CHAPTER 1

INTRODUCTION

In the 19th century, contract law was widely thought of as a pillar of a free society. Sidgwick, for example, wrote: 1

> 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 co-operation 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 and seems now to be giving way to greater flexibility.

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] 2

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1 Sidgwick, *Elements of Politics* (London, Macmillan Co., Ltd., 1879), at p. 82. See Cohen, "The Basis of Contract", 46 Harv. L. Rev. 553 (1933).

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.

> . . . 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 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.

3 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.

4 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

[4] *Ibid.*, at p. 455.

[5] See M.J. Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press, 1993); P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, Clarendon Press, 1979); P.S. Atiyah, *Essays on Contract* (Oxford, Clarendon Press, 1986); C. Fried, *Contract as Promise: a theory of contractual obligation* (Cambridge, Harvard University Press, 1981); A.T. Kronman and R.A. Posner (eds.), *The Economics of Contract Law* (Boston, 1979); Stephen A. Smith, *Contract Theory* (Oxford University Press, 2004); D. Kennedy, "Distributive and Paternalistic Motives in Contract and Tort with special reference to compulsory terms and unequal bargaining power", 41 Maryland L. Rev. 563 (1982); I.R. Macneil, *The New Social Contract* (Yale University Press, 1980); P. Benson, "Abstract right and the possibility of a nondistributive conception of contract: Hegel and contemporary contract theory", 10 Cardozo L. Rev. 1077 (1989); J. Gordley, "Equality in Exchange", 69 Calif. L. Rev. 1587 (1981); C. Dalton, "An essay in the deconstruction of contract doctrine", 94 Yale L.J. 997 (1985); A. Brudner, "Reconstructing Contracts" (1993), 43 U.T.L.J. 1.

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.

5 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 proposal at the time,[7] and his criticism seems to have been vindicated, for after eight years of work the project was abandoned.[8] 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.[9] 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.

6 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"[10] or "unless otherwise agreed"[11] or unless "the circumstances of the case" otherwise require.[12] 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

[6] Law Commission of Great Britain, *First Annual Report* (1966).

[7] H.R. Hahlo, "Here Lies the Common Law: Rest in Peace", 30 Mod. L. Rev. 241 (1967). A reply by Professor Gower, then a member of the Law Commission, follows the article, at p. 259, and a further comment by Professor Hahlo appears at p. 607. See also M.R. Topping and J.P.M. Vandenlinden, "Ibi Renascit Jus Commune", 33 Mod. L. Rev. 170 (1970).

[8] See H.R. Hahlo, "Codifying the Common Law: Protracted Gestation", 38 Mod. L. Rev. 23 (1975).

[9] Lord Mansfield said: "All occasions do not arise at once . . . a statute very seldom can take in all cases, therefore the common law, *that works itself pure* by rules drawn from the fountain of justice, is for this reason superior to an act of parliament:" *arguendo* in *Omychund v. Barker* (1744), 1 Atk. 21 at pp. 33-4, 26 E.R. 15.

[10] See *Sale of Goods Act* (Ont.), ss. 31(1), 48(3), 49(3).

[11] *Ibid.*, s. 53: "Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract." See also ss. 27, 28(5), 29(4), 30(1), 33(2), 35.

[12] *Ibid.*, ss. 18(2), 30(2).

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.[13] 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.[14]

7 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.[15] 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.[16] 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

[13] *Cehave N.V. v. Bremer Handelgesellschaft mbH*, [1976] Q.B. 44.
[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*.

legislature a task that they can and should perform themselves.[17] In *Miliangos v. George Frank (Textiles) Ltd.*[18] 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.[19]

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 8
use of standard form printed 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 — 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 requirements[21] and requirements relating to the

[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.
[18] [1976] A.C. 443.
[19] *Ibid.*, at p. 460.
[20] *Ibid.*, at p. 469.
[21] See *Business Practices and Consumer Protection Act* (B.C.), s. 59; *Consumer Protection Act* (Ont.), s. 24 (note: at the time of going to press this Act was expected to be repealed on July 30, 2005, with the coming into force of the new *Consumer Protection Act, 2002*); Man., s. 4; Nfld. & Lab., s. 16; 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; Sask., ss. 3, 4; *Fair Trading Act* (Alta.), s. 62.

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]

9 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 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.[27] 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.[28]

10 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.[29]

[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 372.

[24] Prohibitions of clauses excluding liability are to be found in the *Unfair Contract Terms Act 1977* (U.K.), in the *Consumer Protection Act* (Ont.), s. 34 (see footnote 21, *supra*), and in comparable legislation in other provinces. See Chapter 14, *infra*, at footnotes 157 *et seq.* Positive prescription of terms is common in insurance legislation, see Chapter 14, footnote 368, and is also employed in agricultural machinery legislation in some provinces, see Chapter 14, *infra*, footnote 367.

[25] See Chapter 11, *infra*.

[26] See Chapter 14, *infra*.

[27] See Landis, "Statutes and the Sources of Law", Harvard Legal Essays of 1934, reprinted 2 Harv. J. on Legis. 7 (1965).

[28] See *Report on Consumer Warranties and Guarantees in the Sale of Goods*, Ontario Law Reform Commission (1972), at p. 106.

It has been recognized at least since the 18th century that this dual 11 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 — more usually called restitution — constitutes a third branch of the law of obligations.[30] 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 relationship but they come into play independently of the contract and only after it is adjudged defective.[31] 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.[32] Thirdly, restitution may work in oppo-

[29] See C. Carr, "Sale of Goods and the Death of Contract", *Law Society of Upper Canada Special Lectures*, 1975 (Toronto, Richard de Boo Ltd., 1975), at pp. 487-8. The distinction was not an ancient one — indeed, the modern law of contracts and torts developed from a common root — but arose only in the 19th century. See Horwitz, "The Historical Foundations of Modern Contract Law", 87 Harv. L. Rev. 917 (1974).

[30] Maddaugh and McCamus, *The Law of Restitution* (Aurora, Canada Law Book, looseleaf ed.); *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32 (H.L.(E.)), especially *per* Lord Wright at p. 61; *Deglman v. Guaranty Trust Co. of Canada and Constantineau*, [1954] 3 D.L.R. 785, [1954] S.C.R. 725; *Pettkus v. Becker* (1980), 117 D.L.R. (3d) 257, [1980] 2 S.C.R. 834.

[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*.

sition 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.[33]

12 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.[34] 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,[35] but so, in several instances, is the law of contracts.[36] 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 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.

13 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.[37] But a mere formal unifi-

[33] See Chapters 12 and 14, *infra*. See also Waddams, "Restitution as Part of Contract Law", in A. Burrows (ed.), *Essays on the Law of Restitution* (Oxford, Clarendon Press, 1991), and Waddams, *Dimensions of Private Law* (Cambridge, University Press, 2003), c. 9.

[34] Torts that protect reliance on false statements involve a consensual relationship between the parties, called in one case "a special relationship", *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.(E.)). Contractual liability for breach of warranty does not depend on any sort of voluntary undertaking. See Waddams, *Products Liability*, 2nd ed. (Toronto, Carswell Co. Ltd., 1980), at p. 72.

[35] *Hedley Byrne & Co. v. Heller & Partners Ltd., supra.*

[36] See Chapter 13, *infra*.

[37] See Gilmore, *The Death of Contract* (Columbus, Ohio State University Press, 1974); Atiyah, "Contracts, Promises and the Law of Obligations", 94 L.Q. Rev. 193 (1978); Waddams, "The Modern Role of Contract Law", 8 C.B.L.J. 2 (1983), and Atiyah's "Comments", at p. 10.

cation 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.[38] 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' con- 14
duct. 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.[39] 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.[40]

Various kinds of conduct give rise to expectations in others. The 15
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,[41] or say that it sets up an estoppel,[42] 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 16
with herself. The problem may arise in the case of contracts with prom-

[38] The civilian systems of law, despite their unitary law of obligations, have by no means avoided a distinction between contract and delict.

[39] See definition in Williston, *The Law of Contracts*, 4th ed. (Rochester, Lawyer's Co-operative Publishing, 1990), §1:1; American Law Inst., *Restatement of the Law of Contracts*, 2nd (St. Paul, 1981), §1.

[40] *Corbin on Contracts* (St. Paul, West Pub. Co., 1963), §3.

[41] See Chapter 13, *infra*.

[42] A person is held to be estopped from denying his own previous assertion when justice requires the protection of another's reliance on that assertion. Estoppel is an integral part of the protection afforded the expectations induced by others' conduct, and an integral part, therefore, in my view, of the law of contracts. See Chapters 5 and 7, *infra*.

ises 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.[43] Statute now provides in most jurisdictions that a person may convey property to herself,[44] 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.[45] 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.[46] 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.[47]

[43] *Ellis v. Kerr*, [1910] 1 Ch. 529; *Napier v. Williams*, [1911] 1 Ch. 361; *Rye v. Rye*, [1962] A.C. 496 (H.L.); *Thistle v. Thistle* (1980), 110 D.L.R. (3d) 137 (N.S.S.C.T.D.). If the covenants were several, rather than joint, they could be enforced: see *Rose v. Poulton* (1831), 2 B. & Ad. 822, 109 E.R. 1348 and *Ellis v. Kerr, supra*, at p. 538. In *Re Sutherland and Volos and Lebopal Realty Ltd.* (1967), 62 D.L.R. (2d) 11 (Ont. C.A.), Laskin J.A. said, at p. 17, of *Rye v. Rye* "It is unnecessary to say whether we agree with that case", and suggested that it may be restricted to leases.

[44] *Law of Property Act* (Man.), s. 17; *Real Property Act* (Man.), s. 88; *Property Act* (N.B.), ss. 23, 24; *Conveyancing and Law of Property Act* (Ont.), ss. 41-3; *Real Property Act* (N.S.), s. 10; *Real Property Act* (P.E.I.), s. 13; *Law of Property Act, 1925* (U.K.), s. 72.

[45] *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.

[46] *Mercantile Law Amendment Act* (Ont.), s. 6.

[47] See Williston, *Contracts*, 4th ed., §3:2, *Restatement of Contracts*, 2d, §17, *Corbin on Contracts*, §55.

PART II

ENFORCEABILITY

"Cases by the million! Libraries so labyrinthine as to require a guide! The leaves of the books like the leaves of the trees! Who can now read all the reports of cases dealing with the law of consideration for informal promises, stating the reasons deemed sufficient for enforcing such promises, laying down the doctrines and constructing the definitions? Certainly not the writer of this volume." — *Corbin on Contracts*, §109.