THE
MODERN LAW REVIEW

Volume 30 July 1967 No. 4

MISREPRESENTATION ACT 1967

I. Introductory

This Act, which is based on the Law Reform Committee's Tenth Report,[1] makes some improvements in the law as to the effect of misrepresentation on a contract and as to certain more or less closely related matters. To this extent, the Act may be welcomed, but it is also open to serious criticism. Some of the reforms are enacted in a manner which is quite extraordinarily tortuous and obscure. Others are based on policy decisions which are at any rate questionable and seem to have been reached without adequate discussion. And the Act has altogether failed to simplify the law. It has left in force many of the distinctions which existed before and has superimposed its own structure upon them. The resulting state of the law is almost incredibly complex. It is indeed fortunate that the Act will be largely superseded when the Law Commission codifies the law of contract.

Before considering the detailed provisions of the Act, a number of general points may be noted.

1. The Act leaves many important points to be decided in accordance with the old law. Thus the definition of " misrepresentation " has not been affected: the term continues to exclude mere puffs, representations of law and representations as to the future. Nor does the Act alter the law as to the conditions which must be satisfied before the representee can rescind: for example, the representee must still show that he relied on the representation and was induced by it to enter into the contract. And the Act does not alter the old law as to the circumstances in which the right to rescind a contract for misrepresentation is lost or barred by impossibility of restitution, the intervention of third party rights, affirmation or lapse of time.

2. The Act in sections 1, 2 and 3 uses the expression " misrepresentation made." This seems to refer to active misrepresentation and not, therefore, to cover non-disclosure. Thus the Act

[1] Cmnd. 1782 (1962).

does not impose liability for non-disclosure where none existed before; nor does the Act vary or affect any existing liability or defence based on non-disclosure. Nevertheless, many of the cases which are sometimes discussed in relation to non-disclosure could be affected by the Act. Thus the Act would probably apply where a misrepresentation has been made which is literally true but misleading by reason of the non-disclosure of other facts which affect the weight of those stated; where an express statement which is true gives rise to the implication of a statement which is false; and where a representation is falsified by events which come to the representor's notice after the representation but before the contract.[2]

3. The Act in sections 1 and 2 (2) uses the expressions "rescind," "rescinded" and "rescission." These expressions have been used in a variety of senses, and the confusion as to their meaning is so rampant that it is impossible to say that one usage rather than another is the "correct" one. For the purposes of the Act, it is particularly important to distinguish between two processes. The first is that of setting a contract aside for all purposes, so that each party is placed as far as possible in the situation in which he would have been had the contract never been made: this may be called "rescission for misrepresentation." The second process is that whereby one party to a contract repudiates his obligations under it by refusing to perform, or to accept performance, on account of the other party's breach: this may be called "rescission for breach." In some respects these two processes are very similar: both involve termination of the contract with respect to future obligations, and (where the contract is not still wholly executory) both may involve some form of *restitutio in integrum*. But there may also be differences between the two processes. In particular, rescission for breach leaves outstanding any liabilities for breach of contract, but it is uncertain whether this is also the effect of rescission for misrepresentation. If, for example, a person were induced to buy a car as a result of a misrepresentation as to its age, and the agreement also contained implied terms as to quality, and as a result of a breach of such terms, the buyer was injured in an accident, could he both rescind for misrepresentation, and claim damages for breach of contract? Statements to the effect that a person cannot rescind a contract in part, while affirming some particular term, suggest that the buyer cannot both rescind and claim damages. But there appears to be no direct authority on this point, and the answer is by no means clear.

The distinction drawn above is reflected, if obscurely, in the language of other relevant statutes. The Sale of Goods Act 1893 refers to the buyer's right of (or grounds for) rejecting goods or of

[2] *Cf.* 2 (2), which deals with a similar situation and goes beyond the old law in imposing liability even where the representor did not actually know of the change of circumstance.

treating the contract as repudiated where there has been a breach of condition.[3] It does not use the word " rescind " in this context, though the word does occur twice in section 48. The context there suggests that " rescind " means something different from rejection or repudiation: that it involves some further positive step to bring the contract to an end.[4] The Marine Insurance Act 1906 provides that the representee " may avoid " a contract for misrepresentation or non-disclosure [5]; but that, on breach of " warranty " [6] and on change of voyage, deviation and delay, the insurer is " discharged from liability." [7] Here " avoid " seems to refer to " rescission for misrepresentation " and " discharged from liability " to " rescission for breach." But the Act is not entirely consistent in this use of terminology as it also sometimes entitles the insurer to " avoid " for breach of " conditions." [8]

II. PROVISIONS OF THE ACT

Section 1 (*a*) resolves a conflict of opinion as to the effect of the incorporation in a contract of a representation made before the contract.[9] The section provides that in such a case the representee shall be entitled to " rescind " notwithstanding that the representation has become a term of the contract. This right to " rescind " will therefore exist whenever a statement of fact (as opposed to a promise) is made to induce a contract and is subsequently incorporated in the contract, whether as a " condition " or as a " warranty." Where a misrepresentation is incorporated in the contract, the section does not take away common law remedies for breach of contract; but the relationship between these and the new statutory right to " rescind " is obscure. If the incorporated misrepresentation gives rise at common law to a right to reject or repudiate *and* claim damages, these rights can presumably still be exercised independently of section 1. If the incorporated misrepresentation gives rise at common law to a right to damages only, the representee can clearly ignore the Act and claim damages for breach of contract. But can he still claim such damages if he does rescind under section 1? If " rescind " here means (as seems from the context more probable) " rescind

[3] ss. 11, 62; *cf.* s. 31 (2).

[4] The contract is rescinded by the exercise of the seller's right of resale: s. 48 (4), but not by his exercise of the right of stoppage: s. 48 (1). In the former case the seller's right to damages is expressly preserved—presumably because it would otherwise disappear unless the " rescission " could be regarded as a species of rescission by agreement, and the agreement impliedly saved the seller's right to damages.

[5] ss. 17, 18, 20.

[6] Used here in a sense resembling that of " condition " in the Sale of Goods Act 1893.

[7] ss. 33, 45 (2), 46 (1), 48.

[8] ss. 36 (2), 42 (1).

[9] See *Cie. Française de Chemin de Fer Paris-Orléans* v. *Leeston Shipping Co.* (1919) 1 Ll.L.R. 235; *Pennsylvania Shipping Co.* v. *Cie. Nationale de Navigation* (1936) 155 L.T. 294.

for misrepresentation," then the answer to this question depends on whether such rescission necessarily destroys all outstanding liabilities for breach of contract. As mentioned above, this is an open question; but if this were the effect of rescission for misrepresentation a most unsatisfactory result could follow from section 1 of the Act. For a person who rescinded out of court for a misrepresentation which had become a term of the contract could thereby lose his right to damages without realising that this was the effect of his " rescission." Of course the court might in such a case rescue the representee by exercising its discretion to declare the contract subsisting and award damages under section 2 (2); but we shall see that the measure of damages under that subsection is probably less extensive than the measure of damages for breach of contract. For this reason, too, a person who brings an action claiming rescission under section 1 for an incorporated misrepresentation would be well advised to claim damages for breach of contract in the alternative.

Section 1 (*b*) puts an end to the rule that an executed contract cannot be rescinded for innocent misrepresentation. The Law Reform Committee had recommended that this change in the law should not apply to contracts for the disposition of interests in land (other than leases for under three years) [10]; but after much debate Parliament rejected this qualification. Thus the remedy of rescission (or damages in lieu) will in future be available to the house-buyer. During the debates, fears were expressed that this might cause hardship, *e.g.*, to a private seller who had made a perfectly innocent misrepresentation as to the state of his house and had then reinvested the proceeds in a new house for himself.[11] This hardship may be alleviated by the rule that lapse of time bars rescission; and by the exercise of the court's discretion under section 2 (2) to award damages in lieu of rescission. But the first alleviation operates uncertainly because no fixed time-limit has been laid down for rescission; and the second may be cold comfort for a seller who is (in substance) asked to pay back part of the price which he received for his former home. Of course the hardship on the representee may be just as great. But it may well be easier for the actual owner of a house to borrow money to make good the defects than for the former owner to raise the money to pay the damages. The representor, it should be stressed may be entirely innocent—perhaps himself the unsuspecting victim of an earlier fraud.

Section 2 (*1*) imposes liability in damages on a party to a contract who has induced the other to enter into the contract by means of a negligent misrepresentation. Before the Act, such liability might have arisen under *Hedley Byrne* v. *Heller*,[12] but the

[10] 10th Report, para. 6.

[11] Such dealing does not of course make *restitutio in integrum* " impossible ": this requirement is satisfied if the representee can reconvey the house.

[12] [1964] A.C. 465.

subsection goes beyond that case in two respects. First, it is not necessary under the subsection to ask whether there was a " special relationship " between the parties: it is enough if they are the two parties to a contract. The subsection would almost certainly apply where the representation was made by the agent of the other contracting party; and, if literally construed, it would in such a case cover the personal liability of the agent as well as that of the principal. But where, as in *Hedley Byrne* v. *Heller* itself, the representation is made by a third party, the need to show a special relationship will still exist. Secondly, the subsection reverses the burden of proof: the representor is liable 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." Where a contract is concluded after long negotiations, or where (as on a sale of land) the actual conclusion of the contract takes place some considerable time after the parties have reached agreement, the task of proving that the reasonable grounds persisted right up to the moment of contracting might well be a difficult one. On the other hand, the subsection only requires the representor to prove that he had reasonable grounds for his belief. Thus the actual means of knowledge of the representor are relevant in determining whether he has satisfied the burden of proof under section 2 (1): a layman may succeed here where an expert would fail.

The statement that section 2 (1) imposes liability for negligent misrepresentation inducing a contract is (it is hoped) accurate; but the subsection does not actually say this. Instead, it produces this effect in a most extraordinary way, by a fiction of fraud: " if the person making the misrepresentation would be liable in 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 " the matters referred to above. It is not clear why this clumsy fiction was adopted, but it appears to have four possible consequences.

(i) *Damages.* The measure of damages in the statutory action will apparently be that in an action of deceit. That is, the plaintiff will recover the difference between the price which he has paid and the actual value of the subject-matter received by him in exchange; and also any loss which he may have suffered by acting in reliance on the misrepresentation.[13] But he will not be entitled to be placed in all respects in the position in which he would have been had the representation been true. He could not, for example, recover the difference in value between the thing as it was and its value as it would have been had the representation been true: this is the contractual measure of damages and does not apply in an

[13] See Mayne and McGregor, *Damages*, ss. 955–956, 964.

action of deceit. It is arguable that the measure of damages under the subsection is still further restricted by the opening words of the section which give the new cause of action to a person who as a result of entering into the contract or of the misrepresentation (it is not clear which) has suffered "loss." There is no reference here, as there is in section 43 of the Companies Act,[14] to "damage." Thus it is arguable that the new cause of action is only in respect of pecuniary loss. But more probably the damages recoverable in the new action are the same as those recoverable in an action of deceit and so include damages in respect of injury to property and in respect of personal injury.[15]

(ii) *Agency.* In the law of deceit, there is a body of rules which deals with the situation in which responsibility for a misrepresentation is shared between principal and agent or between several agents of the same principal. Under these rules the *mens rea* required for fraud must actually exist in one of the persons responsible, who must know both that the representation was being made and that it was false.[16] One reason for this requirement was the undesirability of attaching the stigma of fraud to a person who was morally innocent. Clearly this argument is much less appropriate where liability for negligence is in question. It might, for example, be reasonable to make a large company liable for faulty organisation in distributing information to its employees, even though each of them individually can discharge the burden of proof under section 2 (1). Yet a possible effect of the fiction of fraud is to exonerate the company itself from liability in such a case.

(iii) *Inducement.* The requirement that the representee must have been induced to enter into the contract by the misrepresentation normally means two things. First, that the representee must in fact have relied on the representation, and, secondly, that the representor must have intended that he should do so, or at least have realised that he would probably do so. The first requirement applies to all cases of misrepresentation, but the second may produce different consequences in cases of fraud and negligence respectively. Once fraud is established it is scarcely possible that the representor could show that he did not intend or realise that the representee would act on the representation; whereas in a case of negligence the representor may in truth not intend or realise this. If, for example, the representor tells the representee that he should test the information by his own inquiries this will not save

[14] Which is said to have inspired the present subsection: Law Reform Committee, 10th Report, para. 18.

[15] See *Mullett* v. *Mason* (1866) L.R. 1 C.P. 559 and *Burrows* v. *Rhodes* [1899] 1 Q.B. 816.

[16] See *London County Freehold* v. *Berkeley Property Co. Ltd.* [1936] 2 All E.R. 1069; *Armstrong* v. *Strain* [1952] 1 K.B. 232.

him in a case of fraud,[17] but it might (apart from the fiction of fraud) do so in a case of negligence, at least where the representor fully expects the representee to test the information himself. The fiction of fraud introduced by section 2 (1) seems to mean that the negligent representor will now be liable in such circumstances.

(iv) *Limitation.* Section 26 of the Limitation Act 1939 provides that, where an action is " based upon " or " concealed by " the fraud of the defendant, the period of limitation does not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. In the debates Lord Reid suggested that the effect of the fiction of fraud in the present subsection might well be to apply this rule to the new statutory cause of action for negligence.[18] On the other hand it could be argued that an action under section 2 (1) is not " based upon fraud " and it is much to be hoped that this view will prevail. For the application of section 26 to such an action would, as Lord Reid said, be " rather unreasonable." [19]

Section 2 (2) gives the court a discretionary power to award damages for innocent misrepresentation in lieu of rescission. The subsection excludes fraudulent misrepresentation, which will still allow a right to rescind *and* to claim damages. But the subsection extends to all other misrepresentations, so that it will be possible to award damages even for a perfectly innocent misrepresentation: that is, for one which is not negligent within section 2 (1). It is, certainly, an improvement in the law that some form of monetary relief is now available as a remedy for innocent misrepresentation, so that it will no longer be necessary to unscramble a whole transaction because of some relatively minor misstatement. But the new remedy is not wholly satisfactory either and there are many problems concerning its scope. Moreover, it does not entirely supersede the older remedies and for this reason it has left the law in a very complex state. Tho following points call for particular comment.

(i) The new remedy is discretionary. Thus a plaintiff who wishes to claim damages as of right against a defendant who is not fraudulent or negligent must still prove that the representation has contractual force.

(ii) The new remedy may only be given in lieu of rescission. Thus, if the representee wishes to rescind the contract his claim for compensation will still be limited by the principles which

[17] *S. Pearson Ltd.* v. *Dublin Corpn.* [1907] A.C. 351. It may well be that the reason why the representor is liable for fraud in this situation is, not that special rules apply to fraud, but because the proof of fraud involves (as a necessary inference of fact) that the representor expects the representee to act on the representation, and not to verify the facts himself. If the representor really expects the representee to verify the facts he will presumably not be found to have made a fraudulent statement.

[18] 274 H.L. 936.

[19] *Ibid.*

determine the extent of an "indemnity." The actual decision in *Whittington* v. *Seale-Hayne* [20] remains as good law as it ever was.

(iii) The subsection enables the court to award "damages," but it does not state whether the measure of damages is the contractual or the tortious measure. A moment's reflection about the facts of, for example, *Leaf* v. *International Galleries* [21] will reveal the importance of this question. If the tortious measure applies, the plaintiff in such a case recovers the amount by which the picture was worth less than the £85 which he paid for it: and this could not be more than £85. If the measure is contractual, the plaintiff recovers the amount by which the copy was worth less than the original: this could be many thousands of pounds. In such an extreme case the court would no doubt refuse to exercise its discretion to award damages if it felt convinced that the contractual measure was intended by the subsection. The wording gives little guidance, nor could any be obtained from the debates, even if these were admissible. For the statements by Government spokesmen that the measure of damages under section 2 was the tortious measure all appear to refer to subsection (1).[22] At one stage, an amendment was introduced,[23] the effect of which would have been to apply the contractual measure to actions under section 2 (2).

[20] (1900) 16 T.L.R. 181.

[21] [1950] 2 K.B. 86. The facts of this case deserve another footnote, particularly on the point whether there was a warranty in that case. According to the Law Reports (where the statement of the facts is the reporter's), "At the time of the purchase the defendants represented that the picture was painted by *John* Constable." According to the All England and Times Law Reports, Denning L.J.'s judgment states that a receipt was given as follows: "Mar. 6, 1944. One original oil painting Salisbury Cathedral by *J.* Constable, £85"; and that "On the back of the picture there was a label indicating that it had been *exhibited as a Constable*, and during the negotiations for the purchase the sellers represented that it was a painting by Constable": [1950] 1 All E.R. 693, 694; 66 T.L.R. (Pt. 1) 1031, 1032. In the debates on the Misrepresentation Act Lord Denning referred to

> "two or three cases which we have had in the Court of Appeal and which will be altered by this Bill. . . . One case concerned a man who bought a picture of Salisbury Cathedral for £85. The salesman told him that it was by 'J. Constable' and it was delivered to him. *Nothing was put on the receipt* about its being by Constable, but he believed it. After a *little time* when he was going to resell it, he found it was not by Constable at all, so he wanted to set this sale aside and to get his money back. But the court said: 'No, you cannot do that. You cannot even get damages because it was not a term of the contract.' I hope that this Bill will remedy that situation at once" (274 H.L. 939–940).

This sounds rather like *Leaf* v. *International Galleries* except for the statements that "Nothing was put on the receipt" and that the plaintiff found that the picture was not by Constable "after a little time." (If, in a future case, he takes five years to find out the truth, s. 2 (2) will not help him at all.) It is noteworthy, however, that none of the versions of *Leaf's* case except that in the Law Reports states that the dealer ever said that the picture was by *John* Constable. "By J. Constable" or "exhibited as a Constable" would not in the language of dealers mean that the picture had been painted by John Constable; and there is little doubt that a custom to that effect could have been proved had the buyer claimed the enormous damages which would have been recoverable for breach of warranty.

[22] Standing Committee G, February 23, 1966, 44, 56.

[23] *Ibid.* 52.

But it was not supported by the Government and was withdrawn without discussion. There is perhaps a faint hint in subsection (3), which provides that damages may be awarded under subsection (2) against a person who is also liable under subsection (1), " 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)." This may suggest the likelihood that damages under subsection (2) will be *less* than the tortious measure and make it improbable that the more extensive contractual measure was intended. As a matter of policy there is much to be said for a scale of liability which decreased according to whether the defendant (a) contractually guaranteed the truth of his representation, (b) did not so guarantee but was negligent, and (c) neither so guaranteed nor was negligent. Perhaps the expression " damages " in section 2 is vague enough to enable the courts to develop such a scale by interpretation.

(iv) The new remedy is available where a person " would be entitled, by reason of the misrepresentation, to rescind the contract." What is the effect of these words? Can the court award damages if the representee once had the right to rescind but has lost it? One possible view is that this fact should not affect the court's discretion on the ground that the words quoted above mean " would *at any time have been* entitled . . . to rescind." [24] But more probably they merely mean " would be entitled to rescind *if the court did not exercise its discretion to award damages.*" For the subsequent words that the court may award damages " in lieu of rescission " seem to suggest that both remedies must be available at the time of judgment so as to enable the court to choose between them. If this is right the discretion of the court would not extend to such cases as *Oscar Chess* v. *Williams* [25] or to the actual facts of *Leaf* v. *International Galleries.*[26] The victim of a wholly innocent misrepresentation who has lost the right to rescind will still have to show that the representation has become a term of the contract if he is to succeed in a claim for damages.

(v) We have seen that under section 1 of the Act the right to rescind a contract for misrepresentation is not affected by the fact that the misrepresentation has become a term of the contract. Does the power of the court to award " damages in lieu of rescission " extend to such a case? Two situations may be considered.

(a) The representation is incorporated as a warranty. Clearly, the option whether to rescind or to claim damages for breach of warranty is the plaintiff's. This is the effect of section 1 and not of anything in section 2 (2). If the plaintiff elects to claim rescission, he may be given (lower) damages in lieu; and he should therefore claim damages for breach of contract in the alternative.

[24] *Cf. Harvey* v. *O'Dell Ltd.* [1958] 2 Q.B. 78.
[25] [1957] 1 W.L.R. 370.
[26] [1950] 2 K.B. 86.

(b) The representation is incorporated as a condition, or at any rate as a term, the breach of which would apart from the Act give the representee the right to repudiate the contract. The representee wishes or purports to exercise this right. Does this amount to a claim within section 2 (2) " that the contract ought to be or has been rescinded," so that the court " may declare the contract subsisting and award damages in lieu of rescission "? The view that section 2 (2) applies to such cases is surprising but by no means wholly unattractive. It might, for example, give the court the power to reject an insurance company's claim to repudiate liability on the ground of an entirely innocent misrepresentation which had become a term of the policy; or to disallow a buyer's claim to reject goods for a breach of condition which has caused him no loss. Whether the court has such powers under section 2 (2) depends, of course, on the meaning of the words " rescind," " rescinded " and " rescission." The court has the powers in question if the words can refer to " rescission for breach " but not if they can refer only to " rescission for misrepresentation." One possible view is that the words refer to " rescission for misrepresentation." for the subsection deals with the case of a person who is "entitled, *by reason of the misrepresentation, to rescind* the contract. . . . ." The right to reject and repudiate for breach does not, on this view, arise simply " by reason of the misrepresentation " but by reason of its incorporation in the contract. On the other hand it could be argued that, as a result of section 1 (*a*), a misrepresentation retains its character as such, even after incorporation, for the purpose of the discretion conferred on the court by section 2 (2). As a matter of policy, this argument may be the preferable one, for the view that greater restrictions should be placed on the right to " rescind for breach " in some cases has much to commend it. But there is no hint in the legislative history that any such reform was intended, and if it has indeed been effected by section 2 (2), it would be an extraordinarily partial one. For it would not apply at all to breaches of terms which are not based on representations of fact made before the contract.

(vi) The concluding words of the subsection specify the factors which the court must consider in deciding whether to exercise its discretion to award damages in lieu of rescission. These are:

(a) The nature of the misrepresentation: this could refer to the contents of the representation and also to the degree of fault with which it was made. If the representation is negligent the representee will in fact not benefit at all from the exercise of the discretion, for, apart from it, he could get damages under section 2 (1) *and* rescind. But the court might well be induced by the innocence of the representor to award damages (if it is in his interest that this remedy rather than rescission should be granted against him).

(b) The loss that would be caused by it if the contract were upheld as well as the loss that rescission would cause to the other

party. Where the representation relates to a relatively minor matter, " damages " will often be the most satisfactory solution for both parties; but cases can be imagined where one of the parties stands to gain from rescission while the other may be prejudiced by it. Usually the representor will want to resist rescission, but he might conceivably prefer this remedy while the representee seeks damages. Under the concluding words of the subsection the court can balance the interests of both parties in respectively seeking and resisting rescission.

Section 3. This section is an attempt to deal with provisions which exclude or restrict liabilities or remedies which would otherwise arise from a misrepresentation. The section is completely different in character and scope from the clause recommended by the Law Reform Committee and was part of the abortive 1965 Bill. This would have totally avoided all clauses excluding or restricting any liability or remedy arising from a fraudulent or negligent misrepresentation, but would not have affected innocent misrepresentations in this particular respect. When the 1966 Bill was introduced, clause 3 was still confined to fraudulent and negligent misrepresentations, but, instead of providing for a total ban on exclusion clauses, the Bill now provided that such clauses would be valid where the terms of a contract had been " arrived at in negotiations between the parties." In the House of Lords this provision was attacked as being unworkable,[27] and the clause was amended in two major respects. First, its scope was broadened to cover all misrepresentations; and, secondly, instead of simply avoiding an exclusion provision, the section now lays down that such a provision " shall be of no effect except to the extent (if any) that . . ., the court or arbitrator may allow reliance on it as being fair and reasonable in the circumstances of the case."

(i) "*Agreement.*" The section applies to any *agreement* (whether made before or after the Act) which contains an exclusion provision. The use of the word " agreement " here contrasts with the use of the word " contract " throughout sections 1 and 2, and in paragraphs (*a*) and (*b*) of section 3 itself. These paragraphs define the type of clause being dealt with, namely, provisions excluding or restricting " any liability to which a party to *a contract* " may be subject as a result of a misrepresentation, and " any remedy available to another party to the *contract* " by reason of a misrepresentation. The use of the word " agreement " in the opening part of the section, therefore, appears to contemplate a situation in which the exclusion clause is embodied in a non-contractual agreement but is intended to exclude or restrict liabilities or remedies in connection with an actual contract. Thus the section would presumably extend to an agreement " subject to contract " which contained a provision excluding liability for misrepresentation. There may also be other

[27] 274 H.L. 936–937.

examples of non-contractual agreements containing exempting provisions; for example, it is possible that the clause commonly found at the foot of particulars of properties issued by estate agents might be treated as an " agreement " between the buyer and the agent which would exclude the buyer's remedies against either the vendor or the agent in the absence of section 3.

(ii) *Made before or after the commencement of the Act.* Another odd feature of the opening part of the section is that it expressly includes an agreement made before the commencement of the Act, while section 5 provides that nothing in the Act is to apply to any misrepresentation made before the commencement of the Act. Moreover, section 3 only applies where the misrepresentation is made *before* the contract. This part of section 3 can, therefore, only operate where an agreement is made before the commencement of the Act which excludes or restricts liabilities or remedies arising from a misrepresentation, and then a misrepresentation is made after the commencement of the Act,[28] followed by the actual contract. This does not seem a very likely sequence of events, but it could conceivably arise where parties have entered into a master agreement before the Act providing, *e.g.*, for the supply of goods or services under a series of contracts over a period of time, and a misrepresentation inducing one such contract is made after the commencement of the Act.

(ii) *Scope of the section.* The scope of section 3 centres round the words " a provision which would exclude or restrict any liability . . . or any remedy " which would otherwise arise from the misrepresentation. These words seem comprehensive enough, although they are not perhaps wholly appropriate to the case of a misrepresentee who simply sets up the misrepresentation as a defence to an action by the misrepresentor. However, it seems reasonable to treat this as, in a broad sense, a " remedy available " to the misrepresentee. Apart from this, it seems clear that section 3 applies to any provision which would exclude or restrict, first, a claim for damages by the misrepresentee, either for fraud, or for negligence under section 2 (1); and, secondly, the right to rescind the contract (or to get damages in lieu), and consequential claims for the recovery of money or property by the misrepresentee.

The width of the section is enormous. For example, it would apply to a " no-cancellation clause," *i.e.*, one excluding the right to repudiate while preserving the misrepresentee's claim for damages, if any. But presumably in a straightforward commercial contract between parties at arm's length, the court would exercise its discretion, either under section 3 itself so as to allow reliance on such a provision, or under section 2 (2) so as to award damages in lieu of rescission. On the face of it, the section also appears to apply to clauses excluding liability for misdescriptions, however trivial. But

[28] But see the comments on s. 5, below.

normal commercial stipulations for a margin relating, *e.g.*, to the description of goods being sold would presumably not be within the section, either on the ground that there would in fact be no misrepresentation if the misdescription falls within the stipulated margin, or on the ground that such a provision does not exclude or restrict a liability or remedy, but merely prevents the liability or remedy arising in the first place.

This last point does, however, throw up another difficulty, for the distinction between a provision which excludes or restricts a liability or remedy which would otherwise arise, and a clause which prevents such a liability or remedy from arising at all, is indeed a fine one. What would a court make, for instance, of an agreed damages clause? On a literal construction of the section there can be little doubt that such a clause does fall within its scope, but such a clause differs from the typical exempting provision in that it is normally intended for the benefit of both parties, though in the actual result it can, of course, benefit only one party or the other. One is tempted here to apply the analogy of the common law principles governing exemption clauses. In the *Suisse Atlantique* case,[29] it will be recalled, the House of Lords held (*inter alia*) that these principles do not apply to agreed damages clauses on the ground that such clauses are not really exemption clauses at all. Another type of case where there may be difficulty in saying whether the provision restricts or excludes a liability or remedy which would otherwise arise may occur where the representor tries to evade the normal consequences of a misrepresentation by stipulating that the representation should not be relied on. For example, specifications for a building or engineering contract may contain statements of fact relating to various matters, but the contract may provide that the contractor is to make his own tests and not to rely on the information in the specifications. Doubtless in a case of this kind, the court would uphold the provision in its discretion even if the section did apply to it, but it might be argued that the section has no application at all to this sort of case on the ground that the representor does not expect or intend that the representation will be acted on by the representee. However, it is submitted that a provision of this kind should not be treated as conclusive evidence that the representation is not in fact an effective inducement, and that if the court is satisfied that, despite the provision, the representor knew or should have known that the representee would rely on the statement, then section 3 should apply to it. Unless the courts are prepared to take this view it would not be difficult to draft exempting provisions which would entirely evade the effect of section 3.

Read literally, there is little doubt that section 3 would also extend to arbitration clauses, or at least to clauses of the *Scott* v. *Avery* type, which make an arbitrator's award a condition precedent

[29] [1966] 2 All E.R. 61.

to action at law. For it would be hard to argue that such a clause does not restrict any remedy available to the representee, since it restricts the most obvious remedy of all—action at law. But this can hardly have been the intention of the section since the concluding words actually confer the discretion to uphold or reject the exempting provision on " the court or arbitrator."

On the other hand the section does not apply to exclusion provisions of the kind in question in the *Hedley Byrne* case,[30] for even though the misrepresentee may subsequently enter into a contract on the strength of the misrepresentation in that sort of situation, the exclusion provision does not exclude or restrict any liability of " a party to a contract " by reason of " a misrepresentation made by him," nor does it exclude or restrict a remedy available to a party to the contract by reason of " such a misrepresentation." Nor would it apply to provisions excluding liability for negligent advice given during the performance of contractual duties arising, *e.g.*, from professional relationships, because (even if such advice could be equated with " misrepresentation ") it would not be made *before* the contract, but during its existence.

Nor again does the section apply to one particularly obnoxious type of provision, namely, a provision in a contract that any party negotiating the contract shall be deemed to be the agent of one party rather than another. For example, it is common for insurance proposal forms to contain a provision that any person filling up the form shall be deemed to be the agent of the insured, and such a clause is operative even where it is perfectly plain that the party filling in the form is (in a broad sense) a representative of the insurer and not the insured.[31] Section 3 provides no assistance to an insured in such a case, for this type of provision does not exclude or restrict any liability or remedy arising from a misrepresentation. It does precisely the reverse, for it creates a liability or remedy which would not otherwise arise, *e.g.*, because the insured has disclosed material facts to the agent which the latter has omitted to include in the proposal form.

(iv) *Misrepresentations subsequently incorporated as contractual terms.* If a provision of the agreement purports to exclude or limit the misrepresentor's liability in respect of such misrepresentations, the misrepresentee is presumably entitled to disregard the effect of the misrepresentation as a contractual term, and seek rescission or, if the circumstances warrant, damages under section 2 (1). Thus, whatever the effect of section 3 may be on the misrepresentation as a contractual term (and this is discussed below) it seems reasonably clear that section 3 will not operate the less on the misrepresentation

[30] [1964] A.C. 465.

[31] *Newsholme Bros.* v. *Road Transport & General Insurance Co. Ltd.* [1929] 2 K.B. 356; *Facer* v. *Vehicle & General Insurance Co. Ltd.* [1965] 1 Lloyd's Rep. 113.

as a misrepresentation merely because it has also become a contractual term.

But the question may also arise whether section 8 does in fact have any effect on a misrepresentation as a contractual term, if it subsequently becomes such a term. It seems probable that provisions dealing solely with liabilities and remedies arising from contractual terms are unaffected by the section because of the wording of paragraph (*a*) which refers to any liability to which a party may be subject " by reason of any misrepresentation made by him before the contract was made." On the other hand, read literally the section would invalidate (subject to the court's discretion) any provision which excludes or restricts liabilities or remedies and which deals *both* with misrepresentations and with contractual terms. The point is that the section does not invalidate a provision only *to the extent* that it excludes or restricts a liability or remedy arising from a misrepresentation; it invalidates the whole provision, though subject to the discretion of the court. In practice exclusion provisions of this nature are unlikely to be drafted in two separate clauses, one dealing with misrepresentations, and one dealing with contractual terms; and it may therefore be a moot question in some cases whether the exclusion provision is really one provision only (in which case it would seem wholly void, subject to the court's discretion) or whether it could be construed as two provisions, in which case it would remain valid in so far as it dealt with contractual terms.

If the views expressed in the preceding paragraph are correct, then, once it is found that the offending provision excludes or restricts liabilities or remedies arising from misrepresentation, the section will also apply to the offending provision in so far as it deals with (1) contractual terms which were formerly representations; (2) contractual terms which are statements of fact but were not made before the contract; and (3) contractual terms which are promises and not misrepresentations of fact at all. It is, of course, possible that a court might take the view that even though the section does strictly invalidate a provision dealing both with misrepresentations and with contractual terms, the Act as a whole was not intended to deal with contractual terms, and therefore that the court should exercise its discretion under the section so as to allow reliance on the provision in so far as it deals with contractual terms. But if in fact the provision does appear unfair or unreasonable in the circumstances of the case, and if in law the section does invalidate the provision as a whole, it is not clear whether it would really be open to the court to take this course, or whether a court would be inclined to do so even if it were open.

(v) *Discretion of the court.* The operation of the section is entrusted entirely to the discretion of the court. This discretion is an exceptionally wide one, for it enables the court not merely to uphold or reject the exclusion clause, but to uphold it " to the

extent (if any) that the court finds fair and reasonable in the circumstances." On the face of it, this confers a quite remarkable power of remoulding the clause on the court with absolutely no guidance as to the factors to be considered by the court in exercising its discretion. The court could, for example, rewrite an exclusion clause which precludes an award of damages by limiting the damages to a figure which the court thinks reasonable. It could rewrite a comprehensive exclusion clause by upholding it in so far as it precludes rescission, but condemning it in so far as it precludes an award of damages.[32] It could rewrite the clause so as to leave the misrepresentor protected in respect of some of the matters covered by the misrepresentation, while leaving him liable in respect of other matters. It could, in short, do more or less anything it felt like doing. Palm-tree justice, indeed, is becoming the order of the day.

It is true that discretionary powers to override unreasonable exempting provisions are not wholly unprecedented. For example, under section 7 of the Railway and Canal Traffic Act 1854, the courts used to have power to declare void any provision in a contract for the carriage of goods by rail if it was not " just and reasonable." [33] And section 2–302 of the Uniform Commercial Code (which was invoked as a precedent in the debates on the Misrepresentation Act [34]) confers a similar discretion on the court in contracts of sale of goods. But it must be stressed that these precedents are vastly different in scope and character from section 3 of the Misrepresentation Act. The provision in the Railway and Canal Traffic Act related to one particular type of contract only, and was justified by the fact that in that type of contract, a monopoly supplier was involved. Similarly, section 2–302 of the U.C.C. relates only to contracts of sale of goods, and appears, in any case, to be a residuary provision, designed to deal with cases not specifically dealt with elsewhere in the Code. Exclusion clauses, in particular, are dealt with by a number of other provisions, the most important of which is section 2–316, which requires that specified exclusion clauses must be " conspicuous." [35]

On the other hand the powers conferred by section 3 of this Act extend to contracts of every kind, and give the court a wholly unfettered discretion with no guidance as to the relevant factors to be considered. It seems only too probable that a discretion of this kind will be exercised *ad hoc* according to the circumstances of each case—the section seems to invite this approach—and that no coherent body of case-law will grow out of it. Indeed, it is doubtful

[32] But the court may well be reluctant to take this course where the misrepresentation was wholly innocent, because this would leave the misrepresentee remediless, and in any event the additional discretion of the court under s. 2 (2) could be exercised so as to refuse rescission.

[33] In 1921 this power was (for all practical purposes) transferred to an administrative tribunal by the Railways Act; it was finally abolished by the Transport Act 1962.

[34] 741 H.C. 1369.

[35] As defined in s. 1–201 (10).

how well the ordinary courts are equipped to handle such wide discretionary powers as these, for important questions of public policy and commercial practice may be involved (not least, of course, with regard to insurance) as to which evidence is likely to be lacking in a case in which the public is unrepresented.

The truth is that this section is an abdication by Parliament of its proper responsibility in the formulation of policy for satisfactory law reform. It is little short of scandalous that no attempt whatever should have been made to indicate the circumstances in which exempting clauses should be permissible. It is preposterous that exclusion clauses dealing with misrepresentation should be dealt with, while no express provision should be made for exclusion clauses dealing with contractual terms. And it is shocking that a provision of such potential importance should be drafted in such a way as to create so many points of doubt and uncertainty. The only consolation is that this section is (presumably) likely to be short-lived since one assumes that it is only a stop-gap measure pending the report of the Joint Working Party of the Law Commission and the Board of Trade on the whole subject of exemption clauses—not to mention the codification of the law of contract itself.

Section 4. This section rids the law of sale of goods of two long-standing sores. Subsection (1) repeals the words " or where the contract is for specific goods the property in which has passed to the buyer " in section 11 (1) (*c*) of the Sale of Goods Act 1893. The result of this is that the right to reject goods in a contract of sale will in future depend on whether the buyer has accepted the goods, whether the contract is for specific or unascertained goods. There is no doubt that this is a welcome and long-overdue reform, for the original wording of section 11 (1) (*c*) appeared to have the effect of depriving the buyer of specific goods of any right of rejection at all in many cases. The change is one which will, of course, greatly strengthen the remedies available to the consumer in contracts of sale of goods.

Subsection (2) amends section 35 of the Sale of Goods Act, which deals with acceptance. Section 34 of that Act provides that where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had reasonable opportunity to examine them. Section 35 provides that the buyer is deemed to have accepted the goods (*inter alia*) when they have been delivered to him and he does any act inconsistent with the ownership of the seller. As is well known, it was held by the Court of Appeal in *Hardy & Co. Ltd.* v. *Hillerns & Fowler* [36] that this limb of section 35 could be satisfied even where the buyer had not had an opportunity of examining the goods, with the result that a resale and delivery by the buyer deprived him of his right of rejection. Section 4 (2) of the Misrepresentation Act inserts

[36] [1923] 2 K.B. 490.

before this limb of section 35 the words " (except where section 34 of this Act otherwise provides)." Thus a buyer will no longer lose his right of rejection merely because he has done some act inconsistent with the ownership of the seller, unless he has also had a reasonable opportunity to examine the goods under section 34. Of course, if the act which the buyer has done does in fact prevent him from returning the goods to the seller,[37] he will still be unable to reject, for quite apart from section 35 of the Sale of Goods Act, it is plain that rejection is ineffective unless the buyer can place the goods at the seller's disposal.[38] Accordingly, if the buyer resells and delivers the goods to a sub-buyer, before he has had a chance to examine the goods, his right to reject the goods will in future depend on whether the sub-buyer is in turn prepared to reject or to agree to rescission of the sub-sale.

It is not clear whether the insertion made by section 4 (2) also affects the third limb of section 35, *i.e.*, that retaining the goods precludes rejection after a reasonable time has elapsed. The point is largely academic since it is improbable that the buyer could retain the goods for a reasonable time unless he has in fact had an opportunity to examine them in terms of section 34. But it could be argued that the third limb is already, in effect, a sub-branch of the second limb, *i.e.*, that the true interpretation of the section (without the insertion) is that the buyer is deemed to have accepted

(1) when he intimates acceptance; or
(2) when the goods have been delivered to the buyer; and
  (a) he does an act inconsistent with the seller's ownership; or
  (b) when after the lapse of a reasonable time, he retains the goods without intimating rejection.

If this is right, the insertion made by section 4 (2) of the Misrepresentation Act would govern both the second and the third limbs of the section.

It may seem captious to quarrel with so useful a reform as this amendment to section 35, but the question does arise whether it in fact goes far enough. Since (as indicated above) the buyer cannot reject in any event unless he is in a position to restore the goods to the seller, why should he lose the right to reject merely because he has done an act inconsistent with the ownership of the seller and has had an opportunity to examine the goods? Suppose the buyer fails to take the opportunity, or fails to discover the defect in question, and then resells and delivers to a sub-buyer. If the sub-buyer immediately discovers the defect and returns the goods to the buyer, the buyer will still be unable to reject the goods notwithstanding the

[37] Strictly, the buyer is not required to return the goods, but merely to intimate to the seller that he rejects them: Sale of Goods Act 1893, s. 36.

[38] See *J. L. Lyons & Co. Ltd.* v. *May & Baker Ltd.* [1923] 1 K.B. 685; *Hardy & Co. Ltd.* v. *Hillerns & Fowler* [1923] 2 K.B. 490 at p. 496; *Kwei Tek Chao* v. *British Traders & Shippers Ltd.* [1954] 2 Q.B. 459 at p. 488.

amendment to section 35 made by section 4 (2). Yet the fact that the buyer does an act which *may* affect his ability to restore the goods to the seller is surely no reason for depriving him of his right to reject when in *fact* it does not affect his ability so to restore the goods. All this is not to suggest that there may not be other very good reasons for cutting down the right of rejection in a contract of sale,[39] but this does not seem to be the right way of doing it.

One welcome result of section 4 will be to get rid of most of the difficulties which have sometimes arisen from the existence of two parallel sets of remedies available to a buyer in contracts of sale.[40] In future, it will usually be plain that the buyer's right to reject will be lost at the same time as his right to rescind for misrepresentation. Thus affirmation of the contract barring rescission for misrepresentation, will presumably generally be the same as acceptance, barring rejection. And lapse of time which bars rescission for misrepresentation will generally also amount to acceptance under section 35 of the Sale of Goods Act, barring rejection. But cases of divergence may still occur. As seen above, if a buyer resells and delivers to a sub-buyer after he has had an opportunity for examination, he will lose any right to reject. But if the sub-buyer in turn rejects the goods so that the buyer is able to restore them to the seller, it is by no means certain that he would be unable to rescind for misrepresentation.[41] Moreover, the existence of the two sets of remedies will be more common in future since section 1 (*a*) of the Act (as seen above) provides that rescission remains a remedy for misrepresentation even where the representation becomes a term of the contract.

Section 5. This is the commencement section. It provides that nothing in the Act is to apply in relation to a misrepresentation or contract of sale made before the commencement of the Act. Unfortunately the draftsman appears to have overlooked the elementary principle of continuity of representations, and it is therefore unclear whether this is intended to qualify the operation of the section or not. The normal principle is that a misrepresentation has continuous effect up to the time of the contract,[42] and it is therefore arguable that a misrepresentation made before the commencement of the Act which induces a contract afterwards would fall within the scope of the Act.

One further point appears to have been overlooked. It is a debated and unsettled point whether statutes reforming the law of

[39] See Treitel (1967) 30 M.L.R. 139.

[40] See *Leaf* v. *International Galleries* [1950] 2 K.B. 86; *Long* v. *Lloyd* [1958] 1 W.L.R. 753.

[41] See *Abram S.S. Co.* v. *Westville Shipping Co.* [1923] A.C. 773. There was no actual delivery in this case (which concerned a ship in course of construction) but buyers had sold the ship and passed property to sub-buyers, and on rescission by the sub-buyers, it was held that buyers were also entitled to rescind.

[42] *Traill* v. *Baring* (1864) 4 D.J. & S. 318; *With* v. *O'Flanagan* [1936] Ch. 575; *Briess* v. *Woolley* [1954] A.C. 333.

torts bind the Crown [43] and a similar debate might be raised with regard to statutes reforming the law of contract. The tendency in recent years has been to insert provisions in such reforming Acts which expressly settle the point.[44] The present Act reforms the law of contract and the law of torts in respects that might well affect the Crown; but it does not state whether it binds the Crown. It is to be hoped that the Crown will never take the point and that the problem here raised will remain purely academic.

P. S. ATIYAH.*
G. H. TREITEL.†

[43] Williams, *Crown Proceedings*, pp. 55–58; Street, *Governmental Liability*, p. 134; Treitel [1957] *Public Law* 322–326.

[44] Law Reform (Frustrated Contracts) Act 1943, s. 2 (3); Law Reform (Personal Injuries) Act 1948, s. 4; Law Reform (Limitation of Actions, etc.) Act 1954, s. 5; Occupiers' Liability Act 1957, s. 6.

* M.A., B.C.L.; Fellow of New College, Oxford.
† M.A., B.C.L.; Fellow of Magdalen College, Oxford; All Souls Reader in English Law.