consumer in practice. When someone is buying goods or obtaining services from a monopoly which will allow no negotiation or variation of terms it is immaterial to him whether he knows the exact wording of the terms or not. Knowledge leaves him no better off and if he is to be protected something more is required.

(b) If the suggestion were adopted it would either become a dead letter or would cause something approaching chaos. The following self-evident illustrations will suffice. Suppose, for example, that persons queueing outside a football ground for admission to a rugby test match had to be given an opportunity of perusing the rules governing the conduct of the ground before being granted admission. Or suppose that persons queueing at the rush hour to get on a bus had to be given the opportunity to read the bus company's regulations.

We are impressed with these criticisms and have come to the conclusion that a somewhat different approach is preferable. We consider that in this particular type of situation the test of reasonableness might properly and usefully be imported to determine the validity or otherwise of the incorporated terms. We are confirmed in this approach by the fact that in many cases unsigned writings incorporated by reference are bylaws of the body providing the goods or, more usually, the service. Under the common law a bylaw is void for unreasonableness and a similar test of general application will therefore fit in neatly.

Where the contract includes a signed writing which incorporates by reference unsigned writings, we think there is no need for legislative intervention. This procedure is fairly common in relation to building contracts especially and

it is a convenient procedure. We think that the signature of the principal document must be taken as a sufficient acknowledgement of the incorporation of unsigned writings expressly referred to therein. However where the incorporating document is unsigned or where the contract is by parol we consider that there is need for reform.

Recommendation

Accordingly we recommend that it should be enacted that unsigned writings incorporated in a contract by reference shall be enforceable against a party who has not signed the part of the contract which contains the reference only to the extent that the Court considers fair and reasonable having regard to all the circumstances of the case.

Especially in the sale of goods, it happens that offer and acceptance do not coincide because they both incorporate printed terms which are not consistent with each other. In relation to the sale of goods we will consider whether to recommend the adoption of section 2-207 of the Uniform Commercial Code and will deal with this in our report on the Sale of Goods Act. We are not aware that the problem assumes any importance in other fields, and make no recommendation of general application upon it.

23. Conclusion

Our unanimous recommendations have been strongly debated in our committee by individuals who hold widely divergent views. They do not represent a compromise, rather do they state the minimum degree of reform which is the common consensus of our members. Some of us would go further, but none of us has been led beyond his sincere conviction. As a group we regard the recommendations we have made as representing the minimal degree of reform required now and advise their speedy enactment.

(C.I. Patterson)
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APPENDIX A

THE MISREPRESENTATION ACT 1967

1. Removal of certain bars to rescission for innocent misrepresentation - Where a person has entered into a contract after a misrepresentation has been made to him, and -

(a) the misrepresentation has become a term of the contract; or

(b) the contract has been performed;

or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Act, notwithstanding the matters mentioned in paragraphs (a) and (b) of this section.

2. Damages for misrepresentation - (1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

(2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

(3) Damages may be awarded against a person under subsection (2) of this section whether or not he is liable to damages under subsection (1) thereof, but where he is so liable any award under the said subsection (2) shall be taken into account in assessing his liability under the said subsection (1).

3. Avoidance of certain provisions excluding liability for misrepresentation - If any agreement (whether made before or after the commencement of this Act) contains a provision which would exclude or restrict -

(a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or

(b) any remedy available to another party to the contract by reason of such a misrepresentation;

that provision shall be of no effect except to the extent (if any) that, in any proceedings arising out of the contract the court or arbitrator may allow reliance on it as being fair and reasonable in the circumstances of the case.

4. Amendments of Sale of Goods Act 1893 - (1) In paragraph (c) of section 11 (1) of the Sale of Goods Act 1893 (condition to be treated as warranty where the buyer has accepted the goods or where the property in specific goods has passed) the words "or where the contract is for specific goods, the property in which has passed to the buyer" shall be omitted.

(2) In section 35 of that Act (acceptance) before the words "when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller" there shall be inserted the words "(except where section 34 of this Act otherwise provides)".

5. Saving for past transactions - Nothing in this Act shall apply in relation to any misrepresentation or contract of sale which is made before the commencement of this Act.

6. Short title, commencement and extent - (1) This Act may be cited as the Misrepresentation Act 1967.

(2) This Act shall come into operation at the expiration of the period of one month beginning with the date on which it is passed. (It came into force on 22 April 1967).

(3) This Act, except section 4 (2), does not extend to Scotland.

(4) This Act does not extend to Northern Ireland.

APPENDIX B

SUMMARY OF RECOMMENDATIONS

1. It should be affirmed that the question whether a given statement is or is not a term of the contract is to be decided without regard to the supposed state of mind of any party undisclosed to the other at the time of contracting, but is to be decided according to the conduct of the parties on their words and behaviour. (paragraph 4.)

2. It should be enacted that a party to a contract who is induced to enter into it by the misrepresentation (whether innocent or fraudulent) of another party shall be entitled to damages from such other party as if the representation had been a term of the contract. In this context the terms "representation" and "misrepresentation" are intended to have their common law meanings. (paragraph 13.)

3. The remedies of rescission for misrepresentation and acceptance of repudiation should be replaced by a single remedy known as "cancellation", as described in Recommendation 6 (paragraph 16.1.)

4. The existing right of a party aggrieved by breach of contract or misrepresentation to choose between the available remedies should be retained. (paragraph 16.3.)

5. It should be affirmed that the parties to a contract may expressly designate the remedies for misrepresentation or breach. (paragraph 17.2.)

6. It should be enacted that where there is no express designation the remedy of cancellation should be available according to the following rules:-

   (a) Whenever a party to a contract manifests his intention to another party that he will no longer be bound by the contract, the other party may either affirm or cancel the contract.

   (b) Subject to any express provision of the contract, whenever there is a breach of contract or a misrepresentation whether innocent or fraudulent, the party aggrieved thereby may (unless with knowledge of the breach or misrepresentation he has affirmed the contract) cancel the contract if:-

      (i) the party in breach, or the representor, has not commenced performance of his obligations,

      (ii) the effect on the party aggrieved of the breach or misrepresentation is substantially to deprive him of the benefit of, or substantially to increase his burden under the contract.

   (c) Whenever a contract is cancelled under rule (a) or (b) -

      (i) Any obligations under the contract which are still

still executory need not be performed; and

(ii) All rights based on prior breach or performance survive, and

(iii) The cancelling party retains any right to damages available to him for breach of the contract or for misrepresentation.

(d) Where a contract has been cancelled, the Court may on the application of either party make an order for restoration of property to the extent that restoration is just and practicable and upon such terms as the Court thinks just.

(e) No order for restoration shall be made under rule (d) -

(i) of any property in which a third party has in good faith and for value acquired an interest, or

(ii) of any property if any party has so altered his position in relation to that property (whether before or after cancellation) that having regard to all the relevant circumstances it would be inequitable to any party to order resporation thereof.

(f) Neither cancellation nor an order for restoration will disentitle the party who cancels to such further or other relief by way of damages or otherwise as may be appropriate in the circumstances.

(g) In order to cancel in accordance with these rules it is not necessary to employ any particular form of words provided that the party having the right to cancel communicates his election so to do. Communication may be dispensed with if it is not reasonably practicable. (Paragraph 18.5.)

7. It should be enacted that the remedies available according to the foregoing rules should be enforceable by or against any assignee of the contract or any assignee of the benefit or burden thereof, unless otherwise provided by the contract; provided that the assignee should not be liable in damages, whether by way of set-off, counterclaim or otherwise in a sum exceeding the value of the performance of the assigned contract to which he is entitled by virtue of the Assignment, unless otherwise agreed by the assignee or provided in the assigned contract. An assignee should have, by statute, an indemnity from the assignor against losses incurred by the assignee arising out of any term of the assigned contract or any misrepresentation which was not disclosed to the assignee at the time of assignment, unless otherwise agreed. Nothing in this recommendation should affect the law as to negotiable instruments. (Paragraph 19.8.)

8. It should be enacted that unsigned writings incorporated in a contract by reference shall be enforceable against a party who has not signed the part of the contract which contains the reference only to the extent that the Court considers fair and reasonable having regard to all the circumstances of the case. (Paragraph 22.)

APPENDIX C

TABLE OF CASES