fide and further that the resolution passed by the majority of shareholders was a nullity.

The Court of Appeal held that even if the directors had shown impropriety in making the allotment, this could be, and had been waived by the majority of the votes of the shareholders at the general meeting of the company. The question of bona fides was not therefore argued at length. Harman L.J. cited Lord Russell in the well known case of *Regal (Hastings) Ltd.* v. *Gulliver* [1942] 2 A.C. 134: "they [the directors] could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting. In default of such approval, the liability to account must remain."

Turning to the resolution passed by the majority of shareholders Harman L.J. stated at p. 1111:

> The only question is whether the allotment having been made, as one must assume, in bad faith, is voidable and can be avoided at the instance of the company, at their instance only and of no one else, because the wrong, if wrong it be, is a wrong done to the company. If that be right, the company, which had the right to recall the allotment has also the right to approve of it and forgive it; and I see no difficulty at all in supposing that the ratification by the decision of December 15 in the general meeting of the company was a perfectly good "whitewash" of that which up to that time was a voidable transaction.

M. S. McKechnie

CONTRACTS

Non est factum

In *Gallie* v. *Lee and Another* [1969] 2 W.L.R. 901, Mrs Gallie signed a deed purporting to be an assignment on the sale of her interest in a house to Lee. She signed the document without reading it, and, as Lee knew, in the belief that it was a deed of gift of the property to her nephew. The nephew witnessed the signature while holding a similar belief. Lee then mortgaged the property to a building society and Mrs Gallie, upon learning the true position, claimed that the assignment was void on the ground of *non est factum*. Judgment was entered for her at first instance.

The appeal was by the second defendants, the building society, and was unanimously allowed by the Court of Appeal, though the approaches of the different members of the court proceeded along various paths of reasoning.

Lord Denning M.R. followed a broad principle favouring a *bona fide* transferee for value and, after stating that where the plaintiff's mistaken belief was due to negligence on the part of the plaintiff then there would be liability to an innocent transferee, he held that the signature may not be avoided "when it has come into the hands of one who has in all innocence advanced money on the faith of its being his (the signatory's) document, or otherwise has relied on it as being his document': *ibid.* 913 F.

Salmon L.J. felt that a mistake as to the identity of the transferee named in the document could not be a mistake as to its character and class for the purpose of a plea of *non est factum*, and in this view he had the support of the Master of the Rolls: *ibid.* 910 E-F. Further, both

Russell and Salmon L.JJ. considered that, on the evidence, a transfer by Mrs Gallie to the rogue Lee could not be regarded as of a totally different character or nature from a transfer to her nephew for the purposes of a plea of *non est factum.*

Finally, Lord Denning M.R., in his attempt to cut down the scope of *non est factum,* proposed a view of the law inconsistent with any previous decision of the Court of Appeal. Not for the first time was he unable to obtain the support of the other members, though Salmon L.J. observed on several occasions that the law relating to *non est factum* is not overburdened with logic.

Money Paid Under a Mistake

The Court of Appeal in *Thomas v. Houston Corbett and Co.* [1969] N.Z.L.R. 151 dealt with the situation in which a person receives money without any knowledge that it was not his, and as a consequence alters his position. If the action had been determined following common law rules a change of position would afford no defence to the plaintiff's claim for recovery of money paid under mistake. However, the court had the opportunity, for the first time, to invoke s. 94 B of the Judicature Act 1908, by which it is given a discretion whether or not to allow such a defence:

> Relief . . . in respect of any payment made under mistake, whether of law or of fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.

The Court held that it could adjust the loss in proportion to the degree to which each party could have prevented the mistake. McGregor J. (at 178) stated that the appellant, although ignorant and inexperienced, was undoubtedly foolish, but still considered the greater responsibility rested on the respondents. Turner J. (at 171) felt that it was not fair that the appellant bore the whole loss and divided the loss equally between the two parties, following the maxim "equality is equity".

The Court's analysis of the equities thus led to differences between the members which were resolved only through a process of reconciliation before final judgment. The decided apportionment was an arbitrary one, for "the quantum is not capable of precise calculation": *ibid.* 178, and the Court, in fact, finally decided upon the proposal of North P., which was that the appellant should not be required to repay the full sum of £840, but should retain the sum of $560.

The Court of Appeal's enquiry seems to be a test of an "opportunity to avoid the loss" in that the judgment moves away from a common law rule which can only decide for one party or the other and which would have produced a less fair result to both. It shows a definite attempt to implement the spirit of the legislation, and in so doing may supersede the conventional answers to the law of mistake, allowing the Courts a middle ground in the case of mistaken payments between a valid and void contract.

Effect in Equity of Common Mistake

The English Court of Appeal was faced, in the words of Winn L.J., with "a neat and teasing problem" in *Magee* v. *Pennine Insurance Co.*

[1969] 2 W.L.R. 1278. The courts have assumed that some species of common mistake is capable of making a contract void and the difficulty is to ascertain what the character of the mistake must be in order to have this effect.

In 1961 the plaintiff acquired a car and signed an insurance proposal form which stated that both he and his eighteen year old son had provisional driving licences. In fact he did not have a licence, and wanted the car for his son who, in 1965, had an accident in which the car was a complete wreck. Upon the plaintiff's claim the insurance company made a written offer of $385 which was verbally accepted. The defendants then made inquiries and discovered the true facts, whereupon they claimed, *inter alia,* that they were entitled to repudiate their liability under the policy because its initial granting was induced by misrepresentations on the original proposal form. Judge Leigh in the county court rejected the plaintiff's claim on the policy itself but upheld the offer of £385 as a binding contract of compromise.

It was held, allowing the appeal (Winn L.J. dissenting), that on entering into the compromise agreement both parties were under the common fundamental mistake that the plaintiff had a valid claim under the policy and that the defendants were entitled to have the agreement set aside.

It is not surprising that Lord Denning M.R. rested content with the position taken up by him in *Solle* v. *Butcher* [1950] 1 K.B. 671. Once again he applied the principle that a contract is liable in equity to be set aside if the parties are under a common misapprehension as to facts or to their relative rights, provided that the misapprehension was fundamental. The learned judge held that the common mistake was fundamental in this case, and further that it would not be equitable if the plaintiff were allowed a good claim on the agreement to pay £385 when he had no valid claim on the policy.

The wide language of the speeches of the House of Lords in *Bell v. Lever Brothers, Ltd.* [1932] A.C. 161 provides the basis for the dissenting view of Winn L.J., and though he limited his considerations, he might perhaps have raised increased interest in his view through some comment upon Lord Atkin's later, more restricted, outline of the test, which he then stated was: "Does the state of the new facts destroy the identity of the subject matter as it was in he original sate of facts?": *ibid.,* 227.

While all the Judges applied the test of "underlying assumption", the opinion of Winn L.J. (1285 F-H), that the continued renewal of the policy and the mere passage of time diminished the importance of the terms of the proposal, seems a preferable application, on the facts, of the principle in *Bell* v. *Lever Bros.*

Exclusion of Implied Warranty of Quality

The House of Lords recently considered in two cases the nature and extent of the warranties which the law implies in a contract for the supply of work and materials.

The first was *Young and Marten Ltd.* v. *McManus Childs Ltd.* [1969] 1 A.C. 454, where, by an agreement made between builders and subcontractors, the latter agreed to roof certain houses, the builders specifying a particular tile made by only one manufacturer. The subcontractors duly obtained the tiles in the ordinary course of trade and

fixed them. Owing to faulty manufacture the particular tiles used had an undetectable defect which made them liable to break in frosty weather.

The House accepted the rule laid down in *G. H. Myers and Co.* v. *Brent Cross Service Co.* [1934] 1 K.B. 46, 55 that "a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty" (see Lord Pearce, 471A; Lord Upjohn, 474D; Lord Wilberforce, 478F). It was held that the fact that the builders had specified tiles made by only one manufacturer did not exclude the ordinary implied warranty of quality on the part of the sub-contractors.

The second case was *Gloucester County Council* v. *Richardson* [1969] 1 A.C. 480. The appellant employed the respondent to erect a building. The respondent supplied concrete columns from a supplier nominated by the council, and although passed by the engineers the columns had an undetectable defect which soon became manifest. Relying on several clauses in the contract the contractor gave notice of determination. The council sued the contractor for damages for wrongful repudiation and the contractor conceded he could not rely on the clauses in the contract if he was in breach of an implied warranty.

It was held (Lord Pearson dissenting), that the contractor was entitled to determine the contract. In determining the contract the contractor was entitled to rely on clauses 18 (v) and 20 in that the cause of the delay was obedience to the "architect's instructions" and under clause 18 (v) the fact that some outside cause compelled the architect to give the instructions was irrelevant.

Young and Marten Ltd. v. *McManus Childs Ltd.* (*supra*) was distinguishable in that in the present case the special circumstances of the contract, though sufficient to limit, were not sufficient to exclude the usual obligation of a contractor to supply materials of good quality. Lord Pearce and Lord Wilberforce held that on the true construction of the contract it was the intention of the parties to exclude any implied warranty of good quality and fitness by the contractor in respect of the goods supplied by the nominated suppliers.

Solus Agreements and Restraint of Trade

The facts in *Cleveland Petroleum Co. Ltd.* v. *Dartstone Ltd.* [1969] 1 W.L.R. 116 were that the plaintiffs took the lease of a petrol company for twenty-five years and immediately granted an underlease subject to covenants by which the underlessee was to carry on the business of a petrol station and was not to store or sell on or from the premises any motor fuel not obtained from Cleveland. The third assignee of the sub-lease later challenged this agreement on the ground that it was an unreasonable restraint of trade.

The Court of Appeal (Lord Denning M.R., Russell and Salmon L.JJ.) held, dismissing the appeal, that where a person entered into possession of premises under a lease subject to restrictive covenants on terms that he would be bound by the restrictions, the restrictions were *prima facie* valid and not in unreasonable restraint of trade, for the person taking the lease was not giving up any freedom which he had previously had. The Court stated that the House of Lords in *Esso Petroleum Co.*

Ltd. v. *Harper's Garage* (*Stourport*) *Ltd.* [1968] A.C. 269 had laid down a distinction between a person *already* in possession and a man who is *out* of possession and let in.

It has been argued that this reasoning is specious for a trader having bought land subject to a restraint has restricted his ability to obtain other land (see article in 32 M.L.R. 323). Whatever the logic of the decision, it may well cause a renewed outburst from those who think the doctrine of restraint of trade outmoded in this competitive age.

Measure of Damages

The question arose in an appeal to the House of Lords in *Koufos* v. *C. Czarnikow Ltd.* [1969] 1 A.C. 350 as to what was the correct measure of damages for wrongful delay by a shipowner in the performance of a contract for carriage of goods by sea. Pursuant to a charter party for the consignment of sugar, the ship was loaded and began its voyage on November 1, 1960. A reasonable length of time for the voyage was twenty days but in breach of the charter party the ship deviated from the voyage, owing to which it was delayed nine or ten days. The market price of sugar had dropped £1 7s 3d per ton in the ten days. The charterers sought to recover the difference between the price of the sugar when it should have been delivered and the price when it actually was delivered as damages (£4,183 16s 8d). The shipowner here appealed on the ground that the charterers were only entitled to interest on the value of the sugar during the period of the delay as damages (£172).

The Court of Appeal by a majority (Diplock and Salmon L.JJ., Sellers L.J. dissenting) applied the rule (or rules) in *Hadley v. Baxendale* (1854) 9 Exch. 341 as explained in *Victoria Laundry* (*Windsor*) *Ltd.* v. *Newman Industries Ltd.* [1949] 2 K.B. 528 and held that the loss due to fall in market price was not too remote to be recoverable as damages. The appeal to the House of Lords was dismissed, their Lordships holding that the sole rule as to the measure of damages for any kind of breach of any kind of contract was that the aggrieved party was entitled to recover such part of the damage actually caused by the breach as the defaulting party should reasonably have contemplated would flow from the breach.

Although a detailed analysis of the judgments is not possible here, several points upon which their Lordships were unanimous may be noted.

Firstly the consensus of opinion was that the modern rule of tort is quite different and imposes a much wider liability than that in contract. Lord Upjohn stated that "the rules as to the assessment of damages have diverged in the two cases, and nowadays the concept of 'forseeability' and 'contemplation of the parties' are different concepts in the law": *ibid.*, 422G (see also Lord Reid, 385F; Lord Hodson, 411E).

Secondly all the judgments contain the view that the rule in *Hadley* v. *Baxendale* (*supra*) is not extended by the decision in the *Victoria Laundry* case (*supra*). In the words of Lord Pearce the ambiguous phrase "liable to result" was "not intended as a further or different test from 'serious possibility' or 'real danger' ": *ibid.*, 415G (see also Lord Reid, 387G; Lord Morris of Borth-y-Gest, 399D; Lord Upjohn, 424B).

Thirdly, all their Lordships were of the opinion that different con-

ditions of ocean transport in the present age justified their disturbing of the ninety years' old decision in *The Parana* (1877) 2 P.D. 118. "In principle," it seemed to Lord Morris, "that the rule in *Hadley* v. *Baxendale* (*supra*) must in these days be applied in cases of carriage of goods by sea": *ibid.*, 402G (see also Lord Reid, 392G; Lord Hodson, 408F; Lord Pearce, 420A; Lord Upjohn, 428G).

The Law Lords have failed to lay down a unanimous rule as to the breadth or narrowness of the word "probability". Contrary to Lord Reid's assertion that *Hadley* v. *Baxendale* was not being departed from, the impression gained from the other judgments seems to be that the degree of probability required is not as great as was contemplated in *Hadley* v. *Baxendale*, and that the degree of remoteness of damage has in fact been enlarged by this decision.

Legislation

Minors' Contracts Act 1969. The effect of this Act may be briefly stated as follows:

(1) A minor who is or has been married shall have the same contractual capacity as if he were of full age.
(2) Where a minor has attained the age of 18 his contract shall have effect as if he were of full age; with the proviso that the Court may cancel or decline to enforce it, either in whole or in part where it thinks just, if the consideration accruing to the minor was inadequate or unconscionable, or if the contract imposed harsh or oppressive terms on the minor at the time of contracting.
(3) Every contract entered into by a minor who has not attained the age of 18 shall be unenforceable against the minor, but otherwise shall have effect as if the minor were of full age.
(4) Every contract entered into by a minor shall have effect as if the minor were of full age if, before the contract is entered into by the minor, it is approved by a Magistrate's Court.
(5) A guarantor of a minor's contract is fully liable as if a guarantor of an adult's contract.
(6) The Court is given a discretion to approve any money or damages claimed by or on behalf of a minor in certain circumstances.

J. R. Laidlaw

EQUITY AND THE LAW OF SUCCESSION

Powers and Duties of Trustees

Ex Gratia Payments by Charity Trustees

It was held by Cross J., in *In re Snowden* (*deceased*) [1969] 3 W.L.R. 273 that the court and the Attorney-General have the power to authorise *ex gratia* payments by charity trustees out of funds held by a charity or on charitable trusts, in pursuance of what the trustees consider to be a moral obligation. He qualified this by adding: "It is, however, a power which is not to be exercised lightly or on slender grounds but only in cases where it can be fairly said that if the charity were an individual it would be morally wrong of him to refuse to make the payment."