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**LORD MANSFIELD AND LORD DENNING: SOME PITFALLS AND
POSSIBILITIES PRESENTED BY THE GREAT JUDGE APPROACH TO
LEGAL HISTORY AND THE LAW OF CONTRACT.**

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Many modern legal historians are willing to downplay the role of individual judges, preferring instead to treat judges as mouthpieces of social forces.¹ It was not always the case. Forty five years ago, in his Hamlyn Lecture of 1959, *Judge and Jurist in the Reign of Victoria*, Cecil Fifoot argued that 'Law, no more than any other human creation, is the automatic result of natural forces or intellectual movements. It is made by men... English lawyers of all men, should believe in the power of the great judge'.² Anyone attempting to summon up the ghost of Thomas Carlyle these days risks being labelled a conservative at best, or naïve at worst.³ This type of legal history is certainly difficult to do well. It is sometimes tempting to accept reputations at face value. It is easy to forget that judges are frequently inconsistent. Their views

* Department of Law, Durham University. I am grateful to my former colleague at the University of Birmingham, Mr Peter Cook, who first suggested the subject. Since writing this paper, I have come across CMA McCauliff's, 'A Theme of Fairness Revisited: Lord Mansfield's Legacy for a Holistic Theory of Contract Today' [2000] Denning LJ 67, which considers some of the same issues. I find myself at odds with Professor McCauliff's interpretation on many points but his article is a useful antidote to some of the more radical arguments herein.

¹ For an overview of recent trends in legal history, see KJM Smith and JPS McLaren, 'History's living legacy: an outline of modern historiography of the common law' (2001) 21 LS 251. This approach is the dominant feature of the last thirty years.

² (Sweet and Maxwell, London, 1959) 12.

³ *On Heroes, Hero-worship and the Heroic in History* (Ams Press New York 1969) p. 1 'For as I take it, Universal History, the history of what man has accomplished in this world, is at bottom the History of the Great Men who have worked here'.

can change over time and according to the context. An examination of some of the decisions of Lord Mansfield and Lord Denning on the law of contract,⁴ throws up some surprises which raise questions about the popular reputations of two of the most distinctive judges of the last two hundred and fifty years.

1. LORD MANSFIELD – TAKING CERTAINTY SERIOUSLY.

In *Anderson v Temple* in 1768 Lord Mansfield explained that:

The most desirable object in all judicial determinations, especially in mercantile ones, (which ought to be determined upon natural justice, and not upon the niceties of law,) is, to do substantial Justice.⁵

These remarks do not appear to come from a judge who placed much value on certainty in the law. Contemporaries were quick to criticise Lord Mansfield on just these grounds. Writing in the 1770s, the controversialist Junius complained that:

Instead of those certain, positive rules, by which the judgment of a court of law should invariably be determined, you have fondly introduced your own unsettled notions of equity and substantial justice.... In the meantime the practice gains ground; the court of King's Bench becomes a court of equity, and the judge, instead of consulting strictly the law of the land, refers only to the wisdom of the court, and to the purity of his own conscience.⁶

⁴ For useful earlier attempts to grapple with this subject, see CHS Fifoot, *Lord Mansfield* (OUP, Oxford, 1936) 118-157; J Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (The University of North Carolina Press, Chapel Hill and London, 1992) vol 1, 223-244; P Atiyah, 'Contract and Tort' in JL Jowell and JPWB McAuslan (eds.), *Lord Denning the Judge and the Law* (Sweet & Maxwell, London, 1984) 29; P Atiyah, 'Lord Denning's Contribution to Contract Law' [1999] Denning LJ 1.

⁵ *Alderson v. Temple* (1768) 4 Burr 2235, 2239. The context was an action of trover.

⁶ J Cannon (ed.), *The Letters of Junius* (OUP, Oxford, 1978) Letter XLI pp. 209-210.

When Lord Eldon recalled a remark that Lord Mansfield is supposed to have made to De Grey CJ that ‘he never liked law as well as when it was like equity’,⁷ he did not intend a compliment.⁸ Turning to the judgments themselves, a search of the printed reports reveals that, particularly in the first half of his time as Chief Justice, Lord Mansfield made free use of terms like ‘equity’, ‘justice’ and ‘good conscience’.⁹ His willingness to incorporate mercantile practice, whether through special mercantile juries¹⁰ or by consulting more widely with underwriters¹¹ and others engaged in particular types of insurance contract,¹² suggests that the need for certainty was secondary to the desire to build a law of contract that reflected the needs of merchants.

At the same time, the importance of context should not be overlooked. James Park described the law of insurance prior to Lord Mansfield’s appointment: ‘there have been but few positive regulations upon insurance, the principles, on which they were founded, could never have been widely diffused, nor very generally known’.¹³ The relative absence of Common law authority meant that insurance presented the greatest opportunity for innovation. It was probably no coincidence that this was also the very area where Lord Mansfield made particularly free use of Civilian sources.¹⁴

⁷ *Dursley v. Fitzharedinge* (1801) 6 Ves 251, 260; A Lincoln and R McEwen (eds.), *Lord Eldon’s Anecdote Book* (Stevens & Sons, London, 1960) 238.

⁸ In *The Lives of the Chief Justices of England* (London, 1849) vol. 2 pp 394-95, Lord Campbell named Lord Eldon along with Lord Kenyon as a leading critic of Lord Mansfield.

⁹ *Vintner’s Co v. Passey* (1757) 1 Kenyon 500, 503; *Anderson v. George* (1757) 1 Burr 352, 353 ‘justice and good conscience’; *Windham v. Chetwyn* (1757) 1 Burr 414, 430; *Rose v. Green* (1758) 2 Kenyon 173, 178; *Godin v. London Exchange Assurance* (1758) 2 Kenyon 254, 256; *Burton v. Thompson* (1758) 2 Kenyon 375, 376; *Hawkes v. Crofton* (1758) 2 Kenyon 389, 390; *Foxcraft v. Devonshire* (1760) 1 Wm Bla 193, 195; *Robinson v. Bland* (1760) 1 Wm Bla 256, 263; *Baskerville v. Brown* (1761) 1 Wm Bla 293, 294; *Ingle v. Wandsworth* (1762) 3 Burr 1284, 1286; *Plumer v. Marchant* (1762) 3 Burr 1380, 1384; *Bird v. Randall* (1762) 3 Burr 1345, 1353 ‘justice and conscience’; *Goodright d Carter v. Staplan* (1774) 1 Cowp 201, 203 ‘natural justice and equity’; *Holman v. Johnson* (1775) 1 Cowp 341, 343.

¹⁰ Oldham, (n 4) vol 1, 82-102; J Oldham, ‘The Origins of the Special Jury’ (1983) 50 Univ. Chic. LR 137, 173-175.

¹¹ *Glover v. Black* (1763) 3 Burr 1394; *Camden v. Cowley* (1763) 1 W Bla 417; *Wilson v. Smith* (1764) 3 Burr 1550, 1556. Sometimes underwriters were of course members of a special jury see, *Vallejo v. Wheeler* (1774) 1 Cowp 143, 150.

¹² *Salvador v. Hopkins* (1765) 3 Burr 1707, 1714.

¹³ J Park, *System of the Law of Marine Insurance* (2nd edn, London, 1790) xliv. Park was guilty of considerable exaggeration see, WS Holdsworth, ‘The Early History of the Contract of Insurance’ (1917) 17 Colum L Rev 85.

¹⁴ On the influence of Civilian writers on Lord Mansfield see, WS Holdsworth, *A History of English Law* (Methuen, London, 1938) vol 12, 467; D Coquillette, ‘Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law’ (1987) 67 BUL Rev 877, 949-62. For

In the years preceding the Industrial Revolution, negotiable instruments were widely used as means of easy credit transfer.¹⁵ Writing in 1760, Timothy Cunningham described the bill of exchange as ‘the principal medium of foreign and inland commerce’.¹⁶ A few years later George Crooke observed that, ‘There is scarce any person either gentleman, tradesman, or farmer, but what must, at some times, have occasion for bills of exchange’.¹⁷ Lord Mansfield himself admitted that bills of exchange were ‘of great consequence to trade and commerce especially in this country and at this time’.¹⁸ Negotiable instruments were much better established as a feature of common law litigation than insurance by the time Lord Mansfield took office. Some matters still needed to be settled but the basic legal framework was already in place.¹⁹ There was also a much larger volume of literature devoted to the subject.²⁰ Rather than building a legal framework from scratch, Lord Mansfield was much more concerned to ensure that the existing law worked as well as possible. With this end in mind, he set about removing any obstacles to smooth enforcement²¹ and inconsistencies between different types of negotiable instruments.²² In the process, Lord Mansfield was sometimes prepared to face down mercantile objections.²³

Over time, Lord Mansfield’s position began to harden. As early as 1774, he stated that ‘in mercantile transactions the great object should be certainty’.²⁴ Eight years later he warned: ‘Nothing is more mischievous than uncertainty in mercantile law’ and, as a result, ‘in all mercantile cases there are

examples see, *Goss v. Withers* (1758) 2 Burr 683; *Pelly v. Royal Exchange Assurance Co.* (1760) 1 Burr 341.

¹⁵ R Floud and P Johnson (eds.), *The Cambridge Economic History of Modern Britain 1700-1860* (CUP, Cambridge, 2004) 53-55.

¹⁶ T Cunningham, *The law of bills of exchange, promissory notes, bank-notes, and insurances* (1760) iii.

¹⁷ G Crooke, *The Merchant, Tradesman and Farmer’s director* (1778) iii.

¹⁸ *Blesard v. Hirst* (1770) 5 Burr 2670, 267; *Grant v. Vaughan* (1764) 1 Wm Bla 486, 487.

¹⁹ J Holden, *The History of Negotiable Instruments in English Law* (Anthlone Press London 1955) 99-144; JS Rogers, *The Early History of the Law of Bills and Notes* (CUP, Cambridge, 1995) 210-222.

²⁰ W Forbes, *A Methodical Treatise Concerning Bills Of Exchange* (1718); Anon, *Obscurities and Defects of the Mercantile Law Considered, in an Essay on Bills of Exchange* (1769). Later eighteenth century works include J Bayley, *A Short Treatise on the Law of Bills of Exchange, Cash Bills, and Promissory Notes* (1789); S Kyd, *A Treatise on the Law of Bills of Exchange and Promissory Notes* (1790); J Chitty, *A Treatise on the Law of Bills of Exchange, Checks on Bankers, Promissory Notes, Bankers’ Cash Notes and Banknotes* (1799).

²¹ *Heylyn v. Adamson* (1758) 2 Burr 669; *Grant v. Vaughan* (1764) 3 Burr 1516, 1 Wm Bla 486.

²² *Heylyn v. Adamson* *ibid.* *Grant v. Vaughan* *ibid.* ; Bayley (n00) iii.

²³ *Medcalf v. Hall* (1782) 3 Doug 113; *Appleton v. Sweetapple* (1782) 3 Doug 137.

²⁴ *Vallejo v. Wheeler* (1774) 1 Cowp 143, 153.

two objects, convenience and certainty'.²⁵ He recognised that: 'All questions on mercantile transactions, but more particularly upon policies of insurance, are extremely important and ought to be settled'.²⁶ Much had been done. William Blackstone wrote:

The learning relating to marine insurance hath of late years been greatly improved by a series of judicial decisions, which have now established the law in such a variety of cases, that ... they would form a very complete title in a code of commercial jurisprudence.²⁷

Merchants, as well as judges, no doubt played a part as insurance contracts were drafted in an increasingly sophisticated way.²⁸ Mercantile practice remained relevant where the law remained to be settled²⁹ or when hard and fast rules were difficult to draw as, for example, when it came to determining whether or not a term in an insurance contract should be treated as a warranty.³⁰ But, even here, Lord Mansfield was increasingly reluctant to place too much weight on mercantile usage at the expense of certainty.³¹

According to John Wesket, writing in the 1780s, much still needed to be done:

What, in any country, could be more preposterous and intolerably grievous; or more reproachful to a great commercial Nation, in particular; than that the Administration of private Justice, in the Affairs of MERCHANTS should be solely in the Hands of Inconclusiveness!³²

²⁵ *Medcalf v. Hall* *ibid.* 113. Lord Mansfield made these remarks in a direction to a jury.

²⁶ *Nutt v. Hague* (1786) 1 TR 323, 330. For similar statements see, *Buller v. Harrison* (1777) 2 Cowp 556; *Milles v. Fletcher* (1779) 1 Doug 231, 232; *Simond v. Boydell* (1779) 1 Doug 268, 270-71.

²⁷ W Blackstone, *Commentaries on the Laws of England* (Clarendon Press Oxford 1766) vol 2, 461.

²⁸ *Vallejo v. Wheeler* (1774) 1 Cowp 143, 145.

²⁹ *Carvick v. Vickery* (1783) 2 Doug 653.

³⁰ Oldham, (n00) vol 1, 462

³¹ *Ibid.*

³² J Wesket, *A Complete Digest of the Theory, Laws, and Practice of Insurance* (1781) xvi.

That a degree of inconclusiveness remained inevitable may have had less to do with Lord Mansfield's disregard for certainty than the continued importance of the jury.³³ Whilst prepared to nurture the motion for new trial, which, in time, would eat away at jury discretion,³⁴ Lord Mansfield's relationship with juries was, in other ways, along traditional lines. His trial notes show that he was prepared, on occasion, to coax jurors into reaching the desired conclusion.³⁵ But jurors might still refuse to bow to judicial pressure, even when the matter was put to them more than once.³⁶ He was less inclined than his contemporary, Buller J, to draw sharp lines between questions of law and fact, thereby removing questions from jurors and restricting the scope of their decision making powers.³⁷

2. LORD MANSFIELD: REFORMER OR REVOLUTIONARY?

Lord Mansfield was called 'the founder of commercial law of this country'³⁸ by his friend, Francis Buller. Big strides to develop mercantile law were certainly made at this time but they should not disguise the role played by earlier judges – particularly Chief Justice Holt³⁹ as well as contemporaries like Buller himself. It is often said that Lord Mansfield was also intent on radical reform of mainstream contract doctrine. There is also some truth in this view. But once again it should not be overstated.

³³ J Oldham, *The Varied Life of the Self-Informing Jury* (Selden Society, London, 2005) 26-31. On the later decline of the jury, see M Lobban, 'The Strange Life of the English Civil Jury 1837-1914' in J Cairns and G McLeod (eds.), *The Dearest Birth Right of the People of England* (Hart, Oxford, 2002) 173.

³⁴ *Bright v. Enyon* (1757) 1 Burr 390, 393; *Hodgson v. Richardson* (1764) 1 Wm Bla 463, 465.

³⁵ Oldham, (n 4) vol 1, 206.

³⁶ *Medcalf v. Hall* (1782) 3 Doug 113; Oldham, (n 4) vol 1, 233. On occasions Lord Mansfield's displeasure with jury verdicts left a mark in his trial notebook for examples see, Oldham, (n 4) vol 1, 89-91.

³⁷ Even within an individual action. In *Grant v. Vaughan* (1764) 3 Burr 1516, 1523 having allowed a matter to go before the jury at trial, in *banc* he confessed that 'I ought not to have left the ... point to them for it is a question of law'. For a contrast with Buller J, see *Appleton v Sweetapple* (1782) 3 Doug 137, 140 'In a question of law ... we must not yield to the jury'; *Tindal v. Brown* (1786) 1 TR 167, 169; *Sproat v Mathews* (1786) 1 TR 182, 187. For a discussion of some of these authorities see, Oldham, (n 4) vol 1, 158-160.

³⁸ *Lickbarrow v. Mason* (1787) 2 TR 63, 73, 100 ER 35, 40. Lord Mansfield left Buller a legacy of two thousand pounds, see E Heward, *Lord Mansfield* (Barry Rose, Chichester and London, 1979) 167.

³⁹ For an overview of Holt CJ, see Coquillette, (n 14) 937-948. For detail of Holt CJ's important contribution to negotiable instruments, see Holden, (n 19) Ch 4; Rogers, (n 19) Ch 8.

With the growth of negotiable instruments, the paradigm of contractual relations as face to face dealing involving an exchange expressed through the doctrine of consideration, was becoming outdated. In *Pillans v. Van Mierop*,⁴⁰ Lord Mansfield was prepared to abandon consideration when a contract between commercial parties was put into writing.⁴¹ It seems likely that he was trying to extend the practice of negotiable instruments, where consideration was all but emasculated, to all written contracts between commercial parties, rather than proposing a radical restructuring of the law of contract.⁴² Lord Mansfield was advocating an important exception developed incrementally from existing practice.⁴³ It was Lord Mansfield's fellow judge, Wilmot J, who advocated a more fundamental re-alignment of contract. In an opinion that drew on Civil Law and Natural law,⁴⁴ he argued that the requirement of consideration should be abandoned for all types of written contract.⁴⁵ It was his revolt against orthodoxy which was stamped on in *Rann v. Hughes*.⁴⁶

The scale of Lord Mansfield's second attempt to reform consideration is frequently misunderstood. It is often claimed that Lord Mansfield was keen to import a doctrine of moral consideration into the Common law.⁴⁷ This view originated in the early nineteenth century⁴⁸ amongst those anxious to extend the boundaries of the doctrine of consideration.⁴⁹ In reality, *Atkins v. Hill*⁵⁰ and *Hawkes v. Saunders*⁵¹ were less about introducing moral consideration than extending the Common law into the territory of the Court of

⁴⁰ (1765) 3 Burr 1663. For greater detail on these authorities, see W Swain, 'The Changing Nature of the Doctrine of Consideration, 1750-1850' (2005) JLH 55.

⁴¹ (1765)3 Burr 1663, 1669.

⁴² On the emasculation of consideration in cases of negotiable instruments, see Holden, (n00) 102-103.

⁴³ Although consideration was not part of Scots law, another possibility is that Lord Mansfield was influenced by the way that Scots law relaxed formality requirements in mercantile transactions. For the Scots rules see D Walker (ed.), Viscount Stair, *The Institutions of the Law of Scotland* (University of Edinburgh Press, Edinburgh, 1981) 1.10.3; Lord Bankton, *An Institute of the Laws of Scotland* (1993) Stair Society 1.11.31.

⁴⁴ Wilmot J, like Lord Mansfield, had a deep interest in Civil law, see J Wilmot, *Memories of the Life of The Right Honourable Sir John Eardley Wilmot Knt. Late Lord Chief Justice of the Court of Common Pleas* (2nd edn, 1811) 210.

⁴⁵ 3 Burr 1663, 1670.

⁴⁶ (1778) 4 Bro PC 27, 7 TR 350 note; LI MS Misc. 130 f. 74, 2 ER 18, 101 ER 1013.

⁴⁷ W Holdsworth, *A History of English Law* (Methuen London 1925) vol 8, 25-42; Fifoot, (n00) 129-135. For more detail on these developments, see Swain, (n00) 53-56.

⁴⁸ In their note to *Wennall v. Adney* 3 B & P (note) written in 1814, the law reporters Bosanquet and Puller observed that, 'an idea has prevailed of late years that an express promise, founded simply on an antecedent moral obligation, is sufficient to support an *assumpsit*'.

⁴⁹ Swain, (n00) 57-59.

⁵⁰ (1775) 1 Cowp 284.

⁵¹ (1782) 1 Cowp 289.

Chancery, by allowing *assumpsit* to be used to enforce promises on legacies. Consideration in both instances rested on liability in Equity rather than on a moral obligation. Taken in isolation, there are some passages in Lord Mansfield's judgments which, at first sight, appear more radical. He accepted that some promises could be enforced in *assumpsit* which 'would otherwise only bind a man's conscience'. Contracts rendered unenforceable through the Statute of Limitations, infancy or bankruptcy were cited as examples.⁵² Many of these agreements were already enforceable.⁵³ They were simply rationalised in a new way. They also fit within an older tradition once it is recognised that, from its inception, the doctrine of consideration had allowed some flexibility around the edges so as to encompass situations that are difficult to fit within the reciprocal analysis.⁵⁴ Significantly, no attempt was made at the time, or later on, to use conscience-based consideration outside these examples.

The precise nature of a third reform continues to be debated. In *Moses v. Macferlan*,⁵⁵ in an important passage, Lord Mansfield explained that in money had and received:

If the defendant be under an obligation, from the ties of natural justice to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ('quasi ex contractu' as the Roman law expresses it)...This species of *assumpsit* ('for money had and received to the plaintiff's use') lies in numberless instances, for money the defendant has received from a third person; which he claims title to, in opposition to the plaintiff's right; and which he had, by law, authority to receive from such third person.⁵⁶

⁵² *Atkins v. Hill* (1775) 1 Cowp 284, 288-289; *Hawkes v. Saunders* (1782) 1 Cowp 289, 290.

⁵³ *Heyling v. Hastings* (1698) 1 Ld Raym 421; *Dean v. Crane* (1704) 6 Mod 309; *Yea v. Fouraker* (1760) 2 Burr 1099 (Statute of Limitations); *Southerton v. Whitlock* (1726) 2 Stra 690 (infancy). The promise to pay subsequent to a certificate in bankruptcy may have been a new ground for liability, see also *Trueman v. Fenton* (1777) 2 Cowp 544.

⁵⁴ D Ibbetson, 'Consideration and the Theory of Contract in the Sixteenth Century Common Law' in J Barton (ed), *Towards a General Law of Contract* (Duncker and Humblot, Berlin 1990) 67.

⁵⁵ (1760) 2 Burr 1005, 1 Wm Bla 219. For more detail on this important decision see W Swain, 'Moses v. Macferlan' in C Mitchell and P Mitchell (eds.), *Landmark Cases in the Law of Restitution* (Hart, Oxford 2006) 19.

⁵⁶ (1760) 2 Burr 1005, 1008-1009.

Lord Mansfield would variously describe money had and received as, 'equitable',⁵⁷ 'very beneficial',⁵⁸ 'a very liberal action'⁵⁹ and 'much encouraged'.⁶⁰ At first sight, the action seems to be based on general principles, 'the ties of natural justice'. But a remark made by Lord Mansfield two years later - 'This is an action on the case which I have often observed is almost equivalent to a bill in equity'⁶¹ provides a better clue to his intentions. There was a very concrete link between money had and received and Equitable remedies.⁶² Money had and received was likened to a bill in Equity on several occasions,⁶³ as was the closely related action for money paid against a surety.⁶⁴

Writing in the late nineteenth century, Sir William Anson claimed that money had and received at this time threatened to expand into the vagueness of 'moral obligations'.⁶⁵ In fact, by the late 1770s, Lord Mansfield was beginning to favour a more cautious approach and even warned that the action 'ought not to be carried too far'.⁶⁶ Part of the problem was that, because money had and received was a straight forward action to plead,⁶⁷ plaintiffs began to use money had and received as a way of gaining procedural advantages in claims on warranties.⁶⁸ This dodge was soon stopped and by the mid-1780s, a broader restriction emerged, preventing money had and received from being when the

⁵⁷ *Floyer v. Edwards* (1774) 1 Cowp 112.

⁵⁸ *Towers v. Barrett* (1786) 1 TR 133.

⁵⁹ *Sadler v. Evans* (1766) 4 Burr 1984, 1986; *Price v. Neal* (1762) 3 Burr 1354. He used similarly expansionist terminology to describe the action for money paid around this time see, *Decker v Pope* (1757) LI MS Misc. 129 (unfold.). Lord Mansfield made the same comment about actions on the case generally in *Gardiner v. Crosedale* (1760) 1 Wm Bla 198, 199.

⁶⁰ *Moses v. Macferlan* (1760) 2 Burr 1005, 1011.

⁶¹ *Bird v. Randall* (1762) 1 Wm Bla 386, 388.

⁶² Others have stressed the close relationship between money had and received and Equity: B Kremer, 'The Action for Money Had and Received' (2001) 17 JCL 93; G Virgo, 'Restitution Through the Looking Glass: Restitution Within Equity and Equity Within Restitution' in J Getzler (ed.), *Rationalizing Property, Equity and Trusts Essays in Honour of Edward Burn* (Lexis/Nexis, London, 2003) 82, 87-88. Money had and received was very similar to situations where Chancery would order the repayment of money paid as a result of mistake or fraud, see DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, Oxford, 1999) 273-4.

⁶³ *Clarke v Shee* (1774) 1 Cowp 197, 199-200, 98 ER 1041; *Jeston v. Brooke* (1778) 2 Cowp 793, 795.

Buller J was also explicit about the link, see *Straton v. Rastall* (1787) 2 TR 366, 370.

⁶⁴ *Decker v Pope* (1757) LI MS Misc. 129 (unfol.).

⁶⁵ W Anson, *Principles of the English Law of Contract* (Clarendon Press, Oxford, 1879) 326-7.

⁶⁶ *Longchamp v. Kenny* (1778) 1 Doug 137; LI MS Hill 13 f 311.

⁶⁷ *Stevenson v. Mortimer* (1778) 2 Cowp 805. The ease of pleading money had and received was recognised as early as *Moses v. Macferlan* (1760) 2 Burr 1005, 1010.

⁶⁸ *Power v. Wells* (1778) 2 Cowp 818; *Weston v. Downes* (1778) 1 Doug 21. For more detail on these developments see W Swain, 'Cutter v. Powell and the Pleading of Claims of Unjust Enrichment' (2003) 11 RLR 46.

parties were still in a contractual relationship.⁶⁹ The action would shrink further in the early nineteenth century and, when it was revived, the link with Equity would be lost.

3. LORD DENNING – FROM PRECEDENT TO PRECEDENT.

Speaking in the *Romanes Lecture* of 1959, Lord Denning said that ‘If lawyers hold to their precedents too closely, forgetful of the fundamental principles of truth and justice...they may find the whole edifice comes tumbling down about them’.⁷⁰ Towards the end of his career he would say something similar.⁷¹ No one would pretend that Lord Denning was not a reforming judge willing to jump the obstacles placed in his way by precedent when he could.⁷² In areas of the law like real property, where certainty has traditionally taken precedence over social justice, his methods would cause widespread unease.⁷³

It therefore comes as a surprise to find that Lord Denning sometimes had a better insight into precedent than his critics. He was a long time opponent of the rule preventing a third party from suing or otherwise relying on a contract to which they were not a party.⁷⁴ Along with others, he attempted to undermine the rule by the creative use of exceptions.⁷⁵ But he also went further. He argued that those who claimed that privity of contract was a ‘fundamental principle’ were

⁶⁹ Swain (n 68)51-52.

⁷⁰ Lord Denning, *From Precedent to Precedent* (OUP, Oxford, 1959) 3.

⁷¹ *The Discipline of Law* (Butterworths, London, 1979) 314.

⁷² The phrase is Lord Denning’s own, *ibid.* 201-203.

⁷³ The doctrine of ‘the deserted wife’s equity’ provides a particularly graphic example see Lord Denning, *The Due Process of Law* (Butterworths London 1980) 205-219; S Cretney, *Family Law in the Twentieth Century A History* (OUP, Oxford, 2005) 125-127.

⁷⁴ *Smith and Snipes Hall v. River Douglas Catchment Board* [1949] 2 KB 500, 514; *White v. John Warwick* [1953] 1 WLR 1285, 1294; *Drive Yourself Hire (London) Ltd. v. Strutt & Another* [1954] 1 QB 250, 272.

⁷⁵ The exceptions are discussed in W Swain, ‘Third Party Beneficiaries in English Law 1880-2004’ in D Ibbetson and E Schrage (eds.), *Ius Quaesitum Tertio* (Duncker & Humblot, Berlin 2007) 331.

mistaken.⁷⁶ The leading authority, *Tweddle v. Atkinson*, had ‘departed from the law as it had been understood for the previous 200 years’.⁷⁷

When Lord Denning claimed that Lord Mansfield and Buller J ‘knew nothing’ of the parties only rule, he was half right.⁷⁸ By the late eighteenth century, the courts were adopting a relaxed attitude towards the right of action for non parties in assumpsit, which, by this time, was the main remedy for informal contracts.⁷⁹ The old rule that consideration must move from the promisee remained in place, though in practice, the rules of pleading were sufficiently flexible that relatively few claims were probably defeated.⁸⁰ The position in covenant and debt where a deed was required was different. The parties only rule continued to be strictly applied.⁸¹

In *Drive Yourself Hire (London) Ltd. v. Strutt*, Denning LJ described *Tweddle v. Atkinson* as ‘unfortunate’.⁸² Later, he attempted to distinguish the decision on the basis that neither party to the contract had performed.⁸³ Paradoxically, *Tweddle v. Atkinson* itself can be used to mount a defence of Lord Denning’s position. Numerous inconsistencies between the different reports of the case mean that it offers equivocal support for the parties only rule at best.⁸⁴ The fact that the decision came to stand for the parties only rule had less to do with what was actually said in the case than the way in which it was interpreted by late nineteenth century textbook writers.⁸⁵ A further fifty years

⁷⁶ For example, Lord Haldane in *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.* [1915] AC 847, 854.

⁷⁷ *Drive Yourself Hire (London) Ltd. v. Strutt & Another* [1954] 1 QB 250, 273.

⁷⁸ *Midland Silicones Ltd. v. Scruttons* [1962] AC 446, 483.

⁷⁹ In his *Introduction to the Law of Nisi Prius* (1767) 125, Buller described how the courts currently adopted a more generous attitude towards third-party beneficiaries. He later made the same point on the bench in *Marchington v. Vernon* (1787) 1 B & P 101 note c.

⁸⁰ D Ibbetson and W Swain, ‘Third Party Beneficiaries in English Law: From Dutton v. Poole to Tweddle v. Atkinson’ in Ibbetson and Schrage (ed.) (n 75) 191.

⁸¹ The rule for agreements contained in deeds was stated as long ago as the thirteenth century by Bracton, see SE Thorne (trans.), *Bracton on the Laws and Customs of England* (Cambridge, Mass., 1968) f 18 b. For a nineteenth version, see CG Addison, *Treatise on the Law of Contract and Liabilities ex Contractu* (1st edn, London, 1847) 238.

⁸² [1954] 1 QB 250, 273.

⁸³ *Beswick v. Beswick* [1966] Ch 538, 553-54.

⁸⁴ The case was reported in (1861) 1 B & S 393, 30 LJQB 265, 4 LT 468, 9 WR 781. For a detailed discussion of these differences, see Ibbetson and Swain, (n 75).

⁸⁵ SM Leake, *The Elements of the Law of Contract* (1867) 221; F Pollock, *Principles of Contract at Law and in Equity* (1876) 190-91; Anson, (n 65) 200.

would elapse before the House of Lords unequivocally sanctioned this position,⁸⁶ but to pretend that the rule was ‘fundamental’ as Lord Denning’s critics claimed is quite wrong.⁸⁷ In the case of informal contracts it was a comparatively recent invention.

In a lecture to the Society of Public Teachers of Law in 1959, Lord Denning declared that he was content to be described as an iconoclast.⁸⁸ He took the term to mean one who assails cherished beliefs rather than changes them.⁸⁹ He was not always so circumspect. When, a few years before, he had observed that there were two kinds of judges, ‘bold spirits’ and timorous souls’,⁹⁰ the implication was clear. Given remarks of this sort, it is hardly surprising that Lord Denning is often seen as a judicial maverick.

The Sixth Interim Report of the Law Revision Committee is now largely forgotten.⁹¹ The Report’s key recommendations included reforming privity,⁹² the introduction of a version of the *Pillans v. Van Mierop* heresy⁹³ and abolishing the rule in *Foakes v. Beer*.⁹⁴ Although similar proposals had appeared seventy years before in the Report of the Third Indian Law Commission on Contract,⁹⁵ it was still a radical document for 1937. The tone of the Report was not all that surprising given that two members of the Committee, the Chairman, Lord Wright,⁹⁶ and the comparative lawyer, Professor Gutteridge,⁹⁷ had both criticised consideration.

⁸⁶ *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd* [1915] AC 847.

⁸⁷ *Midland Silicones Ltd. v. Scruttons* [1962] AC 446, 467 (Viscount Simonds).

⁸⁸ Lord Denning, ‘The Way of an Iconoclast’ (1959-1960) 5 JSPTL 77.

⁸⁹ *Ibid.*

⁹⁰ *Chandler v. Crane, Christmas & Co.* [1951] 2 KB 164, 178. During his time in the House of Lords, Lord Denning dissented in 16% of his full judgments. He was in second place to Lord Keith on 22%, see L Blom-Copper and G Drewry, *Final Appeal A Study of the House of Lords in its Judicial Capacity* (OUP, Oxford 1972) 179.

⁹¹ *Law Revision Committee Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration)* (1937) Cmd 5449, 20-21.

⁹² *Ibid.* para 48.

⁹³ *Ibid.* paras 29-30.

⁹⁴ *Ibid.* para 36.

⁹⁵ *The Report of the Indian Law Commission on the Subject of Contracts* (1867-1868) PP HC vol xlix. The Report became the Indian Contract Act 1872. The proposal to replace consideration with writing was considerably watered down in the final Act.

⁹⁶ Lord Wright, ‘Ought the Doctrine of Consideration to be Abolished from the Common Law?’ (1936) 49 Harv LR 1225, 1246, 1250-51.

⁹⁷ ‘Contract and Commercial Law’ (1935) 51 LQR 91, 96-97.

Although the Report never made the statute, book it provides the backdrop to one of Lord Denning's most famous decisions.⁹⁸ In some obiter remarks in *Central London Property Trust v. High Trees House Ltd.*, Denning J said that:

The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better.⁹⁹

This passage immediately attracted criticism. Later the same year, Somervell LJ referred to Denning J's 'rather far reaching observations.'¹⁰⁰ His unease is unsurprising. At first sight Denning J's position is difficult to reconcile with *Foakes v. Beer*,¹⁰¹ where the House of Lords had held that an agreement to accept a smaller sum in satisfaction of a larger one was unsupported by consideration. Denning J's solution was to argue that the representation was binding, not because there was consideration but because it could be brought within 'a series of decisions... which, although they are said to be cases of estoppel are not really such'.¹⁰² But once again this led Denning J into conflict with a leading authority. In *Jordan v. Money*¹⁰³ the House of Lords had held that only representations of fact as opposed to intention were binding.

In fact, the historical foundations of these nineteenth century decisions are perhaps no more secure than *Tweddle v. Atkinson*. In *Foakes v. Beer*, the House of Lords relied on some remarks of Sir Edward Coke in *Pinnel's Case*.¹⁰⁴ As Ames pointed out, *Pinnel's Case* was a very unhelpful authority.¹⁰⁵ It concerned an action of debt at a time when differences between the forms of action remained important. In assumpsit cases of the same period, such agreements were treated as

⁹⁸ Lord Denning was always candid about the influence of the Report see, Denning (n 71) 202; *Central London Property Trust v. High Trees House Ltd* [1947] KB 130, 135.

⁹⁹ [1947] KB 130, 135.

¹⁰⁰ *Re Venning* (1947) 63 TLR 394.

¹⁰¹ (1883-84) 9 App Cas 605.

¹⁰² [1947] KB 130, 134.

¹⁰³ (1854) 5 HLC 185.

¹⁰⁴ (1602) 5 Co Rep 117 a.

¹⁰⁵ JB Ames, 'Two Theories of Consideration' (1898-1899) 12 Harv L Rev 515, 522-23.

binding.¹⁰⁶ In *Foakes v. Beer*, Lord Blackburn said that he knew of no case between *Pinnel's Case* and *Cumber v. Wane*¹⁰⁷ 115 years later where the issue was discussed.¹⁰⁸ Uncertainty persisted into the late eighteenth century¹⁰⁹ and the first unequivocal statement of the rule in assumpsit was made as late as 1804.¹¹⁰ Even then, the rule was eroded by a series of exceptions¹¹¹ and was criticized and even doubted by some influential observers. Frederick Pollock, in the first edition of his textbook, went as far as to describe *Pinnel's Case* as an 'absurdity'.¹¹² Pollock would only modify his stance in light of *Foakes v. Beer*.¹¹³

The case law before *Jorden v. Money* did not all point in one direction. There were some suggestions that a statement of intent, if relied on, was binding.¹¹⁴ In any event, over time, it would be undermined by manipulating the distinction between fact and intention.¹¹⁵ Denning J preferred a new solution. He turned to *Hughes v. Metropolitan Railway Co.*¹¹⁶ and *Birmingham and District Land Co. v. London and North Western Railway Co.*¹¹⁷ He would admit that a judgment of MacCardie J in *Hartley v. Hyams*,¹¹⁸ in which *Hughes* was described as a 'broad rule of justice', first brought the case to his attention.¹¹⁹ Lord Denning would also claim that these authorities were 'lost in obscurity'.¹²⁰ In fact, *Hughes* had first appeared in the

¹⁰⁶ Ibbetson (n 54) 78-79.

¹⁰⁷ (1721) 1 Stra 426.

¹⁰⁸ (1883-84) 9 App Cas 605, 619.

¹⁰⁹ In *Heathcote v. Crookshanks* (1787) 2 TR 24, 28 Buller J referred to the unreported decision of *Hardcastle v. Howard* (1752) and an unnamed decision of Lord Mansfield's, where *Cumber v. Wane* was not applied.

¹¹⁰ *Finch v. Sutton* (1804) 5 East 230.

¹¹¹ *Goddard v. O'Brien* (1882) LR 9 QBD 37, 39 'The doctrine of *Cumber v. Wane* if not actually overruled, has been very much qualified' (Huddleson B); JW Smith, *Leading Cases on Various Aspects of the Law* (1837) 1.148-50; Leake (n 85) 474.

¹¹² Pollock (n 85) 160.

¹¹³ In the 4th edition of his textbook, published in 1885, p 180, he described *Pinnel's Case* as 'paradoxically not anomalous'. In a short note on the case in the first volume of the Law Quarterly Review in 1885 at p. 134 Pollock wrote that, 'The fact that the House of Lords did affirm the doctrine laid down in *Pinnel's Case* is as striking proof as can be found of the weight wisely given by the English courts to authority'.

¹¹⁴ M Lunney, 'Jordan v. Money – A Time for Reappraisal?' (1994) 68 ALJ 559, 563-64. Contrast *Hammersley v. De Biel* (1845) 12 Cl & F 45 with *Maunsell v. Hedges* (1854) 4 HLC 1039.

¹¹⁵ *Fenner v. Blake* [1900] 1 QB 426; *Sainsbury v. Gilmore* [1942] 2 KB 38, 51-52.

¹¹⁶ (1877) 2 App Cas 439.

¹¹⁷ (1888) 40 Ch D 268. For support for a broad interpretation of *Birmingham and District Land Co.*, see R Meagher, D Heydon and M Leeming, *Meagher Gummow & Lehane's Equity Doctrine & Remedies* (4th edn, LexisNexis Butterworths, Australia) 555.

¹¹⁸ [1920] 3 KB 475, 493.

¹¹⁹ Denning, (n 88) 78.

¹²⁰ *Ibid.*

leading practitioners textbook, *Chitty on Contract*, as early as 1909. Though hardly a ‘broad rule of justice’ the description is still notable for its brevity:

And as a general proposition of law, although the subsequent acts of the parties to a contract are not admissible in evidence to vary its terms, they may prevent one of the parties from insisting upon a strict performance of the original agreement.¹²¹

The edition of the work, published in the same year as *High Trees*, contained a similar passage.¹²²

Hughes was derived from Equity. Writing in the 1870s, Pollock alluded to the tensions created by the existence of an equitable doctrine which appeared to be broader than estoppel, its Common law cousin.¹²³ Denning J’s response was to claim that Law and Equity were fused.¹²⁴ A close examination of the background to the Judicature Act 1873 reveals that those who drafted the legislation did not intend substantive fusion,¹²⁵ though several judges seem to have thought so.¹²⁶

Geoffrey Cheshire and Cecil Fifoot, two academics, wrote an extensive case note on *High Trees* which appeared in the *Law Quarterly Review*. They argued that the decision was based on ‘a slim but sufficient catena of authority’.¹²⁷ Cheshire was a friend of Denning’s¹²⁸ and had, along with Fifoot, criticised *Foakes v. Beer* in the first edition of their textbook two years before, whilst

¹²¹ W Paine (ed), J Chitty *A Treatise on the Law of Contract* (15th edn, Sweet & Maxwell, London 1909) 701.

¹²² H Potter (ed), J Chitty *A Treatise on the Law of Contract* (20th edn, Sweet & Maxwell, London 1947) 192.

¹²³ Pollock (n 85) 561.

¹²⁴ For references to fusion in Lord Denning’s judgments, see *Central London Property Trust v. High Trees House Ltd.* [1947] KB 130, 134; *Solle v. Butcher* [1950] 1 KB 671, 691; *Fredrick E Rose (London) Ltd. v. William H Pim & Co. Ltd.* [1953] 2 QB 450; *Bridge v. Campbell Discount* [1962] AC 600, 632 ‘law and equity are one’; *Federal Commerce and Navigation Ltd. v. Molena Alpha Inc.* [1978] QB 927, 974. He made the same point away from the bench as early as 1949, see AT Denning, ‘The Recovery of Money’ (1949) 65 LQR 37, 48.

¹²⁵ M Lobban, ‘Preparing for Fusion: Nineteenth Century Court of Chancery’ (2005) 22 LHR 389, 565.

¹²⁶ *Pugh v. Heath* (1882) 7 App Cas 235, 237 (Lord Cairnes); *Walsh v. Lonsdale* (1882) 21 Ch D 9.

¹²⁷ ‘Central London Property Trust Ltd. v. High Trees House Ltd’ (1947) 63 LQR 283, 288. G Cheshire and CHS Fifoot *The Law of Contract* (2nd edn, Butterworths, London, 1949) 69.

¹²⁸ *The Family Story* (Butterworths, London, 1981) 78; Denning (n 71) 200

conceding that the decision could only be altered by the intervention of Parliament.¹²⁹ The appearance and tone of the note helped to bring the decision to prominence and ensure that Denning J's judgment avoided the fate of a decision one year earlier, where Humphrey J had held that a similar agreement was binding.¹³⁰ But even if there was no deliberate plot to undermine *Foakes v. Beer*, the decision in *High Trees* no doubt delighted those who were dismayed by the failure of Parliament to implement the Law Revision Committee Report.¹³¹

4. LORD MANSFIELD AND LORD DENNING: 'ROUGH TRUTH'.

George Meredith, the Victorian novelist, coined the aphorism 'Caricature is rough truth'.¹³² There is a good deal of 'rough truth' in the representations of Lord Mansfield and Lord Denning. At the same time, Lord Mansfield's reforming zeal can sometimes be overstated. He was well aware that change could be the bedfellow of chaos. It is no coincidence that some of his most significant innovations were built on well established principles, even if they were drawn from Equity. When an action like money had and received began to upset the equilibrium of the Common law, Lord Mansfield pulled back.

Lord Denning is more difficult to pin down than Lord Mansfield. At times he appeared to be bent on radical reform. In *Combes v. Combes*¹³³ and elsewhere,¹³⁴ Denning LJ would deny that it was his intention in *High Trees* to destroy consideration. But there is a strong hint that he was moving in this direction in the late 1940s, both in the way that he emphasised that promisors who intended to enter

¹²⁹ G Cheshire and CHS Fifoot, *The Law of Contract* (Butterworths, London, 1945) 64-65.

¹³⁰ *Buttery v. Pickard* (1946) TLR 241 was noted by PV Baker at (1947) 63 LQR 278 but otherwise disappeared into obscurity. Interestingly, *High Trees* did not appear in the All England Reports until 1956.

¹³¹ For additional support for the Law Revision Committee proposals, see CJ Hamson, 'The Reform of the Doctrine of Consideration' (1938) 54 LQR 233, 239 (albeit with some reservations); Editorial, 'The Law Revision Committee's Sixth Interim Report' (1937) 1 MLR 97.

¹³² G Meredith, *The Egoist: A Comedy in Narrative* (Constable, London, 1915)

¹³³ [1951] 2 KB 215, 219.

¹³⁴ AT Denning, 'Recent Developments in the Doctrine of Consideration' (1951) 15 MLR 1, 4; Denning (n 88) 79-80.

into a legally binding agreement, which was relied upon, should not be able to renege on their promise¹³⁵ and the way in which consideration was treated with some scepticism.¹³⁶ Towards the end of his career he would admit:

During the 16 years whilst I have been Master of the Rolls I do not recall any case in which it (consideration) has arisen or been discussed. It has been replaced by the better precept: 'My word is my bond', irrespective of whether there is consideration to support it. Once a man gives a promise or assurance to his neighbour – on which his neighbour relies – he should not be allowed to go back on it.¹³⁷

Even here, at his most outlandish, Lord Denning tapped into a respectable intellectual heritage amongst legal writers¹³⁸ as well those like Lord Wright, who regarded consideration, in some or all of its aspects, with suspicion.¹³⁹ But in the law of contract at least there is also some truth in Lord Devlin's observation that Lord Denning's 'reputation of waywardness has been exaggerated'.¹⁴⁰ His views on the past were not those of a straight forward radical. As a young barrister he had helped to edit the last edition of *Smith's*

¹³⁵ *Robertson v. Minister of Pensions* [1949] 1 KB 227, 231; *Charles Rickards v. Oppenheim* [1950] 1 KB 616, 623; *JF Perrott v. Cohen* [1951] 1 KB 705, 710; *Wallis v. Semark* [1951] 2 TLR 222.

¹³⁶ *Bob Guinness Ltd. v. Salomonsen* [1948] 2 KB 42, 45 'It must be remembered that that which amounts, in legal theory, to consideration, is sometimes a real consideration and sometimes not. Consideration in law is sometimes the real purchase price of a promise, and sometimes it is a mere fiction devised to make a promise enforceable.'

¹³⁷ Denning (n 71) 223.

¹³⁸ Even the doctrinally conservative Frederick Pollock came to doubt the utility of consideration, though he did not express these views publicly, see N Duxbury, *Frederick Pollock and the English Juristic Tradition* (OUP, Oxford, 2004) 204-205. The literature on the function and value of the doctrine of consideration is vast, particularly in the United States from Ames (n 105) onwards. Ames (n 105) 522 incidentally was no fan of *Cumber v. Wane*, a decision which he described as 'objectionable'.

¹³⁹ It was not the only occasion that Lord Denning and Lord Wright thought along similar lines. Lord Denning was an early champion of unjust enrichment. His first explicit reference was in 1949, see Denning, (n 124) 48. He was less explicit about adopting the unjust enrichment analysis on the Bench, see *Reading v. Attorney-General* [1948] 2 KB 268, 275. His caution was perhaps understandable, see Lord Denning, *The Changing Law* (Stevens, London, 1953) 62-63. On Lord Wright's influence, see Denning *ibid.* 62 and *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32, 64. As counsel in *United Australia Ltd. v. Barclays Bank Ltd.* [1941] AC 1, 6 Denning KC had cited Lord Wright's article 'Sinclair v. Brougham' [1938] CLJ 305 when urging the House of Lords to accept that 'the promise was a fiction'. He had also referred to the American Restatement. For a discussion of this case by Lord Denning, see Lord Justice Denning 'The Universities and Law Reform' (1947-1951) 1 JSPTL 258, 265-66.

¹⁴⁰ In the foreword Jowell and McAuslan (eds.), (n 4) iv.

Leading Cases.¹⁴¹ He would later claim that the process ‘taught me most of the law I ever knew’.¹⁴² In a lecture delivered shortly after *High Trees*, Denning said that:

The researches made by the legal historians of our universities have proved of utmost value. By uncovering the reason for a rule, they may enable the judge or legislator to fit the rule in its proper place and so ensure that the dead hand of the past does not paralyse the development of the present.¹⁴³

Lord Denning may have regarded the ‘dead hand’ of the past with some dread. At the same time these are not the words of a man who regards the past as irrelevant and, in this respect, he was not always the figure of popular public and academic imagination.

¹⁴¹ Sir T Chitty, AT Denning, CP Harvey (eds.) JW Smith, *A Selection of Leading Cases on Various Branches of the Law* (13th edn., Sweet & Maxwell, London 1929) 2 vols. The first edition was published in 1837.

¹⁴² Denning (n 128) 94.

¹⁴³ Denning (n 139) 260.