One criticism of the wording of this Section which is immediately apparent is the vagueness of the words "negligent or otherwise". Does the immunity from proceedings cover loss as a result of negligence *or* deliberate interference, or does it only cover negligence? Presuming that it covers both (and it seems most unlikely that the legislature would have left such an obvious loophole), then in the case of theft by an employee there would be no recourse against the Post Office or the offending employee. The Act does provide for criminal proceedings to be instituted against the latter,[24] but this would be of little comfort to the injured party. If the other interpretation be adopted, then civil action could be taken against the employee (subject to the rule of trespass merging in a felony), and the success of proceedings against the Post Office would depend on the rules of liability in tort. In particular, it could succeed only if the offending employee was acting within the course of his employment in committing the theft.[25] An action for breach of contract would be open to the same common law defences as were raised in the *Triefus Case*.[26] The English cases too, though not binding, would be highly persuasive in favour of the Post Office. The Australian *Post Office Guide* does not include a provision similar to that in its English counterpart denying intention to enter into contractual relations. The Australian authorities have evidently assumed that no further denial of liability is required other than that contained in s. 158.

In conclusion, it may be mentioned that one inroad has been made into the immunity of the English Post Office by s. 9(2)[27] of the Crown Proceedings Act, 1947 (Eng.) which, notwithstanding s. 13 of the Post Office Act, does allow proceedings in tort against the Crown in certain circumstances for loss of, or damage to, a registered inland postal packet. Apart from this exception, until such time as the legislatures or the courts decide otherwise, the Post Offices of both countries would appear to be in a virtually impregnable position.

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INNOCENT MISREPRESENTATION

OSCAR CHESS LTD. v. *WILLIAMS*

The remedies, if any, available to a purchaser who has suffered loss as the result of an innocent misrepresentation made by the vendor in the course of a transaction for the sale of goods, were examined in *Oscar Chess Ltd.* v. *Williams*.[1]

Generally speaking, the principles of law to be applied to cover this situation are well-defined, and the question of whether the representee has a remedy or not will depend on whether, at the time it was made, the representation was regarded by both parties as a contractual term, i.e. one imposing

[24] S. 114.

[25] On this point see *United Africa Co., Ltd.* v. *Saka Owoade* (1955) A.C. 130 (P.C.) (transport contractor held liable for theft by his servants of goods being carried by him for the plaintiff).

[26] (1957) 2 Q.B. 352.

[27] S. 9(2): "Notwithstanding the provisions of section 13 of the Post Office Act, 1908, proceedings shall lie against the Crown under this subsection in respect of loss of or damage to a registered inland postal packet, not being a telegram, in so far as the loss or damage is due to any wrongful act done or any neglect or default committed by a person employed as a servant or agent of the Crown while performing or purporting to perform his functions as such in relation to the receipt, carriage, delivery or other dealing with the packet."

[1] (1957) 1 All E.R. 325.

obligations which the law will recognise as binding on the representor. If the representation is found to constitute a contractual term, then the nature of the term in relation to the agreement as a whole will have to be examined to determine the nature of the remedy. Thus, where it is found to have been a term of the contract of the kind known as a warranty,[2] the remedy will be an action for damages; if, on the other hand, it is a term which is a condition, the purchaser will have the option of rescinding the contract and can claim damages for the loss he has suffered as a result of the representation.[3] Less frequently, damages may be awarded where the representation though not forming part of th main contract was nevertheless the subject of a subsidiary agreement, or collateral warranty as it is called, entered into by the parties at the time when the main contract was concluded. Where, however, it is found that the representation, while inducing the purchaser to enter into the agreement, was neither a condition nor a warranty of the main contract, nor a collateral warranty, the representee will have no action for damages either at law or in equity, although he may in certain circumstances have an equitable right to rescind.

The plaintiff in the case under discussion[4] had purchased from the defendant a second-hand Morris car which the vendor described as a 1948 model. They agreed on a purchase price of £290 which, according to a recognised price guide, was the current market value for that particular model. Unknown to the parties, the registration book, which was duly produced for inspection and handed over at the time of sale and which described the car as a 1948 model, had been falsified by some previous owner and the car was in fact a 1939 model. Had the plaintiff company known this at the time, it would not have paid more than £175 for the car, and when the mistake was discovered eight months later, the company brought an action for £115 damages, being the difference in price between a 1939 and a 1948 model car. The company based its claim either: (a) on the ground that the statement that the car was a 1948 model had been a condition of the contract, which, by virtue of s. 11(1)(c) of the Sale of Goods Act, 1893,[5] had now sunk to the level of a warranty, thus relegating the plaintiff's rights to an action for damages only; or (b) on the ground that there had been a collateral warranty that the car was a 1948 model.

It is to be noted, first, that the statement that the car was a 1948 model was fundamental to the contract, in that it is clear that had the parties known it to be untrue there would have been no sale; and second, that it was never questioned that the defendant had other than an honest belief in the truth of his statement.

The judge at first instance found that because it was fundamental to the contract, the defendant's representation was a condition, the breach of which entitled the plaintiff to the full amount claimed. He did not consider the alternative claim of breach of a collateral warranty. This finding was quashed by a majority of the Court of Appeal (Denning and Hodson, L.JJ., with Morris, L.J. dissenting) on the ground that the true inference from the facts was that the statement was not a term of the contract and the defendant was guilty of a mere innocent misrepresentation, which gave no right to damages to the injured party.

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[2] The use of this word in some early cases has given rise to confusion since it was originally used to describe any contractual term, that is, any binding obligation. Modern terminology has confined the meaning of a simple warranty to describe a term of the contract which is subsidiary to the main purpose, as opposed to a condition which is a vital term going to the root of the contract. See Denning, L.J. *supra*, at 327-28.

[3] When referring to a contract for the sale of goods, this general statement of the law on breach of a condition must be taken as qualified by the provisions of s. 16 (3) of the Sale of Goods Act, 1923-1953 (No. 1 of 1923—No. 8 of 1953) (N.S.W.).

[4] (1957) 1 All E.R. 325.

[5] This is the provision of the English Act which is equivalent to s. 16 (3) of the Sale of Goods Act, 1923-1953 (No. 1 of 1923—No. 8 of 1953) (N.S.W.).

In determining whether or not the statement was a contractual term, both the lower court and the three members of the Court of Appeal purported to affirm a well-established principle set out by Halsbury:[6] "It depends upon the intention of the parties to the contract whether any statement made with reference to the goods is a stipulation in the contract, being a condition, or a warranty, or whether it is an expression of opinion, or other mere representation, not forming part of the contract." This principle is generally said to have had its origin in the statements of Holt, C.J., in *Medina* v. *Stoughton*[7] and *Crosse* v. *Gardner*.[8] Both cases concerned an action by the purchaser of chattels which at the time of the sale were in the possession of the vendor who falsely affirmed the goods to be his own. In a later case,[9] also concerning a false affirmation made by the defendant at the time of sale with intent to defraud the plaintiff, Buller, J. said: "It was rightly held by Holt, C.J. (in the above-mentioned cases) that an affirmation at the time of sale is a warranty[10] provided it appear on evidence to have been so intended."

The judge in the lower court and Morris, L.J. in his dissenting judgment in the Court of Appeal, in purporting to apply this principle, concluded that the evidence showed that the parties had intended that the statement in question should be a condition of the contract. "The promise to pay £290 for that particular car (a figure arrived at by reference to the value of 1948 cars)" says Morris, L.J.,[11] "was the counterpart of the term of the contract that that particular car was a 1948 model." Because the assumption that the car was a 1948 model was fundamental to the contract in that the buyer would have rescinded had he found out in time that it was false, it was thought that the assumption was a condition of the contract.

Denning, L.J., however, applying the same test, rightly denies the validity of this argument when he says[12] "I entirely agree with the judge that both parties assumed that the Morris car was a 1948 model, and that this assumption was fundamental to the contract. This does not prove, however, that the representation was a term of the contract." His Lordship goes on to say[13] that the intention of the parties to regard such an assumption as a term must be determined objectively by reference to what a reasonably intelligent bystander would infer from the facts, and what constitutes a reasonable inference will obviously differ from one set of facts to another. Thus where, as in the present case, a seller in stating a fact implies that he has no personal knowledge but is merely passing on information obtained from an independent source, and the buyer is aware of this, it will not be as easy to imply a warranty as in some other circumstances.[14] In the absence of evidence express or implied to prove that the seller actually guaranteed that the facts set out in the registration book were true, it was held by Denning and Hodson, L.JJ., that no warranty of any kind was intended, and that the statement as to the age of the car was no more than an innocent misrepresentation. They therefore allowed the defendant's appeal against the lower court's award.

In neither the lower court nor the Court of Appeal was the possibility of proving a collateral warranty discussed, although the leading case of *Heilbut*,

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[6] 29 *Laws of England* (2 ed.), p. 52.
[7] (1699) 1 Salk. 210.
[8] (1689) Carth. 90.
[9] *Pasley & Anor.* v. *Freeman* (1789) 3 T.R. 51.
[10] The word "warranty" is used here in the sense of a contractual term, and not in the modern sense referred to *supra* n. 1.
[11] (1957) 1 All E.R. 325 at 333. [12] *Id.* at 327. [13] *Id.* at 328.
[14] Denning, L.J. compares this with the type of case where the seller states a fact which is or should be within his own knowledge and of which the buyer is ignorant (as in *Couchman* v. *Hill* (1947) 1 All E.R. 103) or where the seller makes a promise about something which is or should be within his control (as in *Birch* v. *Paramount Estates Ltd.* (1956) 16 Estates Gazette 396). In these cases it is easier to imply a warranty, but one must bear in mind the warning of Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton* (1913) A.C. 30, 50, to the effect that these facts can only be a guide in determining the intention of the parties.

Symons & Co. v. *Buckleton*[15] was referred to. That case involved a claim for damages by the buyer of shares in a proposed company which he understood from a verbal representation made by the vendor at the time of sale was to be a rubber company. The terms of sale of the shares were later reduced to writing, which, however, did not specifically describe them as shares in a rubber company, and in this action the buyer sought to prove that the terms of his conversation with the seller constituted a collateral warranty independent of the main contract, to the effect that the shares which were the subject of the main contract were to be shares in a rubber company. The House of Lords, however, reversing the findings of a jury in the lower court, held on appeal that it could not be found from the facts that either party intended that the representation should constitute a binding promise and that there was therefore no breach of a collateral warranty when the representation was found to be untrue. From this case the judgment of Lord Moulton in particular was referred to in *Oscar Chess, Ltd.* v. *Williams*[16] where both courts followed his Lordship's test, that in determining whether or not there is a warranty, "the intention of the parties can only be deduced from the totality of the evidence."[17] But, on the ground that it was inapplicable because the contract there was partly oral and partly written, the actual decision of the House of Lords in that case was distinguished both in the lower court and in Morris, L.J.'s dissenting judgment in the Court of Appeal. Denning and Hodson, L.JJ., however, held that there was no reason why the terms of a contract should not be partly written and partly oral, and thus no reason why the earlier case should be distinguished in this way. Their Lordships then applied Lord Moulton's test to determine whether or not the parties intended that the representation should be a condition of the main contract. Finding the parties did not so intend, they held that the appeal should succeed. It is somewhat surprising that they did not even consider whether or not, by an application of the same test, the representation could have constituted a collateral warranty as distinct from a term of the main contract, since it was in this context that Lord Moulton made his ruling.

In any event, it seems unlikely that the claim of a collateral warranty could have been supported on the facts of this case. In *Routledge* v. *McKay*[18] the same situation arose when the seller of a motor cycle stated the age of the vehicle from the date in the registration book which was later found to be false. Applying the *dictum* of Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton*,[19] the court held that the facts did not indicate that any binding promise was intended, and the buyer failed in his action for damages. This decision further exemplifies the rule that the courts will require very strong evidence of intention before attaching the character of a binding obligation by way of collateral warranty to statements made during negotiations leading to the main contract. Lord Moulton has summed up the courts' attitude thus.[20]

> It is evident both on principle and authority that that there may be a contract the consideration for which is the making of some other contract. . . . It is collateral to the main contract, but each has an independent existence and they do not differ in respect of their possessing to the full the character and status of a contract. But . . . such collateral contracts the sole effect of which is to vary or add to the terms of the principal contract, are viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts, but the existence of an *animus contrahendi* on the part of all the parties must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations unquestionably entered into by them . . .

[15] (1913) A.C. 30.
[16] (1957) 1 All E.R. 325.
[17] (1913) A.C. 30 at 51.
[18] (1954) 1 All E.R. 855.
[19] (1913) A.C. 30.
[20] *Id.* at 47.

Thus, in a contract for the sale of a specific chattel where an innocent statement containing a misdescription of the goods sold cannot be said to be incorporated as a term of the main contract it is unlikely in most cases that the courts will be able or willing to impose liability by construing a collateral warranty, and the failure of the court to distinguish this as a separate possibility in *Oscar Chess Ltd.* v. *Williams*[21] was not a serious omission, since on the authority of *Heilbut, Symons & Co.* v. *Buckleton*[22] and *Routledge* v. *McKay*[23] it is unlikely that a collateral warranty could have been proved.

It is thus clear that in the case of an innocent misrepresentation where no contractual obligation is proved, no action can succeed at law, and the only form of relief then available to the representee is the possible right to rescission in equity. This right is a limited one, however, and is subject, for example, to the supposed rule in *Angel* v. *Jay*,[24] which insofar as it is still good authority,[25] says that once a contract has been completed, rescission will not be ordered for a mere innocent misrepresentation. Denning, L.J. has sought to reduce the force of this rule and to enlarge the scope of the equitable right to rescind, by saying that the remedy may be available in some circumstances, not for an innocent misrepresentation as such, but on the ground of common mistake. In *Solle* v. *Butcher*[26] he said: "A contract is also liable to be set aside in equity if the parties were under a common misapprehension either as to facts or as to their relative and respective rights provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault." There is, however, little support at present for so wide a view of the discretion of equity to order rescission.

In any event, the question of the precise limits of the equitable right to rescind is not strictly relevant to the case under consideration, since the contract here involved the sale of a specific chattel, which is necessarily governed by the provisions of the Sale of Goods Act, 1893. Since s. 11(1)(c) of that Act[27] provides that once goods are deemed to be accepted no breach of a condition subsequently discovered will give the buyer a right to reject them, even Denning, L.J. does not think such a right could be upheld in the case of a mere innocent misrepresentation subsequently discovered. In *Leaf* v. *International Galleries*[28] he said: "Although rescission may in some cases be a proper remedy, nevertheless it is to be remembered that an innocent misrepresentation is much less potent than a breach of a condition . . . and if a claim to reject for breach of a condition is barred it seems to me *a fortiori* that a claim to rescission on the ground of innocent misrepresentation is also barred." Since the property in the Morris car in the principal case had passed to the buyer some eight months previously, any right he might have had in equity to rescind either on the ground of innocent misrepresentation or common mistake had been long since lost.

Although in theory the decision of the Court of Appeal in *Oscar Chess Ltd.* v. *Williams*[29] is to be preferred to that of the lower court, its effect was nevertheless to cause hardship to an innocent party. Because he could not prove that the representation was a contractual term, the buyer had no remedy at law, and because he discovered his mistake too late he had no remedy in equity. The only way the courts could in the future shift the burden of this loss would be by overcoming their reluctance to recognise the existence of collateral warranties; and bearing in mind the considerations of policy contained in Lord Moulton's *dictum* in *Heilbut, Symons & Co.* v. *Buckleton*,[30] it is doubtful whether

[21] (1957) 1 All E.R. 325.
[22] (1913) A.C. 30.
[23] (1954) 1 All E.R. 855.
[24] (1911) 1 K.B. 666.
[25] See G. C. Cheshire & C. H. S. Fifoot, *The Law of Contract* (4 ed. 1956) 236-39, where the validity of the rule in *Angel* v. *Jay* is questioned.
[26] (1949) 2 All E.R. 1107, at 1120.
[27] *Supra* n. 5.
[28] (1950) 1 All E.R. 693 at 695.
[29] (1957) 1 All E.R. 325.
[30] (1913) A.C. 30.

such a course would be practicable. The situation is therefore one where, if a choice must be made as to which of two innocent parties is to suffer, the preservation of recognised legal standards demands that the burden of any loss should remain where it has fallen.

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BREACH OF CONTRACT OF SERVICE

NATIONAL COAL BOARD v. *GALLEY*

The Court of Appeal[1] in *National Coal Board* v. *Galley*[2] upheld a decision of Finnemore, J. at Nottingham Assizes that the defendant, a deputy[3] employed by the Board, had been in breach of his contract of service by failing to work a "voluntary" Saturday shift, and was liable in damages, but it disagreed with him on the nature and the measure of damages, therein raising two important aspects of this question.

The defendant, in 1949, had entered into a written contract of service with the Board which provided *inter alia* that it should be regulated by "such national agreement or subsidiary agreements for the time being in force in the industry". In 1952 the National Association of Colliery Overmen and Deputies and Shotfirers (Nacods) of which the defendant's trade union was a member, reached an agreement with the Board "on revised terms and conditions of employment of deputies" this agreement containing a provision that "deputies shall work such days or part days in each week as may reasonably be required". The exigencies of the industry required that deputies, who were paid an "upstanding" weekly wage, could be and in fact were required to work a Saturday shift without payment of overtime.

In June 1956 the deputies at the plaintiff's colliery individually gave notice to the Management that they would not work on Saturdays in future and production was thereby prevented each Saturday between 16th June and 25th August, 1956, at which latter date substitute deputies were employed. Following the initial Saturday breach the plaintiffs issued a writ against the defendant claiming damages limited to £100 for breach of contract and were awarded that amount by Finnemore, J.

On the main question as to breach of contract the Court found that the defendant, by working since 1952 in the terms of the "Nacods" Agreement, had, in effect, adopted that Agreement; that its terms as to reasonableness were not too vague;[4] that the court would supply an implied condition as to reasonableness where duties are not fully defined;[5] and the fact that reasonableness is difficult to decide in a given case should not deter it from deciding what, in the circumstances, is a reasonable requirement. The Court came to the conclusion that the defendant had been reasonably required by his employers to work the Saturday shift on 16th June and, in refusing so to do, he was in breach of his contract of service.

Finnemore, J. had held that, in assessing damages for the breach, he was entitled to take into account matters occurring after the issue of the writ, and so regarded the defendant's continued abstention on succeeding Saturdays until February, 1957 as a continuing cause of action; invoking, as his authority,

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[1] Jenkins, Parker and Pearce, L.JJ.

[2] (1958) 1 W.L.R. 16, (1958) 1 All E.R. 91.

[3] These employees were responsible for safety measures in the mine, their attendance being essential to the working of the shift. They did not, however, participate in the actual winning of the coal.

[4] On the principle of *May & Butcher* v. *The King* (1934) 2 K.B. 172.

[5] *Hillas & Co. Ltd.* v. *Arcos Ltd.* (1932) 147 L.T. 503 *Foley* v. *Classique Coaches Ltd.* (1934) 2 K.B. 1.