Review of Unconscionable Transactions

Preface

The unconscientious abuse of financial power has provided a perennial problem for the law. Throughout recorded history, laws to protect the weak and poor from the more oppressive attentions of their economic superiors have been a feature of the legal systems of most societies. Such regulation has been particularly evident in the areas of moneylending and credit granting, where the potential for abuse is great.

In England, both Parliament and the courts have been involved in the development of rules to regulate the trade in money and credit. Parliament, for the most part, has been concerned primarily with the regulation of the economy by the setting of interest rate limits. On the other hand, the courts, in particular the Court of Chancery, have directed their efforts to the relief of financial oppression. The result is the doctrine authorising the review of unconscionable transactions.

This article examines why the doctrine authorising the review of unconscionable transactions developed, the nature of the development, the failure of the doctrine when unsupported by statutory controls, and its role in the more regulated societies of the twentieth century.

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The English Usury Laws

The development of the doctrine authorising the review of unconscionable transactions is closely linked with changes in the usury laws. Until 1545, the law of England absolutely prohibited the taking of interest.[1] However, the usury laws were frequently evaded or avoided. Among the notable modes of circumvention were the gage, the fictitious sale and the default penalty.[2] These devices were adopted because they disguised the illegal interest charge as a legally recognized claim.

The gage like the mortgage, was, a loan secured on land. The lender obtained his interest from the rent, which the borrower paid to lease back the secured land. The fictitious sale and resale of chattels[3], or foreign currency[4] provided a further avenue for the collection of interest by a lender. The lender sold an article to the borrower and accepted the borrower's promissory note in payment. The borrower subsequently resold the article to the lender for a lesser sum in cash. The difference between the prices represented the interest charged by the lender for forbearing to sue on the promissory note. The third avoiding device was riskier but more subtle. The law forbade the taking of interest but permitted lenders to charge penalties if default was made in repayment of a loan. Interest on a loan could be disguised as a default penalty. Lenders who disguised interest in this manner ran the risk that the borrower would repay before the due date. This risk could be minimized by agreement between the parties or by setting a repayment date which was inconvenient to the borrower.

The Bill against Usury[5], was a bold attempt to regulate a business a business

1. 20 Hen. III c. 5 (1235), 15 Edw. III st. 1 c. 5 (1341), 3 Hen. VII cc. 5 and 6 (1487), 11 Hen. VII c. 8 (1495).
2. These devices are discussed, in greater detail, in Bellot, *The Law relating to Unconscionable Transactions with Moneylenders*, London, 2nd ed. 1906 at 32–37.
3. Known as 'dry exchange'.
4. Known as 'exchange and rechange'.
5. 37 Hen. VIII c. 9 (1545).

which would not accept prohibition. All existing usury legislation was repealed. Interest on money lent or on credit granted in sale transactions was permitted to the extent of 'ten pound in the hundred'[6] per annum. The mortgage interest rate was subjected to the same limits. Section II of the Bill prohibited the repurchase of goods at a lower price within three months of their date of sale[7]. However, the Bill specifically recognized the legality of penalty bonds[8], provided the bond was made for a legitimate purpose and not to mask usury.

This Bill was the model for usury legislation during the next three hundred years. In that period the permitted interest rate was varied[9] but there were few other legislative innovations.

A Common Law Doctrine?

Enforcement of the usury legislation was the responsibility of the common law courts. They were competent to enforce the letter of the law, but less well equipped to penalize breaches of its spirit. Justice requires not only that a person who openly charges more than a permitted rate should be penalized, but that similar penalties should accrue to persons who achieve the same result by devious means. There are only two cases in which the common law expressed an interest in assuming this broader jurisdiction[10].

The earlier case, *James* v. *Morgan*[11] involved a contract for the purchase of a horse. The consideration for the horse was to be calculated in a peculiar manner. The horse had four shoes, each of which contained eight nails. The defendant covenanted to pay one barley corn for the first nail, two for the second, four for the third and so on doubling the amount for each successive nail. It was estimated that five hundred quarters of barley would be needed to satisfy the term. The barley was worth much more than the horse. The jury at the urging of Hyde C.J. awarded the plaintiff £8, the value of the horse, as damages for the purchaser's breach of contract.

The reports of this case are brief and do not give any indications of the course of evidence or whether the judge gave reasons for his direction. Only the facts of the case and the judge's direction (which is contrary to the ordinary rule governing measure of damages) are reported. It can only be assumed that the judge refused to permit a "confidence trickster" to use legal processes to gain the benefit of his sharp practice.

Judges in both *Chesterfield* v. *Janssen*[12] and *Hume* v. *The United States of America*[13] believed that the principle of *James* v. *Morgan*[14] was supported by *Thornborow* v. *Whitacre*[15]. The plaintiff in that case sued when the defendant

6. Section 3. Doubts about the application of the Bill to credit contracts are removed by section 5, the penalties section, which refers specifically to sales of merchandise or wares on credit terms.
7. A continuing prohibition on dry exchange.
8. Section 6.
9. The Act of 5–6 Edw. VI c. 20 (1551) which utterly forbade the taking of interest on moneys lent or credit granted was repealed by 13 Eliz. c. 8 (1571). Subsequent acts reduced the maximum permitted interest rate from 10% to 8% – 21 Jac. I c. 17 (1624), 6% – 12 Car. II c. 13 (1660) and 5% – 12 Ann Stat. 2 c. 16 (1713), which rate was confirmed by 58 Geo. III c. 93 (1818), 1, 2 Geo. IV c. 51 (1821) and 3 Geo. IV c. 47 (1882).
10. The cases could be regarded as decisions on the measure of damages, but were not so regarded by the Supreme Court in *Hume* v. *United States* (1889) 132 U.S. 406 or, more doubtfully, by Sheridan, *Fraud in Equity*, London 1957 pp. 126–7.
11. (1664) 1 Lev. III, 83 E.R. 323.
12. (1750) 2 Ves. Sen. 125, 28 E.R. 82.
13. (1889) 132 U.S. 406.
14. (1664) 83 E.R. 323.
15. (1705) 2 Ld. Raym. 1164, 6 Mod. 305, 87 E.R. 1044.

failed to perform a contract to deliver one grain of rye on Monday 29th March, two grains a fortnight later and so on doubling the amount for each fortnight in the year. The case was settled out of court after Holt C.J. had intimated that "where a man for a valuable consideration undertakes to do an impossible thing, though it cannot be performed, yet he shall answer damages"[16]. There is however, nothing in the reports to indicate that the Chief Justice would have departed from the usual rule for measure of damages or had in any way recognized that the contract was tainted with sharp practice.

One poorly reported seventeenth century case would provide scarcely any basis of support for the proposition that a common law doctrine of relief from harsh and unconscionable transactions exists. However, support for the existence of a common law doctrine is found *Hume* v. *United States*[17]. Hume had contracted to supply shucks to a government hospital. The contract price was 60c a pound, whereas current market value was less than 2c a pound. The United States argued that it had meant to purchase at 60 cents per hundred pounds. Hume claimed the full contract price. Fuller C.J., delivering the judgment in favour of the United States, recognized and approved both *James* v. *Morgan*[18] and *Thornborow* v. *Whitacre*[19]. The tenor of his judgment suggests that the learned Chief Justice treated these cases as authorities for a doctrine which empowers courts to award damages according to the parties' equitable entitlements where a contract is unreasonable and unconscionable.

However, an element of public policy was also recognized in the decision. Persons dealing with public officials must recognize that government agents are bound to act fairly and in good faith towards their principal. This secondary reason may weaken the authority of the case as a support for a common law doctrine.

The existence of a common law doctrine remains doubtful. Two cases provide direct support for the proposition; one other provides indirect recognition. Even if a doctrine does exist, it is a vague and unformed aspect of the common law.

The Role of Equity

The failure of the common law to develop protective glosses on the usury legislation did not result in widespread and uncontrolled avoidance of the provisions of the Act. Equity stepped in promptly to protect the spirit of the legislation. It was a task which the Court of Chancery was reasonably well-equipped to handle:

> "The cause why there is a chancery is for that men's actions are so divers and infinite that it is impossible to make any general law which may aptly meet with every particular act and not fail in some circumstances.
>
> The office of the Chancellor is to correct men's consciences for frauds, breach of trusts, wrongs and *oppressions*[20], of what nature soever they be and to soften and mallify the extremity of the law which is called *summun jus*"[21]

16. (1705) 2 Ld. Raym. 1164, 1165. The reference to an "impossible thing" in this statement should not be read literally. Although the defendant was unable to perform his obligations, this was not a case of physical or legal impossibility. See discussion on "impossible consideration" in 1 *Chitty on Contracts*, 22nd ed. 1961 at para. 122. Cf. 87 E.R. 1044, where the judgment of the court is given as: "[L]et them go to trial; and though this would amount to a vast quantity, yet the jury will consider of the folly of the defendant, and give but reasonable damages against him."
17. (1889) 132 U.S. 406.
18. (1664) 83 E.R. 323.
19. (1705) 87 E.R. 1044.
20. Emphasis added. This was the aspect of the chancery jurisdiction upon which the doctrine permitting relief from unconscionable bargains was founded.
21. *Earl of Oxford's case* (1615) 1 Ch. Rep. 1, 6–7, 21 E.R. 485, 486.

Origin of the Equitable Doctrine

To police transactions which offended against the spirit of the usury legislation the court of chancery developed the doctrine authorising the review of unconscionable bargains.

It is not possible to trace the origin of the doctrine to any one case. The available reports suggest that it developed in the later seventeenth century[22] but it is possible that the doctrine had its genesis in the Tudor or early Stuart periods[23].

The doctrine possessed two distinct limbs. These were a general relief from unconscionable bargains and an equity in favour of heirs and expectants[24]. The major distinction between the two limbs was that judges gave relief to heirs and expectants more readily than to other plaintiffs. The extent of the gap in evidential requirements between the two limbs fluctuated from period to period.

There has been a conflict of opinion over which of the two limbs was the first to develop. The summation in chapter 13 of *1 Equity Cases Abridged (1667–1744),* where *inter alia* relief against unreasonable bonds and bonds obtained from heirs is discussed, suggests that the relief offered was a particular development of the general relief against fraud. On the other hand Lord Hatherley L.C. believed:

> "[T]he principal on which equity originally proceeded to set aside such [unconscionable] transactions was for the protection of family property; but the principle being once established, the Court extended its aid to all cases in which the parties to a contract have not met upon equal terms".[25]

A means of reconciling these apparently conflicting viewpoints is provided by Fonblanque[26]. It appears that the protection of heirs was originally vested in the Court of Star Chamber. When that Court was abolished in 1641[27], its paternalistic function was assumed by the Court of Chancery. It seems likely that this jurisdiction was assimilated to the developing relief against oppressions to create the doctrine authorising the review of unconscionable bargains.

Case Law (1676–1685)

In the earliest reported cases[28], the plaintiffs were generally heirs or expectants, but the court decided the actions on the basis of relief from sharp practices[29]. Relief was given where *indicia* of sharp practice were present, but

22. *Fairfax* v. *Trigg* (1677) R.t. Finch 314, 23 E.R. 172; *Pawlett* v. *Pleydell* (1679) Reg. Lib. 1678–9 A.f. 460, 79 Selden Society 739.
23. Following D.E.C. Yale ed., *Nottingham's Chancery cases* 73 Selden Society xcvi fn. 3.
24. Heirs were persons with settled rights of inheritance; expectants were an associated class of persons with no settled rights of inheritance, but who, because of their parentage or ancestry, had an expectation of benefit accruing to them on the death of a parent or relative.
25. *O'Rorke* v. *Bolingbroke* [1877] 2 App. Cas. 814, 822.
26. J. Fonblanque, *A Treatise on Equity,* London, 5th ed. 1820 at pp. 134–9.
27. 16 Car. 1. c. 10.
28. An explanation for the non-availability of reports of earlier cases on the relief of heirs is given in Fonblanque op. cit. supra. n. 26, 138 fn. (n.): "The just odium in which this tribunal [the Court of Star Chamber] had fallen, before its dissolution, has been the occasion that few memorials have reached us of its nature, jurisdiction and practice . . . "
29. "Sharp practice" is used here and throughout this article as a shorthand expression for those aspects of fraud in equity which are relevant to unconscionable bargains. Two aspects, in particular, are incorporated in this reference:
    (1) "the unconscientious use of power over another. The unconscientiousness is in the making of a bargain, generally hard or the taking of a gift . . . in each case with knowledge of the power."

not if the action related to "voluntary foolish bargains"[30].

Fairfax v. *Trigg,*[31] the first case reported under this head of relief, arose from the avoidance of the usury legislation by means of 'catching bargains'[32]. Fairfax, a young law student purchased 375 pairs of silk stockings reputedly worth 16/- a pair, confessed judgment for £600, but only obtained £90 on resale. In an action to set aside the transaction Lord Nottingham found for the plaintiff. He did not consider the harshness of the bargain, but acted because there were indications of sharp practice. The shopkeeper, knowing the status of the plaintiff, had promised to keep the transaction secret[33].

A more obvious instance of sharp practice occurred in *Earl of Ardglasse* v. *Muschamp*[34] where a moneylender obtained a rent charge of £300 per annum in perpetuity from the death of the earl in return for £300 cash. It was alleged that the earl had been debauched with drink and women. Lord Keeper North set aside the transaction upon payment of £300 plus interest at 6 per cent per annum.

The important feature of this period is that several heirs were left to perform their bargains. In *Pawlett* v. *Pleydell*[35] Lord Pawlett had supplemented a small allowance from his father, the Marquess of Winchester, by borrowing money on the security of annuities. At his father's death he sought to be relieved from these bargains. Lord Nottingham L.C. agreed that the terms were onerous but refused to grant relief because the plaintiff had entered into these agreements voluntarily and the lenders had not resorted to sharp practice.

In *Batty* v. *Lloyd*[36] a young man borrowed £350 and promised to repay £700 after the death of two relatives. Both died within two years. The court did not interfere with the bargain: "the price was the full value, though it happened to prove well."[37] The courts relieved against sharp practice but not against voluntary burdens and normal business risks.

Influence of Lord Jeffreys L.C. (1685–1688)

Lord Jeffreys[38] was responsible for the re-separation of the doctrine into two limbs, each with its special rules. His concern for the maintenace of family estates caused him to isolate an equity for heirs and expectants from the general relief from unconscionable bargains. Plaintiff members of this favoured class were entitled to relief on proof of a harsh transaction, unless the defendant could

(2) misrepresentations – following Sheridan, *Fraud in Equity* London, 1957 at p. 203.

30. *Pawlett* v. *Pleydell* (1679) 79 Selden Society 739.
31. (1677) 23 E.R. 172.
32. Catching bargains were a not expressly prohibited variant of sale and repurchase (discussed in H.H.L. Bellot op. cit. supra. n. 2, 32–37). They had the outward appearance of legitimate wholesaling activities. Merchants sold goods in quantity to a buyer, who paid by way of a promissory note. The buyer, or his agent, then resold the goods for whatever price he could obtain. The transaction took on a sinister air when goods were sold at a grossly inflated price to an heir in return for a promissory note which fell due on the death of a parent or relative.
33. (1677) 79 Selden Society 448, 449, which differs in this respect from 23 E.R. 172.
34. (1684) 1 Vern. 237, 23 E.R. 438.
35. (1679) 79 Selden Society 739.
36. (1682) 1 Vern. 141, 23 E.R. 374.
37. Ibid.
38. Jeffreys L.C. is better known as Judge Jeffreys of the Bloody Assizes. Recent studies of Jeffreys viz. Birkenhead, *Fourteen English Judges,* London. 1926 at p. 96; Keeton, *Lord Chancellor Jeffreys and the Stuart Cause,* London 1965 at Ch. 13; Helm, *Jeffreys* New York 1966 at Ch. 8 conclude that whatever defects Jeffreys may have exhibited as a man, a prosecutor or a criminal judge they were not manifested in his handling of equity cases and that his judgements in this are are sound.

show that the transaction was untainted by sharp practice. All other plaintiffs failed unless they could prove that the harsh bargain was induced by the sharp practice of the defendant. This shift in the onus of proof was of great benefit to members of the class.

The three years of Jeffreys' Chancellorship are marked by the unparalleled success of heirs in actions to avoid moneylending transactions. Heirs who entered into "catching bargains" were relieved on proof of the extravagant nature of the transaction, without, it appears, consideration of whether the transaction was voluntary and foolish or entered under pressure.[39] The court was easily satisfied that "these bargains were corrupt and fraudulent and tended to the utter ruin of families".[40]

Lord Jeffreys was equally protective where an heir purported to sell his entitlement. In *Nott* v. *Johnson and Graham*[41] the evidence showed that Nott was entitled to an estate in tail worth £800. He had been cast off by his father and was destitute. Hill bought Nott's entitlement for £30 cash and £20 per year for the life of Nott and his father. Nott's father lived for a further ten years. In granting Nott relief, the Lord Chancellor declared that it was an "unrighteous bargain in the beginning and that nothing happening afterwards would help it".[42]

The exemplar of this judicial attitude was provided by the Lords Commissioners, who supplanted Jeffreys. In *Wiseman* v. *Beake*[43], Wiseman raised money by giving promissory notes which fell due on his uncle's death. Wiseman was the major beneficiary under his uncle's will. When his uncle died, Wiseman commenced an action in equity to be relieved of his bargain. The evidence disclosed that Wiseman was in his thirties and in practice as a proctor in Doctors' Commons (an ecclesiastical law practitioner when the bargain was made. It did not disclose any sharp practice or undue pressure. Nevertheless Wiseman was relieved of his obligations on payment of principal and interest at the legal rate.

Lord Jeffreys' approach to the protection of heirs and expectants was accepted for many years, until the equity was redefined in the landmark case of *Chesterfield* v. *Janssen*[44]. Even after 1750, his views were persuasive:

> "No difficulty could have arisen in this case, if it had not been that of an expectant heir, dealing for his expectancy during his father's life. To that class of person this Court seems to have extended a degree of protection approaching nearly an incapacity to bind themselves by any contract."[45]

The equity for heirs and expectants

The full and distinguished Bench[46] which heard the case of *Chesterfield* v. *Janssen*[47] showed unanimity in their approach to the problem. In so doing, they paved the way for the development of the modern equity for heirs and expectants.

In 1738, Spencer was in his thirties, possessed of £7000 per annum and an expectation of great wealth on the death of his grandmother, the Duchess of

39. *Berney* v. *Pitt* (1686) 2 Ch. Rep. 396, 397, 21 E.R. 697, 698; (1686) 2 Vern. 14, 23 E.R. 620; *Bill* v. *Price* (1686) 1 Vern. 467, 23 E.R. 592; *Lamplugh* v. *Smith* (1688) 2 Vern. 78, 23 E.R. 660.
40. *Berney* v. *Pitt* (1686) 23 E.R. 620.
41. (1687) 2 Vern. 27, 23 E.R. 627.
42. Ibid.
43. (1690) 2 Vern. 121. 23 E.R. 688.
44. (1750) 2 Ves. sen. 125, 28 E.R. 82.
45. *Peacock* v. *Evans* (1804) 16 Ves. jun. 512, 33 E.R. 1079.
46. Lord Hardwicke L.C., Lee C.J., Strange M.R., Willes C.J. and Burnet J.
47. (1750) 28 E.R. 82.

Marlborough, then 78 years of age. His liabilities included debts of £20,000 and poor health. To meet his more pressing debts, he proposed to raise £5000 on a contingent bond. Brokers were doubtful about accepting the risk. Eventually Janssen accepted.

The duchess lived for a further six years, predeceasing her grandson by only one year and eight months. On the duchess' death, Spencer refinanced the arrangement. The contingent bond was replaced by a bond for £10,000 to be paid in the following April. Spencer made two part payments, each of £1000, before he died.

Janssen claimed he was entitled to the balance of the £10,000 plus penalty. Spencer's executors claimed that Janssen was only entitled to £5000 plus interest from 1738. The court declared that the executors must pay the balance owing on the bond, but relieved them from payment of the penalty.[48]

In reaching this conclusion, the court enunciated a doctrine which stood midway between that of Nottingham and that of Jeffreys. An heir or expectant was in a separate class from others seeking relief from sharp practice. This class was not entitled to claim the benefit of an irrebuttable presumption of fraud[49], but was entitled to the benefit of a rebuttable presumption:

> "There has always been an appearance of fraud from the nature of the bargain . . . In most of these cases have occurred deceit and illusion on other persons not party to the fraudulent agreement: the father, ancestor or relation, from whom was the expectation of the estate, has been kept in the dark: the heir or expectant has been kept from disclosing his circumstances and resorting to them for advice, which might have tended to his relief and also reformation."[50]

Janssen succeeded because he was able to rebut the presumption of sharp practice. The court agreed that the original transaction reflected a fair risk (would Spencer or the Duchess die first?) and was not a colourable contingency to evade the usury legislation. The court also agreed that Spencer's confirmation of the bond, after his grandmother's death, was made freely and voluntarily, without pressure and with knowledge that the original transaction might be impeachable in equity.

The court thus recognized that there were, at least, two ways in which moneylenders could rebut the presumption of fraud. However, subsequent courts were careful to ensure that the concessions did not become avenues for abuse. The lender had to prove his case affirmatively. He could not do this indirectly by showing that the borrower was of mature age and fully understood the bargain[51]. Courts would accept subsequent confirmations as evidence of a voluntary bargain, but only if they were satisfied that the confirmation was made voluntarily and not while under the terror of distress, or any misapprehension of the enforceability of the pre-existing securities.[52]

While many moneylenders attempted to exploit their opportunities to rebut the presumption of sharp practices, few were able to satisfy the judges' high standard of proof. Most lenders had taken advantage of their clients in some respect. They had charged high rates because of their clients' distress,[53] or

48. Ibid., 102.
49. This was the practical effect of Lord Jeffreys L.C.'s approach to the problem.
50. (1750) 28 E.R. 82, 101 (per Lord Hardwicke L.C.).
51. *Bromley* v. *Smith* (1859) 26 Beav. 644, 662–5, 53 E.R. 1047, 1054–5.
52. *Crowe* v. *Ballard* (1790) 1 Ves. jun. 215, 30 E.R. 308.
53. *Croft* v. *Graham* (1863) 2 DeG. J. & S. 155, 46 E.R. 334; *Tyler* v. *Yates* (1871) L.R. 6 Ch. App. 665.

promised not to bring the transactions to their families' attention[54] or failed to suggest that their clients should obtain professional advice[55] or had advanced money in the expectation that their client's family would repay.[56] As a result, almost any heir or expectant, who was prepared to risk the obloquy of court proceedings, could be relieved of his obligations on payment of the money advanced and five per cent simple interest.

Moneylenders who thought that the repeal of the usury legislation in 1854 had abolished the equitable controls were soon proved wrong.[57] The existence of the usury legislation had been a factor affecting the development of the equitable doctrines, but they existed independently of the legislation and remained as a regulating device after its repeal.

General relief from unconscionable bargains:

The second limb of the doctrine was the general relief against unconscionable bargains. This relief was a direct descendant of Lord Nottingham's relief from sharp practice[58]. To succeed a plaintiff had to show that he had been induced to enter into an unwise transaction by sharp practice or the pressures of an unequal bargaining position. Plaintiffs in this category had to prove their case without benefit of any presumption.

This limb of the doctrine was relatively quiescent in the period from 1685 to 1854. The poor[59] were protected by the usury legislation and lenders were, in any event, less interested in those who lacked the security of landed wealth.

The general relief developed, particularly, after the repeal of the usury legislation, when it remained, for most people, the sole bulwark against unconscionable bargains:

> "Whoever had attended to the subject must have seen that the moment the usury laws were repealed, and the lender of money came entitled to exact anything he pleased in the name of interest, from that moment that jurisdiction of the Court which prevailed independently of the usury laws was likely to be called into active operation".[60]

Equity developed as a complement to the law. The removal of the legislation left gaps in the scope of the remedy. Equitable remedies were available only where equity judges could discern conduct of a nature which equity had traditionally reprobated and corrected. At this stage in its development it was unable or unwilling to extend its jurisdiction to all activities which might loosely be termed 'harsh dealings' or 'sharp practice'.[61] Indeed it was bound by law to close its eyes to certain indicia of advantage-taking: "a man may agree to pay £100 per cent if he likes".[62]

54. *Aylesford* v. *Morris* (1873) L.R. 8 Ch. App. 484; *Nevill* v. *Snelling* (1880) 15 Ch. D. 679.
55. *Aylesford* v. *Morris* (1873) L.R. 8 Ch. App. 484.
56. *Nevill* v. *Snelling* (1880) 15 Ch. D. 679.
57. *Bromley* v. *Smith* (1859) 53 E.R. 1047; *Croft* v. *Graham* (1863) 46 E.R. 334; *Tyler* v. *Yates* (1871) L.R. 6 Ch. App. 665.
58. See discussion supra. n. 28 under the heading "Case Law (1676–1685)".
59. The term comprehends a sociological category generally equivalent to lower middle class and working class. It is not used as a reference to those temporarily short of funds.
60. Stuart V.C. in *Barrett* v. *Hartley* (1866) L.R. 2 Eq. 789, 795; see also Lord Selborne in *Aylesford* v. *Morris* (1873) L.R. 8 Ch. App. 484, 490–1; *Miller* v. *Cook* (1870) L.R. 10 Eq. 641, 646.
61. Cf. Equity's presumed response to the abolition of the Court of Star Chamber in the mid-seventeenth century supra. n. 27.
62. Jessel M.R. in *Bennett* v. *Bennett* Dec. 9, 1876 unrep., noted in *Nevill* v. *Snelling* (1880) 15 Ch. D. 679.

The repeal of the usury legislation did not result in the expansion of equity jurisdiction but under pressure the courts lessened the burden of proof in marginal cases. Thus, prior to 1860 the court was wary of granting relief except where actual deceit or misrepresentations were proved[63]. Later it was prepared to act where there were numerous indicia of unconscionable dealings but deceit or misrepresentation could not be proved.[64]

The indicia of sharp practice or unequal bargaining which severally or collectively might induce a court to grant relief from an unconscionable transaction were:

(a) Inadequate consideration:

In *Gwynne* v. *Heaton*[65], a case where a reversionary rent charge was granted at an undervalue, Lord Thurlow L.C. declared:

> To set aside conveyance there must be an inequality *so strong, so gross and manifest* that it must be *impossible to state it without producing an exclamation at the inequality of it.*[66].

This statement has received some support[67], but is contrary to views expressed in an earlier case.[68] Lord Thurlow was less explicit in *Heathcote* v. *Paignon*[69], but followed the logic of his previous decision. In August 1779, George Heathcote, a commissioner of taxes in receipt of a salary of £500 per annum, was short of ready money. He borrowed £100 from Paignon. Later in the month, he contracted to pay a £50 annuity to Paignon for the rest of Heathcote's life in return for £200 cash. Heathcote was then aged 30. In 1782 Heathcote sought relief from this bargain. Evidence showed that actuaries would give between 6 and 11 years purchase for an annuity on the life of a 30 year old. There was no evidence of particular financial distress apart from the onerous terms of the transaction. Lord Thurlow presumed financial distress from the nature of the transaction and granted relief on repayment of the balance of the principal with interest at 5 per cent per annum.

However, *Heathcote* v. *Paignon*[70] provides stronger support for the general principle enunciated by Eyre L.C.B. in *Griffith* v. *Spratley:*[71]

> "When you see distress on the one side and money on the other, and a wish on the one side to press that distress into a submission to his own terms, inadequacy of price goes a great way in warranting a court to infer from this, that some sort of fraud was used to draw the other party into the bargain."

Undervalue by itself is a very dubious ground for relief, but allied with other indicia of sharp practice has often persuaded courts to relieve against unconscionable bargains.

Courts have been particularly quick to grant relief where a poorly educated person of humble means has agreed to forego or compromise his rights without

63. *Harrison* v. *Guest* (1855) 6 DeG. M. & G. 424, 43 E.R. 1298 aff'd (1860) 8 H.L. Cas 481, 11 E.R. 517.
64. *Longmate* v. *Ledger* (1860) 2 Giff. 157, 66 E.R. 67; *Baker* v. *Monk* (1864) 4 DeG. J. & S. 388, 46 E.R. 968; *Fry* v. *Lane* (1888) 40 Ch. D. 312.
65. (1778) 1 Bro. C.C. 1, 28 E.R. 949.
66. (1778) 28 E.R. 949, 953. Reporter's emphasis.
67. *Gibson* v. *Jeyes* (1801) 6 Ves. jun. 266, 273–4, 31 E.R. 1044, 1048.
68. *Hobert* v. *Hobert* (1683) 2 Ch. C. 159, 22 E.R. 893.
69. (1787) 2 Bro. C.C. 167, 29 E.R. 96.
70. (1787) 29 E.R. 96.
71. (1787) 1 Cox 383, 389, 29 E.R. 1213; see also *Underhill* v. *Horwood* (1804) 10 Ves. jun. 209, 219 (per Lord Eldon L.C.).

the benefit of independent legal advice. In *Evans* v. *Llewellin*[72], a tradesman agreed to sell his half interest in his sister's £850 estate for £210. Evans had no independent advice and did not receive a full or adequate explanation of the transaction from the purchasers, who were themselves not fully conversant with the peculiarities of the devolution of gavel-kind[73] estates. Kenyon M.R., in granting rescission of the contract, agreed that there had been no wilful sharp practice, but considered that that plaintiff had been taken by surprise, and had not sufficient time to act with caution.

Equity could also intervene where an unadvised party entered into a usual form of business contract which was complicated by an unusual term. Thus, in *Clark* v. *Malpas*[74], three cottages worth between £156 and £380 were sold for a pension of 12/- a week and £100 at the vendor's death. The undervalue was not excessive, but equity intervened because the transaction was of an unusual nature and the imperfectly educated vendor was not likely to have understood its terms.

Chancery judges were more reluctant to intervene when a straightforward sale of land was involved. The plaintiffs obtained relief in *Wood* v. *Abrey*[75], where land worth £1600 was sold for less than £400, because the purchaser had taken advantage of the vendor's extreme poverty. Likewise they were successful in *Longmate* v. *Ledger*[76] because inadequacy of price was accompanied by the known mental weakness of the vendor. However, in *Harrison* v. *Guest*[77], the court refused to reopen the transaction. Harrison was an elderly but astute retired farmer who was quite satisfied to sell his property in return for full board for the rest of his life.

Say v. *Barwick*[78] is an interesting variant on the inadequate consideration theme. In that case, a landowner who had granted a lease at an undervalue on the morning that he attained his majority had the lease set aside. For some time previous to his coming of age, Say had been kept in a state of habitual intoxication by Barwick. He had returned home late from celebrating his majority and had been woken early on the following morning by Barwick who asked him to sign a lease which had been prepared by Barwick's solicitor. Say signed, although the lease contained disadvantageous terms and the rent was about half the farm's rental value. Undervalue, the plaintiff's ignorance and the defendant's bad influence were all relevant to the court's decision to set aside the lease.

(b) Lack of impartial advice:

Complex legal documents or arrangements are not always intelligible to the educated layman. They pose almost insuperable problems for the ill-educated and unbusinesslike. Courts have been reluctant to enforce onerous arrangements entered into by poor and ignorant persons, unless those persons had the benefit of competent and impartial advice when they entered into the transaction[79].

72. (1787) 1 Cox 333, 29 E.R. 1191, (1787) 2 Bro. C.C. 151, 29 E.R. 86 see also *Dunnage* v. *White* (1818) 1 Swans 137, 36 E.R. 329 and *M'Diarmid* v. *M'Diarmid* (1828) 3 Bli (N.S.) 374, 4 E.R. 1373 in both of which relief from an inequitable settlement of disputed rights was granted.
73. Gavel-kind is a form of pre-feudal free tenure common in Kent.
74. (1862) 4 DeG. F. & J. 401, 45 E.R. 1238.
75. (1818) 3 Madd. 417, 56 E.R. 558.
76. (1860) 2 Giff 157, 66 E.R. 67.
77. (1855) 6 DeG. M. & G. 424, 43 E.R. 1298 aff'd (1860) 8 H.L. Cas. 481, 11 E.R. 517.
78. (1812) 1 V. & B. 195, 35 E.R. 76.
79 *Evans* v. *Llewellin* (1787) 29 E.R. 1191; *Dunnage* v. *White* (1818) 36 E.R. 329; *M'Diarmid* v. *M'Diarmid* (1828) 4 E.R. 1373.

This concern has extended to the more outwardly competent, where there is doubt about their ability to comprehend an arrangement. Thus, in *Fane* v. *Duke of Devonshire*[80], a deathbed settlement of lands, which conflicted with earlier arrangements, was set aside because neither the Lord Chancellor nor the House of Lords were satisfied that the settlor had a mind adequate for business at the relevant time.

Many of the earlier equity cases were concerned with sales at an undervalue. Often the purchaser achieved his purpose by offering the aging vendor an annuity[81]. Although there was no legal requirement that the parties should receive impartial advice, purchasers were likely to lose their purchase if they had not at least suggested to the necessitous, poorly educated or unbusiness like vendor that he should discuss the matter with a competent and independent outsider[82].

In the later nineteenth century when the courts were dealing with more of these cases their attitude hardened:

> "Where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction"[83].

Harrison v. *Guest,*[84] where the court had accepted the aging vendor's refusal to seek outside advice as sufficient, was treated as a decision on its special facts only.

(c) Misrepresentation:

Misrepresentation was not a usual ground of complaint under the general relief. However there are four cases in which this was a major grievance. These cases, although significant in themselves, illustrate the three forms of transactions with which the unconscionability doctrine has been chiefly concerned.

Smith v. *Burroughs*[85] is an example of 'dry exchange'[86]. Smith wished to raise money by mortgaging his estate. The scrivener (conveyancer) whom he had approached to arrange the transaction, working in collusion with the lender, persuaded him to give a bond in exchange for bills and goods of doubtful value and goldsmith's bills for £300. The court, after taking into consideration the conveyancer's collusion and misrepresentations of the quality of the lender, relieved Smith on payment of £300, plus interest.

Haygarth v. *Wearing*[87] provides a slight variant on the theme of sales at an undervalue by the unbusinesslike. Miss Haygarth was informed by Wearing that consequent upon her brother's death, intestate, she had inherited his small allotment in Yorkshire. She had no knowledge of the land but agreed to sell it to Wearing at his own valuation, £100. When she later discovered that the land was worth between £400 and £750, she was successful in an action to have the conveyance set aside.

Moneylending transactions, also, provided opportunities for misrepresentation. Some lenders advertised loans on "easy terms" but charged oppressive rates. In

80. (1718) 6 Brown 137, 2 E.R. 984.
81. *Harrison* v. *Guest* (1855) 43 E.R. 1298 aff'd. (1860) 11 E.R. 517; *Longmate* v. *Ledger* (1860) 66 E.R. 67; *Clark* v. *Malpas* (1862) 45 E.R. 1238.
82. *Clark* v. *Malpas* (1862) 45 E.R. 1238; *Longmate* v. *Ledger* (1860) 66 E.R. 67.
83. *Fry* v. *Lane* (1888) 40 Ch.D. 312, 322 (per Kay, J.) following *Baker* v. *Monk* (1864) 46 E.R. 968.
84. (1855) 43 E.R. 1298 aff'd (1860) 11 E.R. 517.
85. (1696) 2 Vern. 346, 23 E.R. 820.
86. Supra. n. 3.
87. (1871) L.R. 12 Eq. 320.

Helsham v. *Barnett*[88], a court relieved a clergyman borrower from his bargain, on repayment of the loan plus 5 per cent per annum, when it was satisfied that interest at the rate of 60 per cent per annum had been described as "easy terms"[89].

Transactions of a continuing nature may provide more scope for unscrupulous conduct. A lender has no duty to explain the terms of the contract to his client but must not misrepresent the position if inquiries are made. In *Nevill* v. *Snelling*[90] the borrower agreed to pay 60 per cent per annum interest and 5 per cent per month on overdue bills. The lender charged a further 40 per cent bonus for renewing bills. After several renewals, the borrower queried this imposition. The lender explained that the renewal bonus was separate from the penal interest rate, and refused to discuss the matter. When further pressed, he gave the borrower the option of continuing to pay the bonus or repaying all outstanding loans as they fell due. In subsequent court proceedings the borrower was relieved on re-payment of the moneys actually lent plus interest at 5 per cent per annum.

(d) Advantage taken of the inequality of the parties:

The general unconscionability doctrine exists to give relief where one party to the transaction because of his own weaknesses – illiteracy, poverty or mental weaknesses – or because of the other party's sharp practice has been induced to enter into an unwise bargain. The previous three sections could be comprehensively described as situations where advantage had been taken of one of the parties. This fourth ground for relief has been recognized by the courts, as an independent ground, in situations where sharp practice is aggravated by the manifest inequality of the parties.

The earliest case under this head of relief is *Proof* v. *Hines*[91]. Proof, a poor and illiterate man who wished to assert his right to part of a considerable estate, approached Hines for help. Hines spent a considerable amount of money searching registers to prove the descent. Proof always expressed his intention of repaying Hines for his efforts, but was pressed to give a £1000 bond to be paid within a year. At that time he was living in direst poverty, 'without £5 in the world'. Lord Talbot L.C. relieved against the bond saying that it was 'plain that it was obtained of the plaintiff when under force and necessity'[92].

Strachan v. *Brander*[93] arose from a similar set of circumstances. Sir John Strachan was living in poverty in Paris. He was ignorant of his rights as heir of the recently deceased Jacob Banks. Brander sought him out and provided him with financial assistance to establish his claim and enter into possession of the estate. For his trouble Brander obtained part of the estate and a bond for twice the cost of the legal expenses. In a subsequent action, Lord Keeper Henley found that the properties were obtained by 'misrepresentation, imposition and undue advantage taken of the necessitous situation of the plaintiff at a time when he was wholly unacquainted with the respective values of the several estates and before he had taken possession of some of them'.[94]

In later cases, poverty or lack of education were normally treated as ancillary factors, which with others could influence a court[95]. They were sufficient, by themselves, if the transaction was on onerous terms and the other party had

88. (1873) 21 W.R. 309.
89. The same decision was reached in *Moorhouse* v. *Woolfe* (1882) 46 L.T.R. 374.
90. (1880) 15 Ch.D. 679.
91. (1735) Cases t. Talbot III, 25 E.R. 690.
92. (1735) Cases t. Talbot III, 116 cf. 25 E.R. 690, 692.
93. (1759) 1 Eden 303, 28 E.R. 701.
94. (1759) 28 E.R. 701, 702.
95. *Evans* v. *Llewellin* (1787) 29 E.R. 1191; *Wood* v. *Abrey* (1818) 56 E.R. 558; *Longmate* v. *Ledger* (1860) 66 E.R. 67; *Fry* v. *Lane* (1888) 40 Ch.D. 312.

special knowledge or was in a fiduciary relationship to the oppressed party[96].

Failure of the general relief

The failure of the general relief to provide adequate protection is documented in the Report of the Select Committee of the House of Commons on Moneylending[97]. The Select Committee, which had received evidence from judges, borrowers and moneylenders, reported that uncontrolled moneylending had been a social disaster. Moneylenders had indulged in misleading advertising to ensnare borrowers, inserted onerous terms into moneylending contracts, and taken advantage of the repeal of the usury laws to demand whatever rate of interest their clients could be induced to pay.

Not all the responsibility for this state of affairs lies with the courts. Some, at least, of these complaints were remediable in equity[98]; they were not remedied because the borrowers either lacked the money to bring an action, or dreaded the publicity, which recourse to equity would have entailed.

However, even if all available remedies had been utilised, the general relief would not have provided an adequate regimen. Equity struck at unconscionable behaviour. In rare instances, relief was available where a dealing though done openly was so manifestly unfair that it was unconscionable *per se*[99]. Equity did not possess the resources to strike at all instances of harsh dealing or sharp practice. Equity could correct consciences and cure deceits but by the later nineteenth century, was not sufficiently flexible to extend relief to those who were forced by circumstances to accept harsh terms with knowledge that the terms were harsh.

The Twentieth Century

The recommendations of the Select Committee on Moneylending[100] were eventually translated into law in the *Moneylenders Act* 1900.[101] Unlike the usury legislation[102] which had attempted to regulate maximum interest rates, the Act sought to regulate moneylenders. They were required to be licensed and to operate only from their registered business addresses[103]. The doctrine authorising the review of unconscionable transactions was given statutory form as part of a section empowering courts to re-open harsh and unconscionable transactions[104]. This section, with minor variants, was duly incorporated in the

96. *Howley* v. *Cook* Ir.R. 8 Eq. 570 (special knowledge); *Cockell* v. *Taylor* (1852) 15 Beav. 103, 21 L.J. Ch. 545, 51 E.R. 475.
97. (1898) Parl. Papers (U.K.) 260; Bellot, *The law relating to unconscionable transactions with moneylenders* London, 2nd ed. 1906, at p. 68.
98. E.g. *Helsham* v. *Barnett* (1873) 21 W.R. 309 (misleading advertising); *Nevill* v. *Snelling* (1880) 15 Ch.D. 679 (imposing additional terms).
99. *Evans* v. *Llewellin* (1787) 29 E.R. 1191; *Wood* v. *Abrey* (1818) 56 E.R. 558; *Cockell* v. *Taylor* (1852) 51 E.R. 475; *Longmate* v. *Ledger* (1860) 66 E.R. 67; *Fry* v. *Lane* (1880) 40 Ch.D. 312; *Howley* v. *Cook* Ir. R. 8 Eq. 570.
100. (1898) Parl. Papers (U.K.) 260.
101. 63 & 64 Vict. c. 51.
102. Bill against Usury 37 Hen, VIII c. 9. (1545) and amendments 13 Eliz. c. 18 (1571), 21 Jac. I c. 17 (1624), 12 Car. II c. 13 (1660), 12 Ann Stat 2 c. 16 (1714).
103. *Moneylenders Act* 1900 (U.K.) s. 2. The monetary penalties specified for non-compliance with these requirements were supplemented by the judgemade rule that failure to comply rendered the contract unenforceable, *Kirkwood* v. *Gadd* [1910] A.C. 422, 423–4.
104. Moneylenders Act 1900 (U.K.) s. 1 (1).

moneylending legislation of all Australian states[105] and New Zealand[106] and, subsequently, in hire purchase legislation throughout Australasia.[107]

While the re-opening sections have played a limited but useful role within the context of their respective statutory schemes[108], few litigants have had recourse to the aspect of the sections which represents the doctrine. Judges and litigants seem to have assumed that most justifiable claims will be satisfied under one or more of the other grounds for re-opening transactions.

The equity in favour of heirs and expectants has become moribund. Litigants have claimed its protection on two occasions[109] and on both occasions the claim has been rejected. In *Wolfe* v. *Lowther*[110], a borrower, who had an income of £2,000 per year and was entitled to a reversionary interest in property worth £4,000 per annum, was charged interest at rates in excess of 100 per centum per annum on a number of transactions. In the matter which came to court, the borrower agreed to pay £1600 over a period of eight months for a loan of £1000, and the contract provided that, in the event of default, interest at the rate of 60 per centum per annum would be charged on both unpaid capital and interest. The judge did not think that the borrower was entitled to the benefit of the equitable doctrine, but, relying on other limbs of the re-opening provisions, reduced the interest rate to 30 per centum per annum and gave judgment for £1200 plus costs in favour of the moneylender.[111]

The equity which protects the poor ignorant and young still retains some measure of vitality. In the twentieth century, it has been relied on primarily as a means of enabling courts to release ignorant or aged applicants from improvident transactions relating to the disposition of their property. In *Harris* v. *Richardson*[112], a man of limited intelligence who was an undischarged bankrupt sought to borrow money against his sole asset, a life interest in a trust fund, but was persuaded to sell the asset, secured by an assignment of policies on his life, for less than half value. The Court of Appeal, accepted Kay J's statement of the equitable principle[113] and concluded that "the price paid by the applicant was so inadequate as, to quote an expression occasionally used, to shock the conscience of the court and the transaction was unfair and unjust. In plain terms it was an unconscionable bargain".[114] *Richardson* v. *Otto*[115] is another case which emphasises the need to retain the equitable doctrine. Otto, a 64 year old farmer, poorly educated and not in the best of health, was brow beaten into

105. See now s. 4 (1) *Moneylenders Acts* 1916–69 (Qld); s. 30 (1) *Moneylenders and Infants Loans Acts* 1941–69 (NSW); s. 28 (1) *Moneylenders Act* 1912–70 (WA); s. 2 (1) *Lending of Money Act* 1951–71 (Tas); s. 6 (1) *Moneylenders Ordinance* 1936–56 (ACT); s. 46 (1) *Consumer Credit Act* 1972–3 (SA).
106. Section 3 (1) *Moneylenders Act* 1908–71 (NZ).
107. S. 28 *Hire Purchase Act* of 1959 (Qld); s. 32 *Hire Purchase Act* 1960–70 (NSW); s. 24 *Hire Purchase Act* 1959–71 (Vic); s. 24 *Hire Purchase Agreements Act* 1960–71 (SA), until repealed by s. 4 (1) of the *Consumer Transactions Act* 1972–73, which Act at s. 24 abolishes hire purchase; s. 24 *Hire Purchase Ordinance* 1961–66 (ACT). The equitable doctrines reference formed part of s. 8 (1) *Hire Purchase Agreements Act* 1939 (NZ) but has not been retained as part of extended re-opening section, s. 37 of the *Hire Purchase Act* 1971 (NZ).
108. See Pannam, *Law of Moneylenders*, Sydney 1965 at Ch. 17; Else-Mitchell and Parsons, *Hire Purchase Law* Sydney 4th ed. 1968 at pp. 175–180; Trebilcock, *"Re-opening hire purchase transactions"* in (1967) 41 A.L.J. 424.
109. *J. King Ltd.* v. *Hay-Currie* (1911) 28 T.L.R. 10; *Wolfe* v. *Lowther* (1915) 31 T.L.R. 354.
110. (1915) 31 T.L.R. 354.
111. Ibid, at 356.
112. [1930] N.Z.L.R. 890 (C.A.).
113. Ibid, at 918, following *Fry* v. *Lane* (1888) 40 Ch.D. 312, 322.
114. Ibid, at 920.
115. [1938] Q.W.N. 15.

exchanging his £2500 farm for one worth only £1500. Although the judge did not believe evidence that Otto had been denied an opportunity to consult his solicitors, he agreed that this was a case where the defendant ought to have received independent advice. In both *Wilton* v. *Farnworth*[116], where a husband ignorant of the intestate succession rules gave away his interest in his wife's estate, and *Blomley* v. *Ryan*[117], where an elderly farmer sold his farm at a gross undervalue while effected by drink, the High Court of Australia has recognized and applied the doctrine.

The doctrine is, also, available to protect the interests of the young. In *Lancashire Loans Ltd.* v. *Black*[118], a daughter, prompted by her mother, had guaranteed her mother's borrowings. The Court of Appeal would not permit the moneylender to take the benefit of the guarantee unless it could first rebut the presumption of undue influence which arose from the mother/daughter relationship.[119]

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116. (1948) 76 C.L.R. 646.
117. (1956) 99 C.L.R. 362.
118. [1934] 1 K.B. 380.
119. The inadequacy of the memorandum of the loan was an alternative ground for granting relief.

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