CHAPTER 1

INTRODUCTION

In the 19th century, contract law was widely thought of as a pillar of a free society. Sidgwick, for example, wrote:

In a summary view of the civil order of society, as constituted in accordance with the individualistic ideal, performance of contract presents itself as the chief positive element, protection of life and property being the chief negative element. Withdraw contract — suppose that no one can count upon the fulfilment of any engagement — and the members of the human community are atoms that cannot effectively combine; the complex cooperation and division of employments that are the essential characteristics of modern industry cannot be introduced among such beings. Suppose contracts freely made and effectively sanctioned, and the most elaborate social organization becomes possible, at least in a society of such human beings as the individualistic theory contemplates — gifted with mature reason, and governed by enlightened self-interest. Of such beings it is prima facie plausible to say that, when once their respective relations to the surrounding material world have been determined so as to prevent mutual encroachment and secure to each the fruits of his industry, the remainder of their positive mutual rights and obligations ought to depend entirely on that coincidence of their free choices, which we call contract.¹

The attitude was reflected in the judicial approach to contracts, where it took the form of the pursuit of predictability and certainty at the expense of every other legal value. Freedom of contract — sanctity, even, of contracts — was assumed as a self-evident proposition.² This attitude, it is argued in this study, reached a peak in the period from 1850 to 1950. Some recent decisions appear to indicate a greater flexibility, but others have reaffirmed the strict enforcement of contracts.

From the 19th century view of contract law sprang the opinion that, as the common law system developed, eventually it would lay down a determinable rule of law to cover every possible case. Romilly M.R. said in Mullings v. Trinder:³

. . . it is a great scandal to the public and the profession generally that there should be a case in which a Court of Law is not able to determine what the

² Jessel M.R. in Printing & Numerical Registering Co. v. Sampson (1875), L.R. 19 Eq. 462, at p. 465, said: "if there is one thing which more than another 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."
³ (1870), L.R. 10 Eq. 449.
law is. I admit the law is very difficult to determine, but I hope that, by means of improvements, the law will ultimately be reduced into a state that a man of ability, who has devoted his whole life to the subject, may be able to tell a person what the law really is on any one point. That state of things, I hope, may be arrived at; but it is not so now, and will not be so in my time.4  

Since 1870, it has become apparent that this vision of the ideal legal system, providing a definite and certain answer to every question, is illusory. Few would now give to contract law the central place in the structure in society that it was formerly thought to occupy. Yet a civilized society must concern itself with justice between individual and individual, and the law of contracts remains a large and integral part of society’s attempt to secure that justice. In recent years, after a period in which little was written on contract theory, there has been a revival of interest in the theoretical and philosophical aspects of the subject.5 Does contractual obligation rest primarily on principles of morality, or on grounds of social utility? Is the fundamental purpose of contract law to give effect to the will of the promisor, or to protect the reliance or expectation of the promisee? Is it better to think in terms of promises or of bargains? Is contract law primarily in search of justice between individuals, or of the enlargement of social welfare? To what extent are these objectives distinct? Debates on these questions are of constant interest and importance to the student of contract law. All the approaches mentioned contain valuable insights. But no single theory accounts for all of the existing law, nor does any single theory command such general acceptance as to operate as an external criterion for evaluating the merits of legal doctrines and rules. This is hardly surprising. It is not to be expected that a complex and basic legal institution will be amenable to explanation by a single theory, nor that, in a pluralistic society, there is likely to be a consensus on fundamental moral and social questions.

The law of contracts is almost entirely judge-made law. In 1966 the English and Scottish Law Commissions announced an ambitious plan to codify the whole general law of contracts.6 Professor Hahlo criticized the

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4 Ibid., at p. 455.
proposal at the time, and his criticism seems to have been vindicated, for after eight years of work the project was abandoned. The Commissions did not officially reveal the reasons for the change of policy, but some of the difficulties may be deduced. A codifying provision that is very general ("all agreements shall be kept") is useless for the purpose of clarifying or reforming the law. On the other hand a provision that is specific ("a contract shall be evidenced by a signed writing") is apt to be inflexible and to give rise to anomalies. Human conduct is infinitely variable, and no codifier can foresee every problem that will arise, especially in an area covering so many different kinds of human interaction as contract law. The attempt to impose on a highly developed and developing common law system a code sufficiently specific to implement useful changes and yet not so specific as to set up inflexibilities and anomalies in unforeseen cases, proves to be almost an impossible one.

The Sale of Goods Act, dealing with a limited area of contract law, and generally regarded as a successful codification, finds it necessary to preserve flexibility by making many of its rules applicable only "prima facie" or "in the absence of evidence to the contrary" or "unless otherwise agreed" or "the circumstances of the case" otherwise require. Even so, the Act has in some respects proved to be unduly rigid, reflecting as it does the attitudes of the late 19th century and it was said in the English Court of Appeal in 1976 that the law had "developed" on a sale of goods point since 1893 — a concept that seems to indicate a new and flexible judicial approach to statutory interpretation. The desirability of maintaining flexibility is demonstrated by the attempts in the Uniform Commercial Code to codify rules of contract formation. General provisions, such as s. 2-204 ("a contract may be made in any manner sufficient to show agreement"), are successful and may be useful in so far as they increase the flexibility of the courts. Specific provisions, on the other hand, such as s. 2-207 dealing with the exchange of conflicting printed forms, have not succeeded. The section went through six preliminary drafts each adding a new proviso, qualification, or
exception as various committees envisaged previously unforeseen cases in which the proposed rule would be unsatisfactory. The cases subsequently decided, show, as surely was to have been expected, that many more problems were still unforeseen at the time of the final draft. The result is a complex and anomalous rule encrusted with legislative exceptions and judicial glosses, the very contrary, in fact, of the simplification, convenience and rationality that are claimed as the merits of codification.  

Piecemeal legislative reform of contract law is not likely to be more successful, it is suggested, except in so far as it increases judicial flexibility, as for example, by releasing the judges from self-imposed restraints. Even this function, it may be argued, is better performed by the judges themselves. The Frustrated Contracts Act, for example, has served a useful purpose in that it permitted the judges, when granting relief from a contract on account of changes in circumstances, to take some account of principles of restitution and reliance — a power they had formerly denied to themselves. The Act, however, stops short of giving the complete flexibility that would seem desirable. A more satisfactory development would have been for the courts themselves to assume power to grant relief on whatever conditions, as to the protection of reliance and restitution interests, justice might require. The legislative law reformer must take care not to set back judicial development of the law by crystallizing developing rules at an interim stage. The judges, for their part, ought to accept their responsibility for the rational development of the law and to avoid the temptation of assigning to the legislature a task that they can and should perform themselves. In Miliangos v. George Frank (Textiles) Ltd. the House of Lords took an important step towards greater flexibility. Lord Wilberforce (with whom the majority agreed) said of a previous decision of the House of Lords:

What we can do, and what is our responsibility, is to consider whether this decision, clear and comparatively recent, should be regarded as a binding precedent in today's circumstances. For that purpose it is permissible to examine the speeches in order to understand the considerations on which the opinions there reached were based, for the ultimate purpose of seeing whether there have emerged fresh considerations which might have appealed to those who gave those opinions and so may appeal to their successors.

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14 The section is discussed in Chapter 2, infra.
15 See Chapter 12, infra.
16 See the discussion of the reforms proposed by the English Law Commission on penalty clauses, Chapter 14, infra.
17 There is a marked difference of judicial opinion on this question. English decisions in the 1970s adopted a flexible view, but later decisions have been more cautious. Canadian courts, partly because of the influence of the Canadian Charter of Rights and Freedoms, seem likely to favour the flexible view. See, for example, London Drugs Ltd. v. Kuehne & Nagel International Ltd. (1992), 97 D.L.R. (4th) 261 (S.C.C.), and the comments of La Forest J. in Canson Enterprises Ltd. v. Boughton & Co. (1991), 85 D.L.R. (4th) 129, [1991] 3 S.C.R. 534, at pp. 147-8 D.L.R.
19 Ibid., at p. 460.
At a later point, he said:

The law on this topic is judge-made: it has been built up over the years from case to case. It is entirely within this House’s duty, in the course of administering justice, to give the law a new direction in a particular case where, on principle and in reason, it appears right to do so.20

Consumer protection merits separate consideration. The growth in the use of standard form printed and digital documents, together with the inequality of bargaining power between the business supplier of goods and services and the customer have placed stress on contract law. The problems are two: First, the customer may not know or understand the contents of the document signed or agreed to — basically a problem of mistake. Secondly, the contents, whether or not known and understood, may be unfair. The response of the courts on both questions is discussed in this study under the headings of Mistake and Unconscionability. The response of the legislature has similarly been directed to the same two questions. One type of consumer protection legislation aims at eliminating the mistake — examples are disclosure requirements21 and requirements relating to the appearance and form of printed documents.22 The other type of legislation attacks the problem of unfairness, either by giving the court or other tribunal a discretion to assess it,23 or by prohibiting or positively requiring the use of certain specified terms.24

Such legislation is entirely consistent with judicial development of contract law. Clear disclosure of particular terms that are liable to be misunderstood is of concern to a court even where the disclosure is not required by legislation, and in such cases nondisclosure may lead to a judicial remedy.25 Similarly, the abuse of inequality of bargaining power is also, now more openly than formerly, controlled by the courts even in areas where the legislature has not intervened.26 Where a legislative discretion is given to control unfair agreements in, let us say, sales, this should surely be taken not, as is still the tendency of some common lawyers, as a kind of legislative

20 Ibid., at p. 469.
21 See Business Practices and Consumer Protection Act (B.C.), s. 59; Consumer Protection Act, 2002 (Ont.), s. 79; Man., s. 4; N.S., s. 17; P.E.I., s. 16; N.W.T., Part I; Yukon, Part I; Cost of Credit Disclosure Act (N.B.), s. 15; Cost of Credit Disclosure Act, 2002 (Sask.), s. 7; Fair Trading Act (Alta.), s. 62.
22 See Consumer Credit Act 1974 (U.K.), s. 61(1).
23 See Money-lenders Act, 1900 (U.K.), now the Consumer Credit Act 1974 (U.K.), and the Unconscionable Transactions Relief Acts in the various Canadian provinces. See Chapter 14, infra, footnote 426.
24 Prohibitions of clauses excluding liability are to be found in the Unfair Contract Terms Act 1977 (U.K.), in the Consumer Protection Act, 2002 (Ont.), s. 14; and in comparable legislation in other provinces. See Chapter 14, infra, at footnotes 196 et seq. Positive prescription of terms is common in insurance legislation, see Chapter 14, footnote 436, and is also employed in agricultural machinery legislation in some provinces, see Chapter 14, infra, footnote 435.
25 See Chapter 11, infra. See also Québec (Procureur général) c. Canada (Procureur général), [2011] R.J.Q. 598 (C.A. Que.), at para. 315, citing this passage.
26 See Chapter 14, infra.
usurpation to be narrowly confined, but rather as an analogy to be integrated with, and indeed to strengthen, the development of a general judicial power.  

The prohibition or positive requirement of the use of specific clauses may be seen as part of the same pattern, for in some standardized transactions it is possible to say in advance that certain clauses are inconsistent with the type of transaction and therefore always unfair, or so likely to be unfairly used that their absolute prohibition is justified. It is true that a loss of flexibility is involved in this advance prohibition, but it may be justified in the case of consumer transactions by the consumer’s limited access to the courts. A judicial discretion, however flexible, is of no use to one who cannot afford to litigate.

Contract law is part of the search for justice between individual and individual — what is sometimes called the law of obligations. Common lawyers became accustomed to consider the law of obligations as consisting of two watertight compartments — contracts, the law of agreements or promises, and torts, the law of civil wrongs.

It has been recognized at least since the 18th century that this dual classification is incomplete. An important third category is that branch of the law concerned with the avoidance of unjust enrichment, as for example, in case of money paid by mistake. The wide scope assigned to this branch of the law by some judges in the 18th century proved uncongenial to the 19th century search for certainty and predictability, for what could be more dangerously uncertain than so vague a concept as injustice? In recent years the rigidity of the 19th century has given way to greater flexibility and it is now generally recognized that the avoidance of unjust enrichment — sometimes called restitution — constitutes a third branch of the law of obligations.

There are three main areas of contact between the law of contracts and the law of restitution. The first is where something of value has been transferred under a contract but the anticipated exchange fails to materialize, as when the contract is for some reason defective and unenforceable. Because of the defect the transferor does not receive the agreed exchange for the value transferred and, consequently, retention of the value is seen to be unjust. Restitution concepts affect the contractual

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relationship but they come into play independently of the contract and only after it is adjudged defective. Secondly, restitution of value transferred may be a remedy for breach of contract. Instead of pursuing the ordinary contractual remedies the victim of a substantial breach of contract may simply demand the return of the value transferred to the contract-breaker. Here restitution becomes a part of the law of contract remedies. Retention of the benefit by the contract-breaker is unjust because, and only because, the defendant seeks in breach of a valid contract to retain a benefit without supplying the agreed exchange. Thirdly, restitution may work in opposition to contract values. This is the case, for example, where an agreement is entered into on the basis of a mistaken assumption. Contract values tend to favour enforcement of the agreement. Restitution values oppose enrichment by mistake. Here a balance must be struck between opposing sets of principles. Not every mistake can be a ground for relief, but an examination of the cases suggests, contrary to the rigid views of the 19th century, that there comes a point when the mistake is so radical or fundamental that the restitution values outweigh the contract values. The attempt to find a rational basis for marking this point is, of course, an essential part of the study of the law of contractual mistake. But it is equally a part of the law of unjust enrichment.

The division between contracts and torts is similarly now seen to be much less impermeable than was formerly supposed. Distinctions based on consensus cannot be rigidly maintained for many torts contain and many contracts lack a consensual element. The overlap is most clearly demonstrated by the problem of reliance on false statements. The law of torts is concerned to protect reliance on false statements, but so, in several instances, is the law of contracts. Little purpose is served by a debate on nomenclature, but there are substantive issues at stake. Is there an important distinction between promises as to the future, and statements of existing fact? Is the key factor the reliance of the plaintiff or the standard of conduct of the defendant? Is the plaintiff’s remedy measured by the value that would have been received if the defendant’s statement had been true, or by the value that

31 See Deglman v. Guaranty Trust Co. of Canada and Constantineau, supra. Included in this category is the case, discussed in Chapter 16, infra, of a benefit conferred by a party who is himself in substantial breach of contract. The contract then is not initially defective, but it is unenforceable at the suit of the party in breach.
32 See Chapter 21, infra.
35 Hedley Byrne & Co. v. Heller & Partners Ltd., supra, footnote 34.
36 See Chapter 13, infra.
has been lost “out of pocket” by the reliance? A discussion of these matters is an essential part of the study of enforceability of contracts. It is equally a part of the law of torts. Though there are close analogies between contractual and non-contractual obligations, there are also important differences. Contractual obligations are defined by the parties with practically no restrictions. Thus, a contractual obligation may turn out to be extremely onerous, even ruinous, to the defendant, and performance of contractual obligations may have the effect of very greatly enriching the promisee. The exchange of a few words, casually spoken or written, may easily create an obligation that exceeds the defendant’s total wealth. These features are absent from most non-contractual obligations. The reasonable person may usually avoid committing torts without suffering very heavy burdens, and the failure to commit torts does not usually in itself enrich others. Liability for breach of contract is strict, whereas tort liability often requires proof of fault. Another aspect of the matter is that there is usually a public interest in encouraging observance of tort law, but the acts or omissions that constitute breaches of contract are not in themselves inherently objectionable: usually they are, considered simply as actions, perfectly innocent. They are wrongful only in the sense that a private agreement has made them so. Another consideration is that the extent of anticipated liability for breach of contract is related to the contract price and therefore it is appropriate in many cases to assess the contract-breaker’s liability in relation to the whole agreement, including the price; this is a factor that is usually absent in the tort context. There are good reasons, therefore, for making a distinction in several contexts between contractual and non-contractual obligations.

Some would conclude that it would be beneficial therefore to abandon the separate categories of contracts, torts, and restitution and to speak instead of a unitary law of obligations. But a mere formal unification would achieve little. Legal thinking demands some classifications, and a category would certainly emerge from a united law of obligations whether called contracts or some other name, that concerned itself with the protection of expectations based on others’ conduct. It is salutary, however, for the reader and the writer of a study of contract law to bear continuously in mind that the law of contracts is an inseparable part of a larger law of obligations.

The law of contracts protects expectations induced by others’ conduct. This statement is not advanced as a definition of contract law. Definitions of legal subjects always include an element of circularity. Criminal conduct is conduct that the law will punish. A contract is a promise that the law will enforce. The civilian systems of law, despite their unitary law of obligations, have by no means avoided a distinction between contract and delict.

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enforce. Law is inescapably a pragmatic study. To discover what promises the law will enforce one must look at what the courts in fact do. When will the courts enforce a promise? When there are sufficient reasons for justice to require enforcement. When are there such reasons? That must be, as Corbin said, the subject not of a writer’s introductory paragraph but of the whole study.

Various kinds of conduct give rise to expectations in others. The commonest is a promise by a person to do something or not to do something in the future. For this reason, promise is a useful working concept, but it is not a complete definition of the scope of contract law. A statement of existing fact may give rise to enforceable obligations. When it does, we call it a warranty, or say that it sets up an estoppel, but it is not a promise in the ordinary sense of that word. Furthermore, the words or conduct of A may give rise to expectations in B without any intention upon the part of A. If B’s expectations are reasonable and if A ought to have anticipated them, B’s expectations will be protected. But it is only in an extended sense that A can be said to have made a promise. Promise is used in this study, therefore, as a working concept, but it is not advanced as a definition of the scope of contract law.

The question has occasionally arisen whether a person can contract with herself. The problem may arise in the case of contracts with promises made by or to more than one party jointly, or in the case of a person contracting in two different capacities, as, for example, personally on the one side and as trustee or partner on the other. At common law it was held that all such contracts were void on the ground that a person could not contract with himself. Statute now provides in most jurisdictions that a person may convey property to herself, and it may be argued that if she can convey property, she ought also to be able to agree to do so. In Alberta this latter result is specifically provided for by statute. In Ontario, statute provides...
that any covenant or agreement entered into by a person with herself and one
or more other persons shall be construed and be capable of being enforced in
like manner as if the contract or agreement had been entered into with the
other person or persons alone.47 It is suggested that a modern court ought not
to permit the defeat of reasonable expectations simply on the ground that the
promisor was formally a party to the contract as promisee. Even if not
directly enforceable as a contract, it would seem that, where substantial
interests are at stake, an attempt to contract with oneself and another, or for
another’s benefit, might be construed as the creation of a trust for that other.
American courts have enforced such contracts.48

Good faith is a concept that has been used in different senses to address
several distinct questions in contract law. These questions include, among
others, whether pre-contractual negotiations can be broken off, whether
material facts known to one party must be disclosed to the other in pre-
contractual negotiations, whether contracts are enforceable if induced by
misrepresentation or mistake, whether and to what extent the courts should
imply terms into contracts, whether terms that are very unfair can be
enforced, whether non-performance by one party excuses the other, whether
deliberate breaches of contract justify punitive damages and whether the
exercise of contractual rights may in some circumstances be precluded. The
concept of good faith, as applied to these various problems, varies in meaning
and significance, and for that reason it is discussed in this work separately in
the context of each of these particular questions. It would, indeed, be possible
to conceive of the whole of contract law as the embodiment of the idea of
good faith. Sir Frederick Pollock wrote in 1881 that.49

The law of contract is in truth nothing else than the endeavour of the
sovereign power, a more or less imperfect one by the nature of the case, to
establish a positive sanction for the expectation of good faith which has
grown up in the mutual dealings of men of average right-mindedness.

Evidently Pollock was thinking of good faith primarily as supplying a reason
for enforcement of promises, not as a limit on enforcement. He meant that the
rules of contract law themselves reflected the community’s sense of what
good faith required, not that good faith should be deployed to modify or
displace the actual rules of contract law. In 2014, the Supreme Court of
Canada held, in the important case of Bhasin v. Hrynew,50 that there was a
duty of honesty in the performance of all contracts and, more generally, that
“good faith contractual performance is a general organizing principle of the

46 Law of Property Act (Alta.), ss. 10-13. The Law of Property Act, 1925 (U.K.), s. 82,
provides that a covenant entered into by a person with himself and another shall be construed
as one entered into with the other alone.
47 Mercantile Law Amendment Act (Ont.), s. 6.
48 See Williston, Contracts, 4th ed., §3:2, Restatement of Contracts, 2d, §17, Corbin on
Contracts, §55.