COMMON SENSE DECISIONS IN THE LAW OF CONTRACT

In 1918, Nathan Isaacs examined the relation between fault and liability in the history of tort [1] and came to the conclusion that, "alternately approaching and receding from the culpability theory, we have travelled in a cycle, but our second path has been described by a much larger radius than our first." He rejected both the Holmes view that tortious liability developed from liability for moral shortcoming to the notion of acting at one's peril and the converse view which had been advanced by Wigmore and was more widely held. He sought to demonstrate that there had been no one tendency in the history of English law, which had, in his opinion, manifested a series of swings of the pendulum. In 1918, he thought he could point to "the recent tendency to revert to liability without fault in certain cases."

Although much the same sort of question (fault-liability as against liability without fault) may arise in the criminal law and in certain other branches of the law,[2] yet, in the law of contract, on the other hand, the kindred problems are not precisely the same. None the less, there are problems in contract which raise such questions as how far contractual liability should depend on the moral blameworthiness of the defendant, how far the courts should make liability depend on common sense and decency, and so on. It is thought that in all branches of law the same swings of the pendulum may be seen as those demonstrated in the law of tort by Nathan and, although it may well be true that in 1918 there was a tendency to accept an objective theory of contract (which has affinities to the notion of liability without fault in tort), yet in the past two decades greater attention appears to have been paid to "moral shortcomings." The courts have shown a readiness to sacrifice earlier rules, and even statutory provisions, to the need for as just a solution as possible.

In the law of tort, where Nathan detected a tendency to revert to liability without fault, the pendulum has swung back on several occasions since 1918. In *Heap* v. *Ind Coope & Allsopp Ltd.*,[3] for instance, the landlord and tenant of a public house were not allowed to escape liability for damage done by a defective cellar flap, for the Court thought that (in

1. *Fault and Liability* by Nathan Isaacs, (1918) 31 H.L.R. 954.
2. Even in the unlikely cases of procedure and pleading.
3. [1940] 2 K.B. 476.

the words of McKinnon L.J.,[4]) "in all common sense and decency" Heap should recover, if only the precedents would allow it (which, fortunately, they did). This is, perhaps, not the same thing as liability for 'moral shortcoming', but it is some way from liability without fault. Is this tendency discernible in any other branch of law, and, in particular, in contract ?

Our Victorian ancestors appear to have been wedded to the notion of a criminal liability dependent primarily on the 'moral shortcoming' of the accused, so that there was no liability without *mens rea*[5] and conversely there might well be liability for 'moral shortcoming',[6] whatever the *ipsissima verba* in the statute book. Mrs. Tolson's conviction was quashed because, apparently, the Court felt, with Stephen J., that "the conduct of the woman convicted was not in the smallest degree immoral," whereas Prince's conviction was upheld because, apparently, the defence of mistake, if it is to succeed, must relate to facts which, if they existed, would have made the accused's act not immoral. Our own age which has seen the development or criminal liability for public mischief [7] and for conspiracy to corrupt public morals [8] can hardly expect the courts of today to abandon their regard for 'the public interest'. Yet the Court of Criminal Appeal has been prepared to ignore the plain words of a statute, in order to come to a conclusion that would be supported by 'common sense and decency'. By section 1(*f*) of the Criminal Evidence Act, 1898, an accused person who has elected to give evidence loses his protection against being asked questions as to credit if (*inter alia*) "the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor. . . . ." Yet in *R.* v. *Turner,*[9] the Court of Criminal Appeal held that a man charged with rape, whose defence was that the prosecutrix had not only consented but had incited him by acts of gross indecency, is not to be cross-examined as to credit. Later decisions [10] have added the rule that, notwithstanding the statutory deprivation of the protection of the accused in such circumstances, the court may, in its discretion, none the less refuse the prosecution the right of cross-examination ; indeed, it is a ground of appeal that the trial judge followed the statute and failed to put his mind to the question whether he should

4. At p. 483. The learned Lord Justice said: "So far as I am concerned I freely avow that, in as much as in common sense and decency Heap ought to be able to recover against somebody, and, in the circumstances of this case, and having regard to the correspondence which has taken place, in all common sense and decency he is able to recover against these defendants if the law allows it, my concern is to see whether, upon the cases, the law does allow him so to recover."
5. *R.* v. *Tolson* (1889) 23 Q.B.D. 168.
6. *R.* v. *Prince* L.R. 2 C.C.R. 154.
7. *R.* v. *Manley* [1933] 1 K.B. 529.
8. *Shaw* v. *D.P.P.* [1961] 2 W.L.R. 897.
9. *R.* v. *Turner* [1944] K.B. 463.
10. See, *e.g. R.* v. *Cook* [1959] 2 Q.B. 340.

exercise a discretion. The ground for these decisions, we are told, is simply that "to decide otherwise would be to do grave injustice never intended by Parliament." [11]

Lest it be thought that such decisions, which vary the plain words of an Act of Parliament, reflect a trend in the courts towards avoiding injustice to the accused, reference may be made to *R.* v. *Oakes,*[12] in the same volume of the Reports as that which contains *R.* v. *Cook.* [13] There, the Court of Criminal Appeal was prepared to substitute "or" for "and" in section 7 of the Official Secrets Act, 1920, in order to uphold Oakes's conviction. This decision marks no new departure. Even in the nineteenth century, the courts were prepared to interpret the criminal law as common sense and decency required. Thus, although it was an offence to have carnal knowledge of a girl below the age of sixteen, and although it is an offence to incite a person to commit an offence, it was held in *R.* v. *Tyrell*[14] that it is not an offence for such a girl to incite a male person to have carnal knowledge of her.

The interpretation of the rules of procedure and pleading is perhaps the last place in which the lawyer would expect to find decisions in which the courts sacrifice technicality and legalism to common sense and decency. We have no doubt come a long way since a plaintiff was non-suited for a 'variance' for writing 'Baron Waterpark of Waterfork' instead of 'Baron Waterpark of Waterpark'.[15] But even in this century the occasional unsuccessful litigant may well feel that his opponent has been allowed to take advantage of counsel's errors in pleading. No doubt the defendants in *Farr, Smith & Co.* v. *Messers, Ltd.* [16] considered that they had been the victims of a dirty trick which no court wishing to proceed "in all common sense and decency" would countenance. In view of the decision in that case, it is perhaps not surprising that in *Warner* v. *Sampson* [17] the court of first instance visited upon the defendant the sins of her counsel. Her defence denied every allegation made by the plaintiff, her landlord, who thereupon claimed the forfeiture of the lease on the ground that the lessee had denied the landlord's title. This claim was allowed by Ashworth J. The reversal of his decision by the Court of Appeal[18] is a conclusion more in conformity with common sense and decency. The Court of Appeal's reversal of the judge of first instance

11. *R.* v. *Turner* [1944] K.B. 463, at p. 469. More recently, in *R.* v. *Flynn* [1961] 3 All E.R. 58 it has been held that where the prisoner's accusations are necessarily involved in the very nature of his defence, the judge's discretion should generally be exercised in his favour.
12. [1959] 2 Q.B. 350.
13. *Supra.*
14. [1894] 1 Q.B. 710.
15. *Waller* v. *Mace* (1819) 2 B. & Ald. 756.
16. [1928] 1 K.B. 397; *cf. Grindell* v. Bass [1920] 2 Ch. 487.
17. [1958] 2 W.L.R. 212.
18. [1959] 2 W.L.R. 109.

in *Baker* v. *Medway Building & Supplies, Ltd.*[19] is yet another instance of what one learned commentator[20] has termed "ensuring that the law achieves justice."

To what extent will contractual liability be made to reflect the requirements of 'common sense and decency'? To what extent will the 'moral shortcomings' of the parties be taken into account in determining this question? It has been thought by some that this century has seen the establishment of the semblance of agreement (rather than agreement itself) as the basis of contract — a view which would allow the court, in some measure at least, to decide objectively what justice demanded as between the parties. Dr. Glanville Williams,[21] for instance, has seen in the judgment of Denning L.J. in *Rose* v. *Pim*[22] the highwater mark of this 'objective' theory of contract.[23] In the past, the Courts have been prepared to ignore general principles and even to reject the plain meaning of the words of statutes in order to achieve the result thought to be demanded by common sense and decency. Thus, where a married man promises to marry a spinster who thinks him to be single, she may recover damages from him, notwithstanding the fact that there is here a lack of that fundamental principle of contractual liability, mutuality.[24] It has been suggested[25] that this exception may be incorporated into the general body of the law, but it may be doubted whether the courts saw it in this way. In *Wild* v. *Harris*[26] the Court appears to have been content to found its judgment on the proposition that "it would be strange indeed to allow the defendant to rely on his own wrong." Nor do the courts seem to have been unwilling even to abandon the words of an Act of Parliament, to obtain a result in conformity with common sense and decency. The Infants' Relief Act, 1874, declares certain contracts to be "absolutely void"; money under a void contract can usually be recovered; yet in *Valentine* v. *Canali*[27] an infant who had enjoyed the use of furniture received by him under a void contract was held not to be entitled to recover back a sum he had paid on account. The Divisional Court appears to have so decided merely because any other result would in its opinion, have been contrary to common sense and decency. It may be said that the decision in *Coutts & Co.* v. *Browne-Lecky*[28] that the guarantor of an infant's void contract is not himself liable on his undertaking did not reflect either common sense or decency, but the practical importance

19. [1959] 1 W.L.R. 1216.
20. Mr. P. H. Pettit in 22 M.L.R. 325.
21. 17 M.L.R. 154.
22. [1953] 2 Q.B. 450.
23. Professor Shatwell in 33 *Can. Bar Rev.* 164 disagrees with Dr. Glanville William's view of this case.
24. *Wild* v. *Harris* (1849) 7 C.B. 999; *Millward* v. *Littlewood* (1850) 5 Ex. 775.
25. By Mr. Treitel in 77 L.Q.R. 83.
26. *Supra* at p. 1005.
27. (1889) 24 Q.B.D. 166.
28. [1947] K.B. 104.

of that distinction has now disappeared, in view of the Court of Appeal's conclusion in *Yeoman Credit Ltd. v. Latter*[29] that if the third party's undertaking is drafted as an indemnity he is liable as a principal debtor, whatever the position of the infant.

Can it, therefore, be said that there is today a trend towards common sense decisions in the law of contract ? It is proposed to exemplify the answer to this question by an examination of some recent decisions relating to illegality and to the 'fundamental term'.

In 1938, Lord Atkin enunciated the proposition[30] that "no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person." No doubt a century and a quarter earlier, Lord Ellenborough C.J. had in mind the case where the legislature had rendered certain conduct criminal, when he laid down the rule[31] that "what is done in contravention of the provisions of an Act of Parliament, cannot be made the subject-matter of an action." There is, indeed, ample authority for the proposition that a contract to do an act prohibited by Parliament or one which contemplated that such an act might be done or which entailed the doing of such an act, is properly termed an illegal contract. Moreover, the courts have frequently proceeded on the assumption that illegality in the course of the performance of the contract renders the contract illegal.[32] It will be remarked that in these cases the question was whether the parties' conduct was criminal or otherwise illegal; the courts were not concerned with the question of their 'moral shortcomings'. The decisions proceed upon the simple belief that illegality is illegality. In the course of time, however, the courts, in the process of working out the consequences of illegality, have accepted the proposition that there are different types of illegality and different types of statutes. Thus in 1952 both Somervell and Denning L.JJ. were prepared[33] to distinguish between illegality arising from an agreement to commit an immoral or prohibited act (of which there could be no severance) and illegality arising out of an agreement in restraint of trade (to which the doctrine of severance might apply). The kind of illegality is thus relevant to the question of severance[34] and the Courts may pay attention

29. [1961] 1 W.L.R. 828.
30. In *Beresford* v. *Royal Insurance Co. Ltd.*, [1938] A.C. 586, 596.
31. In *Langton* v. *Hughes* (1813) 1 M. & S. 593, 596.
32. See, *e.g. Bensley* v. *Bignold* (1822) 5 B. & Ald. 335, 342; *Anderson* v. *Daniel* [1924] 1 K.B. 138, 145; *B. & B. Viennese Fashions* v. *Losane* [1952] 1 All E.R. 909, 912, 913. In *Archbold's (Freightage) Ltd.* v. *Spanglett, Ltd.* [1961] 2 W.L.R. 170 (dealt with later), it was necessary to distinguish *Re Mahmoud & Ispahani* [1921] 2 K.B. 716 and *Dennis* v. *Munn* [1949] 1 All E.R. 616. This terminology seems to have been abandoned in *Trant* v. *Marles* [1954] 1 Q.B. 29.
33. In *Bennett* v. *Bennett* [1952] 1 K.B. 249. The decision has been stultified by s.l (2) of the Maintenance Agreements Act, 1957.
34. See *per* Lord Moulton in *Mason* v. *Provident Clothing Company* [1913] A.C. 724, 745.

to the moral shortcomings of the parties. During the past decade there have been at least three outstanding instances in which the courts have been prepared to distinguish between what may be called mere illegality, on the one hand, and illegality coupled with moral shortcomings on the other. The consequences which normally attach to illegality have in these cases not been applied to illegality where there is no moral shortcoming, because, it would seem, the courts have felt that to decide otherwise would be contrary to common sense and decency.

The *ratio decidendi* of *Trant* v. *Maries* [35] is difficult to enunciate,[36] but the majority of the Court of Appeal held that the defendants, who had delivered the goods without the invoice required by statute, were, notwithstanding this illegality entitled to claim an indemnity from the original suppliers of goods. Denning L.J. expressly grounded his opinion upon the fact that the failure to conform with requirements of the statute was "an act of inadvertence," and not a deliberate breach of the law. Since the defendants' illegality was not accompanied by any degree of moral culpability, there was, in the opinion of the learned Lord Justice, "no moral justification" for applying the maxim *ex turpi causa non oritur actio,* for this was an instance "where a man can be guilty of a crime without any moral culpability at all." In such circumstances, where the illegality affects only the damages recoverable, there must be moral culpability before the maxim can defeat a claim. It has been suggested [37] that it is not obvious on what principle this distinction is based; and, indeed, a year before Denning L.J. expressed his opinion, both Evershed M.R. and Jenkins L.J. had expressly stated that a failure to deliver a statutory invoice "tainted the contract," indeed, "must taint the whole contract with illegality." [38] In the eyes of Denning L.J. the doctrine of 'tainting' would presumably be confined to cases of moral turpitude. Such a conclusion may be thought to conform with common sense and decency, for a supplier who seeks to evade liability for misdescription by pleading that the goods were later passed on without a statutory invoice relies on a defence which "does not seem founded on a very nice feeling." [39]

In *St. John Shipping Corporation* v. *Joseph Rank, Ltd.* ,[40] Devlin J. follows the line of reasoning advanced by Denning L.J. in *Trant* v. *Marles.*[41] After stating that a court ought to be slow to hold that a statute intends to interfere with contractual rights, the learned judge adds: [42] "Caution in this respect is, I think, especially necessary in these

35. [1954] 1 Q.B. 29.
36. See 16 M.L.R. 372.
37. By Dr. Goodhart in 69 L.Q.R. 293, 295.
38. *B. & B. Viennese Fashions* v. *Losanne* [1952] 1 All. E.R. 909, 912, F, G, 913A, 914.
39. The words are those of Hullock B. in *Tyson* v. *Thomas* (1825) McCl. & Y. 119, 128.
40. [1957] 1 Q.B. 267.
41. *Supra.*
42. [1957] 1 Q.B. 267, at p. 288.

times when so much of commercial life is governed by regulations of one sort and another, which may easily be broken without wicked intent. Persons who deliberately set out to break the law cannot expect to be aided in a court of justice, but it is a different matter when the law is unwittingly broken." The older view, that illegality is illegality, is rejected because "it is questionable how far this contributes to public morality." Devlin J. bases his own conclusion on common sense and decency : "Commercial men," he says (at p. 289), "who have unwittingly offended against one of a multiplicity of regulations may nevertheless feel that they have not thereby forfeited all right to justice."

In the *St. John Shipping* case[43] the claim for freight made by carriers who had illegally overloaded their ship succeeded on the ground that it was not necessary for them to disclose their illegality, for "a ship-owner suing for his freight has only to show that he delivered the goods in the same condition that he received them" *(per* Devlin J., at p. 273). It may therefore be thought that Devlin J.'s observations on the nature and consequences of an illegality not before the Court were *obiter.* In *Archbold's (Freightage), Ltd.* v. *Spanglett, Ltd.*,[44] however, carriers who claimed under a contract of carriage of goods, which were in fact carried by sub-contractors illegally in an unlicensed van, were unable to assert a cause of action without relying on the contract of carriage, so that the illegality of the contract and its effects were directly in issue.[45] In holding that the defendants could not rely on the illegal performance of the contract, Pearce L.J. did so on the ground that the plaintiffs had been "imposed upon," so that for them, "no question of moral turpitude arises here .... [They] were never *in delicto* since they did not know the vital fact that would make the performance of the contract illegal." If the courts are to assess the consequences of illegality in terms of moral turpitude, the earlier warning of Pearce L.J.[46] becomes important, namely, that the courts should not be too ready to imply that a contract is forbidden by statute, since to do so would deprive them of the power "to discriminate between guilt and innocence." And, in this context, one may surmise, the distinction owes more to the notion of moral shortcoming than to technical illegality.

It may be thought that the judicial opinions set out above proceed upon the notion that a plea of illegality should not defeat a plaintiff who ought 'in all common sense and decency' 'to be able to recover against somebody'. Are the recent decisions developing the doctrine of the

43. *Supra.*

44. [1961] 2 W.L.R. 170.

45. See *per* Pearce L.J. on [1961] 1 All E.R., at p. 421 I.

46. At p. 423 H. It may further be remarked that the distinction drawn by Devlin J. in the *St. John* case, *supra,* between a contract for the hire of an unlicensed vehicle and a contract for the carriage of goods in an unlicensed vehicle is accepted by Pearce L.J. on the ground that it is "supported by common sense and convenience."

'fundamental term' founded on the same notion ? The principle that no one should be able to excuse himself in advance from the performance of the fundamental obligation of his contract may obviously be described as a principle of common sense and decency. That the purchaser of a machine should be compelled to accept heap of worthless scrap metal[47] because the seller has excluded liability for breach of condition or warranty must outrage the feelings of all but the most hardened salesman. Over the past decade, the courts from *Alexander* v. *Railway Executive* [48] in 1951 to *Yeoman Credit* v. *Apps* [49] in 1961, have been active in suppressing such outrages on decency, while learned commentators have been equally active in exploring the terminology in which rules to achieve this purpose may be formulated.[50]

It is not proposed to rehearse the difficulties of finding a formula in which to differentiate between a (or the) fundamental term (or condition) [51] and the other 'parts' of a contract, save to remark that some of the language used for this purpose is reminiscent of that formerly employed for the purpose of differentiating a condition from a warranty [52] — language which suffered from the inherent difficulty that what was later described as a condition was in an earlier period described as a warranty. It may well be that the difficulties of terminology which we have inherited from the past will thwart attempts to define comprehensively what in any given case must be regarded as the fundamental term. We may therefore have to content ourselves with forecasting the court's decision in the light of a series of particular conclusions reached by earlier tribunals, without being able to infer from these conclusions any principle of a general nature. It may be, as Mr. Guest has suggested [53] that "a party cannot exempt himself from a failure to perform the main purpose of a contract into which he has entered," but what is the main purpose of any contract will be determined ultimately by the court. There are no doubt cases in which this will be obvious, but in most of those which will be the subject-matter of litigation, the court is likely to have some elbow-room in deciding whether the 'term' with which an exemption clause conflicts is 'fundamental' or no. In such cases, the court will be able to reach the result which is believed common sense

47. See *L'Estrange* v. *Graucob* [1934] 2 K.B. 394.
48. [1951] 2 K.B. 882.
49. [1961] 3 W.L.R. 94.
50. See, *e.g.* 10 M.L.R. 26; 4 Bus. L.R. 30; 15 Camb. L.J. 16; 77 L.Q.R. 98.
51. The language used has shown some slight variations: *e.g.* a (or the) fundamental term, a (or the) fundamental condition, the fundamental obligation and a fundamental breach of the contract ("as the common lawyers call it": *per* Harman J.).
52. The present writer recollects the description of a condition as 'a fundamental, vital, essential term'. How does this differ from a 'fundamental term'?
53. 77 L.Q.R. 98; 327.
54. For this reason one may readily accept Mr. Guest's forecast that the courts would be acute to defeat any attempt to incorporate the exemption clause as part of the fundamental obligation.

and decency require.[54] As Pearce L.J. pointed out in *Yeoman Credit Ltd.* v. *Apps,*[55] "whether there has been a breach of a fundamental condition of the agreement is a question of degree depending on the facts." If this be so, the earlier decisions will give no more than a series of particular *indicia* of the circumstances in which the courts have thought that a defendant should not be permitted to hide behind an exemption clause. A railway company which allows the depositor's friend first to meddle with, then to move, the goods deposited;[56] the man who delivers a car that will not go;[57] shippers whose claim to exemption is so wide that "they would have been absolved if they had given the goods away to some passer-by[58] — these are defendants against whom in all common sense and decency a plaintiff should expect to succeed. But a seller who delivers round mahogany logs, under his contract, has not done "something totally different from that which the contract contemplates" merely because they are short in measure and many are undergrade.[59]

It would seem, then, that a plaintiff who, in all common sense and decency, ought to recover will not necessarily be defeated either by an act of technical illegality on his part (however plainly illegal it be) or by his acceptance of an exemption clause (however plainly it may exempt the defendant from liability for breach of a fundamental term). May we see in this conclusion a 'recent tendency' in the law of contract such as Nathan Isaacs claimed to have detected[60] (albeit in the opposite direction) in the law of tort in 1918? Are we in an age in which the swing of the pendulum is towards an emphasis on common sense and decency in the interpretation of contracts? It is unlikely that such a claim could be substantiated. In the first place, such a tendency, if it exist, cannot be said to be wholly novel. Mr. Marsh has pointed out[61] that distinction between illegality based on an immoral act and mere illegality (such as restraint of trade) is already seen in the eighteenth century. In *Mouys* v. *Leake,*[62] Kenyon C.J. said: "This is not *malum in se.* There is nothing wrong in such a transaction, except as far as it is prohibited by statute. If, indeed, there had been any moral turpitude mixed in it, I would have followed it in all its consequences." Similarly, the doctrine of the fundamental term, which some writers have hailed as of revolutionary import, is a doctrine which the courts have applied off and on for well over a century, not only in contracts relating to real

55. [1961] 3 W.L.R. 94.
56. *Alexander* v. *Railway Executive* [1951] 2 K.B. 882.
57. *Karsales* v. *Wallis* [1956] 2 All E.R. 866; *Yeoman Credit, Ltd.* v. *Apps* [1961] 3 W.L.R. 94.
58. *Sze Hai Tong Bank* v. *Rambler Cycle Co.* [1959] 3 All E.R. 182.
59. *Smeaton* v. *Sassoon Setty* [1953] 2 All E.R. 1471.
60. (1918) 31 H.L.R. 954, *supra.*
61. See, *e.g.*, 64 L.Q.R., at p. 348 and 69 L.Q.R., at p. 113.
62. (1799) 8 T.R. 411, 415.
63. See *Flight* v. *Booth* (1834) 1 Bing. N.C. 370.

property,[63] but also in the carriage of goods by sea,[64] in the carriage of goods by land,[65] in the sale of goods[66] and in bailment.[67] When notions are thus sporadically expounded in judicial opinions over the years, it is difficult to speak with any degree of assurance of any one tendency at any given time.

In the second place, no sooner are judicial opinions discovered which are said to express the tendency of the age than one lights on contemporaneous expressions to the contrary. Thus, when Harman L.J. tells us[68] that the system of equity is "a very precise one," "exercised only on well-known principles," he adds darkly that "there are some who would have it otherwise." And while he is citing Lord Nottingham's dictum[69] that "the Chancery mends no man's bargain," the Court of Appeal is also deciding a case[70] aptly described by one learned commentator[71] under the heading "Rewriting contracts." In that case, language described by Devlin L.J. to be "as plain as a pikestaff" is none the less rejected by the majority of the Court in favour of "an interpretation which seems to be fair to both parties."[72] It can scarcely be doubted that the majority of the Court were straining to attain a result which they regarded as in conformity with the dictates of common sense and decency. But, if today there can be seen manifestations of a tendency to interpret contracts and other documents in such a way as to reach a conclusion which common sense and decency dictate, there are equally manifestations of a tendency to abide by the standard rules of interpretation and thereby to defeat even a testator's intentions. In *Re Angus' Wills Trusts,*[73] Buckley J. was constrained by those rules to reach a conclusion which can hardly be claimed to have given effect to the draftsman's wishes.[74] But perhaps the clearest instance in which a court has in recent years given a decision in which the man in the street would (and the Court did) feel that common sense and decency should lead to the opposite conclusion is *Campbell Discount Co.* v. *Bridge,*[75] in which it was decided that in law honesty

64. *Davis* v. *Garrett* (1830) 6 Bing. 716; *Thorley* v. *Orchis* [1907] 1 K.B. 243; H*ain* v. *Tate & Lyle* [1936] 2 All E.R. 597.
65. *L.N.W. Railway* v. *Neilson* [1922] 2 A.C. 263.
66. *Pinnock* v. *Lewis & Peat* 1923.
67 *Lilley* v. *Doubleday* (1881) 7 Q.B.D. 510.
68. In *Campbell Discount Co.* v. *Bridge* [1961] 2 All E.R. 97.
69. In *Maynard* v. *Moseley* (1676) 3 Swan., at p. 655.
70. *Alder* v. *Moore* [1961] 2 W.L.R. 426.
71. Mr. Fridman in 24 M.L.R. 637.
72. The description is that given by the learned Editor in 77 L.Q.R. 300. As the underwriters in this case settled the claim upon terms fixed by them after (presumably) they had satisfied themselves as to the facts, it is a little difficult to understand why they should have been allowed to go back on that settlement.
73. [1960] 1 W.L.R.
74. In 77 L.Q.R. 14-15, the learned Editor "doubts" whether the decision was "in accordance with justice and common sense."
75. [1961] 2 All E.R. 97.

may not be the best policy. Pearce L.J. came to this conclusion "not without regret," while Harman L.J. gave voice to "the uneasy feeling that I have that the position of the law as it stands is not satisfactory." If it be true that there is today a tendency towards the interpretation of contracts in favour of common sense and decency, this was an occasion upon which the claims of legality were thought to be stronger than those of morality.

It may well be that the search for 'trends' or 'tendencies' is itself misplaced, since it is based on a belief that, if not all, at least a considerable majority of, the judges in any age manifest the same tendency. This assumption may be questioned. The truth is more likely to be that in any age some judges will tend one way and others the other way. If this be true, the 'trends' or 'tendencies' which learned commentators claim to uncover may well turn out to be no more than wishful thinking on their part, supported in some measure by the results of the accidents of which cases come before which judges at what time?

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