unwritten advertisements from s. 5 (1) (b) is deliberate or accidental. The utility of *Goodwin* v. *Brebner* would have been much increased if the court had seen fit to make some observations on these and similar questions.

ANTICIPATORY BREACH

Right of Plaintiff to Perform

The concept of anticipatory breach in the law of contract has not as yet been subjected to any systematic analysis by English or Australian Courts. The principle that a plaintiff is under a duty to minimise the consequences of the defendant's breach is likewise subject to considerable doubt in particular aspects of its operation. When the more obscure features of these doctrines interact, and the issue involves a principle fundamental to the law of contract, one might expect some enlightening analysis from reports and appraisals of the case, particularly if the decision is given by a bare majority of the House of Lords. The decision in *White and Carter (Councils) Ltd.* v. *McGregor*[1] presented such an opportunity but, although the consensus of opinion regards it as unfortunate in its practical consequences, criticism seems to have generally ignored important questions of law which appear vital to the issue it involved.[2]

In this case, advertising agents agreed with the representative of a garage proprietor to display advertisements for his garage, on refuse containers, for a period of three years. On the same day the proprietor wrote requiring them to cancel the contract on the ground that his representative had mistaken his wishes. They refused, however, and began the display in accordance with the contract. A clause provided for acceleration of payments, making all due when an instalment was in arrears for a certain time. The garage proprietor having refused to pay any sums due under the contract, the appellant sued him for the whole amount.

The action was heard at first instance by the Sheriff-Substitute of Dumbarton, who found for the defendant. The Second Division of the Scottish Court of Session unanimously dismissed an appeal from this decision. From there the appellants proceeded to the House of Lords. The House of Lords (Lord Reid, Lord Tucker and Lord Hodson; Lord Keith and Lord Morton dissenting) held that the advertising agents were entitled to carry out the contract and claim the full contract price and were not obliged to accept the repudiation and restrict their remedy to an action for damages.

The substantial issue in the case seemed relatively simple: could the appellant be prevented from earning his right to the defendant's performance after the latter had repudiated the contract? The comparative novelty of this issue in English Law has been explained by the fact that in most cases of this type the plaintiff would require the co-operation of the defendant in order to complete his performance

1. [1962] 2 W.L.R. 17.
2. Notes appear in 36 *A.L.J.* 86; 25 *M.L.R.* 364; 233 *Law Times* 381; 78 *L.Q.R.* 265.

and earn the agreed price.[3] Whilst this may be so, it is probably also true that it would rarely give a tangible business advantage to a plaintiff to persist in performance and claim the contract price, when compensation is available by an action in damages for lost profits, expenses incurred, etc. The present case shows that exceptional circumstances may render it advantageous to complete the contract and sue for the price.[4] Since contract cancellations are not an uncommon business phenomenon, it is of some practical importance that businessmen and their advisers should have a clear picture of the legal consequences that result.

The consensus of opinion among commentators has been fairly unanimous that a plaintiff should not be allowed to continue his side of the contract after the other party has deserted it.[5] In the present case, the onerous consequences of allowing the plaintiff so to continue were particularly in evidence; first, because the respondent was technically bound by his agent's negotiating outside his express authority, secondly, because, being a contract for advertising, the continued publication might prove not only devoid of benefit, but perhaps even injurious to the respondent's business.

The essence of the opinions given by the majority who delivered speeches (Lord Tucker concurred) was contained in the simple proposition that "repudiation by one of the parties does not itself discharge it".[5a] In other words, an unaccepted repudiation continues the contract in full effect. Taking this proposition conjointly with the axiom that one may recover a legitimately incurred debt, there would seem to be little room left for argument.[6] In fact, the only available

3. Goodhart, 78 *L.Q.R.* 263.
4. It is not clear why the appellants took this course. By bringing suit for the liquidated sum, one avoids the difficulties involved in proving the actual damage. In particular, one avoids the risk that a court might assess damages on an unrealistic assumption that the plaintiff should reasonably have taken certain steps to avoid damage.
5. An interesting note in 233 *Law Times* at 381 points out the unfortunate consequences to various common types of contract. Particularly relevant is the observation that it would give the plaintiff a right "to extort a settlement giving far more than reasonable compensation for loss".

5a. *White and Carter (Councils) Ltd.* v. *McGregor* [1962] 2 W.L.R. 17 at p. 36.

6. It has been argued against the majority decision that an unaccepted repudiation does not continue the contract in full effect because by repudiating his own duty the repudiator must lose his right to enforce the other party's obligation, hence there is no longer a corresponding duty on the innocent party to perform (78 *L.Q.R.* 265). This argument may be dealt with independently of the contention, implicit in the mitigation argument dealt with below, that an unaccepted repudiation constitutes a breach and therefore gives rise to a duty to mitigate, for the existence of a breach may nevertheless preserve a contract in full effect, e.g. if the breach is merely a breach of warranty. The argument appears to beg the question because, on present authority, the repudiating party only loses his right to enforce the other party's obligation if the other party exercises his option to determine the contract for the breach of a condition, so that the argument is merely a denial of his right of election. Cases affirming the election are: *Frost* v. *Knight* [1872] L.R. 7 Ex. 111; *Hochster* v. *De la tour* (1853) 2 E. & B. 678; *Avery* v. *Bowden* (1856) 6 E. & B. 953; *Johnstone* v. *Milling* (1886) 16 Q.B.D. 460, 467, 472; *Heyman* v. *Darwins Ltd.* [1942] A.C. 356, 361; *Martin* v. *Stout* [1925] A.C. at 363-5; *Danube Ry* v. *Xenos* (1862) 11 C.B. (N.S.) 152; *Wilkinson* v. *Verity* (1871) L.R. 6 C.P. 206 at 209. See also *Chitty* 21st ed. 192, 248; *Leake* 8th ed. 675; *Sutton and Shannon* 5th ed. 298-301; *Salmond and Williams* 2nd ed. 541; Wilson: *The Law of Contract*, 438; *Cheshire and Fifoot* 5th ed. 488; *Halsbury* 3rd ed. vol. 8, S. 344.

legal argument seemed to be the principle that requires the victim of a contract breach to "take all reasonable steps to mitigate his damage".[7] Thus a plaintiff would presumably be required to refrain from performance, since it caused unnecessary expense to the respondent.

This principle, although ignored by the majority, was invoked by both Lords Morton and Keith in their dissenting opinions. Their view is given considerable force if close attention is paid to the terms of Lord Reid's opinion, particularly this passage:[8]

> It may well be that if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself. . . . So it might be said that, if a party has no interest to insist on a particular remedy, he ought not to be allowed to insist on it.

This could be interpreted as a recognition of the principle of mitigation in a somewhat broader sense, the reason why Lord Reid failed to reach the same conclusion as the minority on this point being the comparatively minor issue of proof, the respondent having merely failed to prove the lack of interest to Lord Reid's satisfaction.[9] If this is so then it would appear that relatively minor additions to the respondents' case could have produced a decision in their favour, the result being conclusive authority that the principle of mitigation can prevent a plaintiff claiming for the price of a performance persisted in despite the defendant's previous repudiation. It is submitted that the present state of the law both on anticipitory breach and on the principle of mitigation, is such as to preclude this result.

The duty to mitigate is a duty to minimise, counterbalance or avoid the injurious consequences of the defendant's breach. It is therefore relevant only to an action for compensation for the damage flowing from the breach. This duty cannot arise until a breach has occurred. Even if such a breach has occurred, the duty is not relevant if the

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7. This "duty to mitigate" though little discussed in English Law, is well supported by authority, including *British Westinghouse* v. *Underground Railways* [1912] A.C. 175; *Jamal* v. *Moolla Dawood* [1916] A.C. 175; *Banco de Portugal* v. *Waterlow* [1932] A.C. 452; *Dunkirk Colliery Co.* v. *Lever* (1872) 26 L.J. 706 (H.L.).

8. [1962] 2 W.L.R. 17, 23.

9. The onus of proving a breach of the duty to mitigate rests on the defendant: *Roper* v. *Johnson* (1872) L.R. 8 C.P. 167 at 181; *James* (*Finlay*) v. *N.V. Kwik Hoo Tong Maatschappij* [1928] 2 K.B. 604 at 614. *Criss* v. *Alexander* 28 (N.S.W.) S.R. 587.

action is not strictly for damages for the breach, but is an action brought for the specific enforcement of an obligation to pay a debt.[10]

I. *An unaccepted repudiation is not a "breach"; therefore no duty to mitigate can arise.*

The proposition that the duty to mitigate arises only from the time of a breach of contract is too well supported by authority to be doubted.[11] It is somewhat more difficult, however, accurately to assess the effect of an unaccepted repudiation, and Scrutton L.J. is certainly not alone in confessing that he has "never been able to understand what effect the repudiation of one party has unless the other party accepts the repudiation."[12] Despite a general lack of analysis, the consensus of opinion in the English texts holds that no breach is constituted until acceptance.[13] This is in agreement with the dictum of Lord Esher M.R. in *Johnstone* v. *Milling*[14] that:

> A renunciation of a contract, or in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract, but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action.

At least one case has been decided on this point. In *Avery* v. *Bowden*[15] the question was whether there had been a complete breach of the contract before the declaration of war. The defendant by a

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10. The arguments developed in this note are admittedly incompatible with American Law on the topic. Since *Clark* v. *Marsiglia* 1 Denio, 317 (1845), there have been many American cases in which the principle of mitigation was used to prevent a plaintiff performing despite repudiation. Although these American decisions cannot now be disputed (*Corbin*, SS. 983, 1053; *Williston*, S. 1298; *Restatement of the Law of Contract* S. 388), it is submitted that they must be regarded as anomalous, since formulation of the principle of mitigation is the same as in English law. The apparent neglect of American texts to analyse the implications of using the principle of mitigation where the action is for enforcement of a debt, leads to some puzzling theorisation. Corbin speaks of the relevance of the principle of mitigation to the analogous claim for specific performance in equity: "The rule as to avoidable consequences is very materially affected by the plaintiff's asking and obtaining a decree for specific performance by the defendant. Such a decree presupposes the continued readiness of the plaintiff to render his agreed performance in exchange; and very generally it will either specifically require or be conditional upon his rendering that performance. Subject to this modification, however, the rule as to avoidable consequences is still applicable. The plaintiff will not be awarded damages for an injury that he could reasonably be expected to avoid; *but it is no longer reasonable to expect him to avoid injury by refraining from rendering the performance upon which his right to specific performance by the defendant is dependent.*" (Italics added.) The same argument is clearly applicable where the action is for performance at common law. In fact perhaps more strongly so, since the discretion incident to an equitable remedy is lacking.

11. Eg. *Harris* v. *Edmonds* (1845) 1 Car. & Kir. 686; *Wilson* v. *Hicks* (1857) 26 L.J. Ex. 242; *Shindler* v. *Northern Raincoat Co.* (1960) 2 A.E.R. 239.

12. *Golding* v. *London & Edinburgh Insurance Co., Ltd.* (1932) 43 Ll. 1 Rep. 487, 488.

13. See eg., *Chitty* 21st ed. 192-193, 249; *Cheshire & Fifoot* 5th ed. 488, n. 2; *Sutton and Shannon* 5th ed. 299; *Leake* 8th ed. 675; Morison: *The Principles of Recission of Contracts* 34-35.

14. (1886) 16 Q.B.D. 460, 467.

15. (1855) 5 E. & B. 714.

charter-party had agreed to supply a cargo for plaintiff's ship within a specified time after it reached Odessa. At the port, the defendant's agent told the Master that no cargo was available, and advised him not to remain in the expectation that a cargo would be supplied. The Master refused to treat this refusal as a ground of excuse from further performance, and continued to demand that a cargo be supplied. In these circumstances, and before the time for loading the ship had expired, war broke out between England and Russia, making performance of the contract impossible. Thereafter the plaintiff sued for breach of contract and the court held that, as the plaintiff had not accepted or acted upon the renunciation, there had been no actual breach prior to the contract's frustration and that consequently there was nothing on which to ground his action. Whether this authority is consistent with a rational exposition of the doctrine of anticipatory breach is another question. The subject has been little written on and must be regarded as open to speculation.

The doctrine of anticipatory breach has developed from cases of repudiation where the repudiation went to the substance of the repudiator's performance. It was therefore historically restricted to cases of anticipatory breach of what, in the modern terminology, would be referred to as a condition. (Theoretically it is conceivable that there might be anticipatory breach of a warranty, a matter incidental to the main purpose of the contract. In fact this would rarely occur, because repudiation is almost always a desertion of the contract.) It is submitted, accordingly, that the sole effect of the doctrine is to anticipate the breach of condition technically occurring only after the time for performance, and give it the status of a present breach of condition. Thus as with normal breach of condition, the plaintiff is given an option to either affirm or disaffirm the contract, plus an independent action for damages.[16] This theory is consistent with the policy of the doctrine, which is evidently to free the innocent party as much as possible from the entanglements of a contract the other has deserted without prejudicing his position vis-a-vis enforcement. It was sufficient for this purpose merely to ensure the plaintiff his option to continue the contract or to rescind it and claim damages; it was never necessary to decide the exact details of this process, whether for instance the repudiation was: (1) a breach of warranty which if accepted constituted a breach of condition; or (2) not a breach proper, but an event which if the plaintiff treated it in a certain way (i.e., accepted it) was constituted a breach of condition; or (3) a breach of condition subject to the formal disability that it must be acknowledged before suing on it. Of these alternatives, the only one

16. Against this must be weighed the dictum in *Johnstone* v. *Milling* op. cit. n. 14, that a plaintiff who affirms the contract cannot also recover for consequential damage flowing from the repudiation (e.g. he may suffer a loss of credit on the cancellation becoming known). This point does not seem to be finally settled, however, and it is submitted that the issue remains open. Some support for the view tendered is apparent in recent dicta of Devlin J. in *Universal Cargo Carriers Corporation* v. *Citati* [1957] 2 W.L.R. 713 at 732. An alternative thesis regards repudiation as an offer to rescind, which may or may not be accepted. *Ehrensperger* v. *Anderson* (1884) 3 Exch. 148 per Baron Parke at 188; Morison: *The Principles of Recission of Contracts*, 34. This "mutual recission" theory fails to account for the action in damages on acceptance.

that appears consistent with *Avery* v. *Bowden, Johnstone* v. *Milling* and the opinions referred to is the second. That is, "acceptance" is technically necessary in order to constitute a breach of contract from a mere repudiation.

Finally, it should be mentioned that there is authority that the limitation period for the purposes of the limitations legislation does not begin to run from an unaccepted repudiation.[17] The holding seems to be based on the incompatibility of the alternative view with the elective right of the plaintiff. Since the limitation period always runs from the time when a complete cause of action first accrued,[18] it follows that there could not have been a breach merely on the repudiation.

II. *The action for the price is not an action for damages for breach of contract and is therefore not subject to the principle of mitigation.*

If it were established that an unaccepted repudiation nevertheless constitutes a breach of contract, it still does not follow that the duty to mitigate can be invoked by a defendant as suggested by the minority Lords in *White's Case*. The duty is confined to the action claiming damages for the injurious consequences of the breach; for here, although a breach may have occurred and a duty may arise in respect of consequential damage flowing from it, yet the action is not for the damage sustained from the breach, but for the debt incurred by the plaintiff's completing his performance subsequent to the breach. In this sense the dictum of Lord Keith of Avonholm that "the party complaining of the breach also has a duty to minimise the damage he has suffered . . . " is misleading, for the party in question is not complaining of the breach of a duty not to anticipatorily repudiate, but of the non-payment of a debt incurred at a later stage.

The principle of mitigation has since its first appearance, invariably been defined, somewhat restrictively, in terms of a duty to mitigate "damage".[19] Consistently, analysis has tended to present it as a qualifying rule to, or subsidiary rule of, those rules used by the courts to ascertain the recoverable damage, *viz.* the so-called rules of remoteness.[20] The notion of such a duty is by definition wholly alien to a suit for performance. In such an action there can be no question of "damage", and no determination of "damages".

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17. *Wilkinson* v. *Verity* (1871) L.R. 6 C.P. 206 at 209. This is also the rule in American Law; *American Jurisprudence* vol. 34, 113.
18. *Reeves* v. *Butcher* [1891] 2 Q.B. 509, 511; *Board of Trade* v. *Cayzer Irvine* [1927] A.C. 610, 617.
19. This is without exception true of judicial formulations of the principle. For examples in leading cases see *Dunkirk Colliery Co.* v. *Lever* (1872) 26 L.T. 706 per James L.J.; *Jamal* v. *Moolla Dawood* [1916] A.C. 175 per Lord Wrenbury at 179; *British Westinghouse* v. *Underground Railways* [1912] A.C. 673 at 689.
    Inexact expression has sometimes led to its description as a duty to mitigate "damages". This is true only in the sense that a reduction in damages is the natural consequence of mitigating the damage. "Damages" includes, however, exemplary, punitive, nominal, etc. damages to which the concept of such a duty is inapplicable.
20. See, e.g., Viscount Haldane in *British Westinghouse* v. *Underground Railways* [1912] A.C. 673 at 689; Street: *Principles of the Law of Damages*, 37; Schmitthoff: *The Journal of Business Law*, Oct. 1961, 363.

One might be tempted to think that the action for payment of the price is an action for damages, but this is not so. Such an action, before the seventeenth century popularization of *indebitatus assumpsit*, was brought under the Writ of Debt.[21] Paradoxical as it sounds, this is a common law action for performance, entirely distinct from the action of *assumpsit* for compensation for the breach of an undertaking.[22]

By endorsing the fiction of a latter promise to discharge a pre-existing debt, *Slade's Case* (1602)[23] effectually extended the damages remedy of *assumpsit* to those fact-situations where the remedy was previously limited to enforcement. This was an important step in the amalgamation of enforcement and damages remedies into a composite and adequate law of contract. The creditor of a debt created by simple contract could now have *indebitatus assumpsit* for compensation or Debt for enforcement.[24]

Blackstone defined the scope of these writs very clearly when he said:[25]

> The legal acceptance of *debt* is, a sum of money due by certain and express agreement: as, by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it. *The non-payment of these is an injury, for which the proper remedy is by action of debt, to compel the performance of the contract and recover the specifical sum due.* . . . So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me; for this is also a *determinate* contract.

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21. The present argument, necessitating reconsideration of these forms of action in order to determine the propriety of the proposed operation of the principle of mitigation, seems to vindicate Maitland's adage that they continue to "rule us from their graves".
22. This argument is concerned with the status of the principle of mitigation in English Law. The historical background to the Scottish Law of contract is quite distinct. The concept of performance in Scots Law appears much broader; "specific implement" seems to share at least equal status with the damages action as a primary and entitled remedy: Gloag and Hendersen: *Introduction to the Law of Scotland* (6th ed.) 116.
23. (1602) 4 Co. Rep,. 92 a.
24. The conceptual distinction between "enforcement" and "damages" actions is still often confused. An example occurred in *Re Schebsman* ([1944] Ch. 83). Members of the Court of Appeal reviewed a contract between A and B whereby B was to pay C a sum of money. Du Parq L.J. said: "It is open to parties to agree that, for a consideration supplied by one of them, the other will make payments to a third person for the use and benefit of that third person and not for the use and benefit of the contracting party who provides the consideration. Whether or not such an agreement has been made in a given case is clearly a question of construction, but assuming that the parties have manifested their intention so to agree, it cannot, I think, be doubted that the common law would regard such an agreement as valid and as enforceable *in the sense of giving a cause of action for damages for its breach to the other party to the contract.*" (Italics added.) If "enforcement" was available at common law, that certainly could not be by an action for damages, for the prospective plaintiff cannot prove any injury to himself to sustain such a claim.
25. Blackstone *Comm.* Bk. III, 155. (Italics added.)

and further down,

> But in an action on the case, on what is called an *indebitatus assumpsit, which is not brought to compel a specific performance of the contract, but to recover damages for its non performance,* the implied *assumpsit* and consequently the damages for the breach of it, are in their nature indeterminate; and will therefore adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration.

The opening passage of Bacon's *Abridgement* states:[26]

> An action of debt is said to be founded upon contract, either express or implied; in which the (a) certainty of the sum or duty appears, and therefore the plaintiff is to recover the same *in numera,* and not to be repaired in damages by the Jury, as in those actions which sound only in damages, as *assumpsit,* trover, etc.

By a close analogy, an action brought to enforce a contract term specifying a valid pre-estimate of damages cannot be prejudiced by considerations of mitigation, because it is an action for performance of a payment due under the contract, not an action for damages for the breach thereof.[27]

It may somewhat explain confusion on this matter that in the common case of an action for the price of goods it is a plausible explanation of the availability of the action that it is really an action for damages on the breach of the term requiring payment, and the damages are assessed on the evaluation of the chattel thereby "lost", i.e., the title to which has been transferred. In this way, the action of *assumpsit,* originally designed to provide compensation by way of unliquidated damages for the breach of a bare undertaking, may seem to have become a method of achieving effective enforcement of the promise to pay the purchase price. That this is so, however, is more or less accidentally due to the fact that title had passed, and hence the damage was the value of the "lost" chattel, and damages were assessed by the price fixed on the chattel by the parties. Hence Lord Chief Baron Gilbert could say,[28] in 1760,

> If any Contract be made to transfer the Right of Chattels, if it be immediately executed the Property is altered. Therefore if A contracts to sell B a Horse for ten pounds. . . . So if A tenders the Horse he may bring debt or *assumpsit* for the money, for the right of the money is transferred by the bargain. . . .

Obviously this could not account for the recovery in Debt where

26. Vol. II, 617.
27. There appears to be no authority on the question. It is submitted that the alternative view is incompatible with the principle by definition. This does not mean that the avoidability of damage will not be considered in deciding whether the stipulated sum is a penalty (*Schroeder* v. *California Yukon Trading Co.*, 95 Fed. 296 (1899)). The point is that once the "pre-estimate" is held to be valid, then a plaintiff's recovery of his debt will not be prejudiced by mitigatory considerations.
28. *Gilbert's Cases in Law and Equity* (1760), 365.

the action is brought for the purchase price of anything other than goods, e.g. of work and labour. It cannot, therefore, be regarded as an adequate explanation.

III. *Additional considerations affecting the proposed operation of the principle of mitigation.*

There are some other arguments, of a comparatively minor nature, which deserve mention for the support they lend to the present view. First, the principle of mitigation primarily requires that the plaintiff reduce his own loss; no case has required him to lessen the burden on the defendant where that is not consequential on lessening the immediate loss to himself.[29] Secondly, some authority suggests that a plaintiff need not destroy or sacrifice his own rights in order to mitigate his loss.[30] In view of the rule that it is a question of fact what are reasonable steps to take in the circumstances,[31] this objection may be invalid.

Finally, it could be argued that to deprive the plaintiff of his contractual right to perform or to release the defendant from his debt for performance rendered, is contrary to the principle of *Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia* v. *Estate and Trust Agencies* (1927) *Ltd.*[32] which, by deciding that an executor or administrator could never justify a refusal to perform a contract on the ground that this was cheaper to the estate, presumably settled the basis of the English law of contract to lie in performance rather than in the availability of damages for breach. There is some obvious support for this basis in the common practice of contracting parties to express themselves adequately on the matter of performance and yet entirely delegate the issue of non-performance to the general common law.

If the arguments developed above are sound, it is fairly clear that the principle of mitigation cannot be used to prevent the innocent party performing after repudiation in order to claim the agreed price. However, there may be a more acceptable argument which will have the same effect.

In *White's Case*, Lord Reid referred[33] to an argument from equitable principles. This argument originated in a dictum of Lord Watson in *Grahame* v. *Magistrates of Kirkaldy*,[34] to the effect that a superior court, having equitable jurisdiction, would have a discretion in certain "exceptional" cases to withhold remedies to which parties were normally entitled. Although qualified by the requirement of "some very cogent reason", it was briefly disposed of by Lord Hodson as introducing "a novel equitable doctrine that a party was not to be held to his contract unless the court in a given instance thought it reasonable

29. *Elliott Steam Tug Co.* v. *The Shipping Controller* [1922] 1 K.B. 127 per Warrington L.J. at 138. American authority is more explicit: *Van Schaick* v. *Sigel* 9 Daly, 383; *Western Grain Co.* v. *Barron G. Collier, Inc.* 163 Ark. 369 (1924).
30. See, e.g., *Shindler* v. *Northern Raincoat Co.* [1960] 2 A.E.R. 239; *Heaven and Kesterton Ltd.* v. *Etablissements Albiac et Compagnie* [1956] Lloyd's Rep. 316 per Devlin J.; *Elliott Steam Tug Co.* v. *Shipping Controller* ibid.; *Mayne & McGregor on Damages*, p. 147. Sale of Goods Act 1895-1952, S. 30.
31. *Payzu* v. *Saunders* [1919] 2 K.B. 581.
32. [1928] A.C. 624, 635.
33. [1962] 2 W.L.R. 17, 23.
34. (1882) 9 R. (H.L.) 91, 92.

so to do".[35] It is submitted that the argument from Lord Watson's dictum would involve an incorrect view of the effect of the Judicature Acts, for it implies that because a Court of Chancery could in theory give equitable remedies at its discretion, therefore a Superior Court invested with equitable jurisdiction could *ipso facto* use its equitable discretion also in regard to common law remedies that parties were previously entitled to as of right from common law courts.[36]

In conclusion it is submitted that a satisfactory solution to this problem might have been found in a liberal interpretation of the maxim that contracts are to be construed according to the expressed or implied intention of the parties. Thus the nature of the contract and the circumstances of its inception would be scrutinised in order that the court may determine whether it was within the intention of the parties that if one party repudiates, the other should have a right to perform in addition to his remedy in damages.[37]

This is open to the obvious counter that the right to continue performance can always be expressly deleted from a contract. However, if it is true, as submitted, that the common man would not have anticipated the survival of the right to perform in cases like the present, it seems preferable that such contracts should be construed as containing an implied term to that effect, leaving the right to perform to be protected, if desired, by express provision.

35. [1962] 2 W.L.R. 17, 37.
36. This submission concerns the validity of the argument in English Law. The status of equity in the Scottish Jurisprudence provides some support for Lord Watson's dictum and in this respect Lord Hodson's refutation may be somewhat dogmatic. See Walker: *Equity in Scots Law* (1954) 66 Jur. Rev. 103.
37. *Ahmed Angullia*, which suggests that parties primarily contract for performance, is interpreted accordingly. Although contracts are primarily for performance, the express or implied intention of the parties may show otherwise.

NEGLIGENCE

Novus actus interveniens — rescuer killed by negligence of third party — apportionment of liability — contributory negligence of rescuer.

Chapman v. *Hearse*[1] is a rescue case which, because of its involved and rather unusual facts, is more interesting than most reported cases of this kind. It is unusual in that, while the rescuer had been placed in a perilous position by the negligence of the original wrongdoer, he was in fact killed by the subsequent negligence of a third party. It was necessary to decide whether this act of negligence had broken the chain of causation thereby relieving the original negligent actor from liability.

The case arose as the result of a collision which occurred on a main road near Adelaide. A car driven by one Chapman struck the rear of another vehicle, which was making a right-hand turn at an intersection, and Chapman was thrown out of his car. He was lying unconscious near the centre of the road when a Dr.

1. (1961) 106 C.L.R. 112.