Einführung in die englische Rechtsterminologie

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Veranstaltungsübersicht

1.	Einführung, Rechtsgebiete und Rechtstexte sowie Grundlagen der Rechtsvergleichung	Freitag, 17.01.2014
2.	Case Law und Präjudiziensystem Aufbau und Stil von Urteilen	Samstag, 18.01.2014
3.	Contract Law Sales Law	Montag, 20.01.2014
4.	International Sales Law Tort Law und Property Law	Dienstag, 21.01.2014
5.	Constitutional Law European Law	Mittwoch, 22.01.2014
6.	Fallstudie „Vertragsgestaltung“	Donnerstag, 23.01.2014
7.	Rechtsvereinheitlichung und Rechtspolitik Studium, Ausbildung und juristische Berufsbilder	Freitag, 24.01.2014

Today‘s lecture

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2. Case Law and Precedence
Judgements – Drafting and Style

- Case Law system
- Common Law
- Judgements
- Interpretation
- Precedence
- etc. …

The Anglo-American Legal System

Case Law system

- “law” flaws from judgments, not from statutes
  - “judge-made law”
- the law is developed on the basis of precedent judgments
  - (case-by-case-system)
- the basis of the law are cases, not codifications of a specific field of law
- an English “BGB” does not exist, but a system of judgments about private law question which form a set of rules that offers an equivalent to a codification
- judgments of higher courts are binding for lower courts
- until the 1960s in England this also meant that no court can deviate from its own earlier judgments

The Anglo-American Legal System

“Common law” (1/2)

- “common law” is a term with different meanings
  - firstly: is used to distinguish between the legal traditions of common law and civil law, as the latter is mainly based on codifications
  - secondly: is used within the English legal system to distinguish between law based on cases, that is the common law in a narrower sense, and law based on statutes
  - thirdly: describes historically the law from the common law courts, instead of law from the courts of equity
  - fourthly: described in contrast to local customs

The Anglo-American Legal System

"Common Law" (2/2)

- in practical terms: law in England has today various sources, not only cases, but also written statutes in various fields of law, including European law, regulations with direct effect, and law transforming European law into English law, on the basis of European directives
  - unlike German law, however, case law forms the basis of the legal system, meaning that in a specific field of law, e.g. contract law, it might be possible that the English legislator does only regulate a specific point of contract law, e.g. contracts for the benefit of third parties, given the case that the legislator disagrees with the case law handed down by the courts and corrects the specific point
  - as England has a long and unbroken history of legal judgments it might be possible that the relevant precedent cases of a case to decide today might be 300 or 400 years old

The Anglo-American Legal System

Precedent

- Method of reasoning
- Duty to give reasons
- ratio decidendi

Binding

- stare decisis
- Vertical binding
- Horizontal binding
- Court being self-bound
- Persuasive authority
- de facto-binding

Practical example - Precedent

Practise Statement 1966 (1/2)

Lord Gardiner's statement in the House of Lords on July 26, 1966

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases.

It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law.

Practical example - Precedent

Practise Statement 1966 (2/2)

They propose therefore, to modify their present practice and, while treating former decisions of this house as normally binding, to depart from a previous decision when it appears right to do so.

In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlement of property, and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

This announcement is not intended to affect the use of precedent elsewhere than in this House.

The Anglo-American Legal System

Inter-pretation

- Overruling
- Prospective overruling
- Distinguishing
- Confirming the decision to its facts
- ratio decidendi of the first case as to the second case
- Obiter dictum

Practical example - Interpretation

Pepper (Her Majesty's Inspector of Taxes) v Hart (1/4)

[1992] 3 WLR 1032

“My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity.

Practical example - Interpretation

Pepper (Her Majesty's Inspector of Taxes) v Hart (2/4)

Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria.“

(Lord Browne-Wilkinson)

Practical example - Interpretation

Pepper (Her Majesty's Inspector of Taxes) v Hart (3/4)

„In my judgment, the plain meaning of article 9, viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil or criminal for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed. Relaxation of the rule will not involve the courts in criticising what is said in Parliament. The purpose of looking at Hansard will not be to construe the words used by the Minister but to give effect to the words used so long as they are clear. Far from questioning the independence of Parliament and its debates, the courts would be giving effect to what is said and done there.“

(Lord Browne-Wilkinson)

Practical example - Interpretation

Pepper (Her Majesty's Inspector of Taxes) v Hart (4/4)

“I believe that practically every question of statutory construction that comes before the courts will involve an argument that the case falls under one or more of these three heads. It follows that the parties' legal advisors will require to study Hansard in practically every such case to see whether or not there is any help to be gained from it. I believe this is an objection of real substance. It is a practical objection not one of principle (…) Such an approach appears to me to involve the possibility at least of an immense increase in the cost of litigation in which statutory construction is involved.“

(Lord Mackay)

Judgements – Basics

Some standard terms

- Majority decision
- Majority vote
- Opinion
  - Dissenting opinion
  - Concurring opinion
- Rationale
- Appellate court/Court of Appeal

Judgements – Basics

Some standard abbreviations

- SC = Supreme Court
- HL = House of Lords
- PC = Privy Council
- CA = Court of Appeal
- KB/QB = King's/Queen's Bench Division (High Court)

Practical example – Judgement I

Donoghue v Stevenson

Die Jovis, 26° Maii, 1932.
Parliamentary Archives, HL/PO/JU/4/3/873
M'ALISTER or DONOGHUE (Pauper) Appellant
v.
STEVENSON. Respondent

Lords Present
Lord Buckmaster
Lord Atkin
Lord Tomlin
Lord Thankerton
Lord Macmillan
Judgment

Lord Buckmaster (read by Lord Tomlin)

Donoghue v Stevenson

Lord Buckmaster (read by Lord Tomlin)

MY LORDS,

The facts of this case are simple.

On August 26th, 1928, the Appellant drank a bottle of ginger beer, manufactured by the Respondent, which a friend had bought from a retailer and given to her. The bottle contained the decomposed remains of a snail which were not and could not be detected until the greater part of the contents of the bottle had been consumed. As a result she alleged and, at this stage her allegations must be accepted as true, that she suffered from shock and severe gastro enteritis. She accordingly instituted the proceedings against the manufacturers which have given rise to this appeal.

The foundation of her case is that the Respondent, as the manufacturers of an article intended for consumption and contained in a receptacle which prevented inspection owed a duty to her as consumer of the article to take care that there was no noxious element in the goods, that they neglected such duty and are consequently liable for any damage caused by such neglect.

Donoghue v Stevenson

Lord Buckmaster (read by Lord Tomlin)

After certain amendments which are now immaterial, the case came before the Lord Ordinary who rejected the plea in Law of the Respondent and allowed a proof. His interlocutor was revoked by the second Division of the Court of Session from whose judgment this appeal has been brought.

Before examining the merits two comments are desirable —

> (1) That the Appellant's case rests solely on the ground of a tort based not on fraud but on negligence; and
> (2) that throughout the appeal the case has been argued on the basis, undisputed by the Second Division and never questioned by counsel for the Appellants or by any of your Lordships, that the English and the Scots law on the subject are identical.
>
> It is, therefore, upon the English law alone that I have considered the matter and in my opinion it is on the English law alone that in the circumstances we ought to proceed.

Donoghue v Stevenson

Lord Buckmaster (read by Lord Tomlin)

The law applicable is the common law and, though[,] its principles are capable of application to meet new conditions not contemplated when the law was laid down, yet themselves they cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.

Now the common law must be sought in law books by writers of authority and in the judgments of the Judges entrusted with its administration. The law books give no assistance because the work of living authors (however deservedly eminent cannot be used as authorities though the opinions they express may demand attention, and the ancient books do not assist. I turn therefore to the decided cases to see if they can be construed so as to support the Appellant's case. One of the earliest is the case of *Langridge v. Levy* 2 M. & W. 519. It is a case often quoted and variously explained. There a man sold a gun which he knew was dangerous for the use of the purchaser's son. The gun exploded in the son's hands and he was held to have a right of action in tort against the gunmaker. How far it is from the present case can be seen from the judgment of Parke B. who in delivering the judgment of the Court used these words

Donoghue v Stevenson

Lord Buckmaster (read by Lord Tomlin)

"(…) The case of *Langridge v. Levy* (…) therefore, can be dismissed from consideration with the comment that it is rather surprising it has so often been cited for a proposition it cannot support.

The case of *Winterbottom v. Wright* 10 M. & W. 109 is, on the other hand, an authority that is closely applicable. (…)"

Longmeid v. Holliday was the case of a defective lamp sold to a man whose wife was injured by its explosion. (…)

The general principle of these cases is stated by Lord Sumner in the case of *Blacker v. Lake & Elliot* 106 L.T. 533 in these terms:

"The breach of the Defendant's contract with A. to use care and skill in the manufacture or repair of an article does not of itself give any cause of action to B. when he is injured by reason of the article proving defective."

Donoghue v Stevenson

Lord Buckmaster (read by Lord Tomlin)

From this general rule there are two Well-known exceptions—

(1) In the case of an article dangerous in itself and

(2) where the article not in itself dangerous is in fact dangerous due to some defect or for any other reason, and this is known to the manufacturer. Until the case of *George v. Skivington* L.R. 5 Ex. 1, I know of no further modification of the general rule.

(…) In this case no one can suggest the ginger beer was an article dangerous in itself, and the words of Lord Dunedin show that the duty attaches only to such articles, for I read the words "a peculiar duty" as meaning a duty peculiar to the special class of subject mentioned.

Of the remaining cases *George v. Skivington* is the one nearest to the present and without that case and the statement of Baron Cleasby in *Francis v. Cockrell* , L.R. 5 Q.B. 501, at p. 515, and the dicta of Lord Esher M.R. in *Heaven v. Pender* 11 Q.B.D. 503, at pp. 500 et seq., the Appellants would be destitute of authority. *George v. Skivington* related to (…)

Donoghue v Stevenson

Lord Buckmaster (read by Lord Tomlin)

In *Francis v. Cockrell* (…)

In *Le Liecre v Gould* (…)

In *Earl v. Lubbock* (…)

(…)

In *Mullin v. Barr* , 1929 S.C. 461, a case indistinguishable from the present, excepting upon the ground that a mouse is not a snail, and necessarily adopted by the Second Division in their judgment, Lord Anderson says this: "(…)"

In agreeing, as I do, with the judgment of Lord Anderson, I desire to add that I find it hard to dissent from the emphatic nature of the language with which his judgment is clothed. I am of opinion that this Appeal should be dismissed, and I beg to move your Lordships accordingly.

Donoghue v Stevenson

Lord Atkin

MY LORDS,
The sole question for determination in this case is legal: do the averments made by the pursuer in her pleading if true disclose a cause of action? I need not restate the particular facts. The question is whether the manufacturer of an article of drink sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health. I do not think a more important problem has occupied your Lordships in your judicial capacity: important both because of its bearing on public health and because of the practical test which it applies to the system of law under which it arises. The case has to be determined in accordance with Scots Law: but it has been a matter of agreement between the experienced counsel who argued this case, and it appears to be the basis of the judgments of the learned judges of the Court of Session that for the purposes of determining this problem the law of Scotland and of England are the same.

Donoghue v Stevenson

Lord Atkin

I speak with little authority on this point, but my own research such as it is satisfies me that the principles of the law of Scotland on such a question as the present are identical with those of English law: and I discuss the issue on that footing. The law of both countries appears to be that in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. In the present case we are not concerned with the breach of the duty; if a duty exists that would be a question of fact which is sufficiently averred and for present purposes must be assumed. We are solely concerned with the question whether as a matter of law in the circumstances alleged the defender owed any duty to the pursuer to take care.

It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. (…)

Donoghue v Stevenson

Lord Atkin

My Lords if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products is likely to result in injury to the consumers life or property owes a duty to the consumer to take that reasonable care. It is a proposition that I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter as in most others is in accordance with sound common sense. I think that this appeal should be allowed.

Donoghue v Stevenson

Lord Tomlin

MY LORDS,

I have had an opportunity of considering the opinion prepared by my noble and learned friend Lord Buckmaster which I have already read. As the reasoning of that opinion and the conclusions reached therein accord in every respect with my own views, I propose to say only a few words. (…)

Lord Thankerton

MY LORDS,

…

Lord Macmillan

MY LORDS,

…

Practical example – Judgement II

Mitchell v Finnley Lock Seeds

[1982] EWCA Civ 5

Case No. 1979 G. No. 1137

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(MR. JUSTICE PARKER)

Royal Courts of Justice.
29th September 1982.

B e f o r e :
THE MASTER OF THE ROLLS (LORD DENNING)
LORD JUSTICE OLIVER
and
LORD JUSTICE KERR

_____

Practical example – Judgement II

Mitchell v Finnley Lock Seeds

GEORGE MITCHELL (CHESTERHALL) LTD. — **(Plaintiff) Respondent**

v.

FINNEY LOCK SEEDS LTD. — **(Defendant) Appellant**

MR. PATRICK TWIGG (instructed by Messrs. McKenna & Co.) appeared on behalf of the (Plaintiff) Respondent.

MR. MARK G. WALLER, Q.C. and MR. MORDECAI LEVENE (instructed by Messrs. Davidson Doughty & Co.) appeared on behalf of the (Defendant) Appellant.

Mitchell v Finnley Lock Seeds

Lord Denning MR

THE MASTER OF THE ROLLS:

In outline

Many of you know Lewis Carroll's "Through the Looking Glass". In it there are these words:

"'The time has come', the Walrus said, 'to talk of many things - of ships and shoes and sealing wax - of cabbages and kings'".

Mitchell v Finnley Lock Seeds

Lord Denning MR

Today it is not "of cabbages and kings" - but of cabbages and what-nots. Some farmers (called George Mitchell Ltd.) ordered 30 lbs. of cabbage seed. It was supplied. It looked just like cabbage seed. No one could say it was not. The farmers planted it over 63 acres. Six months later there appeared out of the ground a lot of loose green leaves. They looked like cabbage leaves but they never turned in. They had no hearts. They were not "cabbages" in our common parlance because they had no hearts. The crop was useless for human consumption. Sheep or cattle might eat it if hungry enough. It was commercially useless. The price of the seed was £192. The loss to the farmers was over £61,000. They claimed damages from the seed merchants. The judge awarded them that sum with interest. The total comes to nearly £100,000.

The seed merchants appeal to this court. They say that they supplied the seed on a printed clause by which their liability was limited to the cost of the seed, that is, £192. They rely much on two recent cases in the House of Lords - Photo Production Ltd. v. Securicor Transport Ltd. (1980) AC 827 and Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd. (unreported at the time), 1982 SLT 377 and Securicor, 26th November, 1981 (not yet reported).

Mitchell v Finnley Lock Seeds

Lord Denning MR

In detail

The farmers' farm land is in the maritime belt of the East Lothian, almost at sea level. The soil is very fertile. It has very mild winters with no frosts. It is about the one place in the country where Dutch winter cabbage can be grown successfully. It is sown in the spring and transplanted in the summer. It grows very slowly and stands throughout the winter in the fields. It is harvested from February onwards. It is a hard, dense, heavy cabbage which captures the market at a time when there is very little other green-stuff available.

For the last 25 years these farmers - and other farmers in the maritime belt - have got their seed from Finneys who get it from Holland. Finneys had a representative, Mr. Wing. He called on the farmers each year. At Christmas 1973 he came. They gave him an order by word of mouth for 30 lbs. of Finneys Late Dutch Special Cabbage Seed. There was no order in writing. In February 1974 the seeds arrived. The invoice gave the date of dispatch as the 14th February, 1974.

Mitchell v Finnley Lock Seeds

Lord Denning MR

"30 lb. Cabbage. Finneys Late Dutch Special 2192.00. Important. For Seeds Act, Statutory Declaration, Conditions of Sale etc., see reverse".

Then on the back there were in small print many Conditions of Sale. Included in them was the clause relied upon by Finneys. They say that their liability was limited to the return of the price, £192: and that they are not liable for £61,000 claimed.

<u>Are the Conditions part of the contract?</u>

Mitchell v Finnley Lock Seeds

Lord Denning MR

The farmers were aware that the sale was subject to some Conditions of Sale. All seed merchants have Conditions of Sale. They were on the back of the catalogue. They were also on the back of the invoice each year. So it would seem that the farmers were bound at common law by the terms of them. The inference from the course of dealing would be that the farmers had accepted the Conditions as printed - even though they had never read them and did not realise that they contained a limitation on liability.

But in view of modern developments, it is to be noticed that the Conditions were not negotiated at all between any representative bodies. They were not negotiated by the National Farmers' Union. They were introduced by the seed merchants by putting them in their catalogue and invoice - and never objected to by the farmers.

It is also to be noticed that the farmers never thought of insuring against any breach of contract by the seedsmen. It would be difficult to get any quotation. It might be possible for the seed merchants to insure themselves; something in the nature of a product liability insurance. Some seed merchants do so.

Mitchell v Finnley Lock Seeds

Lord Denning MR

The printed Condition here

The limitation clause here is of long standing in the seed trade. It has been in use for many years. The material part of it is as follows:

"All Seeds (…) offered for sale or sold by us (…) have been tested in accordance with the provisions of the same. In the event of any seeds or plants (…) not complying with the express terms of the contract of sale (…) or any seeds or plants proving defective in varietal purity we will, at our option, replace the defective seeds or plants, free of charge to the buyer or will refund all payments made to us by the buyer in respect of the defective seeds or plants and this shall be the limit of our obligation. We hereby exclude all liability for any loss or damage arising from the use of any seeds or plants supplied by us and for any consequential loss or damage arising out of such use or any failure in the performance of or any defect in any seeds or plants supplied by us or for any other loss or damage whatsoever save for, at our option, liability for any such replacement or refund as afordsaid.

Mitchell v Finnley Lock Seeds

Lord Denning MR

In accordance with the established custom of the Seed Trade any express or implied condition, statement or warranty, statutory or otherwise, not stated in these Conditions is hereby excluded. The price of any seeds (…) is based upon the foregoing limitations upon our liability. The price of such seeds or plants would be much greater if a more extensive liability were required to be undertaken by us".

The natural meaning

(…)
The hostile meaning

(…)

Mitchell v Finnley Lock Seeds

Lord Denning MR

The heyday of Freedom of Contract

None of you nowadays will remember the trouble we had - when I was called to the Bar - with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of "freedom of contract". But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, "Take it or leave it". The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time. When the courts said to the big concern, "You must put it in clear words", the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clauses or understand them.

Mitchell v Finnley Lock Seeds

Lord Denning MR

It was a bleak winter for our law of contract. It is illustrated by two cases, Thompson v. L.M.S. (1930) 1 KB 41 (in which there was exemption from liability, not on the ticket, but only in small print at the back of the timetable, and the company were held not liable) and L'Estrange v. Graucob (1934) 2 KB 394 (in which there was complete exemption in small print at the bottom of the order form, and the company were held not liable).

The secret weapon

Faced with this abuse of power - by the strong against the weak - by the use of the small print of the conditions - the judges did what they could to put a curb upon it. They still had before them the idol, "freedom of contract". They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back.

Mitchell v Finnley Lock Seeds

Lord Denning MR

This weapon was called "the true construction of the contract". They used it with great skill and ingenuity. They used it so as to depart from the natural meaning of the words of the exemption clause and to put upon them a strained and unnatural construction. In case after case, they said that the words were not strong enough to give the big concern exemption from liability: or that in the circumstances the big concern was not entitled to rely on the exemption clause. (…)

In short, whenever the wide words - in their natural meaning - would give rise to an unreasonable result, the judges either rejected them as repugnant to the main purpose of the contract, or else cut them down to size in order to produce a reasonable result. (…) But when the clause was itself reasonable and gave rise to a reasonable result, the judges upheld it; at any rate, when the clause did not exclude liability entirely but only limited it to a reasonable amount. (…)

Mitchell v Finnley Lock Seeds

Lord Denning MR

The change in climate

(…) No longer was the big concern able to impose whatever terms and conditions it liked in a printed form - no matter how unreasonable they might be. These reports showed most convincingly that the courts could and should only enforce them if they were fair and reasonable in themselves and it was fair and reasonable to allow the big concern to rely on them. So the idol of "freedom of contract" was shattered. In cases of personal injury or death, it was not permissible to exclude or restrict liability at all. In consumer contracts any exemption clause was subject to the test of reasonableness.

(…)

The effect of the changes

What is the result of all this? (…) It is presented by the test of reasonableness.

Mitchell v Finnley Lock Seeds

Lord Denning MR

The two Securicor cases

The revolution is exemplified by the recent two Securicor cases in the House of Lords. In each of them the Securicor company provided a patrolman to keep watch on premises so as to see that they were safe from intruders. They charged very little for the service. In the first case it was a factory with a lot of paper in it. The patrolman set light to it and burnt down the factory. In the second case it was a quay at Aberdeen where ships were berthed. The patrolman went off for the celebrations on New Year's Eve. He left the ships unattended. The tide rose. A ship rose with it. Its bow got "snubbed" under the deck of the quay. It sank. In each case the owners were covered by insurance. The factory owners had their fire insurance. The ship-owners had their hull insurance. In each case the Securicor Company relied on a limitation clause. Under it they were protected from liability beyond a limit which was quite reasonable and their insurance cover was limited accordingly. The issue in practical terms was: Which of the insurers should bear the loss? The question in legal terms in each case was whether Securicor could avail themselves of the limitation clause. In each case the House held that they could. (…)

Mitchell v Finnley Lock Seeds

Lord Denning MR

The Supply of Goods (Implied Terms) Act 1973

In any case the contract for these cabbage seeds was governed by section 55(4) of the 1973 Act. It says that in the case of a contract of sale of goods any term "is ... not enforceable to the extent that it is shown that it would not be fair or reasonable to allow reliance on the term".

That provision is exactly in accord with the principle which I have advocated above. So the ultimate question, to my mind, in this case is just this: To what extent would it be fair or reasonable to allow the seed merchants to rely on the limitation clause?

Fair and reasonable

(…) Our present case is very much on the borderline. There is this to be said in favour of the seed merchants. The price of this cabbage seed was small: £192. The damages claimed are high: £6l,000. But there is this to be said on the other side. The clause was not negotiated between persons of equal bargaining power. It was inserted by the seed merchants in their invoices without any negotiation with the farmers. (…)

Mitchell v Finnley Lock Seeds

Lord Denning MR

Next, I would point out that the buyers had no opportunity at all of knowing or discovering that the seed was not cabbage seed: whereas the sellers could and should have known that it was the wrong seed altogether. The buyers were not covered by insurance against the risk. Nor could they insure. (…)

To that I would add this further point. Such a mistake as this could not have happened without serious negligence on the part of the seed merchants themselves or their Dutch suppliers. So serious that it would not be fair to enable them to escape responsibility for it.

In all the circumstances I am of opinion that it would not be fair or reasonable to allow the seed merchants to rely on the clause to limit their liability.
I would dismiss the appeal accordingly.

Lord Justice Oliver

I agree that this appeal fails.

(…)