JUDICIAL TECHNIQUES AND THE ENGLISH LAW OF CONTRACT

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The author contends that a number of recent English cases on the law of contract suggest that many of the traditional classifications are misleading in modern circumstances, because of changes in the use of legal techniques. Problems which were at one time classified as problems of mistake, or duties of disclosure, for instance, are now usually dealt with as cases of construction. Examination of the cases in these and other fields illustrates the dominating role played in the modern law by the construction technique, and the way it is continually encroaching on other parts of the law of contract. The author concludes by examining the reasons behind this change in techniques, and discusses the way in which it enables policy considerations to be considered while striking a reasonable balance between the needs of flexibility and certainty.

I. INTRODUCTION

The purpose of this article is to explore a number of problems and recent cases in the law of contract with a view to illustrating the way in which the same problems can be, and indeed have been, dealt with by use of differing legal techniques, to suggest that some of the academic controversies of recent times are in reality arguments about the use of these techniques, and to consider the respective merits and demerits of some of the principal techniques in current use. [1]

A large part of the law of contract is concerned with allocating the risks of untoward events between the parties, using this term in the broadest sense to include events or facts existing at the time when the contract is made, and events occurring only subsequently. In many contracts there are certain obvious risks which are allocated by the very nature of the contract, and, leaving aside such external factors as fraud, lack of capacity or illegality,

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[1] The views expressed in this article do not accord in all respects with my previously published opinions, but they are (I believe) a development of, rather than a contradiction of, those opinions.

there is no room for argument about the outcome of a case concerned solely with such risks. The buyer in a contract of sale takes the risk that the market price of the goods may fall, the insurer in a life insurance contract takes the risk that the insured may be run over by a bus the day after the policy is issued, the surety takes the risk of the principal debtor failing to pay, and so forth. To be sure, there is nothing in the law of nature which prescribes these results. A buyer may contract on terms that he is only to pay the market price of the goods prevailing on delivery, a life insurance contract could be entered into which does not cover accidental death, a surety could guarantee the ability but not the willingness of the principal debtor to pay. [2] But the point is that, however unusual the contract, however circumscribed the liabilities of the parties, there will almost always be some obvious risks which are allocated by the contract, and which the parties must realise they are assuming by the very act of entering into the contract.

The difficulties in the allocation of risks begin to emerge when the risks which eventuate are unlikely to have been contemplated by the parties, or perhaps one of the parties, when the risks are, in other words, somewhat out of the normal. It is in these circumstances that disputes are likely to arise, each party feeling it unjust that he should bear a risk which he did not contemplate. In resolving these conflicts, the traditional approach of the English lawyer has been, in the first instance, to conceptualise the problem. Is there a contract at all? Is it void or voidable? Is this a question of mistake, misrepresentation, duty of disclosure, frustration or construction? Indeed, the ability to classify the problem into its "correct" legal category is regarded as one of the most important skills to be inculcated into the English law student. But what is crucially important—and this is the aspect of the matter which has perhaps been insufficiently discussed in English legal literature—is to appreciate that what is involved in this process of "conceptualisation" is largely the selection of a particular technique. It is well known that the "true" basis of the doctrine of frustration has given rise to considerable academic controversy in which even the judiciary has shared. [3] And the arguments over the "correct" classification of problems of mistake have given rise to a voluminous literature (in which the present writer has taken part) which is so well known that it is unnecessary to cite again here. But these controversies appear to be fundamentally about the use of techniques: they tell us nothing about the actual solution of the problems from which they spring. When, for example, there is controversy over whether a problem of common mistake is "truly" a problem about

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[2] *Cf.* Garrard v. James, [1925] Ch. 616, concerning the liability of the guarantor of an ultra vires debt, where the court regarded the question as turning on whether the guarantor had assumed the risk of non-payment by the company on grounds of legal incapacity as well as on grounds of financial inability.

[3] *See* G. TREITEL, LAW OF CONTRACT 639-45 (2d ed. 1966); G. CHESHIRE & C. FIFOOT, LAW OF CONTRACT 480-82 (6th ed. 1964); British Movietonews Ltd. v. London & Dist. Cinemas Ltd., [1952] A.C. 166; Davis Contractors Ltd. v. Fareham Urban Dist. Council, [1956] A.C. 696.

the construction of the contract, or whether there is an independent rule of law avoiding a contract for common fundamental mistake, this tells us nothing about when in fact a contract will be held "void" and the risks allocated in a particular manner. Similarly, arguments about the "true" foundation of the doctrine of frustration do not by themselves tell us when a court will hold a contract to be frustrated.

This is not to say that the use of legal techniques is not important, nor even that the outcome of a case may not sometimes be determined by the selection of one technique rather than another. The proper use of legal technique is of vital importance. For the practising barrister the correct use of legal techniques means, after all, that he must talk the kind of language which the court understands. Even the merest tyro will soon learn, for instance, that it is not much use arguing against a particular construction of a written contract on the ground that it would produce unjust or inconvenient results for his client; but he will equally soon learn that it is perfectly permissible to present the same argument in the form that "the parties could not have intended" the contract to bear the meaning argued against because of the results which would follow. This is an illustration of the fairly harmless foible of ascribing the "true construction" of a written instrument to the intention of the person who made it—harmless because in most cases it is perfectly clear what is being done. But in other cases what is being done may not always be so apparent, and may indeed be disguised by the skilful use of certain techniques. In such cases, the selection of one technique rather than another by careful pleading and advocacy may be essential to success. In the remainder of this article I propose to examine a number of problems connected with mistake and with duties of disclosure with a view to illustrating the way in which these problems are now usually dealt with by the use of one particular technique—the construction technique. I hasten to add that I do not wish to review here any of the well-worn controversies about mistake, and I propose to confine my attention largely to a small group of recent cases in most of which no mention was made of mistake at all.

II. Common Fundamental Mistake and Construction

The recent decision of the Court of Appeal in *Financings, Ltd. v. Stimson* [4] is a case of such interest to the theme of this article that it will be worth setting out the facts in some detail, for it will be necessary to return to the case repeatedly. On March 16, the defendant called at a car dealer's garage, inspected a car, and indicated that he wanted to buy it on hire-purchase terms. The dealer gave him the usual finance company proposal forms which the defendant duly completed, and which were there-

[4] [1962] 3 All E.R. 386 (C.A.).

upon dispatched by the dealer to the plaintiff finance company. The form stated that the agreement was only to become binding on signature on behalf of the plaintiffs, and also a declaration that the hirer had examined the goods and satisfied himself that they were in good condition. The dealer would not allow the defendant possession of the car without production of a comprehensive insurance certificate. Two days later the defendant again called on the dealer with the certificate, and asked to be allowed to drive the car away. The dealer communicated by telephone with the plaintiffs who agreed to the car being delivered to the defendant. Accordingly, the defendant drove it off and used it for two days, but he was so dissatisfied with it that he returned it to the dealer, told him that he did not want to go on with the agreement, and even offered to forfeit his initial payment of some £70 rather than remain bound by the agreement, as he thought he was. He also cancelled his insurance coverage. The dealer failed to inform the plaintiffs what had happened, and on the night of March 24-25, the car was stolen from the dealer's garage and was only recovered in a damaged condition some days later. It was estimated that the damage would have cost about £44 to repair. On the following day, both parties being in ignorance of what had happened, the plaintiffs signed the proposal form and returned a copy to the defendant. When the defendant repudiated the agreement, the plaintiffs resold the car at a loss and sued the defendant for damages for the breach.

The defendant took two points, on both of which he succeeded. First, he argued that he had revoked his offer to enter into the hire-purchase agreement by returning the car to the dealer, and the dealer must be treated as the plaintiffs' agent to receive notice of revocation; second, he argued that his offer to enter into the agreement was subject to an implied condition that the car was, at the time of the acceptance, in substantially the same condition as at the date of the offer itself. The first point is of no special interest for the purposes of this article, but the second gives rise to some interesting questions.

It will be observed, in the first place, that the condition which the court was prepared to imply was not a condition of the contract, but a condition in the offer, the whole effect of which, indeed, was that there never was a contract because the condition was not satisfied, and the offer became therefore incapable of acceptance. It is, in fact, probable that no condition as to the state of the car could have been implied in the contract itself, because the contract almost certainly contained the wide exemption clause invariably found in such contracts before the Hire-Purchase Act, 1964. [5] But the court evidently found no inconsistency between implying

[5] The reports do not tell us whether there was such an exemption clause but it would have been a remarkable contract had there not been one.

a term in the offer and the terms set out in the proposal form. Indeed, the declaration that the hirer had examined the car and found it in good condition was used by the court to justify the inference that there must be an implied condition in the offer. Of this declaration, Lord Justice Pearson said: "The obvious intention is this, that both the proposed hire-purchaser and the finance company will be able to rely on the condition of the car as it appears to the proposed hire-purchaser when he made his offer. . . ." [6] As an application of the normal principles of construction, this is impeccable; as a statement of fact of what the parties' "obvious intentions" were, it is almost certainly false. Declarations of this kind are inserted in hire-purchase proposal forms by finance companies for their own protection. The idea that the finance company really intended by this declaration to confer rights on the hirer is so far-fetched as to be laughable; and it is most improbable that the hirer himself read it or gave it a thought. But this is by the way. The interest of the case lies in the technique adopted by the court for the solution of the case, and the effects of that technique.

Since the contract was held to be void, neither hirer nor finance company was under any liability. The court did not hold that the finance company was obliged to deliver the car to the hirer in the same condition that it was in when he made his offer, though in the particular circumstances of the case this would have been immaterial. The result was that the risk of this event was held to be not fully on either party to the purported contract. [7]

Now the particular condition which the court implied in this case was, of course, of rather an unusual kind. Since it related to facts which occurred between the date of the offer and the date of the acceptance, it could only lead to one of two possible results. Either the condition was fulfilled, in which case the contract came into existence on acceptance and operated normally thereafter, or the condition was not fulfilled, in which case the offer could not be accepted at all, and there never was a contract. In short, the condition was a condition precedent, but a condition precedent of a special kind. In the more usual case a condition precedent does not prevent the formation of a contract, but only goes to its operation. [8] However, having said this, it does not in the least follow that an implied condition in an offer is something radically different from an implied condition

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[6] [1962] 3 All E.R. at 392.

[7] Whether in the upshot the loss was borne by the finance company or the dealer depends of course on the relationship between them, the existence and terms of any recourse agreement and so forth as to which the reports are silent. In some of my previous writing I have perhaps too readily adopted the view that to hold a contract to be void or frustrated means that the risk of the events giving rise to the holding is placed on neither party. In practice such a holding in fact divides the risk, but external events (*e.g.*, as to the state of the market) may mean that the only real risk is placed wholly on one party.

[8] *See, e.g.*, the hypothetical case put by Lord Reid in Wm. Cory & Son Ltd. v. Inland Revenue Comm'r, [1965] 2 W.L.R. 924, at 935 (H.L.).

in a contract. The contract textbooks have treated the case as illustrating the notion of a conditional offer, [9] as though this somehow differs from the kind of offer which results in a conditional contract. But the truth, of course, is that, whenever a conditional contract is made, whenever a contract is subject to a condition precedent, the condition must have been in the offer. Since an offer must be accepted precisely as it stands, it follows logically that no condition can be implied in a contract unless it was first implied in the offer.

It is at this stage that the implications of the technique adopted by the court in this case can be fully appreciated. It will, of course, be recalled that many lawyers (including the present writer) have argued that problems relating to "common mistake" are essentially problems of construction, and that when a court declares a contract to be void for common mistake, it is, in effect, implying a condition precedent in the contract. [10] Thus it is now generally agreed that the decision in *Couturier v. Hastie* [11] is explicable on the ground that there was an implied condition precedent that the cargo which was the subject of the sale was in existence at the time when the contract was made. But it has frequently been argued that a contract can never be held void on such grounds unless the case relates to non-existent goods, and this argument is still to be found in the current edition of Cheshire and Fifoot's *Law of Contract*. [12] Yet in the *Stimson* case, the contract was held to be "void" on just such grounds despite the fact that the "mistake" did not relate to the existence of the goods. I have already stressed that in the *Stimson* case the change in the condition of the goods occurred between the date of the offer and the date of the acceptance, whereas in *Couturier v. Hastie* the goods had perished before the offer was ever made. But it is hard to believe that this was a material factor in the decision, or that the language of the court would have been different had the cargo perished between the date of the offer and the date of the acceptance. It becomes plain then, that the *Stimson* case is a decision holding a contract to be "void" by the use of the construction technique, in circumstances in which the use of a different technique—the mistake technique—might easily have been adopted. But this itself demonstrates the crucial importance of technique, for no one can be sure what the result of the case would have been if counsel for the defendant had pleaded that the contract was void by reason of a common fundamental mistake. My personal view is that the plea would have received short shrift, for the mistake technique is now so rarely used that the court would probably have

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[9] *See* G. CHESHIRE & C. FIFOOT, *supra* note 3, at 50; G. TREITEL *supra* note 3, at 33; W. ANSON, ENGLISH LAW OF CONTRACT 57 (22d ed. A. Guest 1964).

[10] *See, e.g.*, Slade, *Myth of Mistake in English Law of Contract*, 70 L.Q.R. 385 (1954); *Atiyah, Couturier v. Hastie and the Sale of Non-existent Goods*, 73 L.Q.R. 340 (1957); and the famous case McRae v. Commonwealth Disposals Comm'r, 84 Commw. L.R. 377 (Austl. High Ct. 1950).

[11] 5 H.L.C. 673, 10 Eng. Rep. 1065 (1854).

[12] G. CHESHIRE & C. FIFOOT, *supra* note 3, at 195-98.

shied away from invoking it here, whereas by inviting the court to use the construction technique, counsel was able to achieve the desired result. [13]

There are two other points about this case which ought to be discussed. First, why did the court feel able to invoke the construction technique to decide the case in the way in which it did? Even those who have previously argued that a contract can be declared void on construction in circumstances not involving perished or non-existing goods, [14] have always stressed that such a construction is not one to be lightly adopted, and that it would require some very unusual facts to justify it. Thus I have previously argued that in most circumstances the court will place the risk of untoward events wholly on one party or the other, and that they will only rarely declare that neither party bears the full risk. [15] In the *Stimson* case, it seems that this construction was justified by three facts. First, the terms of the declaration in the proposal form, which have already been referred to. Second, the fact that a change took place in the condition of the goods between the date of the offer and the date of the acceptance. Although this fact does not seem to be of critical legal significance in the sense that the same technique could not be used even where no such change has taken place, it is undoubtedly a fact which has a bearing on the construction to be adopted. And third, was the fact that the goods were in the possession of neither party to the contract at the time when they were stolen. In these circumstances it would have been unjust to treat the risk of damage between offer and acceptance as wholly assumed by either party to the contract. This third factor leads naturally on to the next point.

It will be noticed that the condition implied by the court was one of some simplicity, and that on the facts as they actually were, this condition was amply sufficient to dispose of the case. But it needs only a slight adjustment in the facts to make it clear that the condition implied by the court would not have served in different circumstances. Suppose, for example, that the car had been damaged by the negligent driving of the defendant during the two days it was in his possession. It does not seem very likely that the court would still have been content to imply a condition that no substantial change should have taken place between offer and acceptance. Surely the court would have felt obliged to elaborate on the condition by saying that it was only to be implied where the change was not due to the fault of either party. But even this might not have sufficed. If the car had been damaged while in the possession of the defendant, but as a result of negligent driving by a third party, the

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[13] It is remarkable that none of the standard text books on the English law of contract seem to see any connection between this case and the law of "mistake."

[14] *See, e.g.*, Slade, *supra* note 10, at 398-401; Atiyah & Bennion, *Mistake in the Construction of Contracts*, 24 MODERN L. REV. 421, at 432 (1961).

[15] Atiyah & Bennion, *supra* note 14.

court would surely have still been reluctant to imply a condition which would have prevented the contract coming into existence. Indeed, given the fact that the defendant was comprehensively insured (and that the dealer would not allow him possession until he was so insured) it seems certain that once again the court would have felt obliged to modify the implied condition. It would then have been, presumably, a condition to the effect that the car should, on acceptance, be in substantially the same condition as it was at the time of the offer, but excluding from consideration any damage done to it while it was in the possession of the defendant (or perhaps either party). It would not be difficult to construct yet further variations in the facts which might have required even more complications to be introduced into the implied condition, *e.g.*, if the car were damaged in an accident while being driven by the defendant, but the accident was due to a defect present in the car when delivered to him and not reasonably discoverable by him.

Now the fact that the court did not feel called upon to elaborate on the implied condition beyond what the circumstances of the case actually required is indicative of the fact that the court was here merely using a well-tried technique to achieve justice in the particular circumstances of the case. Given the relatively unusual nature of the facts this was no doubt a perfectly reasonable approach. Unfortunately, this will not always do. Courts cannot disregard their precedent-making powers when they use the construction technique. Although (as will be seen below) the doctrine of precedent is not too strictly applied in dealing with questions of construction, it remains true that in dealing with stereotype contracts and regularly recurring situations, a decision on construction is likely to be regarded as a precedent. In such a case, therefore, it may well be necessary for a court to be more cautious in implying terms. In particular, it will be necessary for the court to be satisfied that the term can be formulated in a manner which will enable it to be applied even with variations in circumstances. It was the great difficulty facing counsel in so formulating the condition which he wanted the court to imply, which was at least one of the reasons for the decision in *Lister v. Romford Ice & Cold Storage Co.* [16]

III. Unilateral Mistake and Construction

Generations of law students are familiar with the proposition that a unilateral mistake which is known to the other party may render a contract void if it relates to identify or to the terms of the contract, and not merely to its subject matter. Here again there has been much controversy

[16] [1957] A.C. 555.

over the "theoretical basis" of the law, or (as I would prefer to put it) over the technique best adapted to deal with these problems. Ever since Professor Goodhart's famous article [17] on the decision in *Sowler v. Potter* [18] the view has been gaining ground that this part of the law can best be treated as depending on the rules of offer and acceptance. [19] From here it is but a short step to saying that this also is a question of construction because before it can be determined whether offer and acceptance coincide, the offer and the acceptance must both be construed. Indeed, Professor Goodhart himself explains the mistake of identity cases in terms of the true construction of the offer, and this view of the matter appears to have been accepted by the majority of the Court of Appeal in *Ingram v. Little.* [20]

But here, at least, it is not possible to dismiss the whole question as one of construction without some further explanation, for one of the most crucial and difficult questions in this field concerns the effect of knowledge by the parties of each other's intentions on the "true" construction of offer and acceptance. And on this point, it appears to me that the view to which the authorities now lead involves an analysis, complex though it may be, which has never been fully thought out. I believe that the law on this point can now be stated in the form of a number of rules as follows:

1. The true construction of an offer or acceptance, where the meaning intended by one party is *not* known to the other party (and there is no reason why he should know) is the "objective" construction arrived at in the normal way, according to all the circumstances of the case.

2. The true construction of an offer or acceptance, where the meaning intended by one party *is or ought to be known* to the other party, is that meaning, so long as the party who knows or ought to know of the other party's intentions has led that party to believe that he accepts that meaning.

3. Where both parties know or ought to know the meaning attributed by each other to the offer or acceptance, and these meanings differ, then the contract is void, unless both parties are content to be bound by the terms of the contract, whatever those terms may be held to mean. In this last case, again, the controverted term will be construed by the courts in the normal objective manner.

In this connection, and in support of this approach, it is interesting to examine two recent English cases. In *London County Council v. Henry Boot & Sons,* [21] the plaintiffs were building contractors who had entered into a standard form of contract employed by the London County Council

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[17] Goodhart, *Mistake as to Identity in the Law of Contract,* 57 L.Q.R. 228 (1941).

[18] [1940] 1 K.B. 271.

[19] Slade, *supra* note 10; Shatwell, *The Supposed Doctrine of Mistake in Contract: A Comedy of Errors,* 33 CAN. B. REV. 164 (1955).

[20] [1961] 1 Q.B. 31 (C.A.).

[21] [1959] 1 W.L.R. 133 (C.A.), *rev'd* [1959] 1 W.L.R. 1069 (H.L.).

for certain construction works. The contract contained a "rise and fall" clause for increased payment in the event of increases being granted in the "rates of wages." The dispute concerned a holiday scheme in the building industry under which employers in this industry purchased holiday credit stamps from a central agency, with a view to ensuring that all workers had a paid holiday every year even where they had been employed by several different employers through the year. By agreement between associations of employers and trade unions, the holiday entitlement of the workmen was increased from one to two weeks, and the cost of the stamps to the employers was therefore doubled. The question was whether this increase in cost fell within the "rise and fall" clause of the contract. Now, had there been nothing further in the case, this would of course have been simply a question of "construction" or perhaps more accurately, of "interpretation." But there had been some correspondence about the meaning of this clause before the contract was entered into. The council had taken the view that the clause did not cover increased costs of the holiday scheme, and had notified the contractors to that effect in connection with a different contract. But the council had also corresponded with the London Master Builders' Association, of which the plaintiffs were members, and had taken the same point with them. The Builders' Association had, however, stated that they could not agree with the interpretation placed on the clause, and although the council wrote back maintaining their view, the matter was allowed to rest there.

In the Court of Appeal, it was held that the correspondence was not admissible in evidence on the ground that the plaintiffs were entitled to say: "We do not agree with that [*sc.* the construction placed on the clause by the council]; we accept your contract and let the court decide whether you are right or we are." In the House of Lords, the decision was affirmed on the inadmissibility of the correspondence, but the actual decision was reversed on the ground that the objective interpretation of the "rise and fall" clause clearly led to exclusion of the holiday credits scheme from its purview. This decision was severely criticised by Professor Goodhart [22] both on the objective construction point (which is of not great moment, and does not concern us) and on the point about the admissibility of the correspondence. The real question which faced the courts, he urged, was this: "Can an offeree who has been notified by the offeror that he attaches a particular meaning to a phrase in his offer, accept that offer and then ask the court to attach an entirely different meaning to it?" And he cited English and American authorities to suggest that this is not possible.

With respect, I entirely agree with Professor Goodhart that a person

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[22] Note, 76 L.Q.R. 32 (1959).

who accepts an offer knowing that the offeror places a particular construction on his words is bound by that construction provided that by his acceptance he has led the offeror to think that he does so accept that construction. But the proviso is crucial. In this case, the council had no reason whatever to assume that the plaintiffs accepted their construction of the controverted clause after their correspondence with the Builders' Association. Indeed, when both parties know full well that they hold different views on the construction of the contract, there is no more reason for treating the offeror's construction as conclusive than there would be for treating the offeree's construction as conclusive. The plaintiffs could have made a case no more and no less plausible than the defendants' case for arguing that, since the council knew the construction placed on the clause by the Builders' Association, and nevertheless offered the contract to them on these terms, they were bound by the plaintiffs' construction.

But if both parties know then that their intentions differ, how is it possible to find a contract at all? Is this not a classic case of a contract being void because the parties are not *ad idem*? One party means one thing and the other party means another. This argument was in fact put to the House of Lords, somewhat half-heartedly it would appear, for no argument was heard on the point from the defendants, and Lord Simonds, who delivered the leading judgment, did not even mention it. It was left to Lord Denning, who delivered the only other speech, to point out that the parties were agreed on the only thing that really mattered, namely, the terms that should bind them. It is on this point that the case appears to me principally to break new ground: parties may contract on terms, disagreeing as to the meaning of those terms, and knowing that they disagree, but (in effect) delegating to the court the ultimate decision on their meaning. Apart from this point the case seems to be clear support for the view that cases raising problems known to some academic lawyers as problems of unilateral mistake tend to be treated by use of the construction technique. It may be objected that in fact the court was here using another technique altogether, namely the "evidence" technique, that is, the technique of treating questions of substantive law by reference to the admissibility of evidence. This was, of course, a very common technique in the last century but it has been waning for many years now. But in any event, in this particular type of case, a decision on the admissibility of evidence, is itself a decision on the construction of the contract. The real question, as viewed by the courts in this case, was whether the construction of the contract was affected by the actual intentions of the parties, and their knowledge of each other's intentions.

The other decision which is worth examining in this connection is *A. Roberts & Co. v. Leicestershire County Council* [23] which was a decision

[23] [1961] Ch. 555.

on rectification. In this case the plaintiffs tendered for the construction of a school for the defendants, the tender documents requiring the works to be completed in eighteen months. However, the formal contract prepared by the defendants provided for completion in thirty months, and after the defendants had accepted the plaintiffs' tender, they sent the formal contract for execution without informing the plaintiffs of the change, which was actually in the interests of the defendants rather than the plaintiffs. The plaintiffs executed the contract without noticing the change. The defendants knew all along that the plaintiffs were unaware of the change and had executed the contract in ignorance of it, and it was held that the contract should be rectified by altering the completion time from thirty months to eighteen months. The interesting feature of the case is not so much the actual decision as what is involved in it. For it is necessarily implied in the decision that there was all along a valid contract with an eighteen months' completion time. In other words, despite the terms of the formal contract, it was held to mean what the plaintiffs intended to the knowledge of the defendants. Although both parties had different intentions, the contract was thus very far from being void. The decision thus seems to bear out Professor Goodhart's argument that a person who accepts an offer knowing the real intentions of the offeror is bound to treat that offer as though it correctly stated the offeror's intentions, whatever the objective construction of the offer might be. The distinction between this case and the *Henry Boot* case is that here the defendants' conduct was such as to lead the plaintiffs to believe that the defendants accepted the offer of the plaintiffs in the terms intended by them, whereas in the *Henry Boot* case this was not so.

In the light of these cases it may be interesting to re-examine, very briefly, the celebrated decision in *Smith v. Hughes*,[24] for so long the the leading authority on unilateral mistake. Stripped to their simplest, the facts disclosed a contract by *A* to sell a specific parcel of oats to *B*. *A* knew that the oats were new and did not intend to warrant them to be old. *B* thought the oats were old and thought that *A* was warranting them to be old. Now there seem to be the following possible fact variations in the situation. First, neither party may have known the other's real intentions. Here it seems to me plain that a court would today treat the case as entirely one of construction. On the objective view of what was said and done, and all the surrounding circumstances, was the true construction of the contract that there was a warranty or not?[25] Second, the seller may have known of the buyer's belief that he, the seller, was warranting the oats to

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[24] L.R. 6 Q.B. 597 (1871).

[25] There was, in fact, a good deal of evidence as to the "surrounding circumstances," much of which conflicted. The buyer was (as the seller knew) a race horse trainer, and his evidence was that trainers never bought new oats, and that the agreed price was very high for new oats. The seller's evidence was that trainers did sometimes buy new oats and that the high price was explicable by the scarcity of oats at the time.

be old, and the buyer may not have known of the seller's intention to sell without warranty. Here it seems clear (and the *Roberts* case is an authority for it) that the true construction of the contract would have been that there was a sale with a warranty. Third, the buyer may have known the seller's intentions, and the seller may not have known of the buyer's intentions. This possibility (which could not have been seriously entertained on the evidence) would of course have led to the view that there was a binding contract without a warranty. Fourth, both parties may have known of the other's true intentions. Here, there plainly would have been no contract at all. It would have been as though the seller had written to the buyer offering to sell him "these oats as they are" and the buyer had written back agreeing to buy the oats "with warranty that they are old." Clearly, offer and acceptance would not have coincided. Of course, if the whole contract had been reduced to writing, there might have been room for the possibility adopted in the *Henry Boot* case, that the parties had agreed to contract but disagreed on the meaning of their contract, but this would hardly have been open on the evidence.

It will be noted that, on this view, the knowledge by one party of the intentions of the other, far from being a ground for holding the contract to be void, would be a ground for holding that there was a valid contract in the sense understood by the mistaken party. In *Smith v. Hughes* itself, it cannot be asserted that (even on this view of the facts) the court decided that the contract was void, for the decision and most of the judgments, are equally explicable on the assumption that there would have been a valid contract for the sale of oats warranted to be old. The warranty being broken, the buyer was entitled to reject the goods. [26]

It has, however, been objected [27] that the offer and acceptance theory does not adequately explain the cases of unilateral mistake for two reasons. First, it is said that it does not explain why there can be verbal correspondence of offer and acceptance, as for example, in *Raffles v. Wichelhaus* [28] (the famous *Peerless case*), and yet no contract. But this objection is hardly formidable. Of course, the offer and acceptance "theory" requires that the court construe the offer and the acceptance and ascertain the "true" construction. If the court is unable to do this because there are no surrounding circumstances pointing to one construction rather than another *(quod raro accidit),* the contract is simply void for uncertainty. The court can hardly enforce a contract unless it can say what the contract means.

The second objection to the offer and acceptance "theory" is that "it makes no allowance for the crucial distinction between mistakes which are

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[26] Today, of course, a "warranty" as opposed to a "condition" would not justify this result, but the modern terminology had not been settled at this time.

[27] G. TREITEL, *supra* note 3, at 202-03.

[28] 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864).

fundamental and mistakes which are not." [29] But this is to underestimate the flexibility of the construction technique. For it is a simple enough matter for the court to construe the offer as only including those matters which it regards as sufficiently fundamental. If, for example, the mistake in *Smith v. Hughes* related only to the quality of the oats, and not to the terms of the offer (as, on one view of the facts, it did), the true construction of the contract would have been that there was simply a contract to buy and sell the oats without warranty. This is not necessarily because the quality of the oats was not fundamental—in one sense it certainly was fundamental to the buyer—but because the court would have felt that the sale was for specific goods as they stood and no warranty was needed to do justice between the parties, the buyer having been given a sample. Similarly, in a mistake of identity case where the identity of the offeree is wholly immaterial (and so the mistake, if any, is not fundamental) the court would naturally construe the offer as being made without reference to the identity of the offeree.

But when all is said and done on this controversial subject, if, as I submit, the "theoretical basis" is a matter of technique and no more, then the "correct basis" is not a matter for academic disputation but one for empirical verification. What techniques are the courts in fact using? In point of fact, it is hard to find a single modern case in which the court has preferred the mistake technique to the construction technique. A typical modern case, which in many ways resembles *Smith v. Hughes,* is *Sullivan v. Constable* [30] which was treated throughout as a simple case of construction and nothing more.

IV. Mistake in Equity

It will be recalled that in *Solle v. Butcher,* [31] Lord Justice Denning put forward the thesis that even where a contract is not "void for common mistake" at common law, there is an equitable jurisdiction to set the contract aside where the justice of the case so requires. I do not wish here to rehearse the many criticisms which have been levelled at this idea, [32] but as Lord Denning's view has been applied in a recent English case, it may be worth devoting some attention to this decision in the light of the suggestion that the courts are here basically faced with problems of technique. The case in question is *Grist v. Bailey.* [33] There, the defendant contracted to sell to the plaintiff a house which was occupied by a weekly tenant. Both parties believed that the tenant had statutory security of tenure, and the price of £850 was based on this assumption. In fact the statutory tenant had died

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[29] G. Treitel, *supra* note 3, at 203.
[30] 48 T.L.R. 369 (C.A. 1932).
[31] [1950] 1 K.B. 671 (C.A.).
[32] *See, e.g.,* 66 L.Q.R. 169 (1950); Slade, *supra* note 10; Svanosio v. McNamara, 96 Commw. L.R. 186 (Austl. High Ct. 1956).
[33] [1966] 3 W.L.R. 618 (Ch.).

and the house was occupied by his son who had no security of tenure. The house was, therefore, worth considerably more (in fact about £2250) as it could be sold in effect with vacant possession. It was held that the contract should be set aside on the ground of common mistake in equity, though the buyer was given the option of resiling from the contract completely or paying the full value. Now the actual decision in this case seems, on any view, almost indefensible. It would seem perfectly clear that risks of this sort are assumed by the parties to a contract for the purchase and sale of a house. Indeed, it is difficult to see how the mistake could have occurred without negligence on the part of the solicitors acting for the seller, who would, in this event, have been liable to the seller for the loss suffered by him. But this is not to suggest that facts may not occur in which the most fair and reasonable solution might be to release both parties from the contract. For example, to adapt the facts of the *Stimson* case, suppose that parties have reached agreement for the sale of a house "subject to contract" and that the house is burned down without fault of the seller after the formal offer and before the acceptance.[34] It might, depending on the circumstances, be fair and reasonable to release both parties from the contract in such a case. It is here that difficulties may be encountered with the construction technique, for although there is no *logical* reason why this technique should not be used in this type of contract, the fact is that implied terms with regard to the physical condition of the property are virtually unknown in contracts for the sale of land. It is thus not surprising that it is in this type of case that the courts still occasionally fall back on the mistake technique, as was done in *Grist v. Bailey*.

But there are dangers in this course. If it is the mere unfamiliarity of the construction technique in this context which leads a court to fall back on the mistake technique, the danger is that the mistake technique may be invoked in cases in which there is no real justification for it, as seems to have been the case with *Grist v. Bailey* itself. For the construction technique is remarkably flexible (of which more later) and if the court refuses to imply a term in the contract to deal with the untoward events which have occurred or come to light, this is presumably because the court feels that justice or policy, call it what you will, does not require that result. In this event, it seems almost perverse to achieve the same result by use of a different technique. If, on the other hand, the mistake technique is invoked because there is some positive-law barrier to the use of the construction technique (*e.g.*, some binding and indistinguishable authority) then the use of a different technique to achieve the same result is open to other objections. To those who believe in the sanctity of stare decisis this process is of course objectionable simply because it amounts to evasion of binding authority. But even those who are not so wedded to stare decisis may find objections in

[34] *See* Hitchcock v. Giddings, 4 Price 135, 146 Eng. Rep. 418 (Ex. 1817).

this process. For if the binding authority is really unsatisfactory, it is much better that the rules of precedent should be relaxed and the decision overruled rather than that it should be avoided by use of different techniques. But there is also the danger that by shifting to a different technique, the underlying policy considerations behind the authority in question may get overlooked. For instance, in contracts for the sale of land, the general refusal of the courts to imply conditions relating to the physical state of the property is not an entirely irrational one. It may produce injustice in particular circumstances, and may for that reason need relaxing slightly, but in the majority of cases there are obviously good reasons for it, *e.g.*, that purchasers normally inspect the property that they buy, that it is desirable that dealings in land should be fully recorded in written documents rather than oral agreement or implication, and so forth. [35] If these policy considerations are sound, it is undesirable that they should be overlooked, as they may well be, simply by the process of shifting to a different technique, and using (say) the "mistake" doctrine to achieve a result which cannot be achieved by construction. If, on the other hand, these policy considerations are unsound, it would be much better for the courts boldly to modify the existing law by using those techniques which are already most familiar in analogous situations.

V. Duties of Disclosure and Construction

The use of differing techniques to achieve similar results can be profitably examined by comparing the process of construction with the imposition of—or refusal to impose—duties of disclosure on the parties to a contract. The comparison is a particularly instructive one for it does not seem open to doubt that this is a field in which the courts have largely shifted from one technique to the other over a course of years. And this shift illustrates the dominating part played by the construction technique in the modern law of contract.

It is, of course, well known that according to orthodox theory a party to a contract is under no obligation to disclose facts to the other party unless the contract is *uberrimae fidei,* and in certain other well defined cases such as where there has been a change of circumstance, or where a partial disclosure has been made which is misleading standing by itself. Most of the books and the cases are content to state the duty of disclosure, where it exists, as a duty imposed by law, independent of the parties' intentions, though it may of course be modified by express agreement. It is true that there are a number of cases in which the courts have discussed the "theoretical basis" of the duty to disclose and have sometimes treated it as resting

[35] Precisely the same policy considerations can be invoked against the application of the doctrine of frustration to leases, a problem which has given rise to much controversy in English law.

on an implied term in the contract, [36] but these cases were all dictated by specific statutory questions and did not involve any analysis of the rival merits of the two different techniques. Even those who have explained the duty to disclose as resting on an implied term have made it plain that the term must be an implied condition precedent and not a promissory condition, for it has never been suggested that breach of duty to disclose could give rise to a claim for damages. [37] Still less, of course, is it possible to urge the existence of the duty of disclosure independently of the contract in the sense that a breach of duty might be actionable even if no contract were subsequently entered into. The result is that for most practical purposes it is a purely academic question whether the duty is treated as resting on an implied condition or not. If a person takes out life assurance without disclosing that he knows he is suffering from a serious heart disease, it is quite immaterial whether the insurer can defend himself by pleading that the assured broke his duty to disclose, or that it was an implied condition precedent that the assured was not, to his knowledge, suffering from the disease. The courts have held that it is a defence to an action for breach of promise by a woman, for the man to prove that she was unchaste, [38] but they have never found it necessary to explain whether this is because there is a duty to disclose the facts (though such a contract is not *uberrimae fidei* in the full sense) [39] or whether it is because of an implied condition precedent. Indeed, in strict logic, there is no *necessary* difference between these two things at all. They are merely different ways of saying the same thing, *viz.*, that the defendant is not liable. But they do, of course, involve different legal techniques, and once techniques are established, they have a habit of acquiring a cluster of rules about them, so that even where different techniques do not *necessarily* produce a difference in result, it is quite probable that as a result of positive law they will gradually diverge. Now the law relating to duties of disclosure has in fact acquired three serious limitations over the years which have proved so restrictive that it is not surprising that the technique has fallen largely into disfavour.

First and foremost, the category of contracts *uberrimae fidei* is closed by authority. Despite some doubts about certain fringe contracts (such as contracts of guarantee) [40] it is clear that it is not open to a court today to recognize an entirely new class of contracts *uberrimae fidei*. Second, the duty of disclosure is limited to a duty to disclose those facts which are

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[36] *See, e.g.*, Wm. Pickersgill & Sons Ltd. v. London & Prov. Marine & Gen. Ins. Co., [1912] 3 K.B. 614; *but cf.* Merchants & Mfg. Ins. Co. v. Hunt, [1941] 1 K.B. 295 (C.A.).

[37] *See* Blackburn, Low & Co. v. Vigors, 17 Q.B.D. 553, at 563 (C.A. 1886).

[38] Beach v. Merrick, 1 C. & K. 463, 174 Eng. Rep. 893 (Oxford Assizes 1844).

[39] Beachey v. Brown, El. Bl. & El. 796, 120 Eng. Rep. 706 (Q.B. 1858). It is unnecessary for my purpose to consider how far these cases are still good law, and whether they are based on socially desirable policy.

[40] *See, e.g.*, London Gen. Omnibus Co. v. Holloway, [1912] 2 K.B. 72 (C.A.).

known to the party under the duty.[41] And third, as pointed out above, the remedy for breach of the duty is the inflexible remedy of rescission or repudiation. As it happens (and this is obviously no accident), in most cases in which there is a duty to disclose, rescission is the only practical remedy, but there are many other contracts in which greater flexibility in the available remedies is desirable.

Now the construction technique suffers from none of these crippling limitations. There is no closed category of cases in which terms may be implied though (as already seen) there may well be types of cases in which particular authorities decide against the implication of certain kinds of terms. There is also no reason why terms should only be implied with regard to facts known to the parties. Further, it is possible to provide for flexibility in the remedies by varying the kind of term to be implied. A term in the nature of a warranty gives a right to damages, a term in the nature of a promissory condition gives a right to damages or repudiation or both, whereas a term in the nature of a condition precedent releases both parties with no liability in damages.

These differences in the two techniques may be illustrated by contrasting a number of cases on the duty of disclosure with the *Stimson* case which has already been considered at length above. There is a good deal of authority that a party who makes a statement which is true when made but which subsequent facts render untrue to his knowledge is under a duty to disclose the change of circumstances, provided, of course, that they occur before the contract is concluded.[42] But all these authorities formulate the duty as one which only arises when the party who made the statement knows of the change in the circumstances. It needs little imagination to appreciate that it might be very unjust to hold a party liable on a contract when there has been a change in the circumstances occurring during the negotiations even where the other party did not know of the change—the very thing that happened in fact in the *Stimson* case. And here, as has already been seen, the court was able to do justice by implying an appropriate term despite the fact that the finance company was unaware of the change in the condition of the car.

Similarly, the old controversy as to whether there is any duty on a seller of goods to disclose latent defects known to him[43] has been completely by-passed in modern times by the shift to the implied term

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[41] *See, e.g.*, Blackburn, Low & Co. v. Vigors, 12 App. Cas. 531 (1887); Joel v. Law Union & Crown Ins. Co., [1908] 2 K.B. 863 (C.A.). Of course, the duty can be and commonly is extended by express terms of the contract.

[42] Traill v. Baring, 4 De G.J. & S. 318, 46 Eng. Rep. 941 (Ch. 1864); With v. O'Flanagan, [1936] Ch. 575.

[43] Horsfall v. Thomas, 1 H. & C. 90, at 100, 158 Eng. Rep. 813, at 817 (Ex. 1862); Smith v. Hughes, L.R. 6 Q.B. 597, at 605 (1871).

technique. In the great majority of cases the terms implied in favour of the buyer under the Sale of Goods Act protect him against latent defects whether these are known to the seller or not. Furthermore, the buyer's remedies for breach of these terms are more flexible than would be a bare right of rescission which would not protect against consequential damage. True it is that the buyer will have no remedy under the Sale of Goods Act (in the absence of express warranty or misrepresentation) where the seller is not a dealer in the goods in question, and therefore a buyer from a non-dealer might still try to persuade a court that there is a duty to disclose latent defects known to the seller. Any such holding would, of course, be an evasion, by the use of different techniques, of the provisions of the Sale of Goods Act, but in particular circumstances, the court might be driven to this evasion if the Sale of Goods Act appears to produce a very unjust result.

I do not suggest that knowledge of facts may not, in some cases, be an appropriate ground for invoking or limiting the construction technique, as much as knowledge limits the application of the duty of disclosure technique. If, for instance, the duty to disclose in insurance contracts were indeed to be treated as resting on an implied term, it would surely be reasonable to treat the implied term as relating only to facts known to the insured.

There is another respect in which the construction technique differs from the duty to disclose technique, though in this instance it is the former which is narrower. Where there is a duty to disclose in a contract *uberrimae fidei*, the duty extends to any fact which a reasonable insurer *might* have regarded as material. Now the tests normally used for determining whether a term can be implied in a contract are a good deal more stringent than this. (I disregard here those standard terms such as statutory terms under the Sale of Goods Act which are implied as a matter of course unless excluded.) The "officious bystander" test so frequently invoked in the technique of implying terms really amounts to this, that a term will not be implied merely because the facts in question *might* have influenced the judgment of the other party; it is necessary to go further and show that the facts undoubtedly *would* have influenced him. This distinction may be illustrated by reference to the recent case of *Compagnie Algerienne de Meunerie v. Katana Societa Di Navigatione Marittima S.P.A.*[44] In this case the plaintiffs chartered a ship from the defendants to carry a cargo of corn from Lattakia in Syria to Algeria. This ship had, as the shipowners knew, previously called at Haifa, and was therefore in danger of being refused permission to load at Arab ports because of the Arab boycott of ships calling at Israeli ports. But after the call at

[44] [1960] 2 Q.B. 115 (C.A.).

Haifa the ship had several times passed through the Suez Canal on the master signing a declaration of future non-co-operation with Israel. Nevertheless, when the ship arrived at Lattakia it was at first refused permission to load, and although permission was later granted on a similar declaration being given by the master, it was too late. For before loading could commence the Syrian authorities imposed a total ban on the export of grain to Algeria which plainly frustrated the charter unless the delay in loading could be blamed in some way on the shipowners. The charterers argued that there was an implied term that the shipowners would get permission to load within a reasonable time, but the Court of Appeal refused to imply any such term. The charterers' case was, of course, largely based on the fact that the shipowners knew of the ship's previous history, and the court agreed that knowledge of facts was an aid to the construction of the contract, but they were impressed by the fact that the ship had several times passed freely through the Suez Canal, and they evidently thought that the shipowners had regarded the risk of refusal of permission to load as a very remote one. Thus, in applying the "officious bystander" test the court rejected the implied condition sought to be incorporated by the charterers because even if they had been informed of the facts and the risk they "*might* have accepted" it.[45] If there had been a duty to disclose in this case, then this would of course have been enough to establish that the fact was material, and that the duty was broken. But the implied term technique requires more than a bare possibility that the other party would have been influenced by the facts. It requires—at least in some cases—virtual certainty.

But if this is often, or even normally, a necessary condition to the implication of a term, it is not by itself a sufficient condition. In *Percival v. Wright*,[46] for example, the director of a company bought some shares from a member of the company, knowing of circumstances which were likely to enhance the value of the shares. It was held that the director was under no duty to disclose these facts to the member. No attempt was, indeed, made to invoke the implied term technique in this case, as the plaintiff's case was based on the argument that the director had abused his fiduciary position, and the court held that the fiduciary duties of a director were owed to the company alone. But even if the plaintiff had tried to persuade the court to imply a term in the contract he would plainly have been faced with formidable difficulties. Even though it may have been reasonably certain that the shareholder would not have sold on the agreed terms had he known the facts, it is hard to believe that the court would have implied a term to protect the shareholder. The problem of formulating a suitable term would have been extremely difficult, a fact

[45] *Id.* at 127. [Emphasis added].
[46] [1902] 2 Ch. 421.

which illustrates one of the weaknesses of the construction technique to which I have already drawn attention.

VI. The Scope of the Construction Technique

It will be apparent from the above discussion that the construction technique has considerable advantages over the duty to disclose technique. But it is not only in this sphere that the construction technique has swept all before it. Apart from the problems raised by mistake, which I have sought to show are now also generally dealt with by use of this technique, it hardly seems to be open to doubt that construction has become by far the most popular technique for the solution of practically all problems in the law of contract which do not depend on unyielding rules of positive law, such as capacity, illegality and the requirements of consideration. But even with these rules which appear to be the most unyielding of all, the construction technique is continuously making inroads. Although parties cannot agree that their agreement will be binding in the absence of consideration, the existence of consideration may itself depend on the intention of the parties, and from there it is but a short step to saying that it is, in some cases at least, a question of construction. For example, the distinction between a unilateral contract supported by consideration, and a conditional gift, is now usually said to be a question of construction. And although parties cannot by their intentions override all the rules relating to illegal contracts, it is becoming increasingly evident that the question whether a contract is an illegal one at all may be, in the first instance, a question of construction. [47]

And although parties cannot by their intentions evade all the unyielding rules of privity, the court can often enough create a collateral contract by "construing" a statement as a collateral warranty and finding consideration for it. [48] These developments have assuredly not come to an end. Given the necessary "bold spirits" on the bench, there is no logical reason why the construction technique should not be used to develop and modify the law in a way which would have seemed utter heresy not long ago, and indeed may still seem so to some. For instance, there is no reason why a court should not impose strict liability on the manufacturer of defective products by holding that a mere advertisement can be construed as "an offer to the world" and then "implying" warranties in the "offer" and finding that the parties "intended" the purchase of the product from a retailer to be the consideration. [49] Indeed, the same result

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[47] *See* Archbolds (Freightage) Ltd. v. Spanglett Ltd., [1961] 1 Q.B. 374 (C.A.), especially at 391-92.

[48] For a recent striking example, *see* Wells (Merstham) Ltd. v. Buckland Sand & Silica Ltd., [1965] 2 Q.B. 170.

[49] This is, after all, little more than a combination of Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256 (C.A.) and Wells (Merstham) Ltd. v. Buckland Sand & Silica Ltd., *supra* note 48.

could be achieved in the absence of any reliance on an advertisement by finding that the manufacturer makes an "implied" offer to the world merely by putting his goods on the market. This is not to suggest that developments such as these (although they have of course largely taken place in the United States) are just around the corner in England or other common-law jurisdictions which closely follow English law. It may, indeed, be that they will never come at all, or that the Contract Code on which the Law Commission is now working will overtake the common law before they do so. But what I do suggest is that the construction technique as now used by English courts is sufficiently flexible to enable such developments to take place.

Again, the latest attempts by the English courts to create a new class of unyielding rules, namely the rules relating to "fundamental breach," have now been sternly rebuked, and the rules themselves relegated to rules of construction.[50] And although it is undeniable that, in this sphere at least, the construction technique has weaknesses, every lawyer can cite examples of the ingenious use of construction to defeat unreasonably wide exemption clauses.

VII. Advantages and Disadvantages of the Construction Technique

It may now be appropriate to take stock, and inquire a little more closely into this process of construction. What is it that a court does when it embarks on the process of construction? Why has this particular technique become such a dominating one in the English law of contract? Surprisingly enough, little attention has been devoted to this question. To an English lawyer "construction" is treated as almost synonymous with "interpretation" (indeed it is symptomatic that nobody appears to have explored the relationship between these two processes), and this is thought of as a subject to be treated in books on the "Construction of Documents," rather than in books on the "Law of Contract." None of the standard English textbooks contain separate chapters on "Construction," and the word is not even to be found in the index of the two leading English textbooks, Cheshire and Fifoot's *Law of Contract* and Treitel's *Law of Contract*. When we do find discussions of the process of construction in connection with particular problems, it is usually brief in the extreme, consisting of little more than the statement that, of course, the "true" construction of a contract depends on all the circumstances of the case.

Full examination of the intricacies of the construction techniques would require an article in itself, and I propose here to content myself with a few generalities. It seems to me undeniable that the attractions of the

[50] Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale, [1966] 2 All E.R. 61 (H.L.).

construction technique lie principally in its extreme flexibility. The familiar formula that the construction of a contract "depends on all the circumstances of the case" appears to be little more than a device by which (subject to certain limitations) the court is able to achieve what it regards as the most just result in the circumstances of the case. I have already pointed out how, with a little ingenuity directed to the kind of term which may be implied in a contract, the court is able to produce the most appropriate kind of remedy, *i.e.*, by implying a warranty, a promissory condition or a condition precedent. Similarly, the construction technique enables the court to avoid, where necessary, the suffocating grip of the doctrine of precedent. I do not think anyone familiar with the English legal scene over the past two or three decades can have failed to notice the ease with which courts today distinguish cases as "decisions on questions of fact." [51] Those who wrestled as students a bare ten or fifteen years ago with the problem of reconciling the apparently irreconcilable may be relieved (or according to temperament, irritated) when a court today cuts the Gordian knot with the simple statement that the cases are decisions on "questions of fact," but of the increasing tendency to take this way out, I do not believe there can be any doubt. It is, for example, noticeable how nearly all the modern cases of frustration are treated as raising largely questions of fact—or of the application of "well settled principles" to the facts, which amounts to much the same thing so far as freedom from the binding force of precedent goes.

Another attractive fact of the construction technique is the immense range of facts which may be taken into consideration by the court in arriving at the "true construction" of the contract. Everything said or done by the parties, and all the "surrounding circumstances" may be relevant, subject to a number of limitations (such as the parol evidence rule) which seem to be largely formal today. It has already been seen how the knowledge by a party of some fact may be a part of the "surrounding circumstances" to be taken into account, and the mistake cases show how ignorance of a fact is in like case. A still more striking illustration of the reach of the "surrounding circumstances" is to be found in *Hollins v. J. Davy Ltd.* [52] In this case, which concerned the effect of the doctrine of fundamental breach on an exemption clause in a car-parking contract, the court took into consideration as part of the "surrounding circumstances" and therefore as bearing on the "intention of the parties" the fact that many car owners carry comprehensive insurance coverage, and that therefore an exemption clause may well be in the customer's interest as saving him from the extra cost of double insurance. In a jurisdiction where it is customary to take account frankly of policy considerations, there would be nothing specially noteworthy about this, but in England,

[51] This trend is not confined to the law of contract; it is just as noticeable in the law of torts.
[52] [1963] 1 Q.B. 844.

where every legal decision is conventionally required to be justified by the use of traditional legal techniques, the case is a remarkable example of the flexibility of the construction technique.

But, it may be objected, if the use of the construction technique is so widespread in the law of contract, and if it is so flexible as to enable the court to do justice in such a wide variety of circumstances, is there not a danger that the law will become too uncertain? Every law student knows of the need for the law to strike a balance between flexibility and certainty, and if the construction technique is as flexible as I suggest it is, are the scales not being weighted too much in the interests of flexibility and the justice of the case, and is this not likely to make for unpredictability, with all that that implies in commercial relations? Of course the danger is undeniable, but it is mitigated by some important factors, in particular, the existence of the "rules of construction." However flexible the construction technique may be, it does not involve the use of brushwork on an empty canvas. There is a great deal already on the canvas in the form of prima facie rules which will normally be applied unless there is some reason not to apply them. In some standard classes of contracts the prima facie rules are so strong (and I need only cite again the classic example of the conditions implied by the Sale of Goods Act) that their implication is a matter of course in the absence of special circumstances. Furthermore, the kind of factors which are likely to be taken into account by the courts as circumstances displacing the prima facie rules are, up to a point, discoverable by examination of the precedents. Of course, if flexibility is to remain at all, the relevant factors in any particular situation can never be exhaustively enumerated, and still less can their relative weight be evaluated in advance.

But perhaps it is not too fanciful to suggest that even this element of uncertainty is to some extent mitigated in England by the organisation of the legal profession. The small number of practising barristers, the fact that judges are all recruited from the bar, and the closeness of bar and bench, all help to make counsel's opinion a prediction which is a good deal better than an informed guess. The sort of factors which may weigh with a judge in deciding whether the prima facie rules of construction ought to be displaced in a particular situation, even when they are not clearly articulated, are not based on pure hunch or subjective sentiments of the justice of the case. They tend to be based on sentiments likely to be shared by the great majority of at least that branch of the profession which is concerned with the decision making. These, then, seem to be the reasons for thinking that the construction technique is the one which best balances the needs for flexibility and certainty in so many contractual situations, and which explain why it has become such a popular technique in the last fifty years or so.

Of course, there are disadvantages to the construction technique, some of which I have already mentioned. First and most obvious, construction must in the last resort bow to the expressed intention of the parties, and it is hardly necessary to cite examples to show how (for example, when dealing with exemption clauses) this leads to injustice on occasion. Here one calls to mind the advice to look the problem firmly in the face and then move on. Clearly, there can be no solution to this problem by development of the construction technique. Once construction is allowed to override the expressed intention of the parties, it ceases to be construction. To a considerable extent construction can be, and is, used to modify, or qualify the literal terms of a contract on the ground that the parties "could not really have intended" it to have the effect it appears to have, but it is apparent that this is not a sufficient answer in all cases. One can but note that the answer to this problem lies elsewhere, *e.g.*, by development of the doctrine of public policy, or by legislation.

Another possible disadvantage of the construction technique which has sometimes bothered lawyers [53] is its artificiality. It involves imputing an intention to the parties which in many circumstances is simply not there. I do not, of course, suggest that this is invariably what is being done under the guise of construction. There are undoubtedly many circumstances in which the court genuinely discovers and gives effect to the intention of the parties, and it is one of the misfortunes of the law (though hardly an accidental one) that the term "construction" is used for two such very different purposes. But I do not believe that it can be denied that in a large number of cases the court is simply filling in gaps, or making law for the parties, when it is engaged in the process of construction, and that it is a pure fiction to treat this as a matter of "giving effect to the intention of the parties."

It was no doubt awareness of the artificiality of imputing a fictitious intention to the parties which led the Court of Appeal in *British Movietonews Ld. v. London & Dist. Cinemas Ld.* [54] to reject the "implied term" theory of the basis of the doctrine of frustration. And most academic lawyers (including myself) have felt the force of these objections to the "implied term" or construction theory. But it now seems to me that the objection is largely misconceived. This is not so much because there may be no practical difference in result, whichever theory is adopted (a proposition which is itself highly controversial) [55] but because, as it now seems to me, insufficient attention has been paid to the nature and purposes of judicial techniques. If we consider the three main "theories" as to the "basis" of frustration, namely the "construction" or "implied term" theory, the "just

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[53] Including myself; *see* P. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 130 (1961).
[54] [1951] 1 K.B. 190 (C.A.).
[55] *See* G. TREITEL, *supra* note 3, at 643-44.

solution" theory and the "change in the fundamental obligation" theory, it is surely clear *that they are all correct.* There is no inconsistency between them because they are not on the same plane. The "construction" theory is not a theory at all, but a technique; and whether this technique is used or not, is not a matter for academic disputation, but depends on simple facts. Either it is used by the court in its judgment or it is not. The "just solution" theory is likewise not a theory at all, but it is also not a technique. It is simply the end purpose of the technique which is used, as indeed, one hopes it is the end purpose of all legal techniques. And finally the "change in the fundamental obligation" theory is not a theory either, nor again is it a technique. It is merely a statement of conditions, though rather a sketchy one, in which the court will use the construction technique in one way rather than another. One could parody this famous and rather futile controversy by asking whether the "true basis" of contract is "agreement," or "offer and acceptance" or "the just solution." Is it not perfectly plain that the last is merely the ultimate policy objective, the first indicates the direction in which policy points in any given case and the second is the technique which we use to arrive at the desired result?

VIII. Conclusion

None of this article is likely to seem in the least startling, or perhaps even very original, to lawyers bred in jurisdictions, such as most of the United States, where courts are not afraid to base their decisions frankly and openly on policy considerations. But to lawyers in England and most of the Commonwealth, where the traditional conventions require that policy should be skilfully deployed under the concepts and techniques of the law, it is a matter of vital importance that lawyers should be fully aware of what they are in fact doing when they use legal techniques. This article has been written in the belief that too little attention has hitherto been paid to what is involved in the technique of construction, a technique which has absorbed almost as much of the law of contract, as negligence has absorbed of the law of torts. If the result is to stimulate further thought and writing about this technique, its purpose will have been achieved.