THE CRISIS OF CONTRACT

By DEREK ROEBUCK*

INTRODUCTION

There is nothing new in the suggestion that the law of contract is no longer as flexible or as useful in meeting the new demands made upon it.[1] New economic policies of governments and more refined aspirations for social justice have destroyed *laissez faire* as a political ideal. Since Keynes showed that control was necessary if capitalism was to survive, one country after another has found the need for economic planning and now there is no country of economic significance which tries to do without it. But no similar refutation of *laissez faire* as a political-legal philosophy has gained universal acceptance. Indeed, it still holds sway over the minds of some judges, who accept its tenets as self-evident truths. What is propounded as a theory by scholars is accepted for a time as a dogma by politicians and lingers on as a shibboleth for the use of judges.[2]

Freedom of contract and the limited liability company, the twin pillars of the legal facade of the industrial revolution, have failed to provide the support which modern economic development needs. The limited liability company, whose corporate personality has always been of greater economic importance than the later development of limited liability, has been kept alive only with the assistance of a great mass of statutory control. Without this control it is now

* Professor of Law, University of Tasmania.

1 The literature is too voluminous to refer to in detail, but see for the common law Karl Llewellyn, 'What Price Contract?' (1931) 40 *Yale L. J.* 704 and for a recent symposium on the civil law, 'La Crise du Contrat,' (1968) *Archives de Philosophie du Droit*, No. 13. For an Australian view, concentrating on the problems of hire purchase contracts, see E. K. Braybrooke, 'The Inadequacy of Contract,' (1960-62) 5 *U. West Australia Law Review* 515. Most attention has been paid to the need for new procedures for dealing with conflicts arising from contracts of adhesion either between supplier or manufacturer or finance company and consumer or between associations and their members. The examples dealt with here are chosen because they are *not* of this kind, in an attempt to show that the problem is not so restricted.

2 Lord Dilhorne, for example, in *Suisse Atlantique &c.* v. *N. V. Rotterdamsche &c.* [1967] A.C. 361 at 392, speaking of the doctrine of fundamental breach which the judges had created to deal, albeit in a rather crude fashion, with some of the worst excesses of exclusion clauses, said: 'In my view, it is not right to say that the law prohibits and nullifies a clause exempting or limiting liability for a fundamental breach or breach of a fundamental term. Such a rule of law would involve a restriction on freedom of contract and in the older cases I can find no trace of it.' The *locus classicus* is the *dictum* of Sir George Jessel M.R. in *Printing & Numerical &c.* v. *Sampson* (1875) L.R. 19 Eq. 462 at 465: 'If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.'

politically unacceptable. With it, it has become a thing quite different from what it was in the heyday of *laissez faire*. It has been possible for great changes to take place in the economic infrastructure, such as the divorce of ownership from managerial (though not economic) power. There have not been the same radical changes in the legal superstructure. We have managed with a patched-up job. Because changes in company law are of great concern to those with political power, and perhaps because company law is a newer legal topic which seems more amenable to statutory reform, it has been possible to get sufficient political initiative and parliamentary time to review company law once in a generation. But freedom of contract has not been the subject of any great comprehensive treatment. There have been a few attempts to tidy up the parts which regularly caused injustice to large groups, such as hire purchase contracts, but there has been little in the way of modernization. Only one Australian state has followed the example of the United Kingdom in enacting a Frustrated Contracts Act, for whatever that may be worth. None have restricted the scope of the Statute of Frauds as the United Kingdom and New Zealand have done. We have no Misrepresentation Act, and no sign of one.

Nor have the courts taken all the chances open to them to use old contract principles as material from which to fashion answers to new problems.[3] The truth is that some of the problems now facing the law of contract cannot be solved by the further refinement of general contract principles. There is a special need to state this now when there is, for the first time, a real prospect of the codifcation of these principles in England. It is at least possible that such a code will be followed by similar ones in Australia and New Zealand. Even if it is not, it will have great influence. We will then discover, whether we like it or not, that some problems are not susceptible of solution by all-applicable contract principles, however sophisticated. It is important that the codifiers should not waste time seeking such principles and bending them to fit the inapt case. It is also important to spike the guns of those who would use, as an argument against codification, the undoubted fact that no code of general contract principles can possibly perform satisfactorily what are now considered by many lawyers to be the functions of those principles.

Indeed, it has never seemed worthy of comment that we do not expect the general principles of the law of contract to cope with the special problems of many of the most important commercial contracts. We are happy with the fact that there is a doctrine of good faith special to contracts of insurance, and that exceptions to the maxim *nemo dat quod non habet* have been devised for negotiable

[3] The speeches of the Lords in *Suisse Atlantique* show the prevalent judicial attitude. Lord Devlin has described it in *Samples of Lawmaking*, Oxford U.P. 1962, in particular at pp. 119 and 120.

instruments and certain kinds of sales. Perhaps one day a legal philosopher of great wisdom and knowledge of the world will be able to extract from all the differing exceptions a few golden rules which will work in all those cases of conflict which we now categorize as contractual. If they look nice and symmetrical they may even win the approval of other scholars. But until then we should be happy with our anomalies and exceptions, and look for more ways of creating new principles to deal with problems of limited scope. These should provide the best conceivable solution to the particular problems for which they are devised, and should not be subjected to criticism because they do not provide a principle of general validity.

The purpose of this essay is to show that there are problems which the courts have tried to solve by the application of general contract principles, but which cannot be solved satisfactorily in this way. An attempt will be made to provide examples of solutions that can be discovered by isolating a particular kind of conflict and restricting the search for principles to those necessary for its solution.

Examples

I. *Offer and Acceptance.*

Pollock used the examples of multipartite agreements and simultaneous manifestations of willingness to be bound to show that offer and acceptance are at best rough and ready tools for finding agreement, and certainly no sovereign touchstone. His argument was that the analysis into offer and acceptance breaks down:—

(a) where A and B both sign a formal instrument, which itself has contractual force apart from and perhaps different from what has been negotiated.

(b) where two parties are discussing the terms of a contract and cannot agree, and a third indifferent person suggests terms which they both accept;

(c) where the competitors in a race accept rules laid down by the committee and become bound to one another in contract.[4]

The most direct critic of Pollock's argument was Salmond:

> In the case of the document prepared by a third person, however, it does not seem a difficult application of the analysis of agreement into offer and acceptance to regard the party who first signs the document as the offeror and the other party as the acceptor. The first signature means: "I offer to agree with you in these terms if you accept my offer by signing this document yourself". The second signature means, "I accept your offer as expressed in this document".[5]

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[4] Sir F. Pollock, *Principles of Contract*, 10th edn. Stevens, 1936 pp. 6 and 7.
[5] Salmond and Williams, *On Contract*, Sweet & Maxwell, 1945 p. 70.

The short answer to this is 'Who says that is what the signature means?' Neither A nor B could give evidence that any such thought was in his mind. Salmond could if he wished *pretend* that was what happened, but everyone knows that it did not. Sometimes it is necessary for the courts to pretend that things happen which do not. Without such a pretence there may be no remedy where justice demands one, or no defence to an unjust claim. But there can never be any excuse for an academic writer making believe so that he can avoid some awkward anomaly which spoils his pretty picture. It is not only that this is dishonest: Salmond's arguments go on to show that the next step from intellectual self-deception is happy acceptance of injustice in the cause of symmetry.

> The case of the two parties who verbally assent to an arrangement suggested by an indifferent third person seems readily susceptible of analysis into offer and acceptance where first one party assents and then the other. The assent of the first is an offer by him to the other and the assent of the second is an acceptance of that offer.[6]

Is it, though? Who says? Not the 'offeror,' nor the 'acceptor.' Again you can pretend if you like, and no great injustice will be done to the parties. But see where it leads!

> The position is more difficult where the two parties accept simultaneously the terms proposed by the third person. If, however, that were all that the two parties said or did then it would seem that there would be no agreement. Agreement involves the apparent meeting of the minds of the parties, an apparent union of their wills. How can there be an apparent union of wills where neither party, at the time when he declares his will, can have heard the declaration of the will of the other party?[7]

Contract demands agreement. Agreement involves the apparent meeting of the minds. Why? It may well be that contract demands apparent agreement, and that if this element were removed it would be best to use some other word for the legal relation between the parties. But there is no reason why the apparent agreement which arises where both parties accede to a third's compromise or other suggested contract should not give rise to a binding contract. It is tempting to lapse into the same style of argument as Salmond and say: The suggestion of the third party is heard by the parties A and B, who then, by expressing their willingness to be bound by a contract on the suggested terms *mean* 'I am consenting to the proposed contract which I can now hear the other party speak and which I can also hear myself speaking. This simultaneous manifestation is on both sides both offer and acceptance,' but no such metaphysical nonsense is necessary. Provided that their willingness to be bound

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[6] *Ibid.*
[7] *Ibid.*

is manifested to one another or to the third party as an agreed go-between, there is no reason to demand more.

> . . . Several persons, by entering for some competition on the basis of rules laid down by the managers of the competition, are considered to have agreed with each other to observe those rules (*e.g. Clarke* v. *Dunraven*[8]). But it would seem that when this case is carefully examined it proves to be merely a special instance of the same general type as the case of two parties assenting to terms proposed by a third indifferent person. The first competitor to enter must be taken to be offering, to all other persons who may subsequently enter, an undertaking to observe the rules if they will for their part give similar undertakings. The second competitor to enter, by so doing, accepts this offer, and himself makes a similar offer to all persons who may subsequently enter; and so on.[9]

Of course, there was no mention of this in *Clarke* v. *Dunraven*. None of the judges at the three hearings was astute enough to spot this mechanism or to realize that this was what the first competitor *must be taken* to be up to. They did not need to rationalize in this way. They merely said (or assumed) that where competitors entered on the basis of rules they were bound by a contract each with the others individually to observe the rules. If there was no contract, then the rules could not be used to found an action. It would have been unjust to allow a member to ignore the rules. There was no other body of law but contract to assist.

To replace offer and acceptance with the more refined requirement of mutual manifestations of willingness to be bound on the same terms gets rid of some difficulties but not all. Take as an example the familiar facts of an ordinary application for a job. A Ltd. advertises a vacancy on its staff. B applies for the job by post. A Ltd.'s secretary, who is authorised to do so by the directors, writes to B and tells him that he is the successful applicant. There is a contract when the letter is posted, *British Guiana Credit Corp.* v. *Da Silva.*[10] The question in that case was whether the secretary's communication made a contract. It was held that it did. It was a valid acceptance. The application was therefore an offer. Mr. Da Silva got damages for being supplanted after a change in the membership of the appointments committee. All seems well. It certainly would have been worse if the secretary's letter had been held to be an offer needing acceptance by the applicant, *i.e.* that the application was only an invitation to treat, because then the employers could have played fast and loose with the applicant, as they tried to do.

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8 [1897] A.C. 59.
9 Salmond and Williams, *op. cit.* p. 71.
10 [1965] 1 W.L.R. 248 (Privy Council).

The case is authority for the proposition that where a job is advertised by A calling for applications, and B applies, a contract of employment is concluded when A manifests to B his willingness to be bound. Is this the rule that is wanted? What if B wants to turn the job down? In some future case in which the point arises, it will surely come as a surprise to both employer and employee to find that the employee can be sued for damages for breach of contract. Would he have to compensate the employer for the cost of advertising the job again, and of bringing other applicants for interview? It would not be unusual for, say, an academic to apply for half a dozen jobs in different parts of the world at the same time. It normally takes an Australian university six months to make its mind up about a senior appointment. A man may find himself all at once with acceptances of half a dozen applications. He is guilty of breach of contract in respect of all the contracts he cannot perform. He is not in quite the same position as Richard Gordon's medical student, who regretted his offer of marriage, which had been accepted by A, and made the most of the situation by proposing to B, C, D and E. Disappointed employers may as a rule be no more willing to look foolish by bringing an action than disappointed fiancées, but some may.

No amount of manipulation of offer and acceptance, or indeed of any other contract principles, will produce a system to deal with this and similar problems. In the bargaining situation between employer and employee, both have expectations which they consider the law ought to see fulfilled. It is an axiom of our law that one party cannot be bound before the other. The contract only comes into existence when both parties are bound to their promises. But there is no reason to allow this axiom to cause the disappointment of the parties' proper expectations. These would be fulfilled if the law relating to this kind of situation were that when the employer communicates his willingness to be bound to the employee, the employee has a reasonable time, in default of agreement as to its duration, in which to accept or reject the job. During this reasonable time, it would not be possible for the employer to retract his offer.

II. *Mistake of Identity and the Passing of Property.*

The common law is specially inept at dealing with the allocation of loss between two innocent parties who have suffered from the wrong of a third. One familiar situation arises where A is induced to part with possession of goods by the fraud of B who then transfers the goods to C for value. B then disappears or dissipates the value he has received. The contract between A and B is voidable for fraud. But under a voidable contract property can pass. It is not enough, therefore, for A to show that his contract with B was induced by B's fraud. He must show that there is no contract under which property can leave him. He must show that the contract

he is alleged to have made with B is 'void for mistake.' If he can prove 'mistake,' he gets the goods back. If not, they belong to C.

It is noteworthy that only one judge has found this all or nothing principle sufficiently preposterous to suggest a possible improvement by statute. In *Ingram* v. *Little*[11] in the English Court of Appeal, Devlin L. J. was not content to chase moonbeams and enjoy the distinctions between making an offer to the person actually in the offeror's company and making the offer 'really' to the person the offeree said he was. There are some scholars who would try to solve the difficulties of unilateral mistake by saying that it is all a question of offer and acceptance, but their system produces similarly irrelevant solutions, though perhaps in a rather smarter way. Devlin L. J. suggested that justice would be more likely to result if the court took into consideration the conduct of the parties A and C, to find out which of them was responsible for making the loss possible. As this test would rest on showing carelessness, he considered that the loss might be apportioned according to the degree of carelessness of each party. There have indeed been judges who, in a different context, have been prepared to enunciate a general principle that 'wherever one of the two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.'[12] It has rightly been said that such a broad general principle goes too far. All that is needed here is for the law to give the courts a discretion to apportion the loss between the parties according to their carelessness which caused it. There is one further difficulty. What is the loss to be apportioned? A sells a car to B, a crook, who gives A a cheque for $1,500 in payment of the price. The cheque is dishonoured. By this time B has sold the car to C for $600. The loss to be apportioned is not the same amount to both A and C. If C is more at fault because, for example, he took the car from B knowing that B had only owned it for a matter of hours, it might well be impossible to show that C did not take in good faith. Yet the court would perhaps want to make C 80 per cent responsible. But should C be responsible for 80 per cent of A's loss? A's carelessness was caused in part by avarice, the basis of all the best frauds. He got $1,500 for a car that he would have been happy to sell for $1,000, the going price. C would have been happy to pay $800, the buying price for dealers.

The riddle could be solved by adopting a device familiar to lawyers who wind up estates. Where two beneficiaries or descendants want the same chattel, the lawyer holds an informal auction between them. Here, too, the court or one of its officers could find out which of A and C would be prepared to pay the higher price for

11 [1961] 1 Q.B. 31 (Court of Appeal).
12 Ashurst J. in *Lickbarrow* v. *Mason* (1787) 2 Term Rep. 63, 70.

the car. It would not pay either party to overbid. The winner would get the car and have the job of disposing of it for the best price he could get. Or the car could be sold by public auction, with A and B having the right to bid. This, however, solves only half the problem. The actual amounts which are to be dispensed to A and C can only be found by the use of a slightly more complex calculation. Perhaps the following formula could be applied.[13]

The facts. A sells a car to B, the rogue, for a $1,500 cheque, which is dishonoured. B sells to C for $600 (call this amount x) and disappears. A is found to be 20% negligent (call this percentage a). B is found to be 80% negligent (call this percentage b). It is found as a fact that a reasonable car dealer would buy the car in question for $800 (call this B.P. for buying price) and that a reasonable private seller would sell the car for $1000 (call this S.P.).

The procedure.

1. At this stage ignore the potential value of the car on resale. One of the parties must notionally compensate the other, so that their respective losses correspond to the proportions of their responsibility as found by the court. What has A lost? Not $1,500, because the law will not allow him to recover profits which are inflated by his own avarice and credulity. Had A been a reasonable man, he would have accepted $1,000, *i.e.* S. P.

A's loss = S.P. = $1,000.

What has C lost? Not only $600, because he ought to be allowed a reasonable profit, say $200, which is the profit on the sale of a car with a selling price for C of $1,000, and which would normally have been bought by him for $800, the normal selling price (or S.P.). C should not be allowed to make a killing because of his transaction with the rogue.

C's loss = x + S.P. — B.P. = $800.

So that A owes C 20% of C's loss, or $ a(x + S.P. — B.P.). C owes A 80% of A's loss, or $ b(S.P.). To set these off, subtract one from the other. The amount C pays A is $ b(S.P.) — a(x + S.P. — B.P.) which is $640. A's loss of $1,000 will be reduced to $360, or 20% of the total loss of $1,800, and C's loss of $800 will be increased to $1,440, or 80% of the total loss. It is to be remembered that at this stage the resale value of the car is ignored.

2. The auction. A and C may bid if they like. The proceeds will be divided in the ratio 80 : 20, and will be used to reduce the losses of A and C, as found above. C will get the *larger* amount, A the

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[13] I am indebted to Mr. P. M. Crisp, a second year student at this Law School, for his suggestions in relation to this formula and for the clarity of his criticism.

smaller. To preserve the correct ratio of responsibility and therefore of losses, C must get 80% of the proceeds of the auction, and A 20%. If the car is sold for $1,100, C will get $880 and A $220, so that C's loss will be $560, A's $140.

If, at the time the fraud is discovered, C has already sold to D, then it will not be possible or necessary to hold an auction of the car. But it is not fair to make C bring into account the price he received from D. That price will, of course, be evidence of what the actual market value of the car was at the relevant time, but it will not be conclusive, and if C was able to get a price above that market value, then there is no reason to make him share his good fortune with A.

If there are still those who oppose reform, particularly reforms which give the courts a discretion in a business dispute, on the ground that certainty is all important, they should reflect on the irrelevance of that value here. For certainty is an advantage when men rest their plans for the future on the efficacy of a system of legal principle. It is then a good argument to say that to change the rule may disappoint men's expectations and to leave a discretion may stop them from planning their future conduct with efficiency. But no man plans his future on the assumption that his contracts are going to be induced by the kind of fraud that produces in his mind such a mistake as to allow him to avoid the contract. When one is dealing with mistake, or rather with fraud, *ex hypothesi* no question of certainty arises.

III. *Common Mistake.*[14]

Adherence to the ideology of freedom of contract made it necessary to avoid the overt application to contract problems of solutions based on the judge's own assessment of a fair compromise or a fair disposition when a conflict arose from an insufficient expression in the contract of the parties' intentions. The court had to pretend to seek the intention of the parties, even though there was clearly no hope of finding it. If there has ever been a common intention, there clearly is not one at the time the case is heard, or there would be no need to submit a dispute to the court. 'Et comme il y en a au moins deux possibles, que chacun des contractants invoque respectivement parce qu' elle lui est avantageuse, nul ne peut dire, selon la remarque de Ripert, lequel des deux l'aurait emporté si l'opposition de leurs intérêts leur était apparue.'[15] The economic theory has the same effect in the civil and common law.

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14 It would be incredible to a scholar in any other discipline that lawyers even today have no means of standardizing nomenclature. It is a pity that all lawyers and judges do not adopt the term common mistake to describe a mistake which is shared by the parties, and keep "mutual mistake" for a case where the parties are at cross purposes, as suggested by Cheshire and Fifoot.

15 H. Batiffol, 'La "Crise du Contrat" et sa Portée,' (1968) *Archives de Philosophie du Droit,* no. 13, p. 17.

It is interesting to follow the fortunes of one of the manifestations of this search for the intentions of the parties, the implied term theory, in two closely linked problem areas which are now at different stages of their development. Both in 'frustration' and 'common mistake' cases, justice can only be done if the court is prepared to step in and relieve a party of his contractual obligation in some circumstances. In the development of the doctrines now applicable to frustration cases, the implied term theory has played an important role,[16] but it has been superseded by a much more satisfactory body of principle, a refined version of Lord Denning's 'just solution' theory, which having been firmly rejected in its first crude form has, like other schemes of the same provenance, been adopted later in a different guise. Whether a contract has been frustrated or not now depends on the outcome of the application of the following test.[17] First construe the terms which are in the contract, read in the light of the contract's nature and the relevant surrounding circumstances when the contract was made. This reveals the scope of the original obligation, *i.e.* what the parties would have had to do to carry out the contractual promises in the original circumstances contemplated by the parties. Second, examine the situation existing after the event has occurred, which is alleged to have frustrated the contract, to find out what the obligation of the parties would now be if the words of the contract were literally enforced in the new circumstances. Third, compare the original obligation with the new obligation, to decide whether the new is 'radically or significantly' different from the original obligation, to such an extent that it would be unjust to hold to the original obligation the party who is now trying to escape it.

The judge still has to exercise a discretion, but it is within limits set by the terms of the contract, as far as their relevance can be discovered, and the discretion is dressed up enough to make it acceptable to judges and scholars. When a judge in England, New Zealand or Victoria finds that a contract has been frustrated, he then has the provisions of a Frustrated Contracts Act[18] to help him exercise further discretions as to how the loss is to be borne by the parties. In the rest of Australia he has to make do with the clumsy tools of quasi-contract.

It is strange that in what is often thought of as a separate but kindred part of the law, common mistake, the principles presently applicable, as far as these can be deduced from the very unsatisfactory

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16 It would not be proper to elaborate its history here; see Cheshire and Fifoot, *Law of Contract*, 7th edn. Butterworths, 1969, pp. 509-511.

17 As propounded by Lord Denning M.R. in *The Eugenia* [1964] 2 Q.B. 226 following *Tsakiroglou* v. *Noblee and Thorl* [1962] A.C. 93.

18 Whether the lack of litigation under these Acts means that they work well, or whether it means that there are so many kinds of contract excluded from the scope of the Act that it is not used at all, cannot be guessed. No doubt it would be possible to find out by a study of commercial contract disputes before arbitrators.

exposition of them by the judges,[19] are two stages of development behind. It is true that in *McRae* v. *Commonwealth Disposals Commission*[20] it was shown that whether a contract is void because the subject matter was not in existence at the time the contract was made depends on the presumed intention of the parties. The contract must be 'construed' to find out whether the parties can be taken to have impliedly agreed that in the event of the subject matter not being in existence

1. there shall be no contract,
2. only A will be liable for non-performance,
3. only B will be liable for non-performance,
4. both parties will be liable for non-performance.

Even in England, where it has generally been understood that in *res extincta* cases there is a presumption that the contract is void, all this should mean is that it is up to the party trying to recover damages for breach of contract to show that on the proper construction of the contract the other party took the risk of the subject matter's non-existence. Indeed, this approach was suggested at one point in Lord Atkin's judgment in *Bell* v. *Lever Bros.*[21]

But do we have to go through this period of development, when we know from the history of frustration where it will lead? Should it not be possible to cut out this stage and move directly to a principle for common mistake analogous to that which has been worked out for frustration?[22] The relation between law and equity is shown to be confused by some of the judges who have had to deal with the few common mistake cases that have been litigated recently.[23] Would it not be better if they could be given each its proper place in the following way?

The test might then be: first construe the contract as it may be presumed to have appeared to the parties at the time they made it, and thereby find what their contractual rights and duties were. Second, see what the rights and duties of the parties would be if the contract were to be enforced in spite of the mistake which has now come

19 As, for example, in *Magee* v. *Pennine Insurance* [1969] 2 W.L.R. 1278, where it seems that Lord Denning found for the appellant on the ground that common mistake does not make contract void at common law but only voidable in equity and equity would aid this appellant; Winn L.J. found for the respondent on the ground that the contract was not void at common law, though common mistake could in some circumstances have that effect, and did not mention equity; Fenton Atkinson L.J. found that common mistake at common law could make a contract void and did so in this case!

20 (1951) 84 C.L.R. 377.

21 [1932] A.C. 161.

22 Especially as it is now commonly accepted that the only basic difference between frustration and common mistake is temporal, in the relation between the time of the change in the circumstances and the time of contracting. Treitel warns that the analogy should not be pressed too far, see G. H. Treitel, *Law of Contract,* Stevens 2nd edn. 1966, pp. 644 and 645, but his advice is based on the law as it now is, not as it should be.

23 As in *Magee* v. *Pennine,* see note 19.

to their knowledge. Third, interfere with the contract (*i.e.* declare it void or set it aside on terms) only if the result of enforcing it according to its terms as originally agreed would be to force on a party an obligation which is so radically or significantly different that it is unjust for him to have to carry it.

This would go some way towards providing a just solution of problems of common mistake. The term 'just solution' is anathema to some lawyers, but one may be forgiven for pointing out that this is what society has a right to expect the law to aim for in every case, though not of course to guarantee. Sometimes the reason which is given for opposition to a 'just solution' principle is not the need to adhere to the dogma of freedom of contract, but distrust of the court's powers of making contracts for businessmen. There is no alternative, however, where the parties did not make any provision in their contract for what was to happen if there was such a mistake. The court cannot refuse to deal with the matter. It does not make for less certainty to give the court a discretionary power here. The uncertainty arises not from what the court does but from the nature of the difficulty which life throws up every so often. The power of the court to impose terms on the parties, as was done in *Cooper* v. *Phibbs*[24] and *Solle* v. *Butcher*,[25] would serve in this context the purpose served by a Frustrated Contracts Act in cases of frustration. Indeed, it would be more flexible and probably more serviceable.

Conclusion

It is only fairly recently in the history of the common law that writers on contract have seen their task to be the working out of a neat and all-purpose machinery of principles by induction and abstraction from the cases. Weber has shown how the 'cautelary jurisprudence' of the common lawyer 'facilitated the disposition of new situations upon the pattern of previous instances.'[26] There is no need for a romantic return to the practices of the past. Where we have gone wrong is in accepting as an article of faith that there are contract principles there, if only we look hard enough for them, which will solve any problem we like to call a contract problem. A code of general contract principles, though necessary, and a great stimulus to thoughtful and efficient reform, is not enough. What is needed is legislation, piecemeal legislation if you like, which will deal with those problems which are now dealt with inefficiently, or unjustly, or not at all, by general contract principles. This legislation must provide lawyers with principles which are appropriate to their needs in the resolution of the particular problems, but which do not distort the general contract principles.

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24 (1867) L.R. 2 H.L. 149.
25 [1950] 1 K.B. 671.
26 Max Weber, *On Law in Economy and Society*, Harvard U.P. 1966, p. 201.

The recipe for reform of the law of contract is not reliance on authority, the elaboration of a few dogmas with an occasional touch of serendipity.[27] It is enquiry into the problem by observation of the facts of the social relations which give rise to it, and preparation of principles of limited scope specially constructed for its solution.

27 As, for example, the escape available to the judges from an unsupportable application of the rules of privity in *Beswick* v. *Beswick* [1968] A.C. 58. What would they have done in the House of Lords if they had not had the luck to find specific performance waiting to be used to get them out of trouble? Would they have given Mrs. Beswick no remedy?