

INTENTION TO CREATE LEGAL RELATIONS

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THE aim of this article is to examine the purpose and effect of the alleged rule of English law that an agreement supported by consideration will not be enforceable as a contract unless there is additional proof of an intention to create legal relations.

This inquiry has been rendered necessary by two recent events. The first is the decision in *Ford Motor Co. Ltd. v. Amalgamated Union of Engineering and Foundry Workers*¹ in which the enforceability of three collective labour agreements was made to turn upon the implied or fictitious intentions of the parties. Secondly, the view has been urged upon the English Law Commission, which proposes to revise and codify the law of contract, that the doctrine of consideration may safely be abolished because English law "would still retain its rules which establish the seriousness of a promise."² It is not proposed to consider the full implications of substituting a rule about the seriousness of a promise for the doctrine of consideration,³ but simply to question two of the premises upon which such a proposed reform rests: (i) that "the seriousness of a promise is not determined by the fact that there is consideration," and (ii) that, even if it is, English law has developed a separate set of rules about the seriousness of a promise which could perform the function of consideration.

THE FORD CASE

In the *Ford* case Geoffrey Lane J. found that there was "ample consideration" for each of the alleged agreements.⁴ By the first, entered into in 1955 and dealing largely with procedural matters, some nineteen trade unions (including the defendants) whose members are employed at Fords promised, in return for negotiating

¹ [1969] 1 W.L.R. 339. For comment, see N. Selwyn, "Collective Agreements and the Law" (1969) 32 M.L.R. 377; K. Foster, "The Ford Case and After" (1969) 113 S.J. 295; and Note (1969) 85 L.Q.R. 314.

² A. G. Chloros, "The Doctrine of Consideration and the Reform of the Law of Contract" (1968) 17 I.C.L.Q. 137, 147 (a paper commissioned by the Law Commission).

³ The fullest exposition of the viewpoint opposite to that of Professor Chloros is still to be found in Professor C. J. Hamson's critique of the Report of the Law Revision Committee (Cmd. 5449) in (1938) 64 L.Q.R. 233.

⁴ [1969] 1 W.L.R. at 350.

rights and other benefits, that “at each stage of the procedure set out in this Agreement, every attempt will be made to resolve issues raised and that until such procedure has been carried through there shall be no stoppage of work or other unconstitutional action.” By the second agreement (referred to by counsel as the “price-list”) the unions promised, in return for wage and other benefits conferred on their members, to negotiate any variation of the agreement through the National Joint Negotiating Committee (N.J.N.C.), a body on which each union, irrespective of size, had one vote. The existence of the third agreement, the subject of negotiations in 1969, was in dispute for reasons not relevant to this article,⁵ but the contract alleged by Fords conferred wage increases and income-security plans on employees in return for various measures designed to penalise employees taking part in unconstitutional strikes and requiring a minimum of twenty-one days’ strike notice to be given by the unions. Fords alleged that the defendant unions were in breach of these three agreements and claimed *ex parte* injunctions designed to prevent them continuing an official strike at Fords’ factories or from encouraging its spread pending the hearing of an application for interlocutory relief.⁶ Assuming, for the sake of argument, the existence of the alleged agreements, the fundamental question was whether they were enforceable by legal process.

Since the agreements were between the unions and a single employer, section 4 of the Trade Union Act 1871 presented no obstacle to their direct enforcement.⁷ The question, therefore, had to be decided on ordinary common law principles. The process by which Geoffrey Lane J. reached the conclusion that they were not enforceable illustrates many of the disadvantages inherent in requiring proof of an intention to create legal relations in addition to the test of bargain. The court considered it necessary to discover

⁵ These centred around the fact that Fords’ proposals had been accepted by only a slender majority (7–5) of the unions on the N.J.N.C. and a formal document had not been signed on behalf of each of the 19 unions. His Lordship thought it “strongly arguable” that the N.J.N.C. was simply a negotiating body and until the document was signed there was no binding agreement (at 356). He left open the question whether a large number of agents (as on the N.J.N.C.) could bind their principals unless they acted unanimously (at 357).

⁶ An interim injunction had been granted some days earlier and the present proceedings resolved themselves into a hearing on the question whether that injunction should be continued for a further seven days, and, in addition, whether a mandatory injunction ordering the defendants to countermand strike instructions should be granted for that period.

⁷ S. 4 (4) prevents the “direct enforcement” of “any agreement made between one trade union and another.” In law, many employers’ associations fall within the statutory definition of a “trade union.” The Government proposes to modify this section so as to put such agreements in the same position as those between trade unions and individual employers (*In Place of Strife*, Cmnd. 3888, para. 46).

what the "intentions" of the parties were. Since these intentions had not been expressed, the court was led to examine "the general state of opinion as it existed during these times" and, in particular, the sources which "inevitably would have come into the hands of these men to shape their . . . intentions when making these agreements."⁸ These sources⁹ all adopt the view, which has been associated with the writings of Professor Kahn-Freund since 1954,¹⁰ that collective labour agreements are unenforceable because "the parties do not intend to make a legally binding contract." Accordingly, his Lordship found that the agreements in this case were meant "to remain in the realm of undertakings binding in honour."¹¹

It is a sobering thought that had the court found that certain other sources, favourable to enforceability, were bound to have come into the parties' hands, the opposite conclusion would have been reached. Professor Kahn-Freund himself once took the view that collective agreements may have contractual effect, but since he expressed these views in the *Modern Law Review*,¹² "a publication unlikely to come into the hands of the executives of Fords or indeed the executives of the union," it was said that this would not have affected the minds of the executive officers. Other writers¹³ have not shared Professor Kahn-Freund's change of mind on this issue, but their publications were not referred to, presumably because they had a more restricted readership and so had not become part of the folklore of industrial relations. In a situation in which the legal effect of collective agreements has for some time been the subject of doubt and controversy,¹⁴ it seems odd that the issue has now been

⁸ [1969] 1 W.L.R. at 350.

⁹ Report of the Royal Commission on Trade Unions and Employers' Associations (Cmd. 3623, 1968), paras. 470-474; written evidence to that Commission submitted by Confederation of British Industry, paras. 172-173, Ministry of Labour, pp. 76, 80, and Trade Union Congress, paras. 339, 341; Court of Inquiry into the causes and circumstances of a dispute between the parties represented on the National Joint Industrial Council for the Electricity Supply Industry (Cmd. 2361, 1964), para. 140; Ministry of Labour, *Industrial Relations Handbook* (1961), p. 19; Kahn-Freund in *The System of Industrial Relations in Great Britain* (ed. Flanders and Clegg) (London 1954), pp. 55-58.

¹⁰ *Op. cit.* (note 9); and in *Law and Opinion in England in the 20th Century* (ed. Ginsberg) (London 1959), p. 215, and *Labour Relations and the Law* (London 1965), pp. 25-27. For an earlier view to this effect, see F. Tillyard and W. A. Robson, "The Enforcement of the Collective Bargain in the U.K." (1938) 48 *Economic Journal* 15.

¹¹ [1969] 1 W.L.R. at 356.

¹² "Collective Agreements under War Legislation" (1943) 6 M.L.R. 112. See, too, his earlier note in (1940) 4 M.L.R. 225.

¹³ e.g., J. L. Gayler, *Industrial Law* (London 1955), pp. 170-174. See generally J. B. McCartney in *Labour Relations and the Law*, pp. 40-47.

¹⁴ There are several cases in which the issue has arisen indirectly and the judicial dicta are conflicting. Those appearing to support legal enforceability are: *Smithies v. National Association of Operative Plasterers* [1909] 1 K.B. 310, 337, 341; *East London Bakers' Union v. Goldstein, The Times*, 9 June 1904; *Bradford Dyers' Association Ltd. v. National Union of Textile Workers, The*

decided, but only in relation to three particular agreements, on the basis of what the parties rightly or wrongly *believed* the law to be. Moreover, this belief was imputed to them by inference from the literature with which executives “in the top rank of efficiency, expertise and knowledge”¹⁵ would be expected to keep abreast. How would the court have imputed an intention to a small employer, ignorant of the latest views on the enforceability of collective agreements? Any concession to his ignorance might have resulted in enforcement. On the other hand, strict adherence to an objective view of intention would have made the inquiry even more artificial and unreal. Was this not, despite the denial by counsel for the unions, a case of “mass delusion” making law?

Apart from considering the “climate of opinion adverse to enforceability” his Lordship also examined the wording of the agreements. It was not contended by counsel for the unions that the agreements were void for uncertainty. Indeed, it might have been difficult for him to do so in the light of the decision in *National Coal Board v. Galley*¹⁶ which indicated that the courts are no less willing to supply implied terms as to reasonableness in the case of collective agreements than in commercial contracts. Instead he submitted, and the court agreed, that the “vague aspirational” wording of many of the clauses made it clear that the parties could not have intended legal enforceability. Those terms which were specific (particularly those in the “price-list”), it was argued, were intended to be incorporated in the individual contracts of employment between Fords and their employees but were not intended to be enforceable by or against the unions.

This argument rests upon a false assumption. It cannot have been the case that *every* specific term in the collective agreements had become a term in the contracts of individual Ford employees. Each man was required to sign a form of acceptance of employment stating:

Times, 24 July 1926; *Rookes v. Barnard* [1961] 2 All E.R. 825, 827 (Sachs J.); *Hynes v. Conlon* [1939] 5 Ir.Jur.R. 49. Dicta to the contrary may be found in *Rookes v. Barnard* [1963] 1 Q.B. 623, 658, 675 (C.A.); *Pitman v. Typographical Assn.*, *The Times*, 22 September 1949; *Spring v. N.A.D.S.* [1956] 1 W.L.R. 585, 592; *Ardley and Morey v. London Electricity Board*, *The Times*, 16 June 1956; *Read v. Friendly Society of Operative Stonemasons* [1902] 1 K.B. 732, 737, 740; *Young v. C.N.R.* [1931] A.C. 83, 89 (P.C., Canada). The latter decision must now be read in the light of Canadian legislation giving legal status to collective agreements: see A. W. R. Carrothers, *Collective Bargaining Law in Canada* (Toronto 1965), esp. pp. 326–330 on the nature of collective agreements at common law.

¹⁵ At 350. The “objective” nature of the test of intention has often been stressed: *Coward v. Motor Insurers' Bureau* [1963] 1 Q.B. 259, 271; *Connell v. Motor Insurers' Bureau* [1969] 2 Q.B. 494, 505; *Edwards v. Skyways Ltd.* [1964] 1 W.L.R. 349, 356.

¹⁶ [1958] 1 W.L.R. 16, 23–24.

"I understand that such employment is subject to the terms of agreements made from time to time between the company and the trade unions and to the company's rules and regulations." This clearly constituted an express incorporation of those matters in the "price-list" appropriate to the occupation of the individual employee.¹⁷ On the other hand, there were a number of specific *procedural* steps which the unions had agreed to follow in regard to the variation and termination of the agreements and the settlement of disputes. These could hardly be described as "vague aspirations." They were quite specific enough to enable a court to determine the existence of a breach by the unions. It would be curious, if not absurd, to suggest that individual employees would be liable for breach of procedural steps which only the unions could take, but the unions themselves were free to disregard them.¹⁸ This would turn the "implied-term" theory into a means for imposing contractual liabilities on third parties.

Why was the language of the parties treated as relevant to the *existence* of a contract, rather than to the *extent* of the promises? The answer must be found in the peculiarity of the English rules for the construction of enforceable promises. The construction which English law places upon binding promises is strict. Vital importance is attached to the *actual* words used by the promisor. Civil lawyers, by contrast, look aghast at this approach, preferring a benign interpretation according to good faith. This is particularly important in the case of collective labour agreements because the pressure to reach a quick and peaceful solution to an economic conflict often leads the parties to leave deliberate gaps and ambiguities in the terms of settlement. In some continental countries where collective agreements are subject to the general principles of the law of contract the courts are able to consider matters such as the changed situation of the parties, whose fault contributed to the misunderstanding, the underlying assumptions of the agreement and good faith in general. There are several indications in Geoffrey Lane J.'s judgment—in particular his references to "this unhappy dispute,"¹⁹ "this deplorable

¹⁷ "They are incorporated into the contract of employment of each man, *in so far as they are applicable to his situation*": *per* Lord Denning M.R. in *Camden Exhibition and Display Ltd. v. Lynott* [1966] 1 Q.B. 555, 563 (*italics added*). These comments on the effect of a statement issued under s. 4 of the Contracts of Employment Act 1963 referring the employee to the terms of a collective agreement which are impliedly incorporated in the individual's contract seem equally relevant where, as in the *Ford* case, there is an *express* incorporation.

¹⁸ Indeed, it is generally thought that most "no-strike" clauses are not appropriate for incorporation in individual contracts: see the comments by K. W. Wedderburn in (1961) 24 M.L.R. at 583-584; (1962) 25 M.L.R. at 526-530.

¹⁹ At 343, and, during argument: "I sigh and I sigh . . .": *The Times*, 4 March 1969

matter,”²⁰ “the whole slightly unreal situation”²¹ and “the background adverse to enforceability”²²—that he was not unmindful of the dilemma created by English rules of construction *stricti juris*. He sought to escape this dilemma by denying the very existence of a contract. This meant that there were no enforceable promises left for him to construe.²³

In practical terms what this means is that other judges, faced by attempts to enforce a “no-strike” clause in somewhat different circumstances, may not be persuaded that, in the absence of an express intention to be bound, the clause is unenforceable. Some lay commentators have erroneously concluded from the *Ford* decision that *all* collective agreements are unenforceable. It is, of course, possible that their comments will have a self-perpetuating effect because those involved in industrial relations will be “deemed” to have read those comments rather than the views expressed in legal periodicals. This seems a most unsatisfactory way to settle an issue of vital importance to employers, unions and those 16 million workers whose terms and conditions of employment are affected by collective bargaining. There is also a danger that the reform of section 4 of the Trade Union Act 1871 will proceed on a mistaken understanding of the common law. This would be a result of the artificial and unusual reasoning in the *Ford* case. The fictions employed in that case, as well as the views urged upon the Law Commission, spring from a misconception about the place of intention in the formation of simple contracts in English law.

INTENTION AND CONSIDERATION

The requirement of an intention to create legal relations, additional to the test of bargain, has been repeatedly criticised by academic commentators.²⁴ In essence, the objection raised by the critics is that the whole basis of the common law of contract is the notion of bargain, of which offer, acceptance and consideration are indivisible facets. Every offer may be seen as consisting of a promise and a request to the offeree to do some act (which may be the giving of a

²⁰ At 344.

²¹ At 346.

²² At 356.

²³ Counsel for one of the unions contended that, even if the agreements were enforceable, they did not prevent the unions from striking in the circumstances of the case. It was unnecessary for his Lordship to deal with this argument, but it seems to have been based on the *actual wording* of the agreements.

²⁴ *Williston on Contracts*, 3rd ed., s. 21; C. J. Hamson, *loc. cit.* [note 3]; R. Tuck (1943) 21 Canadian B.R. 123; K. O. Shatwell (1954) 1 Sydney L.R. 289, 314–315; J. Unger (1956) 19 M.L.R. 96 (on *Simpkins v. Pays* [1955] 1 W.L.R. 975).

promise or the rendering of a performance) in exchange for the promise. From the offeree's side the doing of that act is an acceptance of the offer. From the offeror's angle, the response to his request is consideration. For analytical reasons it has become traditional to separate the element of agreement (usually reduced to an offer and acceptance) from the element of consideration. In determining the existence of agreement the courts have sought to find *consensus ad idem* by objective yardsticks, by strict grammatical rules of construction, and by classifications such as "invitation to treat," "puff" and "offer" which provide *a priori* tests of the respective "intentions" of the parties. The intervention of equity has made this approach workable by preventing "hardship amounting to injustice" ²⁵ where appearances are too far removed from reality. Consideration has provided the test of enforceability. This separation of agreement from consideration (in part inspired by a desire to contrast consideration with the civil law *causa*) has resulted in a fundamental point being overlooked. This is that the common law recognised at an early stage that parties usually do not define their intention to enter legal relations. Consequently, the fact that they have cast their arrangement into the form of bargain (offer, acceptance, consideration) provides an extremely practical test of that intention. This test of bargain renders superfluous any *additional* proof of intention.

The difficulties which have arisen in reconciling this approach with the remarks of Atkin L.J. (as he then was) in *Balfour v. Balfour* ²⁶ have arisen, as the late Professor Unger showed, only because of Atkin L.J.'s definition of consideration. It will be remembered that his Lordship insisted that "arrangements made between husband and wife are arrangements in which there are mutual promises, or there is consideration in form within the definition that I have mentioned. Nevertheless they are not contracts . . . because the parties do not intend that they should be attended by legal consequences." ²⁷ He defined consideration as consisting of a benefit received by one party or a loss suffered by the other, but he failed to add that the benefit or loss must be received or suffered as the price for the other. An agreement between spouses may consist of mutual promises and yet not be a contract precisely because the promise of the one party is not given as the price for the other. The same reasoning can be applied to other domestic agreements. In *Shadwell v. Shadwell*,²⁸ for example, the court was agreed that the question they had to answer was, "Was the plaintiff's marriage

²⁵ *Tamplin v. James* (1879) 15 Ch.D. 215, 221.

²⁶ [1919] 2 K.B. 571; Unger, *loc. cit.* [note 24].

²⁷ At 578-579.

²⁸ (1860) 9 C.B.(N.S.) 159.

at his uncle's request?" Their Lordships differed only on the construction of the particular promise before them.

The courts, aided by all the standard textbooks, have tended to conceal this simple analysis of every offer into a promise and request by the repeated incantation of Atkin L.J.'s dictum without making the essential qualification about the sense in which he defined consideration.

A recent example is *Jones v. Padavatton*.²⁹ At her mother's request and in return for a promise to provide \$200 a month maintenance for her, the plaintiff gave up an "excellent" job and other advantages of living in Washington in order to come to England in 1962 to read for the Bar. In 1964 the mother bought a house in London for the daughter to live in one or two rooms and let the rest to tenants to cover expenses and provide maintenance. After a quarrel with her daughter in 1967, the mother brought legal proceedings for possession of the house. Danckwerts and Fenton Atkinson L.JJ. agreed that there was good consideration for the mother's promise in 1962 but held that the principle in *Balfour v. Balfour* applied and that the presumption against an intention to be bound in family matters had not been rebutted. Accordingly, the mother was entitled to possession. Salmon L.J. reached the same result but by a different route. He held that the presumption had been rebutted in the case of the 1962 agreement, but that the agreement in 1964 regarding possession of the house was unenforceable. A close examination of Salmon L.J.'s judgment (like the well-known inquiry of Scrutton L.J. into the alleged bargain in *Wyatt v. Kreglinger and Fernau*)³⁰ reveals that although he stated the problem in the *language* of intention, the test of that intention was in fact that of bargain. The mother's promise of maintenance (confirmed through her attorney) was the decisive factor which led the daughter to respond to the request to live in London.³¹ In regard to the second agreement, however, Salmon L.J. said: "There is no evidence that the mother bargained away her right to dispose of her home, or to evict her daughter (who was a mere licensee) whenever she wished to do so."³² Bargain was once again used as the test of contractual intention.

To require, as Danckwerts and Fenton Atkinson L.JJ. did, some further test of intention is to invite confusion and uncertainty. Indeed, their Lordships were not agreed how that intention should be ascertained. Fenton Atkinson L.J. was influenced by the fact that

²⁹ [1969] 1 W.L.R. 328.

³⁰ [1933] 1 K.B. 793.

³¹ Cf. *Balfour v. Balfour* at 574, 576, in which "there was no bargain on the part of the wife at all."

³² At 335.

the daughter had said in cross-examination, "a normal mother doesn't sue her daughter in court,"³³ to which Salmon L.J. responded: "the fact that a contracting party is in some circumstances unlikely to extract his pound of flesh does not mean that he has no right to it."³⁴ Fenton Atkinson L.J. also remarked on the failure of the daughter at any stage prior to the institution of proceedings against her to bring into discussion her right to a particular amount of maintenance. This surely goes no further than to confirm Professor Unger's view that "the family circle differs from the market place in that it is not the setting for bargaining but for gratuitous services."³⁵

It has been argued that "one cannot tell whether mutual promises are a bargain or an 'exchange of gifts' without regard to the intention of the parties."³⁶ This attributes unnecessary circularity to the notion of bargain. Once it was conceded that an agreement existed in *Jones v. Padavatton*, the only test of intention ought to have been the terms of the promises which were given by mother and daughter. Was there a request to the daughter to come to London in return for the promise of maintenance? Did the daughter respond to that request? This approach would have done much to simplify what Danckwerts L.J. called a "most difficult" case.³⁷

Although Lord Atkin's celebrated judgment has been accepted as authoritative for fifty years, it is interesting to note that when it recently reached the House of Lords, as an incidental issue in *Pettitt v. Pettitt*,³⁸ there was a keen desire to limit its application. It was described as "an extreme case"³⁹ and one which "stretched the doctrine [that in ordinary day-to-day life spouses do not intend to contract] to its limits."⁴⁰ At a time when this cautious approach is evident in the context for which the *Balfour v. Balfour* principle was devised, it seems strange that it should be undergoing an extension in another direction to resolve the problems of a very different type of relationship, namely, collective bargaining.

This extension was preceded by the attempt of some textbook writers to rationalise a number of cases involving ordinary business

³³ At 336.

³⁴ At 334.

³⁵ *Loc. cit.* [note 24] at 98.

³⁶ G. H. Treitel, *The Law of Contract*, 2nd ed. (London 1966), p. 105.

³⁷ I do not contend that the actual result in this case was erroneous. Indeed, there is much to commend the view that there was no request (in the legal sense) in relation to the 1964 agreement.

³⁸ [1969] 2 W.L.R. 966.

³⁹ At 983 (Lord Hodson).

⁴⁰ At 992 (Lord Upjohn). Lord Reid (at 973) appears to limit the principle to "non-financial" arrangements. Where the parties are at arm's length, at the time of their agreement, the courts usually impute an intention to be bound: *Merritt v. Merritt*, *The Times*, 15 May 1969; cf. *Gould v. Gould* [1969] 3 W.L.R. 490.

contracts by reference to the *Balfour v. Balfour* principle. In my view this attempt was mistaken because all those cases may properly be classed under some other definite rule of the law of contract.

First, there are those cases in which contracts have been distinguished from licences. Although the language of contractual intention has been used, the test in fact employed has been that of bargain. So in *Gore v. Van der Lann*⁴¹ the court found that there was a negotiated bargain although the stated intention of the parties was that the free pass issued by Liverpool Corporation "merely constitutes and grants a licence to the holder to travel on the . . . Corporation's buses." The crucial fact leading to the inference of a contractual *animus* was that the pass was issued to Mrs. Gore only pursuant to her written application. This distinguished the case from *Wilkie v. L.P.T.B.*⁴² where Mr. Wilkie, being an employee, received his free pass as a matter of course. The test of contractual intention in both these cases was that of bargain. It might be argued, with some justification, that the Court of Appeal stretched the facts to their limits in finding a contract between Mrs. Gore and the Corporation, but it is clear that no additional proof of intention was required apart from the bilateral nature of the negotiations between the parties.⁴³

Secondly, there are those cases in which proof of an *animus contrahendi* has been required to distinguish a mere representation from a contractual warranty (either forming part of a single contract with the main promise or standing as a separate collateral contract). It has been suggested⁴⁴ that *Heilbut, Symons & Co. v. Buckleton*⁴⁵ cannot be explained by those who criticise the requirement of additional proof of an intention to create legal relations. The simple answer is that the House of Lords did not ask whether there was offer, acceptance, consideration *and* some additional proof of intention. On the contrary, when Lord Moulton said that a party wishing to establish a collateral contract must clearly prove "not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties,"⁴⁶ he was referring to the need to establish an offer (promise and request) and acceptance. This is made

⁴¹ [1967] 2 Q.B. 31, 41, 45; J. W. Harris (1967) 30 M.L.R. 584.

⁴² [1947] 1 All E.R. 258, 260 (C.A.); and [1946] 1 All E.R. 650 (Goddard L.C.J.).

⁴³ It was said that the "language of contract" used by the parties indicated an intention to contract. This may be understood to mean that the documents were to be construed as importing a promise and request (see Salmon L.J. at 45). Compare *Booker v. Palmer* [1942] 2 All E.R. 674, where the informality of the statement made it impossible to imply a promise. But lack of formality is not decisive: *Parker v. Clark* [1960] 1 W.L.R. 286.

⁴⁴ Treitel, *op. cit.*, p. 105.

⁴⁵ [1913] A.C. 30. On the "objective" test in this context, see K. W. Wedderburn "Collateral Contracts" [1959] C.L.J. 58, 77.

⁴⁶ At 47.

particularly clear in the speech of Lord Atkinson who said that the plaintiff's "own language . . . appears to me to be inconsistent with the idea that he accepted the alleged offer or treated it as part of the bargain."⁴⁷

In cases where puffs and statements made in jest or anger have been distinguished from binding promises, the legal question has been whether a reasonable person would have understood the words as importing a promise. The judges in that timeless case of *Carlill v. Carbolic Smoke Ball Co.*⁴⁸ had no doubt that in dealing with this question they were inquiring into the existence of a bargain. A. L. Smith L.J. remarked: "The defendants have contended that [the advertisement] was a promise in honour or an agreement or a contract in honour—whatever that may mean. I understand that if there is no consideration for a promise, it may be a promise in honour, or, as we should call it, a promise without consideration and *nudum pactum*; but if anything else is meant I do not understand it."⁴⁹

Thirdly, there are those cases in which a driver has given a lift to a friend or workmate in return for the payment of money or contribution to petrol and the courts have denied the existence of a contract on the ground of an absence of intention to create legal relations. Most of the cases have been concerned with the interpretation of section 203 of the Road Traffic Act 1960 which requires insurance "in the case of a vehicle in which passengers are carried for hire or reward." *Coward v. Motor Insurers' Bureau*⁵⁰ is an example of the way in which the common law notion of bargain can be distorted because of the exigencies of statutory interpretation. Can it be seriously argued that had Coward refused to pay the weekly amount promised in return for Cole's lift, the courts would have denied Cole a contractual remedy? Fortunately, the Court of Appeal has now provided a more satisfactory basis on which to rest the decision in *Coward's* case, namely, that section 203 requires insurance only where passengers are *habitually* carried for hire or reward.⁵¹ It is far more satisfactory to ask what purposes were

⁴⁷ At 44.

⁴⁸ [1893] 1 Q.B. 256.

⁴⁹ At 273 (and Bowen L.J. at 266, and Lindley L.J. at 271). This approach is also explicit in *Licences Insurance Corp. and Guarantee Fund (Ltd.) v. Lawson* (1896) 12 T.L.R. 501 (statements made "in the course of . . . arguments and of a somewhat warm discussion") and *Dimmock v. Hallett* (1866) L.R. 2 Ch.App. 21. A number of other cases cited in the books in the context of "intention to create legal relations" are, in fact, concerned with the construction of alleged promises and the related question of mistake: *Beesly v. Hallwood Estates Ltd.* [1960] 1 W.L.R. 549, 558; cf. *British Homophone Ltd. v. Kunz* (1935) 152 L.T. 589; *Parke v. Daily News Ltd.* [1962] Ch. 927, 948; *J. H. Milner & Son v. Percy Bilton Ltd.* [1966] 1 W.L.R. 1582; and cases on agreements "subject to contract" (Treitel, *op. cit.*, p. 10).

⁵⁰ [1963] 1 Q.B. 259.

⁵¹ *Connell v. Motor Insurers' Bureau* [1969] 2 Q.B. 494. Lord Denning said he was "not altogether satisfied" with *Coward v. M.I.B.*

intended by Parliament than to say that a bargain is not a contract. This leaves *Buckpitt v. Oates*,⁵² which was decided on the basis that if there was a contract between an infant driver and his infant passenger to the effect that the latter should be carried at his own risk this contract would be void (because it would not be to his benefit) and the negligent driver would have to submit to judgment in respect of damage caused by his negligent driving. In order to avoid this consequence it was held that there was no contract, despite the fact of bargain, because of the absence of an intention to create legal relations. It is submitted that this was unnecessary for the decision because even had the agreement been void as a contract, the question could still have been considered whether the terms of that agreement gave the defence of assumption of risk.⁵³

Finally, mention must be made of those instances in which the parties have *expressed* an intention not to be bound.⁵⁴ These create no problem because the test of bargain is used to establish the contractual character of the promise only if parties are silent as to their intentions. However, expressions of intention can be ambiguous, as in *Edwards v. Skyways Ltd.*,⁵⁵ in which a promise to make an *ex gratia* payment to a redundant pilot fell to be interpreted. In deciding that the words “*ex gratia*” did not imply that the agreement was to be without legal effect, the court went no further, in relation to *Balfour v. Balfour*, than to say that “where the subject-matter . . . is related to business affairs, the parties may, by using *clear words*, show that their intention is to make the transaction binding in honour only and not in law; and the courts will give effect to that expressed intention.”⁵⁶

The conclusions to be drawn from this are as follows:

- (1) In ascertaining whether or not the parties have reached agreement the common law inquires how a reasonable person would have understood the words or conduct in issue. The courts may, however, prevent injustice by denying or granting equitable relief.
- (2) In ascertaining whether or not the agreement is enforceable the common law applies the test of bargain.

⁵² [1968] 1 All E.R. 1145.

⁵³ See Glanville Williams, *Joint Torts and Contributory Negligence* (London 1951), p. 312.

⁵⁴ *Rose and Frank & Co. v. J. R. Crompton Bros. Ltd.* [1923] 2 K.B. 261; [1925] A.C. 445; *Appleson v. H. Littlewood Ltd.* [1939] 1 All E.R. 464; *Jones v. Vernon Pools Ltd.* [1938] 2 All E.R. 626; *Lee v. Sherman's Pools* [1951] W.N. 70; *Guest v. Empire Pools* (1964) 108 S.J. 98.

⁵⁵ [1964] 1 W.L.R. 349.

⁵⁶ At 355.

These tests (1) and (2) are sometimes couched in the language of "intention." Viewed in this way, they are conclusive evidence of an "intention to create legal relations."

- (3) Atkin L.J.'s dictum requiring some *additional* proof of an intention to create legal relations must be understood in the light of the special meaning which he attached to "consideration," and should not be extended to situations in which a bargain in the usual sense of offer, acceptance and consideration is found to exist. Attempts to make such extensions, as in the *Ford* case, inevitably result in the use of unnecessary legal fictions. This cannot be in the interests of the rational development of the law of contract, particularly in such modern contexts as collective labour relations.
- (4) The present English rules about the seriousness of promises are inseparable from tests (1) and (2) above.⁵⁷

BARGAINS AND POLICY

It would be open to the House of Lords in an appropriate case to review the cases since *Balfour v. Balfour* and to reject or modify the requirement of additional proof of an intention to create legal relations. A possible obstacle, however, is that the device of constructive "intention" is superficially attractive because it enables the courts to cloak policy decisions in the mantle of private contractual autonomy.

In most situations the test of bargain provides a satisfactory answer to the policy question. It also satisfies the theory of contractual autonomy since it is for the parties to cast their transaction in the form of a bargain. For example, Atkin L.J. himself recognised the policy considerations behind the non-enforceability of social and domestic arrangements when he said: "the small courts of this country would have to be multiplied one hundredfold if these arrangements were held to be legal obligations,"⁵⁸ and that "in these cold courts" natural love and affection counted for little. Consequently, "each house is a domain into which the King's writ does not run."⁵⁹ This policy can be flexibly implemented by applying the test of bargain.

⁵⁷ It is not possible within the scope of the present article to examine the wide variety of requirements of good faith which exist in civil law systems, either as separate rules or as implicit in rules which bear a superficial similarity with those of English law, and which I believe it would be necessary to introduce into English law if the doctrine of consideration were abolished.

⁵⁸ *Balfour v. Balfour* at 579.

⁵⁹ *Ibid.*; and see Duke L.J. at 577, and Salmon L.J. in *Jones v. Padavatton* at 332.

There are, however, other agreements, manifestly cast in the form of bargain, to which the concepts of private contract law seem inappropriate. The main examples are government contracts and collective labour agreements. In dealing with agreements such as these the courts prefer to deny legal enforceability on the grounds of absence of a constructive intention rather than to base their decisions explicitly on policy grounds.

The term "government contracts" is used here to describe those "undertakings that are political in character—using the word 'political' as referring to promises and undertakings of governments, either to their own citizens, or to other states or governments."⁶⁰ Sometimes the nature of the statutory relationship between the consumer and the government or a public body may lead to the conclusion that there is no consensual bargain at all. So there is no "sale" of a prescribed drug to an outpatient who is entitled, under National Health Service regulations, to demand it on payment of a nominal charge. The transaction is a creature of statute.⁶¹ Similarly, electricity is supplied in pursuance of a statutory duty; the transaction cannot be treated as the acceptance by the electricity board of an offer by the consumer to take and pay for the supply.⁶²

There are other situations, however, in which there appears to be a voluntary assumption of legal responsibility but the courts nevertheless treat the undertaking as non-justiciable. This may be attributed to the status of a government department or public body. For example, the Post Office has been treated as a branch of Revenue created by Act of Parliament and the consequence of this has been said to be that the Post Office does not enter into contractual relations.⁶³ This was avowedly a policy decision⁶⁴ but it has sometimes been thought necessary to explain it on the basis that the parties did not intend, or cannot be regarded as having intended, to subject their agreement to the adjudication of the courts.⁶⁵ The "intention" usually considered in this regard is solely that of the government (which does not want to be held liable) and not that of the private

⁶⁰ *State of South Australia v. The Commonwealth* (1962) 108 C.L.R. 130, 154.

⁶¹ *Pfizer Corp. v. Ministry of Health* [1965] A.C. 512, 535, 544, 548, 552, 571 (H.L.).

⁶² *Willmore v. South Eastern Electricity Board* [1957] 2 Lloyd's Rep. 375, 380.

⁶³ *Lane v. Cotton* (1701) 1 Ld.Raym. 646; *Triefus v. Post Office* [1957] 2 Q.B. 352. Successive Post Office Acts have been framed on this basis.

⁶⁴ Lord Mansfield gave a clear exposition of this policy in *Whitfield v. Lord Lé Despencer* (1778) 2 Cowp. 754. See, too, *Gibson v. The East India Company* (1839) 5 Bing.N.C. 262, in which the Court of Common Pleas distinguished between the acts done by the Company in its trading capacity and its capacity as Government of India. The remedy in respect of the latter was said to be "petition, memorial or remonstrance" and not action in a court of law.

⁶⁵ e.g., *Sutton & Shannon on Contracts* (6th ed., 1963), p. 55. The Australian courts have also explained the non-justiciability of political arrangements in terms of intention: *State of S. Australia v. The Commonwealth* (note 60).

contractor. The justification in terms of absence of intention may be one of the factors which has retarded the development of a separate set of legal rules to deal with the construction and effects of government "contracts" and may help to account for the meagre role played by the courts in regulating this activity of government.

The rigid classification of the issues on a "contract/no contract" basis has also precluded the development in England of a separate jurisprudence of the collective labour agreement. This classification was itself a product of the "intention" theory. The policy implicit in the *Ford* decision was that the parties had arranged their affairs on the basis that the "peace" obligation in those collective agreements would be enforced by social rather than legal sanctions in the circumstances of the particular dispute. This policy was implemented by saying that no contract had been formed. The assumption was that there either was a contract, in which case it would have to be strictly construed like other contracts, or there was no contract at all.

An alternative approach would have been to assume that the fact of bargain was sufficient to create a legal relationship, but then to find that the distinctive features of collective bargaining give rise to a relationship *sui generis*. These features have often been pointed out.⁶⁶ Collective labour agreements partake more of the features of statute or treaty of peace than of commercial bargain.⁶⁷ As the Donovan Report pointed out,⁶⁸ it is often impossible to fit these agreements into the traditional categories of contract. The continuous nature of the relationship, in which the interpretation of an agreement merges imperceptibly into differences concerning claims, and the "open-ended" nature of many agreements, means that it is difficult to find "rights" capable of legal enforcement. The concept of material breach seems meaningless in a situation in which the parties are less interested in deviations from the bargain struck than in the achievement of the just and harmonious operation of an enterprise. Moreover, the power of performance may lie in the hands of employees on the shop floor and not of union officials. The multiplicity of parties (as on the Fords' N.J.N.C.) introduces extremely difficult problems of agency to which the common law provides no clear answers. Many agreements, if treated like ordinary contracts, would run foul of the

⁶⁶ N. W. Chamberlain, "Collective Bargaining and the Concept of Contract" (1943) 48 Columbia L.R. 829; and H. Shulman, "Reason, Contract and Law in Labor Relations" (1955) 68 Harvard L.R. 999; cf. C. W. Summers, "Collective Agreements and the Law of Contracts" (1969) 78 Yale L.J. 525; A. Cox, "The Legal Nature of Collective Bargaining Agreements" (1958) 57 Michigan L.R. 1; and A. W. R. Carrothers, *Labour Arbitration in Canada* (Toronto 1961), pp. 41, 68.

⁶⁷ Cf. the *Ford* case, in which they were treated as *prima facie* dealing with commercial relationships.

⁶⁸ Cmnd. 3623, para. 471.

doctrines of restraint of trade. Nor would traditional contractual remedies be adequate. These and other difficulties reflect the fact that the formative period of the modern law of contract antedated the rise of collective labour relations. Concepts appropriate to private bargains cannot simply be extended to collective agreements.

None of these distinctive features of the collective bargain, however, presents an absolute barrier to legal enforceability. If it did, it would be impossible to account for the enforceability of such agreements in most other countries, or for the fact that even in England the parties may expressly declare themselves to be bound. The real legal difficulty is that the courts, having been led to view the issues through the blinkers of the "contract/no contract" analysis, may not now be willing or able to develop a separate set of rules for the construction in good faith of collective agreements, nor to create appropriate remedies. This is bound to become an increasingly important problem. The growth of formal, fixed-period plant and company bargains—the central recommendation in the Donovan Report—may lead the courts to find that the climate of opinion adverse to enforceability has changed and that the language of contract has been used. *A fortiori* there will be legal enforcement on the basis of ordinary contract law when the parties declare their intention to be bound.

The question whether or not collective labour agreements should be justiciable is too important and controversial a political matter to be left to the courts. In view of the fact that the courts have rejected the test of bargain, enforceability or non-enforceability, as the case may be, should now be on the basis of an express statutory provision rather than constructive intention.⁶⁹ This would leave the way clear for the common law to free itself from the stultifying effects of the requirement of additional proof of an intention to create legal relations.

⁶⁹ The Government has announced that the Industrial Relations Bill, to be published in 1970, will provide that collective agreements can be made legally binding only by an express written provision in the agreement (*In Place of Strife*, Cmnd. 3888, para. 46). Apparently, no special rules for the interpretation and enforcement of such agreements will be laid down. Moreover, it is not clear whether the parties will be free to provide that their agreement shall be a contract but that the ordinary courts shall have no jurisdiction over it: see, e.g., *Czarnikow v. Roth, Schmidt & Co.* [1922] 2 K.B. 478; and generally, Halsbury, *Laws of England* (3rd ed.), Vol. 9, p. 352, and *Leigh v. N.U.R.* [1970] 2 W.L.R. 60, 65.