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SOME COMPARATIVE NOTES ON ENGLISH AND AMERICAN CONTRACT LAW

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I. INTRODUCTION

COMPARATIVE law studies have traditionally concentrated on differences between civil and common law; but more attention is now given to comparisons between legal systems within these two families, and, in particular, to differences between the common law in England and in the United States. No one can be better aware of such differences than Joe M[c]Knight, of whose four law degrees the first two were taken in England and the last two in the United States. Such comparisons are of particular interest in those parts of the law which, starting from shared common law principles, have moved (for reasons by no means easy to fathom) in diverse directions.

Contract law provides one of the best sources of materials for making such comparisons, since the general contours of the subject have remained sufficiently similar in both systems to make the exercise possible, while the differences that have developed between them are sufficiently significant to make it interesting. There is, for example, a clear resemblance between Restatement (and Restatement 2d), Contracts, § 90 and the English doctrine of promissory estoppel,[1] both serving the same purpose of mitigating the requirement of consideration. But there is also the significant difference between them that, while § 90 is expressed so as to give rise to causes of action, the English doctrine is still thought of only as discharging or reducing prior obligations,[2] though this position may be under threat as a result of a contrary development in Australia.[3] This is perhaps more likely than the American doctrine to be influential in England since the Australian and English judicial styles of argument and analysis are closer to each other than either is to the American.

A full discussion of such differences between English and American contract law would occupy a fair-sized volume and so is beyond the scope of these few general observations. But it may be appropriate here to go

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1. Stretching back into the 19th Century: *Hughes v. Metropolitan Ry.* (1877) 2 App. Cas. 439.

2. *Combe v. Combe* [1951] 2 K.B.215.

3. *Waltons Stores (International Ltd. v. Maher* (1988) 164 C.L.R 387.

into two further points of this kind, before turning to some more general matters of structure concerning the development of contract law in the two systems.

II. THIRD PARTY BENEFICIARIES

The recognition of the rights of third party beneficiaries in most of the United States (Massachusetts forming a notable exception until 1979) and the refusal of the English common law, in general, to recognise such rights forms probably the most significant difference between the contract doctrines of the two systems. English courts have sometimes found ways around their general rule "in a manner that can only command an awed Transatlantic respect."[4] But our present concern is with a curious historical point. The early development of the American third party beneficiary doctrine is usually associated with the New York case of *Lawrence v. Fox*,[5] decided in 1859, while the development in England of the contrary doctrine of privity of contract is, in turn, associated with the case of *Tweddle v. Atkinson*,[6] decided by the Court of Queen's Bench just two years later. In *Lawrence v. Fox*, reference is made to earlier English cases (which were in some conflict), but only by one of the dissentients; while there is no reference to *Lawrence v. Fox* or to any other American decision in any of the reports of *Tweddle v. Atkinson*. Whether that case actually is authority for the English privity doctrine is, indeed, open to argument; but the significant point is that it came to be regarded as such in the late 19th Century, attempts by counsel in 1884 to resurrect earlier, contrary, decisions being then judicially described as "mere pedantry".[7] Corbin, in an article published in England[8] in 1930 tried another line of attack on the English doctrine: the core of his argument was that a third party beneficiary doctrine was recognised in equity (where the promisee was sometimes regarded as trustee of the promise for the third party) and that this equitable principle prevailed over the contrary common law doctrine by virtue of the general statement in section 25(11) of the Judicature Act 1873,[9] giving primacy to rules of equity where these conflicted with rules of common law. But this reasoning did not convince the English courts. In 1943, Corbin's article was cited in the Chancery Division by no less distinguished an advocate than Denning KC[10] (soon to become Denning J and later Lord Denning MR) but specifically rejected by the court[11] in a decision that was approved on appeal without further explicit

4. *Kessler and Gilmore, Contracts Cases and Materials*, 2nd ed. (1970) 1127, commenting on *Beswick v. Beswick* [1968] A.C. 58 where the third party was the promisee's administratrix and was held entitled in that capacity specifically to enforce the promise against the promisor for her own benefit in her personal capacity.

5. 20 N.Y. 268 (1859).

6. (1861) 1 B. & S. 393.

7. *Gandy v. Gandy* (1884) 30 Ch. D. 57, 69.

8. 46 L.Q.R.12 (1930).

9. Now Supreme Court Act 1981, section 49(1).

10. *Re Schebsman* [1943] Ch. 366, 368.

11. *Re Schebsman* [1943] Ch. 366, 370, per Uthwatt J.

reference by the appellate court to Corbin's article.[12] On the contrary, English courts, while recognising the equitable doctrine, restricted its scope on the ground that the inference of a trust where none was in terms created would unduly limit the power of promisor and promisee consensually to rescind or vary the contract. The operation of trust reasoning in this field was viewed by them as an exception, of limited scope, to the common law rule, rather than as a conflicting rule.

When, in the mid-20th Century, the English position came under judicial attack from Denning LJ and from Devlin J[13] (later Lord Devlin), no further reliance was placed on Corbin's reasoning, though in one of the cases in question Denning LJ did rely on the *American* third party beneficiary rule, saying that the American courts had rejected what he called the "new rule" in *Tweddle v. Atkinson*[14] and had "followed the original common law, which is much more in accord with the needs of a civilised society."[15] But the bewildering complexity of the judicially developed American doctrine[16] seems to have been one of the reasons for the general view[17] in England that reform of the common law doctrine of privity, which had become the target of frequent criticism in the House of Lords and the lower courts, should not be undertaken on a step by step basis by judicial decision but should be left to legislation. That reform finally came with the Contracts (Rights of Third Parties) Act 1999 which, while not wholly abolishing the privity doctrine, creates, in the words of the Law Commission Report on which the Act is based, "a general and wide-ranging exception" to it.[18] This is not the place for an extended analysis of the Act; the point of interest here is that in three of its sections[19] the Act deals in a relatively succinct way with some of the central issues which have been the source of so much litigation in the United States: the circumstances in which rights of enforcement are prima facie acquired by the third party; the effects, on the third party's rights, of rescission or variation of the contract by agreement between promisor and promisee; and the extent to which the promisor can rely against the third party on defences and set-offs that would have been available to him against the promisee. No one would pretend that legislative foresight in respect of these matters (or of others dealt with in the Act) will turn out to have been comprehensive or all-embracing; but the Act does provide a struc-

12. [1944] Ch. 83, where Uthwatt J.s reasoning was specifically approved at p. 104.

13. See, amongst other cases, *Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board* [1949] 2 K.B. 500; *Drive Yourself Hire Co. (London) Ltd v. Strutt* [1954]1 Q.B. 250; *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.* [1954] 2 Q.B. 402, where the actual issue was whether a person could be *bound* by a contract to which he was not a party.

14. *Supra,* n. 6.

15. *Drive Yourself Hire Co. (London) Ltd v. Strutt* [1954] 1 Q.B. 250, 274.

16. The account of it in *Corbin on Contracts,* Chapters 41 to 44 occupies more than 350 pages.

17. For a distinguished exception see Steyn LJ (now Lord Steyn) in *Darlington B.C. . v. Wiltshier Northern Ltd.* [1995] 1 W.L.R. 68, 76.

18. *Privity of Contract: Contracts for the Benefit of Third Parties*, Law Com. No. 242 (1996), §5.16.

19. Sections 1 to 3.

tured scheme which could scarcely have been attained (or attained so quickly) if the development had proceeded on a case by case basis.

III. UNEXPECTED SUPERVENING EVENTS

The starting point for the doctrine of discharge by supervening impossibility is considered, both in England and in the United States, to be Blackburn J's famous judgment in *Taylor v. Caldwell*[20], where the destruction of a music hall which had been hired out for the giving of a series of concerts was held to have discharged the contract of hire. The resulting doctrine (or its subsequent expansion) came to be known in England as discharge by frustration and in the United States as discharge by impossibility, impracticability and frustration of purpose. This difference in terminology reflects (in part) the wider scope of the American, than that of the English, doctrine, the latter being reluctant to recognise "impracticability" (as opposed to "impossibility"), though prepared (in the well-known coronation cases) to recognise frustration of purpose, as a ground of discharge. But our concern here is with the further difference which relates to the legal effects of, rather than to the precise grounds for, discharge.

The basic principle is that (in Blackburn J's words) "both parties are excused"[21] from further performance; but this leaves outstanding the problems which arise from one-sided or partial performance and from expenditure incurred in reliance on the contract. In England, judicial solutions of these problems came to be regarded as unsatisfactory or inadequate[22] so that a legislative solution was eventually provided by the Law Reform (Frustrated Contracts) Act 1943; while in the United States similar problems were dealt with , except in the Field Code States, without legislative intervention. The English legislation, however, dealt only in a restricted way with the problem of expenditure which had been incurred in reliance on the subsequently discharged contract and was wasted by reason of the discharging event. Under the 1943 Act, relief can be granted in respect of such expenditure only in favour of a party to whom a payment of money was made or due under the contract before the time of discharge[23] or on whom a valuable benefit other than money had before that time been conferred.[24] Neither of these alternatives would apply on facts such as those of *Taylor v. Caldwell,* where the actual claim made (and rejected) was by the hirers of the hall for the expenses which they had wasted in preparing for the concerts, which the destruction of the hall made it impossible to give. American cases support claims for wasted expenditure in cases of so-called "essential reliance": i.e., where

20. (1863) 3 B. & S. 826.
21. 3 B. &. S. 826, 840.
22. See the Report cited in n. 34 below and the well-known *Fibrosa* case [1943] A.C. 32.
23. Section 1(2), proviso.
24. Section 1(3)(a).

the reliance takes the form of performing obligations imposed by the contract.[25] The Restatement, Contracts, 2d, § 272(2) goes further in giving the courts a general discretion to "protect the parties' reliance interests" where simple discharge would "not avoid injustice." It is strange to think that the exercise of this discretion could, on facts such as those of *Taylor v. Caldwell*, lead to a result precisely the opposite of that there reached in a decision generally regarded as one of the more beneficent Victorian innovations in the law of contract. Perhaps an American court, confronted with this possibility, could avoid such a startling conclusion by refusing to exercise the § 272(2) discretion on the ground that *each* party had incurred expenses that were wasted in consequence of the supervening event. In the most recent English case on the point, the court refused to exercise its *statutory* discretion under the 1943 Act on precisely this ground.[26]

IV. RESTATEMENTS AND CODES

Perhaps the most important structural difference between American and English contract law in the 20th Century is that the influence on the subject in the United States of the Restatements and of the UCC (especially Articles 1 and 2) has had no real counterpart in England; and, as what is as yet no more than a footnote to this point, one might add that any influence which the Vienna Convention on Contracts for the International Sale of Goods might come to have on the general principles of contract law in the United States will not be replicated in England so long as the United Kingdom maintains its present reluctance to ratify this Convention.

One could, of course, point to the fact that considerable parts of English commercial law were "codified" in a series of late 19th and early 20th Century statutes such as the Bills of Exchange Act 1882, the Sale of Goods Act 1893 (now 1979) and the Marine Insurance Act 1906. The last of these "codes" has had no counterpart in the United States. Conversely there is no very close English counterpart to the detailed American legislation on bills of lading formerly contained in the Uniform Bills of Lading Act (now superseded by UCC Article 7) and in the Federal Bills of Lading Act 1916 (now re-enacted in 49 USC Chapter 81): the English Bills of Lading Act 1855 was, and the Carriage of Goods by Sea Act 1992 which has replaced it is, a much less comprehensive piece of legislation, designed only to deal with a limited range of issues, the treatment of which forms a relatively small part of the American legislation. Perhaps the reason for this difference is that the concept of a "bill of lading" was, and still is, much narrower in English than in American law and commercial practice, being used in England only in relation to the carriage of goods by sea and in the United States in relation also to carriage of goods by

25. e.g., *Angus v. Scully* 57 N.E. 674 (1900); *Albre Marble and Tile Co. v. John Bowen & Co.* 155 N.E. 2d 437 (1959).

26. *Gamerco S.A. v. ICM/ Fair Warning Agency Ltd.* [1995] 1 W.L.R. 1226.

other means.[27] In the 19th and early 20th Centuries, legal regulation of carriage of goods by sea was not seen as a matter of high priority in England, while carriage by rail and inland waterway was regulated by a separate body of legislation, such as the Railway and Canal Traffic Act 1854, requiring conditions of carriage to be reasonable, a requirement leading to the judicial development of the so-called doctrine of the "fair alternative."[28] In relation to carriage of goods by sea, freedom of contract prevailed in England, so that English common law allowed the carrier to exclude liability for negligence[29] while American common law did not.[30] The series of compromises on this point (and on others) initiated in the United States by the Harter Act 1893 reached England only when the Carriage of Goods by Sea Act 1924 (now superseded by the Carriage of Goods by Sea Act 1971) gave effect to the Hague (now superseded by the Hague-Visby) Rules.

Setting aside the question of coverage, the nature of the English Acts codifying parts of commercial law differs from that of the UCC in that the object of the English Acts was merely to embody the previous common law in statutory form. It was not their purpose to introduce new concepts, having no precise counterparts (though they may have had analogies) in the previous common law, such as those found in the UCC under the headings of (for example) "adequate assurance of performance"[31] or "failure of presupposed conditions."[32] These seem rather to have been derived, at least in large part, from civil law sources which it may not have been politic to publicise at the time of the original adoption of the Code. Indeed, the attempt to illustrate the latter concept by reference to the *English* case of *Ford & Sons Ltd. v. Henry Leetham & Sons Ltd*[33] is so patently misguided (that case being concerned only with the interpretation of an *express* contractual provision for supervening events) that it is scarcely credible to suppose that the draftsman was not aware of the point. The adoption of many such UCC innovations by the Restatement 2d (the two examples given above being reflected in its §§ 251 and 261) and their consequent influence on the development of general contract law calls for no further comment here.

In the United States, academic lawyers contributed substantially to the drafting of the UCC and of the Restatements, while in England there was in the first half of the 20th Century little influence on the development of the law of contract from this quarter. One might speculate as to the reasons for this contrast: it may have had something to do with the facts that at that time many English judges did not have law degrees; that in En-

27. See now UCC §1-201(6).
28. *Peek v. North Staffordshire Railway* (1863) 10 H.L.C. 473.
29. *Blackburn v. Liverpool, etc, S.N. Co.* [1902] 1 KB 290.
30. *Liverpool, etc, Steam Co. v. Phenix Ins. Co.* 129 U.S. 397(1889).
31. §2-609.
32. §2-615 – interestingly, this phrase occurs only in the heading to, and not in the legislative text of, the section.
33. (1915) 21 Com. Cas. 55.

gland few academic lawyers engaged to a significant degree in practice and that direct movement from academic posts to senior judicial appointments was (and still is) unknown. The picture began to change in the 1930s with academic representation on the part-time bodies set up to make recommendations for the reform of particular areas of the law referred to them by the Lord Chancellor; in the present context, it is of interest to note that A.L. Goodhart, an American whose distinguished academic career was almost exclusively in England, served as a member of the Law Revision Committee. In the law of contract, one of that Committee's most successful exercises[34] resulted in the passing of the Law Reform (Frustrated Contracts) Act 1943, mentioned above, though that Act received further impetus from the need to resolve problems in the law of contract which had arisen from the disruption of trade consequent on the outbreak of the Second World War.[35] Academic contribution to law reform proposals continued in the United Kingdom with the creation by the Law Commissions Act 1965 of the two Law Commissions, one for England and one for Scotland. These are permanent, full time law reform bodies on each of which one Commissioner is, by tradition, an academic lawyer, and such lawyers have also acted as outside consultants to the Commissions on specific law reform projects. Many recent legislative changes in the English law of contract owe their origin, wholly or in part, to the work of the English Law Commission; such changes include those made by the Unfair Contract Terms Act 1977, the Minors' Contracts Act 1987 and the Contracts (Rights of Third Parties) Act 1999, discussed above.

Much the most ambitious project undertaken by the Law Commission in the field of contract law was put forward in its First Programme of Law Reform in 1965: it was that this branch of the law should be "examined with a view to codification" since its "clarity and accessibility" were of "the greatest importance" (it being presumably thought that these desiderata would be promoted by codification) and since this branch of the law, being "well settled" was "ripe for codification." With hindsight, the last of these statements must be regarded as (to say the least) over-optimistic and to reflect a serious under-estimate of the difficulty of the project. That difficulty was exacerbated by two decisions: first, to combine codification with reform, a necessarily controversial process; and secondly, to produce (in collaboration with the Scottish Law Commission) a code for the whole of the United Kingdom, so that it became necessary to reconcile (or to reach compromises on) the many differences between English and Scots contract law. A draft Code was produced but in 1972 the project was abandoned. One reason for this was that the Scottish Law Commission withdrew from the exercise; and another, which in the end proved decisive even in the purely English setting, lay in the precise

34. Law Revision Committee, 7th Interim Report (1939); Appendix A refers to Restatement, Contracts, §468.

35. See the *Fibrosa* case, above n. 22.

and accurate style of legislative drafting adopted by Parliamentary Counsel in England. This is widely different from the often vague and general legislative language of, for example, corresponding provisions of the Field Code in some of the United States, a difference perhaps reflected as long ago as 1887 in Sir Frederick Pollock's criticism of that Code as "about the worst piece of codification ever produced."[36] The English style of drafting would have led to more readily predictable results and so could have promoted the "clarity and accessibility" which were the Law Commission's objective (or at least the first of these qualities), though at the expense of flexibility. But the view taken at the time was that the task of translating the draft Code into the language of an Act of Parliament was so complex that, though a small part of it was accomplished, its completion would have called for efforts (and the use of legislative resources) that were not commensurate with the benefits to be obtained. One suggestion made at the time was that, instead of a Code, the Commission might produce something in the nature of an English Restatement; but this idea was not pursued. Comparison with the American scene would seem to suggest that legislative energies are better directed towards a Commercial Code than towards a Contract Code; and one might note that codification was not, in the United States, identified as an ultimate object of the Restatement, even though that enterprise shared with the English codification project the objective of rendering the law "more certain."[37]

V. CIVIL LAW INFLUENCES

Law is one of the more resistant of human institutions to the modern process of globalisation; but even the law of contract has not been able to escape from it entirely. Towards the end of the 20th Century, English contract law began to a considerable extent to be exposed to European continental civil law through the implementation in England (often by secondary legislation) of European Community Directives. These have, for example, been the source of legislation that regulates the relations between "commercial agents" and their principals[38] and of much legislation in the field of consumer protection, most notably of the Unfair Terms in Consumer Contracts Regulations 1999.[39] The quantity of legislation from this source is considerable and growing; and English courts are faced in it with a style of legislative drafting and with legal concepts that will call for considerable agility and adaptability on their part.

In the United States, the dimensions of a similar problem are smaller; but here too there has been some penetration of civil law concepts into

36. See Pollock and Mullah, *Indian Contact and Specific Relief Acts*, 9th ed. (1972) xii. The criticism may have been prompted by the incorporation of parts of the Field Code into the Indian Contract Act 1872 and Specific Relief Act 1877.

37. Restatement, Contracts, p. viii.

38. Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, as subsequently amended.

39. SI 1999/3159.

contract law as a result of the ratification by the United States of the Vienna Convention on Contracts for the International Sale of Goods. The point may be illustrated by the machinery provided by Articles 49(1)(b) and 64(1)(b) of the Convention, entitling a buyer to whom the goods have not been delivered and a seller to whom the price has not been paid to give notice to the party in breach requiring the latter to perform within a further period specified in the notice and, if performance is not rendered within that period, to declare the contract avoided. These provisions owe more to the German institution of the *Nachfrist*[40] than to the common law (or more strictly equitable) rules as to notices making time of the essence in contracts for the sale of land: for example, such a notice binds *both* parties while the notices under the Vienna Convention relate only to the obligations of the party *to* whom they are given. The analogy between the Vienna Convention notices and the concept of adequate assurance of performance (itself, as noted above, probably derived from a civil law source[41]) is also imperfect: for example, the Vienna Convention notices must follow, while the request for adequate assurance may (and usually will) precede, breach; and the former must, while the latter need not, specify a fixed (extended) period for performance.

The observations here made are intended to be of a predominantly retrospective nature and do not aspire to prophecy. Already English courts have accepted that their traditional approach to the interpretation of legislation will have to be modified in the interpretation of domestic implementation of European Community law.[42] Apart from this point, the question of how English and American courts will integrate civil law concepts and methods into their common law systems cannot yet be answered with any degree of certainty. The only safe prediction is that the process will be a difficult and an interesting one.

40. BGB §326.
41. BGB §321.
42. *Litster v. Forth Dry Dock & Engineering Co. Ltd* [1990] 1 A.C. 546, 559.