WANT OF CONSIDERATION

by Francis Bennion*

The distinguished lawyers who signed the Law Revision Committee's famous Sixth Interim Report would doubtless have felt surprise at any suggestion that their recommendations as to the doctrine of consideration would come into effect 'without recourse to legislation at all'. Indeed, that part of the report which deals with consideration begins: 'No doctrine of the common law of England is more firmly established at the present day than the doctrine of consideration'. Lord Wright, the chairman of the committee, elsewhere stated the law in even more emphatic terms,[1] and more recently Denning L.J. has said that the doctrine is 'too firmly fixed to be overthrown by a side-wind'.[2] However, the last-mentioned learned judge has in a recent article[3] blown very hard upon consideration and has suggested that the law is developing in such a way as to lead to fundamental changes in the rule. The argument is supported by an examination of some recent decisions which in the learned author's view have 'much modified the old law'. In the present article it is proposed to analyse Denning L.J.'s argument and to submit, with respect, that the doctrine of consideration has not changed one whit in recent years, and that what Lord Mansfield was too late to achieve in the eighteenth century cannot be achieved in the twentieth century otherwise than by legislation.

It is not here proposed to re-argue the merits of the doctrine of consideration although its usefulness as a negative test of the existence of a contractual obligation is familiar to all practising lawyers. The points for and against it are well known[4] and only extreme conservatives would not concede that it is at least in need of amendment. What is so disturbing to the ordinary lawyer, bred in the doctrine of the authority of precedent, is the suggestion that it is still open to the courts to emasculate if not destroy a firmly rooted principle of the common law. If this suggestion achieves the results aimed at, a much-criticised doctrine will have been reformed at the cost of incalculable damage to a far more important principle, that of *stare decisis*.

In the article now under discussion Denning L.J. is concerned only with the unilateral contract - a promise for an act - and he contends that it is the present tendency to regard any act

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1 'The necessity of consideration is established by authorities which not even the House of Lords could distinguish or disregard,' 49 Harv.L.R. at p.1226.

2 In *Combe v. Combe* [1951] 2 K.B. 215, at p.220.

3 'Recent developments in the doctrine of consideration' by Denning L.J., 15 M.L.R. 1.

4 See, e.g., 'The Reform of Consideration' by C.J.Hamson, 54 L.Q.R. 233; Lord Wright, *loc.cit.*; 1 M.L.R. 97; L.R.Committee, Sixth Interim Report.

done on the faith of a promise as sufficient consideration to support it and to bring a unilateral contract into being. It is respectfully submitted that this tendency does not in fact exist, and that if it did it would do violence to the true nature of contracts and should be discountenanced.

First principles tell us that the following are necessary for the creation of a unilateral contract:

(a) An offer. (This must contain (expressly or by implication) all the terms which are to be embodied in the complete contract, and can be reduced to the formula 'if you perform act A, I promise to perform act B'.)

(b) The communication of the offer to the offeree. (Without this communication the offeree cannot claim that, because he has unwittingly performed act B, he is entitled to call for the performance of act A.[5])

(c)The doing by the offeree of the act called for by the offer. (This constitutes acceptance of the offer, and also consideration on the part of the offeree.)

The controversy arises over requirement (a). Denning L.J. appears to deny the need for any reference (whether express or implied) in the offer to the part to be played by the offeree: it is sufficient that a promise is made which is intended to be legally binding and to be acted upon, and which is in fact acted upon.

Dr. A.L. Goodhart has cited[6] as 'the stock illustration of a unilateral contract' that given by Brett J. in *Great Northern Railway v. Witham*[7] of A saying to B: 'If you will go to York, I will give you £100,' an offer which would be accepted by B's going to York. Denning L.J. would hold that if A merely says to B 'I will give you £100' intending to create legal relations and intending B to act thereon, and B thereupon goes to York and runs up a hotel bill which he expects to pay out of A's £100, B's act provides consideration and renders A's promise binding. This might be satisfying to the moralist, but most common lawyers would unhesitatingly say that B's action for £100 damages against A should fail for want of consideration.

It is perhaps more accurate to say that the offer contained no reference to the furnishing of consideration by the offeree and that therefore, since the terms of the offer must foreshadow the terms of the contract, the offer was defective and incapable of ripening into a contract. This was precisely the situation in *Combe v. Combe*,[8] where, shortly after a woman had obtained a decree *nisi* of divorce, her solicitors wrote to her husband's solicitors: 'We understand that your client is prepared to make her (the wife) an allowance of one hundred

[5] *Wigan v. English & Scottish Life Assurance Association* [1909] 1 Ch. 291; *Oliver v. Davis* [1949] 2 K.B. 727; *Fitch v. Snedaker*, 38 N.Y. 248.
[6] 67 L.Q.R. 456.
[7] (1873) L.R. 9 C.P. 16.
[8] [1951] 2 K.B.215.

pounds a year.' The reply was: 'The (husband) has agreed to allow your client one hundred pounds a year.' No discussion had taken place on the question of the wife's forbearing from applying to the court for permanent maintenance, and there was no evidence on which to add any implied terms to the husband's offer.[9] It could not therefore be turned into a contract by any act of acceptance by the wife and the Court of Appeal rightly found for the husband.

Dr Goodhart's suggestion[10] that the price for the husband's promise was the wife's forbearance and that his position was that he would pay her one hundred pounds a year until she made an application to the court, seems, with respect, not to be based on any evidence which was before the court and which was relevant to establishing the terms of the husband's offer. Dr Goodhart emphasises that the negotiations were continued not casually but by solicitors, and yet the correspondence apparently contained no hint of the 'implied price' that the wife was to pay. The husband may well have intended the wife to act on his promise in the way she did: the crucial point was that he made no express or implied stipulation to this effect.

In case it should be said that Denning L.J.'s argument is based on the proposition that unilateral contracts are not governed by the doctrine of offer and acceptance, it is necessary to point out that the learned judge does not advance this as his view, and the cases he relies on are all consistent with analysis into offer and acceptance or, in other words, are concerned with conditional promises. Most reliance is placed by Denning L.J. on the cases concerning debtors who, to obtain forbearance from their creditors, have promised to give additional security. It is submitted that in these cases the debtor's offer could always have been reduced to the form shown in (a) above, although very often the act to be done by the offeree in return for the promise was not expressly mentioned but was to be gleaned from surrounding circumstances. Thus in *Alliance Bank v.Broom*[11] the debtor had been asked for security, and must have known that, in the words of the learned Vice-Chancellor,' if he had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt, and have taken steps to enforce it'. It was easily deduced that, in return for his promise, the debtor was asking that such steps should not be taken.

Difficulty has been caused by the word 'request' in this connection. An unconvincing attempt has recently been made[12] to show that all offers must import a request to the

[9] I cannot find any evidence of any intention by the husband that the wife should forbear from applying to the court for maintenance,' *per* Denning L.J. Birkett L.J. made a similar observation.
[10] 69 L.Q.R. 109.
[11] (1864) 2 Dr. & Sm. 289.
[12] 'Unilateral Contracts and Consideration,' by Mr. J.C. Smith, 69 L.Q.R. 99.

offeree to accept them, but it is respectfully submitted that Dr.Goodhart is right in saying that this element is irrelevant. There is no case which has decided that, although all the terms of an offer were expressed, no contract in fact materialised because the offeror had adopted a take-it-or-leave-it rather than a precatory attitude, and no one expects such a case to arise in the future. Where the nature of the act called for has to be gathered from surrounding circumstances, however, it can often be inferred that the offeror has 'requested' a particular act in return for his promise. Accordingly, judges have naturally made use of the word as, it is submitted, a convenient way of describing a stipulation impliedly contained in the offer. It may further be observed that in most of the cases where the word has been used the offeror, being a debtor *in extremis*, was supplicatory, and it was therefore more apt to say of him that he made a request, rather than that he imposed a stipulation.

Denning L.J. puts forward the view that: 'Instead of using the old language of "request" and "consideration" 'we can express the self-same principle by saying that a promise is binding in law if it was intended to create legal relations, intended to be acted upon and was in fact acted upon.' If this restatement connotes no alteration of existing principle it is beyond criticism; in so far as it introduces novel principles it is submitted with respect that it runs counter to invincible authority, places the emphasis wrongly and is too wide. For example, if a right-minded debtor says to his creditor: 'I consider that you are entitled to security and I undertake to give it, but I am not stipulating for any forbearance from you,' and if the creditor relies on this statement and forbears, on Denning L.J.' s principle the debtor should be bound, though on the authorities he would not be.[13] The debtor might intend his statement to be legally binding but this would make no difference; indeed to consider this point is to beg the question, for however earnestly a man seeks to bind himself contractually he will fail if he neglects the essential legal requirements.

Denning L.J.'s object in this part of his article would appear to be to give a more general application to the principle enunciated by him in *Central London Property Trust v. High Trees House*.[14] In that case the learned judge said that ' a promise intended to be binding, intended to be acted upon and in fact acted upon, is binding . . .' The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but

[13] Cf. Dr. Goodhart's example (67 L.Q.R. 456) of a father saying to a son 'I do not ask you not to smoke until you are 25, because it is for you to decide this for yourself, but if you do not smoke before that time I will give you £100.' This differs of course in that here the promise is conditional, forming an offer to enter into a unilateral contract.

[14] [1947] K.B. 130.

they have refused to allow the party making it to act inconsistently with it. Now it seems that a cause of action is to be given on the scant authority of a restatement of the rule in *Alliance Bank v. Broom*.[15] In this connection Denning L.J. treats *Combe v. Combe* as an exception to his suggested principle on the ground that the maintenance agreement there was not an implied request to forbear from application to the court. This was of course the *ratio decidendi* on the point of consideration or no consideration: it was not the reason why the *High Trees* doctrine was not applied. Byrne J. at first instance could understandably find no reason why the formula of *High Trees* was not satisfied, since it appeared to him that the maintenance agreement was intended to be binding and to be acted on, and was acted on in that the wife did in fact forbear from applying to the court even though not in pursuance of any request, express or implied, by the husband. Byrne J. was held to be wrong not in this, but in supposing that the *High Trees* shield could be beaten into a sword.

Denning L.J. finds another modern development in 'the gradual disregard of "benefit" and "detriment"'. It is strange that no authority illustrative of this modern development can be cited later in date than 1866. In the 'marriage cases' (*Shadwell v. Shadwell*[16] and *Chichester v.Cobb*[17]) it was held that marriage may involve a detriment in that pecuniary liabilities are undertaken, while in the third case relied on by Denning L.J., namely *Scotson v. Pegg*,[18] it was regarded as a benefit for a man to obtain 'an interest in the performance of a contract made by another'. All three cases were decided by judges who clearly regarded themselves as bound to weigh the question whether or not consideration existed by reference to criteria of benefit and detriment. To use these cases as a foundation for a directly opposite theory nearly a hundred years later and without citing in support any more recent authority seems, with respect, a curious way of establishing a conclusion.[19]

Turning to the rules governing the modification and discharge of contracts, Denning L.J. accepts that 'the law for centuries has been that a promise to waive, modify or discharge the strict terms of a contract needs to be supported by consideration just the same as any other promise'. He further concedes that

[15] (1864) 2 Dr. & Sm. 289.
[16] (1860) 9 C.B. (N.S.) 159.
[17] (1866) 14 L.T. 433.
[18] (1861) 6 H. & N. 295.
[19] Much difficulty is avoided if the complex idea of consideration is defined not by an over-concise reference to benefit and detriment but in terms such as those used in *Currie v. Misa*, L.R. 10 Ex. 162, and by Bowen L.J. in *Miles v. New Zealand Alford Estate Co.*, L.R. 32 Ch.D. 266, 289. In this way Denning L.J.'s example of the promise to a charitable institution (15 M.L.R.2) can be met by saying that the promisor would be bound because, in procuring nine other persons to pay £100 each, the institution had incurred a responsibility to administer the funds so procured.

Foakes v.Beer[20] remains a binding authority in determining the 'strict legal rights' of the parties. The claim is made, however, that the effectiveness of these principles has been undermined by the application of the equitable rule which is to be gathered from the judgments of Lord Cairns in *Hughes v. Metropolitan Railway*[21] and Bowen L.J. in *Birmingham, etc., Land Co. v. L.& N.W. Railway*.[22]

This rule, under the rubric quasi-estoppel, has been subjected to an elaborate analysis by Mr. J. F. Wilson in a recent article,[23] and that learned author has demonstrated that the true statement of the rule is that, where A leads B to believe that he intends not to enforce some contractual right which he has against B and B relies on that belief to his detriment, equity will restrain the exercise of A's contractual right until B has had an opportunity of recovering his former position, or if such recovery has become impossible a total restraint will be imposed. To express the rule in wider terms than this is to leave the authorities behind and venture into the realms of hypothetical jurisprudence. In any case it is clear that this rule of equitable or quasi-estoppel forms no part of the doctrine of consideration, although it may afford relief in cases where, through want of consideration, no contractual right exists.

Denning L.J. however seeks to treat cases where one party to a contract has promised without consideration to waive, modify or discharge his strict legal rights and the other party has acted on such promise whether to his detriment or not as cases in which consideration exists. But, as indicated above, it is surely necessary to distinguish the unilateral contract with its clear breakdown into offer (a conditional promise), and acceptance (an act fulfilling the stipulated condition), and the case of a simple promise which does not constitute an offer in the technical sense because it makes no reference, express or implied, to any future conduct of the promisee, but is unconditional and non-contractual, amounting to no more than a statement of intention binding in honour only except in so far as it may give rise to quasi-estoppel or delictual obligation.

The fact that the promise is made in the context of a subsisting contract can make no difference because, as the learned Lord Justice concedes, consideration is required even in this case. But it is argued that consideration does exist wherever an act is done on the faith of such a promise, although there is binding authority directly contrary to this proposition. For example in *Foakes v. Beer*[24] itself there was an undoubted promise by the judgment creditor not to sue on the judgment if the debt were paid by agreed instalments. Undoubtedly this was meant to be

[20] 9 App.Cas. 605.
[21] 2 App.Cas. 439.
[22] 40 Ch.D. 268
[23] 67 L.Q.R. 330. This apparently has the approval of Denning L.J.: see 15 M.L.R. 8 (footnote).
[24] (1884) 9 App.Cas. 605.

binding and to be acted upon by the debtor. It was acted upon in that the debtor paid every instalment, yet the House of Lords held that there was no consideration for the agreement so that it was void.

It may be argued that Denning L.J. does not intend his new theory of consideration to apply to cases coming within the rule in *Pinnel's Case*,[25] although it appears to be put forward as a means of neutralising the effects of that rule. Can the new theory be applied apart from the rule in *Pinnel's Case*? Recent cases are relied on by Denning L.J. to show that it can, but there is clear authority to the opposite effect. In *Williams v. Stern*[26] A gave B a bill of sale on his goods as security for a loan to be repaid by weekly instalments. The bill authorised B to seize the goods at any time and hold them until the part of the loan then outstanding had been repaid. It also gave B a power of sale. A paid thirteen instalments punctually, but on the day when the fourteenth was due he had to attend the Court of Passage as a juryman. At A's request, B promised to wait a week for the instalment. Three days later, while A was still away on jury service, B seized the goods and sold them. The jury found that B had so acted as to induce A to believe that B would stay his hand, but judgment was given for B and a new trial ordered by a strong Court of Appeal on the grounds that there was no consideration for B's promise: it was, in the words of Brett L.J. 'a mere naked promise,' yet unquestionably A had acted upon it and B had intended that he should. Relief in equity was not granted, although *Hughes v. Metropolitan Railway* had been cited to the court.

The cases cited by Lord Justice Denning as authority for the proposition that any act done in reliance on a promise not to enforce contractual rights will now operate as consideration are the *High Trees* case, *Foster v. Robinson*[27] and *Wallis v. Semark*.[28] The first of these contains celebrated obiter dicta all founded on the equitable principle of quasi-estoppel. It was never suggested in that case that the agreement to vary the rent constituted a contract, and indeed if it had there would have been no need to rely on quasi-estoppel at all, and the observation of the learned judge that 'the courts have not gone so far as to give a cause of action in damages for the breach of such a promise' would have been inapposite. With all respect, therefore, it seems clear that the first case cited in support of the proposition that an act pursuant to a promise intended to be binding and to be acted on will create a contractual obligation is in fact authority of contrary effect.[29]

[25] (1602) 5 Co.Rep. 117.
[26] (1880) 5 Q.B.D. 409.
[27] [1951] 1 K.B. 149.
[28] [1951] 2 T.L.R. 222.
[29] See the observation of Denning L.J. in *Combe v. Combe* [1951] 2 K.B. 215, that the *High Trees* principle 'can never do away with the necessity of consideration when that is an essential part of the cause of action.'

The second case relied on, *Foster v. Robinson*, was an appeal from a county court which turned entirely on a question of whether or not a tenancy had been surrendered by operation of law. The brief facts were that T had been a tenant for many years of a cottage owned by L, the farmer who employed him. In 1946 a transaction took place between T and L of which the only evidence was that given by L at the hearing (which was accepted as honest). L then said 'I told him (i.e., T) the existing tenancy would cease and I would charge him no more rent and he could live there the rest of his life rent-free. He said "Thank you very much", and said he was very pleased to accept the condition.' From that time until his death in 1950 T lived under this arrangement, paying no rent. The Court of Appeal held that by ordinary principles of estoppel T's daughter and administratrix was precluded from asserting that the tenancy had not come to an end in 1946 by T's conduct in living on in the cottage rent-free. Evershed M.R. remarked: 'The fact that the doctrine of estoppel really forms the foundation in such a case as this of the alleged surrender by operation of law is, I think, clear from the judgment of Chitty J. in *Wallis v. Hands*[30]' Singleton L.J. said 'The position of the defendant's father was altered by agreement between the parties; there was a complete change: the father became a licensee, and could not have been heard to say that he was anything more than that. He had had the advantage of the agreement and had paid no rent for three and a half years'.

It would not appear that this case is at all relevant to the doctrine of consideration, for it was not suggested that the arrangement of 1946 had created a new contract between L and T, unless certain observations of the Master of the Rolls are taken to have this meaning. Referring to L's promise to T that he could 'live there the rest of his life rent-free', the Master of the Rolls said: 'Since the recent decision in *Winter Gardens Theatre (London) Limited v. Millennium Productions, Ltd*.[31] I think that, although a licence of that kind may, apart from the terms of the contract, be revoked, it may now be taken that if the landlord, having made that arrangement, sought to revoke it, he would be restrained by the court from doing so'.

With all respect, it is submitted that this observation is open to a number of criticisms. First, it is not requisite to a surrender by operation of law that some binding relationship supersede the surrendered tenancy,[31a] so that the question of whether T's tenancy came to an end in 1946 or not is not affected by the question whether he remained in possession under a bare licence or under a

[30] (1893) 2 Ch. 75.
[31] [1948] A.C. 173.
[31a] See *Peter v. Kendal* 6 B. & C. 703; *Metcalfe v. Boyce* [1927] 1 K.B. 758; Foa (7th ed.), 617 (cited with approval by Evershed M.R. in *Foster v. Robinson* at p. 155).

contract. Second, there is no suggestion in the county court judge's notes or in the report of counsel's speeches that there was in fact a new contract, and the learned judges in the Court of Appeal do not, apart from the passage quoted above, base their judgments in any way on a new contract or probe the question of consideration. Thirdly, the court were concerned at a possible evasion of the Rent Acts, and were at pains to emphasise that T had not been overreached. It may be that the question whether T's licence was irrevocable or not was relevant to the question of the genuineness of the 1946 arrangement, but it is submitted that in fact that arrangement gave T no more than a bare licence, and that such a licence was, in accordance with the immemorial doctrine of the common law, revocable at the will of the licensor. In any case it would seem that this point forms no part of the *ratio decidendi* of the case, which, as stated above, was based on the ordinary principles of estoppel.[32]

The third case relied on by Denning L.J. is *Wallis v. Semark*, which concerned the alteration of words in a rent-book from 'one month's notice each party' to 'one month's notice from tenant; two years' notice from landlord.' Somervell L.J. rejected the argument that there was no consideration for the change in the terms of the tenancy in these words: 'I think that fails. Though very little is known, I think it would be wrong to draw that inference from the fact that one month was changed to two years. We do not know the circumstances. In cases of this kind it is always possible that a tenant may say: "unless you can give me greater security, I must go". And if he is a good tenant the landlord, *for a good consideration*,[33] may say: "I will give you greater security", and the consideration is the tenant's remaining on and paying the rent.'

It is submitted that the learned Lord Justice was here finding a unilateral contract under which, in consequence of the landlord's promise, the tenant refrained from terminating the tenancy and thus satisfied the condition on which the promise was given. Although the decision may be open to the criticism that the altered terms were repugnant to a monthly tenancy and were therefore void, it is submitted that on the point of consideration Somervell L.J. must be taken to have held that there were facts from which consideration could be inferred, whilst in the other judgment Denning L.J. expressed the view that 'there was no consideration in point of law' but held the landlord estopped from disputing the varied terms by virtue of the *High Trees* principle. Again, it is difficult to see how this case can be said to furnish any authority for modifying the doctrine of consideration.

[32] See the explanation given by the Master of the Rolls of his above-cited dictum in *Vaughan v. Vaughan* [1953] 1 All E.R. 209, 211.
[33] Italics mine.

In Part V of his article, entitled 'Cases on Conduct', Denning L.J. discusses the quasi-estoppel cases, starting with *Hughes v. Metropolitan Railway*, but it appears from the observations in the concluding part of the article that the learned author prefers to regard these cases as exemplifying not aspects of the doctrine of consideration but 'a kind of estoppel', a view which appears to agree with most contemporary opinions on this topic.

In the result, it is submitted with respect that the authorities relied on by Denning L.J. do not manifest any change in the doctrine of consideration, or even, apart from the quasi-estoppel principle of *Hughes v. Metropolitan Railway*, provide any relief against its effects. The common law cannot at its present stage of development change its well established rules without the aid of the legislature, and if the question now under discussion came before the House of Lords for decision it is submitted that there can be little doubt of what their Lordships' answer would be. *Mutatis mutandis*, the words of the present Lord Chancellor in the *British Movietonews* case[34] might well be echoed:

> ' Nor can I accept the theory . . . that in recent cases . . . there has been some development of this branch of the law.[35] It is, no doubt, essential to the life of the common law that its principles should be adapted to meet fresh circumstances and needs. But I respectfully demur to the suggestion that there has recently been, or need be, any change in . . . the application of the law of frustration to commercial agreements, and, if indeed (certain recent cases) illustrate such a change, they would have to be regarded as of doubtful authority; they can, however, be justified on more orthodox grounds.'

In conclusion it is desired to draw attention to the dangers implicit in any weakening of the importance of the contractual tie and any attempt to provide contractual remedies where no contract exists. The attempt to do justice will bring widespread uncertainty into the law, so that a growing number of litigants and even their skilled advisers will be unable short of litigation to determine what their rights and liabilities are. Consideration still remains part of our law because, as Anson wrote long ago: 'We need some means of ascertaining whether the maker and receiver of a promise contemplated the creation of a legal liability'.[36] This touchstone is not infallible, as shown by such cases as *Balfour v. Balfour*[37] but without it disputes as to whether an agreement was intended to be legally binding or not could rarely be resolved without litigation. Uncertainty, especially in commercial matters, should always be the law's enemy and the maxim 'hard cases make bad law' may have to be borne firmly in mind. In two recent cases this maxim was apparently overlooked, with strange and inelegant results.

[34] [1952] A.C. 166, at p. 188.
[35] i.e., the doctrine of frustration.
[36] *Law of Contract*, 14th ed., p.98.
[37] [1919] 2 K.B. 571.

The first case was *Brown v. Sheen and Richmond Car Sales Ltd.,*[38] where A, a motor dealer, made certain representations to B regarding a particular car. Acting on these representations, B paid a deposit to A, and entered into a hire purchase agreement with C whereby C bought the car from A and resold it on hire purchase terms to B. B now sought to sue A on the representations. Jones J made no finding of fraud against A, but held that B was entitled to recover for breach of warranty notwithstanding there was no sale, and therefore no contract between A and B.

This decision was followed by McNair J. in *Shanklin Pier, Ltd. v. Detel Products, Ltd.,*[39] where X, a firm of paint manufacturers, represented to Y, the owner of a pier, that their paint had various qualities which made it suitable for painting a pier. Acting on this, Y specified in his contract with Z, who was to paint the pier, that X's paint be used. It was so used, and proved unsatisfactory. Y sued X for breach of warranty. The learned judge held that there was an enforceable warranty supported by the consideration that Y should cause Z to enter into a contract with Z for the supply of the paint. This apparently did not amount to a finding that there was a contract between X and Y, since *Brown's Case* was relied on, and the plea that the warranty in question was not actionable since it was not a term in any contract between X and Y was rejected on the grounds that such a contract was unnecessary. McNair J remarked that 'If, as is elementary, the consideration for the warranty in the usual case is the entering into of the main contract in relation to which the warranty is given, I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A . . .' With respect, it is submitted that there is some confusion here between a mere representation, which may induce a party to enter into a contract, and a warranty, which can only have legal effect if it constitutes one of the terms of the contract or forms an additional contract on its own. It is well established that a mere representation which turns out to be untrue gives no right to a claim for damages unless there is a finding of fraud.[40] It is equally well established that a warranty can, at any rate where no fraud is alleged, only give rise to liability in damages where it forms a term in a contract[41] The learned judge in the

[38] [1950] 1 All E.R. 1102.
[39] [1951] 2 K.B. 854.
[40] See, e.g., *Heilbut v. Buckleton* [1913] A.C. 30: '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', *per* Lord Moulton at p.51.
[41] See, e.g., *Mahon v. Ainscough* [1952] 1 All E.R. 337: 'There seems to be no hint in the evidence of there having been any intention to make such a separate contract as a warranty must necessarily import,' *per* Evershed M.R. at p.340. See also Jenkins L.J. at pp. 340-41, *passim*. In the *Shanklin Pier* case the following dictum of Scott L.J.'s in the similar case of *Drury v. Victor Buckland, Ltd.* [1941] 1 All E.R. 269, was cited: 'It was a sale by the Buckland Company (the defendants) to the hire- purchase company. The property passed to them on the terms that they (the defendants) would get paid by the hire-purchase company. Therefore, the claim (brought by the plaintiffs) against them (the defendants) for damages for breach of warranty is a cause of action unsupported by any contract which would carry it'. This was distinguished by McNair J. on the grounds that it applied only to the case where the warranty was one implied by law (as under the Sale of Goods Act, 1893) and not where the warranty was express. It is respectfully submitted that this distinction is invalid, and that Scott L.J. intended to refer to the necessity for a warranty to be embedded in a contract in order to be actionable.

Shanklin Pier Case, in the dictum cited above is, with respect, enunciating an undoubted principle if he is taken to postulate as an 'enforceable warranty' an agreement between A and B that A should be liable in damages if certain representations he has made prove untrue, in consideration for B's causing C to enter into a contract with A. This would be enforceable as an ordinary unilateral contract. However it seems apparent that this was not the postulate intended; indeed the learned judge described the point arising in the case as posing 'a comparatively novel question'. Thus it appears that in order to relieve a deserving defendant from hardship the court was in both the cases cited granting a contractual remedy to one not privy to any contract, or, it might be said, awarding damages for fraud where no fraud existed. The law is quick to grant its aid where there has been wrongdoing, but it has always hitherto insisted that a non-fraudulent party shall have bound himself contractually before being mulcted in damages for some other's loss.

'To administer justice it is necessary to administer law' and it may be said with all respect that those who, from motives of compassion, show a want of consideration for principles of high and long-standing authority - either by choosing to ignore them or by formulating unreal distinctions - do only disservice to the true cause of justice. To usurp the function of the legislature in the name of a developing jurisprudence is surely to destroy the reality of the common law, to make its doctrines undependable and to leave those whom it should serve bereft in costly uncertainty.