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ON THE NATURE OF CONTRACT

G. H. L. FRIDMAN*

I

Two general problems are raised at the outset. The first is the question whether philosophers and lawyers are speaking in different languages when they talk about legal issues like the nature of contract and contractual obligation. Presumably the philosopher approaches such questions as the nature of contractual obligation to discover what makes contract important, why people observe contracts, and the function of contract in relation to human activity in general. Philosophical investigations may be directed by, and towards, an analysis of the language employed by lawyers and others in describing what they are doing when they enter into contractual transactions; or may involve the underlying ethical, political, perhaps even sociological reasons for the recognition and enforcement of contracts. The lawyer, in contrast, is concerned with understanding contract in order to determine whether, in any given situation, two or more parties have so conducted themselves that they have made a binding arrangement that is, ultimately, enforceable in the courts—either by an injunction or decree of specific performance or by an award of damages in lieu of such performance. It might be argued that the lawyer ought not to be so limited: that he should be concerned with the wider, deeper issues raised by even so basic, elemental, pragmatic a subject as contract. The plain fact is that most lawyers are not: and, for their purposes, even for more jurisprudential purposes, may not have to be. If I am correct in this, lawyers and philosophers may be saying things which, while valid and important in their own particular spheres of interest and inquiry, may not be of the slightest relevance to each other.¹

The second general problem is this. It is frequently assumed that all common law countries share a common appreciation, language, and philosophy when it comes to the nature, scope and effects of their law and their legal systems (granted that there are differences of detail that are of considerable importance). Although there is some validity in this assumption, I would not accept without question the free and easy invocation of one system to explain and understand another. Nor would I be prepared to make an un-

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1. Atiyah, *Promises and the Law of Contract*, 88 MIND 410 (1979).

qualified transition from one system to another in order to analyze and explain some fundamental notion that seems to belong in common to all. Indeed, we may be more misled by our common heritage, and our apparent similarity of approach, than if we were discussing what are manifestly different legal systems, stemming from a different basis and operating along different lines. It may be correct that certain concepts are material and used in different systems, and that many of the issues that arise in the law are common to all legal societies, all cultures, and all politico-economic groups or organizations. That is not to say that their approaches to such concepts and issues are necessarily the same. Nor that the inferences that may be drawn from one are equally relevant and applicable to another. Nor that the philosophical implications of one, assuming that there are any to be found, of necessity must be made of another. If I am right in my contention, this has serious implications or consequences for the purposes of the present discussion. Much writing on contractual obligation which has emerged from the United States has been founded upon what courts and writers in that country have stated or suggested to be the law. Such statements or suggestions are not unquestionably applicable to the Anglo-Canadian situation. American ideas of contract, whether legal or philosophical in form or nature, may not explain or be applicable to the present day position in either England or Canada.

I am neither a philosopher, nor an economist: neither an anthropologist, nor a sociologist. I am a common lawyer, whose background and experience have been limited by study of the case-law from which developed the law of England and thus of Canada, from the period of the Year Books, if not before, up to the time which Lord Scarman once called "the age of legal aid, law reform, and Lord Denning." My approach to the law in general, and to the law of contract in particular, is that of the common lawyer who seeks to find legal principles, as well as legal rules in the decided cases.

On the basis of that approach, my investigation of the nature of contract in Anglo-Canadian law will be centered on three questions:

1. How does a contract come into existence?
2. What does a contract mean?
3. When does a contract end?

To these I would add, by way of supplement, the subordinate question: What happens when a contract ends, particularly when it ends as a result of being broken by one party?

The way the courts have responded to these issues should tell

us the basis upon which the courts approach the notion of contract or contractual obligation. Professor Atiyah's recent extensive survey of the history of the law of contract over the past two hundred years² endeavours to establish that judicial ideas about contract have altered. It seems to be integral to his thesis that the courts have expounded the doctrines of contract in accordance with prevailing philosophical and economic theories of the particular time when they are adjudicating, and that, by enshrining such theories in the corporeal appearance of legal rules, the judges were attempting to prescribe acceptable standards of behaviour, or to dictate to, or inculcate within those subject to the law a *modus vivendi* which would ensure that their "contractual life," as it were, would correspond to the model which the judges conceived as appropriate for the kind of society in which the judges operated (whether or not everyone else operated in such society). Professor Fried, on the other hand,³ appears to take the view that the ship of contract law has not luffed so radically with the winds of political, social, or economic change. Instead, he argues, as I understand what he has written, that the law of contract has maintained a steady course along the latitudes of morality. Whatever the vicissitudes of the voyage across the centuries, however much the law has been compelled to zigzag in its path by reason of occasional currents or storms, it has not fundamentally wandered from what might be termed "the path of righteousness." It is the moral force of the concept of "promise" that has directed the route along which the law has evolved and developed. It is the obligation to keep one's word that has been the rudder.

II

What, after all, is a contract? To the modern editor of Anson, echoing the views of his original author, a contract is a legally binding promise: and a promise is "a declaration of assurance made to another person, stating that a certain state of affairs exists, or that the maker will do, or refrain from, some specified act, and conferring on that other a right to claim the fulfillment of such declaration or assurance."⁴ As a result, there are involved two parties: a promisor and a promisee.⁵ To Treitel, a contract is a legally binding

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2. P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979).
 3. C. FRIED, *CONTRACT AS PROMISE* (1981).
 4. ANSON, *LAW OF CONTRACT* (A. G. Guest 25th ed. 1979).
 5. *Id.*

agreement.⁶ Cheshire and Fifoot also stress that the nature of contract is agreement.⁷ However in the years since 1945, when the first edition of their book on the law of contract appeared, about the same time as I began the study of law, a change has occurred in their approach to, and treatment of this subject. Contract is still agreement. But eleven years after the first edition,⁸ there crept into the opening account of the law the notion that agreement was not a matter of subjective will, or even of reality. It was a question of appearance. What counted was what everything said or done by the parties looked like, rather than what everything they said or did actually was. According to the revised views of Cheshire and Fifoot, what is significant in the law of contract is not what parties purporting to contract have caused to happen between themselves, but what reasonable men think they have caused to happen. Hence the reference to the opening chapter of that book as dealing with "The Phenomena of Agreement" rather than "Agreement," as in the first edition. Cheshire and Fifoot for the past quarter of a century have been concerned with what has been called the "objective" view of contract, which, in Anson's words "places little emphasis upon the meeting of wills and much more upon the legal expectations aroused by the conduct of the parties."⁹ Treitel and Anson, however, still seem to suggest that the more "subjective" view of contract is important. According to that view, again to cite Anson, "the essence of a contract was said to be the meeting of the wills of the parties: an agreement was the outcome of free and consenting minds."¹⁰ In spite of certain qualifications, derived from recent statutory and common law developments in the twentieth century, Treitel regards it still as being broadly true that the law of contract is concerned with the circumstances in which agreements are legally binding.¹¹ In other words, agreement is the key: although not all agreements are contracts, only those which have legal effect and are legally enforceable.

Promise and agreement: are they different, or the same? It would appear, from the way that Anson continues to discuss the idea of promise, that they are really and fundamentally aspects of

6. G. TREITEL, *LAW OF CONTRACT* 1, 5 (1979).

7. CHESHIRE & FIFOOT, *LAW OF CONTRACT* 19-26 (M. Furmston 9th ed. 1976). This passage is considerably shorter in the Tenth edition, 1981.

8. CHESHIRE & FIFOOT, *LAW OF CONTRACT* (4th ed. 1956).

9. ANSON, *supra* note 4, at 5.

10. *Id.* at 3.

11. G. TREITEL, *supra* note 6, at 5; for the qualifications, *see id.* at 1-5.

the same concept. "A promise," says Anson,¹² "is more than a mere statement of intention, for it imports a willingness on the part of the promisor to be bound to the person to whom it is made." It is also more than a mere offer to perform some particular act. It must have been accepted by the promisee. A promise which has not been accepted is without legal effect.¹³ Indeed, the classical formulation of contract in the common law is in terms of offer and acceptance, around which many detailed, sometimes inconsistent or scarcely reconcilable, often, perhaps, illogical, rules have evolved during the course of the period from the end of the seventeenth century to the present day.¹⁴ Hence most contracts "take the form of an *agreement*, that is to say, of a manifestation of mutual assent by each party to the other. By such agreement, each party expresses to the other his willingness to carry out the promise or promises which he has made, and at the same time signifies his expectation that the promise or promises made to him will be fulfilled."¹⁵ Thus, Anson neatly and validly draws together the ideas of promise, agreement, will, intention and expectation.

It may be quite true that in more recent decades there has been much statutory interference and considerable judicial regulation of contractual obligations and their creation and content. Beneath all this, however, still stands firm and unshakable, the idea that parties are only bound contractually when they have expressed, by their language or conduct, that they desire and intend, willingly and freely, to be bound in that way. Hence the distinction between contracts and other forms of legal obligation. Hence, also, the insistence by the courts that parties, in the plainest language or by the most obvious conduct, should clearly evince an intention not only to enter into the appropriate relationship, but also to enter into a relationship that is meant to have *legal*, as contrasted with other effects and consequences.¹⁶ Hence, also, the complex, and sometimes puzzling doctrines enshrined in many difficult, often irreconcilable decisions about the effects of mistake, fraud, misrepresentation, un-

12. ANSON, *supra* note 4, at 2.

13. *Id.*

14. Butler Machine Tool Co., Ltd. v. Ex-Cello-O Corp (England) Ltd., [1979] 1 All E.R. 965.

15. ANSON, *supra* note 4, at 2.

16. Rose & Frank Ltd. v. J.R. Crompton & Bros. Ltd, [1925] A.C. 445; Balfour v. Balfour, [1919] 2 K.B. 571; Ford Motor Co. v. Amalgamated Union of Engineering Workers, [1969] 2 Q.B. 303; Esso Petroleum Ltd. v. Commissioners of Customs & Excise, [1976] 1 All E.R. 117; Moir v. J.P. Porter Co. Ltd. 33 N.S.R.2d 674 (1979).

due influence, duress, and, the most recently developed idea, "un-conscionability."¹⁷

The approach of the law to contracts and the process of contracting has become less objective, whether through the refinement of the strict common law or through the intervention of equitable principles, which have always been more directed towards individual instances and less stringent in the application of the law in all its brutal directness whatever the moral or other merits of the parties. That is to say, courts in England and Canada have become more inclined to investigate and pay attention to the individual contractor's knowledge, belief, and intent, rather than to the external appearance of what he has said or done. In this way motive as an element in contracting has crept onto the scene and has begun to play a role, albeit comparatively minor. Obviously, and quite properly, where a court is concerned that there should be genuine agreement, there is going to be some examination of the realities of what occurred—some consideration of why a party agreed to the contract in issue. This, I suggest, is not the denial or negation of the notion of intent to contract, but its fulfillment. It is not the rejection of the idea of *consensus ad idem*, epitomising the will to subject oneself to and with another party: it is the very realization of that idea. Why, then, do some authorities extrapolate from these pathological instances of consent, when there is a deviation from the norm, when matters have gone awry, a more general theory of contract which is at odds with the classical idea of the common law: that contract depends upon consent to enter into a contract, as evidencing a desire or will to engage in such transaction? I can only assume or infer that such writers do so because they wish to see a more flexible, less corseted, idea of contract. Presumably they think that this will achieve a greater degree of "justice," or enable courts to produce solutions to litigation that conform more to so-called "reality."

There is another factor which must be taken into account in connection with the coming into existence of a contract: consideration. If consensus is a vital ingredient of contract in Anglo-Canadian law, so is the notion of bargain or exchange. Unfortunately, the doctrine of consideration, and the quintessence of consideration, have become confused and confusing over the centuries, until it is no longer possible to define with any degree of certitude just what is, or will be, or is capable of being, consideration. The whole area is internally inconsistent and anomalous, as Professor Fried rightly

17. Lloyd's Bank v. Bundy, [1976] Q.B. 326.

says.^{17a} Even so, I suggest, it is possible to see what the law was attempting to say, or to stipulate as an indicator of contract, through evolution of this doctrine. Consideration was intended to prove or establish that parties had in fact contracted. In other words, consideration was the signal that a promise was "serious": that there was the will and intent to be bound in a manner acceptable to the law. It marked the distinction between morality and law.

True enough, during the first few centuries of the modern life of contract in English common law, there was no such sharp distinction between morality and law. Cases at law and in equity made use of the notion of good consideration, which referred to the natural love and affection that existed, or could be taken to exist, between the parties. The desire to do that which was right and proper counted as consideration.¹⁸ All that changed in the early part of the nineteenth century. After much hesitation the courts came down firmly on the side of "bargain" rather than righteousness.¹⁹ From then on, the function of consideration was to separate the sheep of contractual obligation from the goats of mere "promise." Prior to the evolution of the idea of "intent to contract," which is a fairly recent addendum, and is still highly debatable as a separate element in contract,²⁰ the only distinguishing feature of contracts in law, and agreements which were not legally binding, was consideration. I say that "intent to contract" is a debatable concept, because sometimes judges introduce the same notion, or a similar one under the guise of a discussion of certainty (which clearly is an aspect of the intention to contract, i.e., whether or not parties have sufficiently indicated that they have willed and desired to bind themselves together).²¹ Consideration, which began as a very simple idea, easily intelligible and extremely purposive and purposeful, has become in recent decades so technical and complex that some scholars have suggested that its utility and reason have disappeared. Moreover, if the purpose of consideration was to differentiate contracts from other, non-legal agreements, new modes of marking that distinction have suggested themselves to lawyers both on and off the bench. In place of the bargain or exchange indicating intention and will to contract, there has been put forward the idea that "reliance" which

17a. C. FRIED, *supra* note 3, at 35.

18. *Pillans v. Van Mierop*, 3 Burr. 1664 (1765).

19. *Rann v. Hughes*, 7 Term Rep. 350n (1778); *Eastwood v. Kenyon*, 11 Ad. & El. 438 (1840); *Thomas v. Thomas*, [1842] 2 Q.B. 851.

20. Hepple, *Intention to Create Legal Relations*, 28 CAM. L.J. 122 (1970).

21. *Arnold Nemetz Engineering Ltd. v. Tobien*, [1971] 4 W.W.R. 373.

causes detriment or loss is either an alternative basis for contract or, indeed, the sole and true rationale for contract and contractual liability.

In the United States in particular, it has been strongly argued that contract does, or should, stem not from any will, wish, desire or intent to contract—nor from any promise as such—but from reliance by one party upon the statements of the other, where the consequence of such reliance is, or would be, to cause loss to the party so relying, were it subsequently held that no contractual nexus arose from prior statement and its effects. In effect, “promissory estoppel” which began as an exception to, or qualification of the strict doctrine of consideration, bargain, or exchange, has by a process of extension in the course of which there has been more emphasis upon the “promissory” aspects and less upon the “estoppel,” almost superseded the notion of bargain or exchange, witnessing an intent to contract, as the explanation of contract. Echoes of this can be heard in some recent Canadian writing on contract, in which there has been emphasis upon the idea that the law enforces “reasonable expectations.”²² More important, however, are the comments of Professor Atiyah who has criticized the classical notion of the executory contract²³ and makes the point that the courts are concerned in the main with executed, or partly executed contracts, in respect of which they grant damages to the injured party, who has fulfilled his side of the bargain but has been disappointed by the other party’s nonperformance. He suggests that this indicates that what counts in the courts is not intention to contract, nor promise in the sense expounded by Professor Fried, but actual loss, i.e., the reliance factor.

But mere reliance has been denied as the hallmark of liability²⁴ except where misrepresentation is alleged; or, in modern times, where an existing contract has been modified; or where the source of liability is tort, not contract. Indeed the traditional distinction in the law was, and remains, that between promise on the one hand and representation on the other. The former, under certain conditions, gives birth to contract; the latter to possible liability, not necessarily contractual in nature, depending upon a number of factors, such as fraud or negligence. It may be true that in some

22. B. REITER & J. SWAN, *STUDIES IN CONTRACT LAW* 1, 235 (1980).

23. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q.R. 193 (1978).

24. See e.g., *Brown & Brown v. Prairie Leaseholds Ltd.*, 9 W.W.R. 577 (1953); *Zeismann v. W.P.W. Developments Ltd.*, 78 D.L.R.3d 619 (1976).

modern cases in England, and *a fortiori* in Canada, there has been a gradual erasure of the sharpness and clarity of the distinction. Practical considerations have brought this about. Judges anxious to protect an innocent consumer have sometimes been deliberately careless about differentiating between a contractual promise, i.e., a term of a contract, and a mere representation.²⁵ Such judicial impishness, however, should not cause one to lose sight of the original and valid difference between the two. It may be that reliance is a common element of both. The one who acts in consequence of a representation is obviously relying upon the truth of that representation. One who performs his part of a contract is just as obviously relying on the willingness and ability of the other party to perform his part (except where that other party has *already* performed). What is more, even before the party relying has done what he was supposed to do under the contract, he relies upon the existence and eventual performance of the contract in ordering his affairs. He does not buy goods elsewhere when he has obtained a contract from X that X will sell him the goods. Because of that, he may miss an opportunity which he will later regret if and when X does not deliver, or delivers the wrong or faulty goods. Which is why the remedy granted to the disappointed buyer against X, the neglectful seller, takes into account this and other lost opportunities. However, the reliance in each instance is a different kind of reliance. In the case of a representation, it can be said that the reliance is unjustified, or, in a sense, self-induced. In the case of the contract, the reliance is supported by the well-understood and broadly accepted notion of keeping one's word. A long history of human activity, including the history of consideration, has taught us the difference between situations in which we are entitled and can expect to rely on somebody, and situations in which we should be more careful and can expect less. The fact that the law has seen fit, for reasons which are immaterial here, to extend liability beyond the confines of contract, does not detract from, nor impinge upon the separation between contract and representation, nor that between promise and reliance.

However, this is collateral to the real issue, which is not whether contract is based on promise or reliance, but whether contract is based upon promise or upon will or intent. Professor Fried,

25. *Esso Petroleum Ltd. v. Mardon*, [1976] 2 All E.R. 5; *Richview Construction Co. Ltd. v. Rapsa*, 66 D.L.R.3d 193 (1975); *J. Evans & Son Ltd. v. Andrea Merzario Ltd.*, [1976] 2 All E.R. 930; *Howard Marine Ltd. v. Ogdan & Sons*, [1978] 2 All E.R. 1134; *R.E. Lister Ltd. v. Dunlop Canada Ltd.*, 85 D.L.R.3d 321 (1978), 105 D.L.R. 684 (1980); *Sodd Corporation Inc. v. Tessis*, 79 D.L.R.3d 632 (1978).

as I understand him, attacks will and stresses promise. My interpretation of the caselaw is different. To regard promise as the essence of contract is like viewing the Cheshire cat's grin as the essence of the cat. There may be a promise without a contract, but there cannot be a contract without a promise. Nor can there be a contract without an intent to contract, evidencing the parties' wish and will to be bound to each other in a way which exceeds the bonds of friendship, courtesy, politeness, or morality (and may even exist in the absence of any of these). When the courts speak about *consensus ad idem*, and its synonyms, they are talking about the need to show that parties have expressed themselves in such a way as to indicate their desire to be bound. Once they have done this, the law imports promise into the situation. The contract is formed.

III

Contract is an aspect of freedom.²⁶ The ability to contract is one of the features of a free man in a free society. Contract may indeed be a form of *vinculum juris*, but the bond is self-forged. This, indeed, is an objection to the "reliance" theory of contract, which appears to create contract not out of a free expression or desires as to one's future conduct, but imposes contract, *nolens volens*, upon someone because of *another's* reaction to what the former has said or done, even, possibly, where that reaction is a kind of over-reaction. There may be good reasons for imposing some kind of liability upon the one bringing about the reaction: a sophisticated legal system may have to create such liability. To call it contract, however, is to pervert the very meaning and essence of contract.

The unreliability of "reliance," if I may put it that way, is manifested more clearly in relation to the second question of the three which I stated earlier would provide the format for my discussion: what does a contract mean? Indeed I would go further and suggest that "promise" is also a possibly unpromising source of enlightenment in that connection. Several issues merit consideration when attempting to see how the interpretation of contracts, as undertaken and performed by the courts, illuminates the nature of contract: first, the distinction between what I have called elsewhere²⁷ "external" and "internal" terms of a contract; second, the construction of express terms; third, the extent to which, and circumstances in

26. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 268 (1980).

27. G. FRIDMAN, LAW OF CONTRACT IN CANADA 275 (1977) (hereinafter FRIDMAN, CONTRACT); G. FRIDMAN, SALE OF GOODS IN CANADA 31 (1979).

which terms may be implied. It is not enough merely to examine how, when and why a contract is formed. It is also essential that any theory of contractual liability should be able to explain and justify the way the courts deal with the explication of the meaning and effect of a contract (however that contract may have been formed or come into existence for legal purposes).

The aim of the courts in construing or interpreting a contract is to discover the intentions of the parties. This has been stated many times, and is comparable to the aim of the courts in endeavouring to interpret statutory provisions, namely, to ascertain and expound the intention of Parliament (or whatever legislature may be involved). The underlying reason for trying to latch on to, and effectuate, the parties' intentions is to carry out, in the way, manner and extent to which they envisaged by the terms of their contract, the ultimate agreement of the parties. The courts do not exist to make contracts for parties.²⁸ This means, first of all, that courts will not create a contract where one has not been perfected by the parties; secondly, that, where there is a contract, the courts will not fill in gaps left by the parties, even if to do so may seem to be necessary to make sense, or to make better sense, of what the parties have said or done. The sole function of the courts in construing contracts is to elucidate what the parties themselves have done. Looking at what courts sometimes do, while operating under the guise of strict construction, one may get the impression that this seemingly objective, impartial, arbitral (but not arbitrary) attitude partakes somewhat of a pantomime costume which enables the courts to perpetrate a gigantic hoax: such that the idea of strict construction is a fiction. What would be the purpose of all this? In the first place, it would be to maintain control over contracts, so as to ensure their conformity to certain standards acceptable to the community. Secondly, it would be to secure the promotion of justice, in the form of the grant of a remedy where a court conceived that one was necessary in all the circumstances. The former reason suggests a legislative function for the courts, by the exercise of which they can formulate rules and principles by application of which the validity of an attempt to contract may be tested, and by employment of which parties may engage in effective transactions. The latter reason would indicate, possibly, some acceptance of the idea that contracts are founded upon "reliance" or "reasonable expectations." Where a

28. *Kelly v. Watson* 61 S.C.R. 482 (1921); *Murphy v. McSorley*, [1929] S.C.R. 542.

party has relied upon there being a contract, or has reasonably formed the expectation that a contract has emerged, or that the terms mean what he says, and thinks they mean, then the court should provide that party with an appropriate remedy, e.g., damages.

Although there may be some decisions which appear to support such a view, I am of the opinion that the bulk of the cases do nothing of the kind. On the contrary, I suggest, they underline the true character of what the courts are doing when they construe a contract, which is to give effect to the parties' own agreement, where it exists, and such as it is. The occasionally seemingly odd, and apparently antagonistic judgment, in which the result may be contrary to what one party argues was the effect of the transaction that he understood he was making, is explicable when one bears in mind that the quality and purport of what parties have done is not necessarily for them to decide. Once they have written down on paper, or spoken words, which express their wishes and intentions, it is not their task to provide an interpretation. Once they have used language which has a meaning in the particular context of the circumstances, they may be presumed to have intended what that language normally involves, and to have meant what the reasonable, objective observer (in other words the court) would legitimately understand that they meant by such language. If the result is something from which one or other, or both, can dissent, then they have only themselves to blame. They should have been more exact, more precise, or more clear and unambiguous.

Take, for example, the long string of cases concerned with the interpretation and effect of "conditions precedent."²⁹ The problem in these has been to determine whether the parties concluded a final agreement, subject though it might be (so far as performance was concerned) to some condition, or whether they had not yet committed themselves pending the outcome of some act or event that was to be finalized in the future. Controversy exists over the way Canadian courts, in contrast with those in other common-law jurisdictions, have approached such cases.³⁰ However, there would seem to be agreement that what such cases involve, and what has to be decided when a case of this kind comes before a court, is the effect

29. G. FRIDMAN, *CONTRACT*, *supra* note 27, at 272-75, & First Supplement at 79-85; CHESHIRE & FIFOOT, *supra* note 7, at 136-38.

30. Davies, *Conditional Contracts for the Sale of Land in Canada*, 55 CAN. BAR REV. 289 (1977).

of what the parties have expressly stated in the documentation that contains the language by which they have assented to regulate their relationship (whatever that relationship may be).

Sometimes it has been held that this language fails to express any decisive agreement that a contract exists.³¹ At other times the result has been that a contract has come into existence but its entire or even partial performance may await some extrinsic happening over which the parties have no control, and failing the occurrence of which the parties are relieved of obligations.³² On still other occasions, courts have held that, while no contract may bind the parties to mutual obligations, there is some sort of duty for one party either to act positively in a certain way so as to bring about, or assist in the bringing about, the contemplated event, or, at the very least, not to act in a way which would impede the occurrence of such event.³³ In each instance, the question is not what would the court think was a reasonable contract for the parties to have made; nor whether one party is entitled to rely on the other in a certain way, so as to give the former a right of action based upon his reliance or his reasonable expectations. The question is: what did the parties intend? Did they wish to be bound immediately upon the making of the accord (and, if so, what was the nature of the bond that they created for themselves)? Or did they wish to keep any final accord in abeyance pending the outcome of some necessary act or event upon which their ultimately desired agreement was based, such that, if it did not take place there would be little or no point in the agreement which they had in mind? To what, in fact, did they agree?

At times this draws a court to the conclusion that there was not one contract, but two: one, the main or substantive contract, the ultimate ordering of their mutual affairs which they wished to organize; the other, a subsidiary or collateral contract, by which they agreed that the underlying condition upon which the substantive contract depended would be brought about by one party or the other. It should be noted at this stage that this latter contract can sometimes be implied, rather than express. I shall have more to say about implied contracts or terms shortly. For the moment, I wish to point out only that, in attempting to discover the agreement of the

31. *Turney v. Zhilka*, [1959] S.C.R. 578; *Barnett v. Harrison*, 57 D.L.R.3d 225 (1975).

32. *Focal Properties Ltd. v. George Wimpy Canada Ltd.*, [1978] 1 S.C.R. 2.

33. *Dynamic Transport Ltd. v. O.K. Detailing Ltd.* 85 D.L.R.3d 19 (1978); *100 Main St. Ltd. v. W.B. Sullivan Construction Ltd.*, 20 O.R. 401 (1978).

parties, courts have sometimes resorted to the technical device of implication. But never, as will be seen, for the purpose of invention: always only to establish that which is real and actual, that which is inherent in the language or conduct of the parties.³⁴

Let us suppose that no dispute of that kind is raised by the agreement reached by the parties, and that the issue is one of deciding what was the effect of a transaction that was intended by the parties to be binding as soon as it was concluded. Problems may arise with respect to the meaning of this transaction. What duties did it impose upon a party? What rights did it give? What was supposed to be done, or not done by one or other? What was the nature and scope of the performance to be exacted from one party and expected by the other? It might be thought that here was a fertile field for creative activity by the courts. Language is slippery. Words are noted for their nebulosity of meaning; inconsistencies and repugnancies can abound in contracts (as they can in statutes); sometimes the most carefully drafted and verbose agreement can contain omissions or gaps; circumstances may arise that do not appear to be covered by the wording employed by the parties. In situations like these, what is the role or function of a court? Some might argue that it is to make sense of the transaction: *ut sit res magis valeat quam pereat*.³⁵ Or that the court can tolerate whatever is needed to give effect to . . . to what? The intent of the parties? Their reasonable expectations? The extent to which one has relied upon the statements or conduct of the other? How is that intent to be discovered? Whose "reasonable expectations"? How defined or revealed? What if the reliance were reasonable, or excessive? Suppose, which is usually the case, there is dispute about any or all of these matters. How can and should such dispute be resolved? By what doctrines, rules, principles, or standards should such resolution come about? There is room for much disagreement here. There are dangers, sometimes obvious, sometimes latent and only subsequently exposed, when a later case might involve the undue stretching of a decision that seemed quite reasonable the first time, and in the context in which it was made.

The valorous judge may be obliged, in Lord Atkin's graphic phrase,³⁶ to ignore the ghosts of the past standing in his path with their clinking chains and fetters: but he cannot, and must not ignore

34. See e.g., *British Crane Hire Corp. Ltd. v. Ipswich Plant Hire Ltd.*, [1974] 1 All E.R. 1059 (Court refers to the "common understanding" of the parties).

35. *Hillas & Co. v. Arcos Ltd.*, 147 L.T. 503, 514 (1932) (Lord Wright).

36. *United Australia Ltd. v. Barclays Bank Ltd.* [1941] A.C. 1, 29.

the very real horrors of substituting his own thoughts of what the contract should be in place of what the parties wished and intended it to be. The adoption of such an approach leads to judicial autarchy. It can result in the suppression of the liberty of action that is the rationale, purpose and function of contract in our society. There are those who may dislike what contract has been and still remains, and think that by extolling the individualism that the development of contract has fostered, considerable damage has been done to the fabric of social and business relations.

Professor Fried refers in his book³⁷ to the article by Professor Duncan Kennedy³⁸ which, as he says, proposes altruism as the competing morality for contractual relations. All relations may be moved by the ethic of altruism, and if not so moved spontaneously, should be shaped to that ideal by the intervention of the courts. Professor Fried continues with these words, which I think are most apposite in the present context:³⁹

And since altruism is primarily interested in making adjustments as a relationship develops, there is naturally associated with it the rejection of individualism's concern to identify and enforce the original agreement according to its terms. This rejection takes the form of an attack on a vaguely defined vice called formalism.

I take this to be an explanation of a theory of contract that would involve or invite the courts to rewrite contracts in order to give effect to this idea of "altruism," whatever that may mean in this connection. Such a broad approach to the problem of contractual interpretation or construction, I suggest, owes its origins to a particular social or political opinion as to the function of contract. It does not stem from the classical common law view of contracts as a means whereby the parties can determine for themselves how their affairs are to be ordered, by using the legal device or concept of contract to give effect to their wishes and desires, leaving to the courts only the task of understanding and enforcing those wishes and desires.

Thus, save where a court can legitimately impose its own views upon the parties by reason of the doctrine of public policy, or, on a narrower view, by virtue of the illegality of what the parties have

37. C. FRIED, *supra* note 3, at 76.

38. Note, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). See also Kronman, *Contract Law and Distributive Justice*, 89 YALE L. J. 472 (1980).

39. C. FRIED, *supra* note 3, at 77.

agreed or proposed, it is not open to a court to do more than give full expression to the will of the parties, as stated and expressed in their contract. How this may be achieved can involve the application of technical rules of law, for example the oft-denigrated and criticised parol evidence rule, or the many so-called "canons of construction" to be found in the cases and the books.⁴⁰ It is not open to a court to reformulate what the parties have said, whether this is purported to be done by giving a new meaning to words, adding words that are not there, taking out words which are present, or otherwise. The most that may be done, and this has been made clearer in recent times by the language of Lord Wilberforce,⁴¹ is to examine and interpret the language of the parties in the factual and circumstantial context in which it was written or uttered. This may be especially true where the parties are contracting in a commercial, business situation. It may also be true, though perhaps to a more limited degree, where the parties are private citizens not engaged in a customary or widespread business, professional or governmental activity. The "matrix of facts" may be looked upon as the background or landscape against which the figures of the parties and what they are doing may be viewed and explained.

In this connection it is relevant to consider the question of implied terms. At first sight it would appear that what courts have done with respect to the implication of terms into contracts goes some way towards contradicting earlier comments. This may be particularly valid in relation to the "implied term" theory of frustration (of which more will be said later). Even without that aspect of implied terms, the justification and methodology for their implication contains some elements of both "reasonable expectations" and "reliance" as explanations of contractual liability. Terms are implied where there is a gap which leaves an issue unresolved by the express language of the contract, an issue which arises in some subsequent litigation. Why does the gap exist? Surely that is the crucial question. It may be because the parties simply forgot to put in the appropriate indication of their wishes and intent. Or because they took it for granted that the matter would be dealt with in some particular way. Or because they never conceived that the problem could or would arise, which meant that to have provided for it would have been superogatory. (I omit for the time being, as already noted, the possibility that the omission stemmed from the fact that the cir-

40. See G. FRIDMAN, *CONTRACT*, *supra* note 27, at 245-48, 252-57.

41. *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570, 574-75.

cumstances were unforeseeable and unforeseen—the frustration issue.)

How, then, to resolve the matter now that it has arisen? It could be done by examining the contract to see what the “reasonable expectations” of the parties were under the contract, so as to infer how to make those expectations cope with and conform to the situation. It may be to see the extent to which either party has relied upon the contract having a certain meaning or effect, and then interpreting the contract so as to be consistent with such reliance and yet deal with the omission. Both these suggestions may be contained in, and underlie the attempt by Lord Denning in a recent case⁴² to propound the view that a court may imply a term when it is “reasonable” to do so. By this I understand him to have meant that it would be a reasonable way for a court to recompose or edit the contract given the circumstances. The proposition of the Master of the Rolls, which would have endowed courts with wide powers of reconstruction, was expressly and firmly rejected by the House of Lords when the case in question went there on appeal.⁴³ Indeed, and quite remarkably and unusually, Lord Denning has accepted that criticism and recanted in a later case.⁴⁴ He has adhered to the more traditional Anglo-Canadian view of implied terms, which was first given utterance by Bowen, L.J. in 1889.⁴⁵ That view owes nothing to reasonable expectations, reliance, or even reasonableness. It is founded squarely upon the doctrine of “business efficacy,” or necessity. That, in turn, as the language of Bowen, L.J. indicates, is drawn from the basic idea that the courts must put themselves into the shoes of the parties in an effort to establish what the parties actually determined for themselves, or would have done had they thought, at the time they were contracting, of the situation presently in issue. Once again an examination of the cases leads ineluctably to the conclusion that the fundamental theory of contract, in the common law of England and Canada, is the intention of the parties, their mutual wills, as evidenced by what they have agreed upon, where they have not expressly stated that intention or clearly manifested their wishes.

Although there is much reference in the decisions to the “of-

42. *Liverpool City Council v. Irwin*, [1978] 1 Q.B. 319.

43. (1977) A.C. 239.

44. *Shell U.K. Ltd. v. Lostock Garages Ltd.*, 1 All E.R. 481 (1977). *See also* LORD DENNING, *THE DISCIPLINE OF THE LAW* 32-41 (1979).

45. *The Moorcock* 14 P.D. 64, 68 (1889). *See Smith v. Mosher Limestone Co. Ltd.* 121 D.L.R.3d 290 (1981).

ficious bystander," the "reasonable and objective observer," and the like, this hypothetical creature, however he is clothed in judicial language, seems to be nothing more than an eponym for all the parties who ever in the past or in the future, find themselves in the position now occupied by the parties before the court. In some instances, as Lord Denning has validly said, it may now be too late to deny that a certain term or terms may be implied in a contract of a particular class.⁴⁶ Decades, if not centuries of developments and decisions have established that when parties A and B have entered into contract of type X, then unless they say something expressly to the contrary (which, we may now add, has now become illegal or inoperative in some circumstances, by the will of various legislatures), it is no longer a matter of construction but a matter of law that a certain term, sometimes even certain terms, must be regarded as being implied in their contract. Sale of goods is perhaps the best known example. There are others. What has happened in these situations, I venture to suggest, is that, by reason of the common experience of merchants or others in a particular position, it became possible for courts to draw the inference that parties in these situations would naturally intend or desire the incorporation of such terms into their transactions, unless there were indications to the contrary in the language of their individual contracts.

In a sense this is an example of that "matrix of facts," looking at contracts, especially commercial contracts of certain types, in their context, of which Lord Wilberforce spoke.⁴⁷ The only real difference between such cases and the others to which Lord Denning referred in his recent discussion, is that the implication of such terms in the former class of case has been concretised and generalized, and does not involve or require any specific, particular determination according to the facts and circumstances of an individual instance. Given enough time and experience, it may indeed become possible to put more and more types of contracts into the first class (although it is doubtful, given the variety of human activity, that all contracts can be so categorized). In the first class of contracts, therefore, the intention or wish of the parties is a matter of presumption, rebuttable presumption it is true, but presumption all the same. Questions of fact have become principles of law (and, at least in the example of goods, of statutory law). Elsewhere, of course, these issues remain questions of fact, of contractual con-

46. *Shell U.K. Ltd. v. Lostock Garages Ltd.*, [1977] 1 All E.R. 481, 487-88.

47. *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570, 574-75.

struction. Even where the implication of a term is based upon custom, or upon prior similar dealings between the same parties, it is still a matter of drawing an appropriate conclusion as to what the parties intended, by reference to the past experience of those parties or of others in the like situation. From that experience it is legitimate to infer what the parties had in mind when they contracted, what they desired to bring about, and how they wished to bind themselves, by their contract. Their freedom of contract is not, and ought not to be circumscribed by the courts. But it may be bounded, either expressly or inferentially, by what they themselves take for granted as being the basis for, or the inevitable contents of, their agreement.

IV

Leaving aside the prospect that a contract can be ended by some subsequent agreement between the parties, either relieving them of the original undertaking or substituting a new one in its place, a contract may be terminated in one of three ways. It may be performed. It may be frustrated. It may be broken. The first situation affords a genuine example of termination. The second is more pseudo-termination, in that the contract may be treated as over, for the purposes of relieving the parties from any present or future obligation (although the contract is not without certain effects or consequences at common law and under statute). The third situation may not give rise to termination: whether it does so depends upon the reaction of the innocent, or injured party, as he may be called. A more detailed examination of these three possibilities may throw light on the question with which we are concerned.

What do we mean when we speak of a contract's being performed? There are two possible answers. One: the promise is fulfilled in precisely the terms in which it was given. Two: the expectations of the promisee are satisfied. The first answer concentrates upon the factor of promise, and suggests that the purpose of a contract is to ensure that certain acts or omissions are done or not done, as the case may be. The consequences of such acts or omissions are not relevant. Those consequences will determine the nature of the promise that is extracted by the promisee from the promisor at the time of contracting: once the promise is given they play no further role in the contracting process, as long as the promise is fulfilled. What happens, or may happen, when it is not is another matter. The second answer, involving the satisfaction of expectations, raises the spectre of subjectivity. What was the promisee expecting to obtain

from the promise? Have those expectations been realized? What if they have not? The attitude of the common law seems to be that, as long as the party providing performance has given effect to his promise, whatever that may have been, however interpreted, the expectations of the beneficiary of such performance are irrelevant. A bargain may turn out to be a bad one. The desired effects of the contract may be illusory. Unless this is attributable to some misconduct on the part of the performer, using the expression "misconduct" in the widest, most technical sense, the contract will be deemed performed for all legal purposes. In other words, performance is related to expectations only to the extent that those expectations have been expressed by the parties in the terms of the contract. Undeclared expectations are immaterial. If a party hopes, and intends, that a contract should have certain consequences, he should provide for those in the language of the contract. A contract expresses the intentions of the parties with respect to certain acts or abstentions from action. Its purpose is not an integral part of the legal quality of the contract. Put another way, the law is concerned with intent to contract, not with the motive for contracting.

Superficially, the doctrine of frustration appears to give the lie to this: and to suggest that contractual motives are all-important; else why would the courts declare a contract terminated through frustration of the commercial adventure?⁴⁸ Indeed some difficult decisions tread warily the path between holding a contract no longer operative if and when it has become no longer profitable or desirable for a party seeking to have it determined, and holding a contract still valid and operative even if it can only be performed at greater expense or with greater difficulty than the promisor originally envisaged and intended.⁴⁹ The debate about the true basis for invoking frustration, which has still not ended in the courts and *a fortiori* outside them, seems to turn upon a conflict of opinion between those who view the doctrine as dependent upon the parties' intention, however notionally and artificially discovered, and those who argue for a more positive, constructive role to be played by the court, whether under the guise of allocating risk, doing what is just and reasonable, or simply preventing hardship.

48. Tedeschi, *Frustration of Purpose*, 10 ISRAEL L. REV. 1 (1975).

49. *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.*, 61 D.L.R. 3d 385 (1975); *Victoria Wood Developments Corp. v. Ondrey*, 92 D.L.R.3d 229 (1978); *Graham v. Wagman*, 73 D.L.R.3d 667 (1976); *Amalgamated Investment & Property Co. Ltd. v. J. Walker & Sons Ltd.* [1976] 3 All E.R. 509; *National Carriers Ltd. v. Panalpina*, [1981] 1 All E.R. 161.

The classical view was that what had to be found was an implied term, emanating from the obvious hypothetical intentions of the parties, had they contemplated what in fact occurred. This may now be said to have gone. In its place is a more modern, possibly less manifestly hypocritical approach: has what has occurred so changed the circumstances of the contract that, if the circumstances had been known in advance, a party would not have contracted?⁵⁰ This, it may be noted, is still firmly rooted in the notion that the courts are seeking the parties' true intentions, not their expectations, nor whether one party has relied upon some set of circumstances or some statements or acts by the other party. The "risk" approach, and others that have been put forward, notably in some decisions by Lord Denning,⁵¹ seem to empower courts to interfere in a contract, notwithstanding any expressed or implicit intentions of the parties, simply on the basis that the courts exist to promote justice and prevent injustice: and manipulation of the concept of frustration is one way to achieve these ends.

I do not think that these views, however they are formally presented or described, really explain what English and Canadian courts, on the whole, are doing or attempting to do, when they decide whether or not a contract is terminated through frustration. They are as unwilling to rewrite a contract in this context as when they are charged with the responsibility of finding what the contract means (indeed frustration cases are only one specific example of the task of interpretation previously considered). It is not expectations that are frustrated. Nor is it that one party, having relied upon the other, has been frustrated in respect of what he thought was the situation. It is the will of the parties which is affected by the change of circumstances that is capable of rendering the transaction frustrated. If they have willed otherwise, whether in actual words or by the implications of their language, then the contract stands. If their will manifestly indicates that it cannot accept the binding nature of the transaction under changed conditions, the duty of the court is to give effect to such will. As with performance, it is not the reason behind the contract, the motive for contracting, that counts, but the intent to contract, and the extent to which that in-

50. *Davis Construction v. Fareham U.D.C.*, [1956] 2 All E.R. 145, 159-60 (Lord Radcliffe); *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.*, 61 D.L.R.3d 385 (1975); *Victoria Wood Development Corp. v. Ondrey*, 92 D.L.R.3d 229 (1978).

51. *Ocean Tramp Tankers Corp. v. V/O Sovfracht*, [1964] 2 Q.B. 226; *Shell U.K. Ltd. v. Lostock Garages Ltd.*, [1977] 1 All E.R. 481; *Staffordshire Area Health Authority v. S. Staffordshire Waterworks Co.*, [1978] 3 All E.R. 769.

tent can still be held to be operative in view of changed conditions. If such conditions are vital to the expressions of the will to contract and the intention to make a binding obligation, their alteration will naturally affect both. If not, then there are no grounds for interfering with what was an absolutely binding transaction. The parties are free to make their arrangements. Insofar as they have not declared any contrary intention, a change of circumstances will not mean a change of intention: nor a change in the prior arrangements of their affairs. Even in the cases where frustration of the adventure brings about the termination of contractual obligation, it is not that there ceases to be any motive or purpose in continuing with the contract, but that its performance was expressly or implicitly postulated upon certain prevailing conditions, the disappearance or material alteration of which inevitably leads a court to the conclusion that the parties did not mean to contract on the new circumstantial basis.

One way of speaking about these issues might be to talk in terms of "qualified," as contrasted with "absolute" obligations. The traditional view is that contracts result in strict liability, in the sense that, without appropriate expression by the parties, there are no ways of escape from the performance of what has been promised, undertaken, and intended. In the light of developments in the law of frustration, as well as those relating to mistake and exception, exclusion or limitation clauses, it may be argued that, unless otherwise stipulated, parties are only promising or intending to perform if what is intended is possible or capable of performance: or, to put this another way, only under certain (explicit or implicit) conditions.⁵² When Professor Fried, referring to frustration cases,⁵³ seems to speak of the absence of any will of the parties, necessitating the imposition of a resolution of the problem by the court, he may well be skating over the question, avoiding the correct description of what is happening. The logical analysis of the promise principle (which is the principle favoured by Professor Fried) would involve an examination of whether the parties had absolutely or qualifiedly promised something. In either event, nothing would be inherently expressed or implied in what the parties had promised, i.e., their expression of their intentions.

Termination by breach is a much clearer instance of giving ef-

52. Nicholas, *Rule and Terms: Civil Law and Common Law*, 48 TUL. L. REV. 946 (1974); Kiralfy, *Absolute Liability in Contract*, 1 J. LEGAL HIST. 89 (1980).

53. C. FRIED, *supra* note 3, at 64-5.

fect to the parties' will or intentions. The contract-breaker shows that he does not wish to fulfill or continue to fulfill his obligations. The other party, by his language or conduct, then reveals whether or not he "accepts" such breach, thereby intending the contract to end (save for its remedial consequences), or prefers that the contract remain in force and effect, thereby intending to hold the other party to his obligations, regardless of the knowledge that the contract-breaker will not keep them.⁵⁴ This kind of "election," as we have learned from a recent decision in the House of Lords,⁵⁵ can operate whether the breach in question occurred at the due time for performance, or at some earlier moment of time (when it is sometimes called "anticipatory" breach or repudiation).⁵⁶ Interestingly, whether an act or omission that is said to constitute a breach is of sufficient gravity to give rise to the sort of election mentioned above, would now seem to depend upon the foreseeable consequences of such breach, rather than, as at an earlier stage in the development of the law, upon the intended nature of the term that has been broken.⁵⁷

Nevertheless, while the focus of attention may have drifted, the reason why such attention is paid by the law remains more or less the same: what did the parties intend to happen, such that, if there is a failure to perform in a particular way it has the effect of destroying the object of that intention. To express this differently, the only difference between frustration and breach as modes of ending a contract lies in the responsibility of the party who cannot perform, not in the nature of consequences of that non-performance. In either instance, the test of determination is whether what has happened has so interfered with, or interrupted the willed intentions of the parties as to mean that their contract is no longer purposive and alive. Where frustration is the cause, there is no blame or guilt, and the contract determines automatically. Where there is breach, there is guilt, but there is also the possibility of some choice being asserted by the innocent party. In the final analysis, the effect of that choice is of little moment, even where an exclusion clause may

54. As to the meaning of "acceptance" here, see G. FRIDMAN, *CONTRACT*, *supra* note 27, at 524; *Buckland v. Farmer & Moody*, [1978] 3 All E.R. 929.

55. *Johnson v. Agnew*, [1979] 1 All E.R. 883; on which see, Hetherington, *Keeping the Plaintiff Out of His Contractual Remedies: The Heresies That Survive Johnson v. Agnew*, 96 L.Q.R. 403 (1980).

56. On which see, Dawson, *Metaphors and Anticipatory Breach of Contract*, [1981] C.L.J. 83; McRae, *Repudiation of Contract in Canadian Law* 56 CAN. B. REV. 233 (1978).

57. G. FRIDMAN, *CONTRACT*, *supra* note 27, at 278-88, 537-38. See also *Bremer v. Vandem*, [1978] 2 Lloyd's Rep. 109; *Bunge Corp. v. Tradax S.A.* [1981] 2 All E.R. 673.

be involved, although once upon a time there was the view that, in such cases, the innocent victim's response to the breach might have some consequences as regards a limitation or exemption provision in the contract.⁵⁸ The vexatious problems of that part of the law need not detain us here. Suffice it to say, I hope, that it is really the deliberate or attributed intention of the contract-breaker to foil the intentions of the other party (as well as to negate his own earlier expressed intentions as evidenced by the contract) which settles whether or not the contract is capable of being regarded as at an end.

Once a contract is terminated wrongfully, the issue of liability arises. In this respect I am concerned only with the issue of damages. The remedies of specific performance or injunction (to name only two of the possible alternative remedies that upon occasion may be sought by an innocent victim of a breach of contract) do not raise any particular problems in the present context. In effect, when such remedy is asked for by a party, what he seeks to achieve thereby is the enforcement of his, and presumably also, at the same time, the wrongdoing party's, will and intentions. Damages, however, are another matter entirely. They are a palliative, designed to be compensatory, since (notwithstanding recent developments with regard to nervous shock, anxiety, emotional distress, and the like,⁵⁹ when what some courts have done appears to approach the awarding of punitive, or semi-punitive damages for breach of contract) such variety of damages are normally unattainable in actions of that kind. To compensate for what? Herein lies another dispute, which, it may be said, arises from the views expounded some forty years ago by two learned American authors,⁶⁰ views which may have permeated academic lawyers in the United States and Canada, and may have affected the way American courts look at damages in contract cases, but cannot be said to have had much, if indeed any effect upon courts in England and Canada.⁶¹

58. See now *Photo Productions Ltd. v. Securicor Transport*, [1980] 1 All E.R. 556; *Beaufort Realities Inc. v. Chomedy Aluminum Co. Ltd.*, 97 D.L.R.3d 170 (1979) 116 D.L.R.3d 103 (1981).

59. G. FRIDMAN, *CONTRACT*, *supra* note 27, at 571-73, First Supplement at 164-66 and cases cited therein. See also Veitch, *Sentimental Damages in Contract*, 16 U. W. ONTARIO L. REV. 227 (1977).

60. Fuller & Perdue, *Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1937).

61. The only case I have found in which the article is mentioned is *Bewlay Logging Ltd. v. Domtar Ltd.*, 87 D.L.R.3d 325 (1978), and it seems that Berger J. was influenced by one particular point in the article (on which English authors, viz., Treitel

The division in that old article between restitutionary, expectancy and reliance damages, and the discussion of the circumstances in which each category is appropriate, seems to provide support for approaches to contract that differ from the more classical English one, that of agreement, *consensus*, a meeting of the minds and wills of the parties (with its emphasis on promises rather than upon either reliance or expectation). English and Canadian courts, however, adhere to the traditional notions of damages that stem from 1854,⁶² if not earlier,⁶³ albeit that recent decisions have elaborated, expanded, and clarified, as well as exemplified, some problems that the broader sweep of the nineteenth century caselaw left unresolved.⁶⁴ In other words, damages are measured in terms of what the parties must have known would result from a breach—what, therefore, may be considered as having been intended.

It is all, of course, notional. But the notion has some, if minimal, connection with reality.⁶⁵ It is true that there are occasions when the measure of damages is what the innocent party has expended in performance, or preparation for performance of the contract. Such cases will presumably arise only where there has been no, or no measurable, loss of profit because of the breach. They depend not upon reliance in the sense used by some writers, but upon foresight of consequences. If the expenditures were the kind of outlay that the contract-breaker could, or should, have realized the other party would indulge in once the contract was agreed upon, or even before if the making of the contract was readily and properly foreseeable as coming into effect, then such expenditures are recoverable (unless they can be subsumed somehow under the heading of loss of profit, as in the usual kind of case).⁶⁶

However these and other cases may be analyzed for the purpose of a judicial determination of the actual, litigated issue, I suggest that the foundation for the way the courts approach and dispose of such cases is the actual or imputed intention of the parties,

and Ogus, stated that English law was uncertain) rather than by the entire conceptual analysis contained in the article.

62. *Hadley v. Baxendale*, 9 Ex. 341 (1854).

63. *Robinson v. Harman*, 1 Ex. 850 (1848).

64. *Victoria Laundry Ltd. v. Newman Industries Ltd.*, [1949] 2 K.B. 528; *Koufos v. C. Czarnikow Ltd.*, [1969] 1 A.C. 350; *Parsons (Livestock) Ltd. v. Uttley Ingham & Co. Ltd.*, [1978] 1 All E.R. 525.

65. See further, Teh, *Recovery of Actual Loss and Notional Loss in Contract*, 1977 IRISH JURIST 71.

66. Cp. *Radford v. De Frobeville*, 1 All E.R. 33 (1978).

based upon what they could or should have foreseen as the outcome of their agreement. This, indeed, is the way that modern expressions of the law dealing with the seriousness of a breach of contract, for the purpose of deciding whether or not the contract is determined by the breach, have been put forward. It coincides with and conforms to similar ideas with respect to the calculation and measurement of allowable damages. In both instances the question for the courts is to ascertain the intentions of the parties as necessarily contained in their actual or implied agreement. Awards of damages are as much the logical outcome of agreement, as much an inherent aspect of the whole process of making a contract, as war, to Von Clausewitz, was the extension of, and therefore an inherent party of diplomacy. Nobody wants war: but it may become necessary to carry out a particular political scheme or idea. Nobody wants to pay damages: but the payment of damages may be a necessary concomitant of a contract. Just as war is a recognition of the failure of diplomacy, so a claim for damages, and its success, are a recognition of the failure of contract, since contracts are entered into to be fulfilled, to give effect to the parties' intentions, not to secure the payment of a sum of money by way of compensation (which, indeed, may never adequately and completely compensate the injured party).

V

To Professor Fried,⁶⁷ the law of contracts "just because it is rooted in promise and so in right and wrong, is a ramifying system of moral judgments working out the entailments of a few primitive principles. . . ." The promise described and discussed by Professor Fried, I suggest, is a sophisticated sort of promise, the promise of the philosophers and moralists. The promise of the real contractual world is more simplistic. It is the promise of the man or woman who seeks some sort of assurance that what has been agreed upon will be undertaken, adhered to, and performed.

What I am suggesting is that, in the mundane quotidian world of the contract lawyer, and the courts, the essence of contractual obligation is agreement. Promise is the apparel donned on high days and holidays. It is the formal clothing of agreement; or, if you prefer, the jurisprudential, or philosophical dress in which writers cloak their discussions of contract. It is possible to talk about contract in terms of promise. Indeed, the frequent employment of the

67. C. FRIED, *supra* note 3, at 132.

expression "promisor" and "promisee" to denote the parties to a contract (bearing in mind that the same party can be both promisor and promisee, when examined from different standpoints), reveals how useful such language can be. But "promise" has moralistic, or ethical, overtones. Such, after all, is the message of Professor Fried.

While I do not decry the moral aspects of contract, it seems to me that, from the more pragmatic, even more realistic standpoint of the common lawyer (which, as I explained early on in this paper, was the standpoint from which I approach this question), it is the technical notion of agreement that lies at the root or heart of the matter. Agreement is important because it recognizes that the parties have come together in a common, intended or desired enterprise (perhaps for different reasons, or from different motives). Some modern writers have sought to discover the essence or nature of contract elsewhere: some in notion of "reliance,"⁶⁸ others in an admixture of complex factors, which have been described by Professor Macneil.⁶⁹ There may indeed be contexts in which such suggestions have relevance, and can serve to illuminate what is happening. For my purpose, from my perspective, limited although it may be, the key to contract is agreement, arrived at, interpreted, and applied in the ways herein described.

Why the law should recognize, and courts should enforce, agreements may give rise to very interesting philosophical arguments—relating to deep political, economic, or moral issues that are fundamental to society. But is the lawyer, as lawyer, concerned with these? At certain levels, perhaps. At the level of discourse with which I am concerned, perhaps not. It is enough for the lawyer to appreciate and understand that, once he has found the kind of agreement which has been defined and recognized as amounting to a valid enforceable contract in law, he can then describe the various rights and duties that emerge from such a legal relationship. His task is to find the relevant duty and see that it is either specifically enforced or compensated for if breached. The lawyer's search, in other words, is for the relevant duty. In this respect, the judges of the common

68. E.g., Reiter & Swan, *Contracts and the Protection of Reasonable Expectations*, in *STUDIES IN CONTRACT LAW* (B. Reiter & J. Swan eds. 1980) (Study 1); Reiter, *Contracts, Torts, Relations & Reliance*, in *STUDIES IN CONTRACT LAW* (B. Reiter & Swan eds. 1980) (Study 8).

69. I. MACNEIL, *THE NEW SOCIAL CONTRACT* (1980); Macneil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691 (1974); Macneil, *Economic Analysis of Contractual Relations*, 75 NW. U.L. REV. 1018 (1981); Macneil, *Value in Contract: Internal and External*, 78 NW. U.L. REV. ____ (1983).

law have spent many centuries analyzing and formulating the kinds of duty that can be created by agreement between consenting parties, and the ways in which those various kinds of duty can be expressed so as to indicate what it was that the parties desired and intended to impose on themselves. Whether or not they have always succeeded, or have achieved results that meet with the approval of all lawyers, let alone all philosophers, does not really concern me. I am content merely to endeavour to identify and elucidate the processes of the common law.