

FREEZE, FLIGHT AND FIGHT IN HIGH COURT CONTRACT JUDGMENTS

SECTION 1

According to Corbin, whose treatise on contracts has been called the greatest law book ever written¹, "rules must be stated in words that can be defined; that the definitions are merely 'working definitions'. . . and the rules are merely tentative 'working rules' that become confusing and harmful the moment that they cease to work".²

Most judgments in contract do not at first sight give the impression of being concerned with the application of working rules. They typically state the law in unqualified terms, and only rarely in such a way as to indicate that only tentative formulae are being offered. For instance, a case chosen quite at random, in which a buyer of land who paid the seller's absconding agent is being sued for the price by the seller, yields the following formulae most salient to the decision (for the plaintiff): 'An agent has no implied authority to receive the purchase money in the sense that receipt by him will discharge the purchaser.' 'The burden of proving authority was on [the purchaser].' 'Only unequivocal words or acts suffice to establish ratification.' 'A necessary element [of estoppel] would be that [the defendant] had been led by acts or words of the plaintiff to refrain from steps against [the agent].' 'It is a general principle that while commencement of an action against one of the two persons alternatively liable *does not*, entry of judgment against one of the *does* constitute a final irrevocable election.'³ Of these statements only the last conceivably conveys the notion that only a working rule is being put forward: the phrase "It is a general principle that" suggests the possibility of exceptions (but even here the emphases which follow diminish the force of this suggestion.)

It is true, of course, that the absolute form of such statements may often be a matter more of style than of substance. In supporting a particular outcome one cannot be forever qualifying one's reasons. Like any verbal artefact, a judgment must be taken as a whole. Statements of law shorn of all qualification may occur in it, but the manner of their deployment, or their context, may indicate clearly that not all possibilities are intended to be covered.

On the other hand, such statements may be intended literally, as formulae which *must* be applied once the facts are found to fall within their particular ambit. Or, for that matter, the judgment may revolve around a rule not stated, but implied in such a way as to demonstrate this literality of conception.⁴ In this article I shall call such a statement,

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1 Gilmore, *The Death of Contract* (1974) 5.

2 Corbin on Contracts (One Volume Edition, 1952) 6.

3 *Petersen v Moloney* (1951) 84 CLR 91, at 95, 98, 101, 102. In this article single quotation marks indicate that the original has been abbreviated (though by deletion only); double marks indicate that the passage is given unaltered.

4 See, for example, my discussion of *DTR Nominees P/L v Mona Homes P/L* p43 infra.

or a rule thus implied, a dogma. A dogma is the polar opposite of a working rule. Working rules, according to Corbin's criterion, cease to apply when they become confusing or harmful. Dogmas must be accommodated. If the result of their application is absurd or otherwise unwanted the judge is caught in a dilemma.

Such a dilemma is the central concern of a famous essay by Sir Owen Dixon, "Concerning Judicial Method"⁵. In this essay Dixon, who was for thirty-five years a Justice of the High Court of Australia, and for the last twelve its Chief Justice, gives his view of the course to be adopted by courts in meeting "the demands which changing conceptions of justice and convenience make"⁶. It is expounded by way of example. Dixon takes as his point of departure "a very simple transaction": the creditor under a contract which obliges the debtor to make periodic payments agrees to accept smaller amounts than contracted for in full discharge — in other words, to a reduction of the debt. On the faith of this agreement the debtor "proceeds in the conduct of his affairs". At the end the credit reneges, claiming the original amount.⁷

Dixon gives the following dogmas: (a) "consideration is necessary to the formation of every contract", and (b) "payment of a smaller sum accepted in satisfaction of a larger is not a good discharge of a debt", regarded as a logical derivative of (a). That these statements are not merely working rules is emphasized: "reforming zeal . . . could hardly go so far as denying" (a), and (b) "has long been clear law".⁸

Dixon considers, however, that "there is something wrong with the conclusion [which seems *prima facie* to follow] that the creditor's claim must be enforced." But it would be equally wrong if the court were "without compunction" to "reject the ancient conclusion" that a debt cannot be discharged by payment of a smaller sum. A judge thus acting without compunction might "merely appeal to the injustice conceived to result, and so, without doctrine or other rationale, pronounce against the claim." It is not difficult to agree with Dixon not merely that "judges of this temper are not common", but that such a course would in our system be an illegitimate evasion of a "received technique".⁹

Dixon's own response to the dilemma occupies four pages of close and not altogether transparent analysis. He first offers the reminder that the creditor's forbearance may not be pure gratuity: it may be possible to imply a promise by the debtor to refrain from some course legally open to him by which the position of the creditor could have been "rendered less beneficial". The "basis of simple contract" is, after all, no more than "the voluntary restriction upon the existing area of action or inaction legally open to the contracting parties". Should this broad road of circumvention not suffice, however, "the principles of estoppel" may be resorted to. The snag, Dixon concedes, is that estoppel must "in many jurisdictions" be based on an assumption of fact, and not on promise. "Unless you can say that the parties concurred in adopting the assumption that the lesser sum was in fact nominated in the earlier obligation, it is not easy to find a supposedly existing fact." That you

5 Given as an address at Yale, 19/9/1955; printed in Dixon, *Jesting Pilate* (1965) 152.

6 Dixon, *supra* n 5, 165.

7 Dixon, *supra* n 5, 160.

8 All these quotations are drawn from Dixon, *supra* n 5, 159-60.

9 Dixon, *supra* n 5, 160-1.

can, in fact, say this is somewhat coyly implied in the remainder of Dixon's analysis, which proceeds to the conclusion that if the debtor can show detriment the creditor will be estopped.¹⁰

Whether the debtor's bacon be saved by the first or second analytical course thus indicated, the essential point of technique is the same: in either case the dogmas announced at the outset remain formally unimpaired but have been effectively sidelined.

In this article I shall call such a course of analysis FLIGHT, and distinguish it from FREEZE and FIGHT. The conceptual nub around which this trinity of categories revolves is the antithesis of dogma and working rule. Thus I confer the label FIGHT when a course of analysis proceeds from the conception of the governing rule as a working rule. I designate the opposite point of departure, characterised by the conception of the rule as dogma, as either FREEZE or FLIGHT, depending on whether the dogma is applied or evaded. Had Dixon dealt with his hypothetical situation by applying the dogma so as to allow the reneging creditor to succeed the case would have seen one of FREEZE. On the other hand, had the requirement of consideration been conceived of as a working rule, it would have been possible to protect the debtor by excluding his situation from the ambit of that rule; this would have been FIGHT. Of course, FIGHT is shown not as refusal to apply a rule as such: it can be shown also where the rule is applied, so long as that application rests not merely on its perception as dogma, but on its aptness in context.¹¹

A single example, such as Dixon's hypothetical, is, of course, not a sufficient foundation for a scheme of classification. I propose, in the next section, to apply the scheme to actual cases in the High Court of Australia, and by this means (rather than by prefatory abstractions) to give a fuller account of its categories. One prefatory point that must be made, however, is to remind the reader that the labels "FREEZE", "FLIGHT" and "FIGHT" are not applied according to outcome but rather according to the means of analysis employed to get to that outcome. It is perfectly possible to reach a just decision by any one of the three categories, and in assigning a judgement to any one of the categories I am saying nothing about the actual decision.¹² It is, I think, possible to say something about the *general* tendencies, so far as outcomes are concerned, of FREEZE, FLIGHT and FIGHT, but I have left such speculations to the last section of this article.

10 Dixon, *supra* n 5, 161-5.

11 See, for example, Stephen J's judgment in *ABC v APRA Ltd*, discussed *infra* at 41.

12 It seems futile, in fact, in most cases, to guess whether the decision of the court was just as between the parties. The facts of the case must be taken as presented in the judgments, and each judgment is necessarily selective in its account of them, so that majority and minority often differ significantly in their selection. (For example, compare the narratives offered by McTiernan and Kitto in *Blomley v Ryan*, (1956) 99 CLR 362.) Moreover the merits often appear so neatly poised as to defy second-guessing at the safe distance which separates the commentator from the event. (This is not to say that it is *never* appropriate to attempt such a critique; it is not always necessary to have been there.)

SECTION 2

In this section of the paper I apply the categories FREEZE, FLIGHT and FIGHT to a sample of 18 modern High Court cases on contract.¹³ In doing so, I am conscious of skirting well-trodden ground.¹⁴ The nature of rules and indeed of law, the etiology of judicial decisions, the role of authority, and other staple concerns of legal theory are inevitably touched on by my enterprise. But I have not attempted to take formal account of established theoretical complexes,¹⁵ just as I have not bothered much with the historical and intellectual context of Corbin's notion of the working rule, which is so central to my concerns.¹⁶ I have cast myself in the role of participant-observer working on the inside, nose firmly on the ground, on the trail of particulars.¹⁷ My hope has been to gain some impression of the mix of dogma and working rule in actual decision-making, and, from immersion in that process (rather than from contemplation of it at a remove) some insight into which is the preferable point of conceptual departure, at least in the field of contract law.

Applying these categories in the analysis of actual cases proved no easy task. Not only is it necessary, as has already been noted, to distinguish between style and substance. It is further necessary on many occasions to strike a quantitative estimate, as many judgments show more than one tendency, particularly when pursuing more than one issue or path of

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- 13 My sample represents about 10 per cent of the High Court's total output of decisions in contract between 1949 and the present. In selecting it I was concerned to gather specimen from the beginning, middle and end of that period, and occasionally motivated by personal interest in particular issues; in all other respects my choice was random.
- 14 In particular I come close to jurimetrical attempts to measure "the basic attitudinal determinants of judgments" by multiple scaling analysis: see eg Blackshield, "X/Y/Z/N scales: the High Court of Australia, 1972-6," in Tomasic (ed), *Understanding Lawyers* (1982) 133. Blackshield's Y, Z and N scales express concerns which clearly overlap with my own; see especially *ibid*, pp 136-8. But such jurimetrics are concerned with charting attitudes of individual judges (Blackshield, *ibid* 150 n 6), whereas I have been chiefly interested in elucidating my categories without such specific quantifications, so that unanimous decisions have been as much grist to my mill as cases containing several opinions.
- 15 It will be evident, in particular, that in thinking of contract law as a collection of rules, and in using the word "rule" to encompass both "working rule" and "dogma", I am using that word loosely. Dworkin's use of it, for instance, would hardly extend beyond what I call dogma: "Rules are applicable in an all-or-nothing fashion." Dworkin, *Taking Rights Seriously* (1977) 24. See generally, Twining and Miers, *How To Do Things With Rules* (2nd ed, 1982) 126ff.
- 16 Corbin's notion belongs to the critique of legal formalism ushered in, in the United States, by Holmes' famous dictum "The life of the law has not been logic: it has been experience": Holmes, *The Common Law* (1881) 5. Professor Golding identifies the major subsequent figures as Pound, Cardozo, and the Cohens: Golding, "Aesthetics and Legal Reasoning: A Strand in American Legal Thought" (unpublished paper) 1. To these should be added, if the topic be broadened somewhat (as seems unavoidable) to include American "realism", such names as Gray, Llewellyn, Levi, Oliphant, Frank and Twining: see Ehrenzweig, *Law: A Personal View* (1977) 132ff. See also Fiocco and Wallace, "The American contrast: a history of American legal education from an Australian viewpoint," (1980) 6 *Univ Tas L Rev* 260. The rise of legal formalism in the United States is traced in Horwitz, *The Transformation of American Law 1780-1850*, (1977) esp. ch 8.
- 17 Diesing, *Patterns of Discovery in the Social Sciences* (1971), distinguishes the participant-observer method from "rational reconstruction", "conceptual analysis" and "typology". I would not wish to pretend, however, that my stance fully conforms to the criteria of participant-observation as described by Diesing.

analysis. In the analyses which follow I have therefore had to concentrate on essentials, and to adopt some procrustean strategies. I would not be surprised if some cases defied analysis altogether in terms of the categories used here.^{17a}

In presenting my analysis of the cases I was at first tempted to present all instances of the same category together, so as to make neat bundles of Freeze, Flight and Fight judgments, instead of presenting each case as a whole, and thereby often putting a judgment of one kind beside one of another. But in the end I have preferred the latter method, as making for a better feel of the working of the categories. Readers who find this tedious will find it possible to pursue one category at a time by skipping from case to case, following the capitalized indicators.

1. *Prior v Payne*, [1956] Arg. LR 10.

The plaintiffs sued to enforce an option. The defendant had signed the following: "In consideration of the sum of five pounds I hereby give an option of purchase of my dairying business . . . to W J and J W Payne. Purchase price to be based on valuation by Mr. King Warburton or mutually agreed. Option to be exercised within one month of said valuation." He argued that the second sentence meant that the parties were yet to agree on the price, using the valuation as a basis, and that therefore there was no binding agreement. The court (Dixon, Williams, Webb): FLIGHT. The defendant's point of departure was that there could be no obligation if the price was yet to be agreed. The court (in a proceeding on demurrer) shows no inclination other than to accept this, but nevertheless enforces the option, rejecting the defendant's interpretation in favour of one which satisfies the demand of dogma: "The interpretation preferable is that if the parties failed themselves to agree on a price they should be bound by the valuation subject to adjustment of outgoings."

2. *Slee v Warke*, (1949) 86 CLR 271.

Another action to enforce an option, by a lessee under a three year lease which gave him an option to purchase after expiry of the first year. The lessors' defence was that they had executed the lease (drafted by their own solicitors) without reading it, believing it contained an option exercisable not after, but only during, the first year; and that specific performance was not available against a party thus mistaken.¹⁸ The court (Rich, Dixon, Williams): FIGHT. 'Where there is a unilateral mistake of the defendant not contributed to by the plaintiff, whether the court should make a decree for specific performance must depend on the circumstances of the particular case. Although the appellants have proved a unilateral mistake, they have not proved that it would be a hardship to compel them specifically to perform the contract [278-9].' A rule employing as criterion the circumstances of the particular case is, of course, quintessentially a working rule, and remains such even when fleshed out with the more indicative referent "hardship". "Hardship" is what Pound would have called a "standard"; the function of such standards is, inter alia, to preserve the possibility of joining imperative syntax with open meaning. "[T]he rule is that the conduct . . . must

^{17a} See note 34 infra.

¹⁸ The action was apparently one for a declaration, but was treated as one in substance for specific performance: 86 CLR at 279.

come up to the requirements of the standard. Yet the significant thing is not the fixed rule but the margin of discretion involved in the standard and its regard for the circumstances of the particular case.”¹⁹ I have treated all rules employing such a standard as the sole criterion of their application as working rules, and their use as Fight.

3. *Suttor v Gundowda P/L, (1950) 81 CLR 418.*

Again an action for specific performance by the buyer of land. The seller argued: 1 that a clause applied providing that the contract should be “deemed cancelled”, 2 that in any case specific performance was unavailable because (a) the buyer was guilty of sharp practice, (b) the contract provided for personal services.

1. The clause in question provided that the contract should be “deemed cancelled” if the consent of the Treasurer was not obtained within two months, which it was not. The seller’s argument was that the plain meaning of the clause must prevail. The court (Latham, Williams, Fullagar): FIGHT. ‘The provision is to be construed as making the contract not void but voidable. If one party has by default brought about the event, the other party alone has the option of avoiding the contract. If the event happened without default on either side, then either party may avoid the contract. [441]’ That is to say, that the plain meaning prevails is a working rule: where the event which triggers the operation of such a clause may be brought about by default of party, any such default may have to be brought into account, and hence the clause cannot be self-executing.²⁰

2(a). FIGHT again: ‘It would be necessary for the defendant to prove hardship amounting to injustice. [439]’ Hardship amounting to injustice is, of course, a standard.

2(b). FLIGHT. The contract provided that the buyer should by deed undertake to continue to employ three named persons for a specified period. The court holds that this is not an undertaking to employ, but one to execute a deed; hence the rule that specific performance is not available to enforce a contract for services is inapplicable. This is a conceit reminiscent of the finer turns of medieval theology,²¹ and one which only a court intent on the preservation of dogma would adopt.

4. *McRae v Commonwealth Disposals Commission, (1951) 84 CLR 377.*

The Commission, acting on mere rumour [394], advertised for sale an “oil tanker lying on Jourmaund Reef . . . said to contain oil.” The plaintiffs’ tender was accepted. They refitted their ship, brought in equipment and personnel, and went to the reef, but found only a wrecked barge. They recovered only limited damages at first instance, and appealed. The appeal succeeds. On both major issues the court (Dixon/Fullagar, McTiernan concurring) shows FIGHT. (a) The non-existence of the tanker did not make the contract void, whether by impossibility or mistake, for any such doctrine must take account of

19 Pound, *An Introduction to the Philosophy of Law* (Yale Paperbound edition, 1959) 57-8. “Standards” have, of course, gone by other labels in different taxonomies: compare, for instance, Stone’s “category of indeterminate reference”: Stone, *Legal System and Lawyers’ Reasonings* (1964) 263ff.

20 Lines of Flight, based on variation and affirmation, are also proposed, 81 CLR at 441 and 442 respectively, but may be regarded as secondary.

21 Cf Arnold, *The Symbols of Government* (1935) 59ff.

context — as here, where the Commission had ‘contracted that there was a tanker there’ [410] and ‘any mistake was induced by [its] serious fault’ [ibid]. (b) The fact that the tanker’s value was speculative did not mean that substantial damages could not be recovered. In particular, expenses incurred in reliance on the Commission’s assertion could be recovered even though it was possible that the plaintiffs might have made a loss had there been a tanker: ‘The burden is thrown on the Commission of establishing that . . . This, of course, the Commission cannot establish [414]’. A careful but pragmatic inventory of recoverable items follows, compiled under the auspices of the maxim that difficulty in estimating the damages does not relieve a tribunal from assessing them as best as it can [411].

5. *Cavallari v Premier Refrigeration Co. (1952) 85 CLR 20.*

Buyer’s action for specific performance. Cavallari wrote to the company: “I hereby give you an option to purchase the freehold owned by me . . . I will require a period of not less than six months to enable me to make arrangements re my business plant etc.” The company’s notice of exercise rehearsed the terms of the option, and included the sentence: “Vacant possession to be given after the expiration of six months.” Cavallari argued that his offer stipulated that he should have time to make the arrangements referred to even if this took longer than six months; the company’s notice simply stipulated for possession after six months and was therefore a counter-offer. The rule invoked is, it will be apparent, that acceptance must conform to the offer if there is to be a contract. Webb (dissenting): FREEZE. ‘To bring about a binding contract the offer and reply must be of precisely the same terms. [28]’ Dixon/McTiernan/Fullagar/Kitto: FLIGHT. The critical sentence could be read as not ‘wholly stipulatory in character, but as containing a stipulation and a reason for making the stipulation [27]’. (My point is not that the court’s interpretation is wholly implausible; some features of the context perhaps supported it.²² It is, rather, that the absolute correspondence of offer and acceptance is taken as invariably required. But where they are at odds in only trivial respects, where a paraphrase was obviously intended, and particularly where documents of some complexity are involved, the way must be open to the conclusion that a contract was made nonetheless.²³)

6. *Peter Turnbull & Co P/L v Mundus Trading P/L, (1954) 90 CLR 235*

Buyer’s action for non-delivery of goods. The seller contracted to deliver oats in January-February in Sydney to a ship nominated by the buyer. The buyer nominated a ship early in January. At the end of that month he was informed of the seller’s inability to supply. The buyer had resold the oats and collaborated in efforts to persuade the sub-buyer to take delivery in Melbourne.

When these failed, the buyer bought oats from another source. In the event the ship nominated by the buyer did not reach Sydney in time for loading before the end of February. The seller relied on this as a failure of condition excusing performance on his part.

22 See 85 CLR at 28.

23 Cf *International Harvester Co v Carrigan’s Hazeldene Pastoral Co*, (1958) 100 CLR 644 at 653; *Trustee Executors & Agency Co Ltd v Peters*, (1960) 102 CLR 537 at 547, 548, 555, 556; *Godecke v Kirwan*, (1973) 129 CLR 629 at 637; *Sindel v Georgiou*, (1984) 55 ALR 1 (discussed at p49).

The majority (3:1) rejects this argument, but all judgments accept the proposition that failure of a condition necessarily excuses. Dixon: FLIGHT. (a) The seller dispensed with fulfilment of the condition by sufficiently manifesting an intention to accept the nominated ship notwithstanding its lateness. [245, 248] Kitto: FLIGHT. There was a 'continuing intimation that the condition need not be observed [251]' Taylor (dissenting): FREEZE. The logic of conditionality pre-empts that of waiver or forbearance [see esp 265].²⁴

7. *Bellgrove v Eldridge*, (1954) 90 CLR 62

The builder of a two-storey house used concrete not mixed according to contract; the house was unstable as a result. The owner sued for the cost of demolition and re-erection. The builder argued that as the house was saleable as it stood, the measure of damages must be the difference between the actual value and that contracted for. The court (Dixon, Webb, Taylor): FIGHT. What the builder proposed was only the prima facie measure. Where the item is not a commodity for which homogeneous substitutes are readily obtainable the cost of rectifying defects may be awarded, as long as this is 'a reasonable course to adopt [618]'. This is a double dose of Fight: (a) the measurement of damages by reference to the sale value of the performance actually is expressly made subject to displacement; (b) measurement based on the cost of making good must itself meet the standard 'that it must be a reasonable course to adopt. [618]'

8. *Brooks v Burns Philp Trustee Co.* (1969) 121 CLR 432

The executor company claimed the right to continue payments made by the deceased to his ex-wife under a deed by which he promised such payments and she covenanted to "accept the terms provided for by this Deed in full settlement of all claims against the husband for alimony and maintenance." The company argued that the wife's promise was illegal as ousting the court's jurisdiction and therefore void, and that the husband's promise failed equally, since a promise dependent on a void promise must itself be void. The majority (3:2) agrees. Owen: FREEZE. 'If the appellant's covenant was void the deceased's covenant failed with it [478].' Kitto: FREEZE. 'The husband's covenant and the wife's covenant were intended to operate reciprocally or not at all. [438]' Taylor: FREEZE. 'Where the entire consideration for one person's covenant is a covenant by the other party which is void there can be no severance. [443]' Menzies [dissenting]: FLIGHT. 'I accept that if a covenant by a husband is dependent on a void covenant by the wife the husband's covenant is itself unenforceable. [449]' But there was, after all, no ouster of the court's jurisdiction because of another clause in the deed [446, 449]. Windeyer (dissenting): FIGHT. 'We should avoid what Cardozo J once described as "the extension of a maxim or a definition, with relentless disregard of consequence, 'to a dryly logical extreme' ". [450]' 'I am unable to accept the proposition that simply because the appellant's covenant was not enforceable against her, her husband's covenant was unenforceable by her. [464]' 'Public policy prevented her abandoning the rights which statute gave her, but it did not require that she assert them.

24 Webb must be taken to be a mute concurrent with the majority; he deals only with a subsidiary argument not treated here.

While she kept her covenant, why should it be said that he was not bound by his? [465]' ²⁵

9. *Maralinga P/L v Major Enterpriese P/L*, (1973) 128 CLR 302.

Buyer's action for rectification and specific performance of a contract of sale of house and land. The contract, a standard form, provided for payment in full on completion. It also provided (cl. 23): "The property is sold subject to the demolition of all buildings . . . by the Vendor". The sale was by auction; the auctioneer described the printed form beforehand, including the terms above; but he also went on to announce, as additional terms, (a) that only \$75,000 would be required on completion, the vendor to take a mortgage for the remainder; (b) that demolition was at the buyer's option. The contract was presented to the buyer after the property had been knocked down to him; he queried cl. 23 and proposed a variation of it to ensure that the buyer had the right to refuse demolition (but apparently raised no query regarding the printed terms of payment). He was told: "There won't be any alteration. Sign it as it is or the deal is off." He signed, thinking that cl. 23 in fact allowed the buyer the option of preventing demolition, and that the oral term on finance overrode the printed form [342, 347].

The buyer's suit to have the contract performed as rectified by the substitution of the oral terms fails by majority (2:1). Both majority judgments apply the rule that rectification is available only where there has been a mistake as to the content of a document. Mason: FREEZE. 'The judge found that Mr Mutton when he signed the contract knew that it contained condition 23 and provision for payment of cash on completion. [348] The written instrument was not executed as the result of a mistaken belief as to what it contained. Mr Mutton was mistaken as to its effect but not as to its content. [350] The plaintiff does not displace the hypothesis arising from the execution of the written instrument, namely, that it is the true agreement of the parties. [351]' Menzies: FREEZE. 'The purchaser was given the option to sign or tear up the contract. There was just no evidence that he mistakenly thought that the written agreement accorded with the terms of the sale at auction. It may be that this is a hard case, but I have no doubt that the law as established does not provide for the relief claimed. [347]' (The semi-apologetic note struck here, with its implied reference to the maxim 'hard cases make bad law', is a recurrent feature of Freeze.²⁶) Barwick (dissenting): FIGHT. 'The form of the contract did not record the bargain which had been made between the parties. There is a clear case for rectification. [345-6]'

10. *ABC v APRA Ltd.* (1973) 129 CLR 99

APRA sued the ABC for royalties claimed to be due under a rise and fall clause in an agreement made in 1964. By the agreement the ABC contracted to pay to APRA, in return for performing rights, an annual amount of 2.3 pence per head of population, "subject to rise and fall by a percentage equal to the percentage movement in the cost of living in each financial year . . . [T]he percentage movement in the Consumer

25 In thus classifying this judgment as Fight I ignore, it must be admitted a good deal that is equivocal. Windeyer himself remarks, disarmingly: "what I have written is discursive, opinionated, perhaps turgid, certainly lengthy [476]".

26 See Maher, "Hard Cases in the Law" (unpublished).

Price Index . . . shall be taken for the December quarter . . . and compared with the previous December quarter, then where a variation is evident such variation shall be applied to determine the rate applicable for the then current financial year.”

On a literal reading this clause provided for the variation of a base sum, 2.3 pence per head of population, by the percentage movement in the cost of living *in that year*. This would not, however, serve the apparent purpose of the clause to provide a hedge against inflation: as long as the rate of inflation remained constant or declined, payments to APRA would not increase though money continued to decline in value. APRA therefore argued that the sum to which the CPI percentage should be applied was not “2.3p per head of population”, but an amount per head of population derived from dividing the total sum paid in the preceding year by the population total of that year; in this way the accumulative effect of inflation would be taken into account.

The court by 2:1 majority rejects APRA’s claim. The judgments nicely span the spectrum. Barwick: FREEZE. If a ‘result is produced by the words in which the parties have expressed themselves, it is no part of the function of a court to attribute an intention for which their express words do not provide. [105]’ [Cf 107] Stephen: FIGHT. He agrees that the literal meaning must prevail, but not as a matter of dogma: ‘Two corporations have determined, in unambiguous terms and in a formal document obviously prepared with legal assistance, their quite complex contractual relationship for a considerable term of years. The approach of courts to the construction of such documents, when they contain no ambiguity or any other patent error or omission, cannot be other than that of an uncritical rendering of the meaning of the text.’ [114-5]. In its careful delineation of context this plainly implies that the rule which gives pre-eminence to what the contract literally says need not infallibly apply. Gibbs (dissenting): FLIGHT. He accepts as dogma that unambiguous language must be applied, but proceeds to discover ambiguities: “in each year” does not mean “in that year” [110]; to say that the variation in the CPI “shall be applied to determine the rate applicable” suggests that more is contemplated than the mere variation of a constant base sum [111]. And ‘if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust [109]’. Thus dogma is at once acknowledged and avoided.

11. *Laybutt v Amoco Aust P/L*. (1974) 132 CLR 57

Another action for specific performance by an optionee. The defence was (a) that the grantor’s death invalidated the option, (b) that the option had not been validly exercised.

(a) Gibbs (only he deals expressly with this issue): FIGHT. ‘As a general rule, on death of a party to a contract his liabilities thereunder pass to his representatives. If it is correct to regard an option as a conditional contract for sale there is no reason why the ordinary principle should not apply. [71] I consider that an option to purchase (at least in a form similar to that in the present case) is a contract to sell on condition. [75]’ These statements are carefully composed: the phrases “general rule”, “ordinary principle”, “at least in a form similar”, allow the judgment to contain much technical analysis without generating Flight.

(b) The contract, in standard form, provided: “This option may be

exercised by notice in writing . . . to me/one of us* (*delete words that do not apply and initial) . . . and by payment to the said Agent . . . of the deposit". The grantor died four days after executing it. No agent was ever appointed. The optionee gave notice of exercise to the grantor's widow and paid the deposit to the solicitors for the estate. On these facts the argument was double-pronged: (i) Payment to the agent was required and the option could not therefore be exercised at all. *Menzies/Mason: FIGHT*. 'It is implied that payment will be made to the other contracting party, his successor and assigns. [65]' *Gibbs: FREEZE*. 'Those provisions of the option that relate to payment of the deposit are meaningless. Payment of the option appears essential to the exercise of the option. The meaningless words cannot be severed. There is no binding contract. [81-82]' (ii) Payment had not been made to the grantor or his successor, but to the solicitors for the estate. *Menzies/Mason: FREEZE*: The letter to the solicitors accompanying the cheque for the deposit stated that they were to hold it "as stakeholder, pending completion of the purchase". The payment, accordingly, was not a payment to the grantor, his successors and assigns. [65]

12. *Port Jackson Stevedoring P/L v Salmond & Spraggon (Aust) P/L, (1978) 139 CLR 231*.

The consignee of cargo sued the stevedore from whose store the cargo had been stolen. The suit was brought more than a year after delivery from the ship. The stevedore claimed immunity under a clause in the bill of lading providing for discharge of all liability "unless suit is brought within a year after the delivery". The court holds (a) 3:2 that a contract existed between stevedore and consignor²⁷, of which the clause was a part, but (b) 4:1 that the clause did not apply in the circumstances.

(a) If by the bill of lading the consignor had contracted with the carrier to hold the stevedore immune, why should it matter that no such contract existed between the consignor and the stevedore itself? The answer lies, of course, in the doctrine that A and B cannot confer the right to enforce their contract on C. *Barwick and Mason/Jacobs: FLIGHT*. All three decide that the stevedore is a contracting party. The judgments bear the traces of strenuous analysis so usual in cases of flight. The Reid stratagem (according to which the carrier is deemed to be the stevedore's agent if four prerequisites obtain)²⁸, a masterpiece of flight in itself, is given added dimension, in *Barwick's* case by resort to the notion of a non-promissory "arrangement" or "compact to provide an agreed consequence to future action [244]", in *Mason/Jacobs'* by resort to the presumption that 'proof of performance of the conditions to an offer by a person who knows of its existence will constitute prima facie evidence of acceptance. [270]'²⁹ *Stephen and Murphy: FIGHT*. In their refusal to evade application of the privity concept these judgments at first sight suggest *Freeze*, but in fact that concept is applied not

27 The consignee is, of course, treated (ironically by subversion sub silentio of the privity doctrine otherwise so firmly endorsed in this case) as entitled to stand in the consignor's shoes.

28 See *Scruttons Ltd v Midland Silicones Ltd*, [1962] AC 446 at 474.

29 *Barwick's* notion that the formation of a contract may be brought about by a self-executing prior arrangement has, however, a potential as such which ought not to go unacknowledged; it might, for instance, short-circuit the momentous lucubrations concerning offer and acceptance to be found in *MacRobertson Miller Airline Services v Commissioner of State Taxation*, (1975) 133 CLR 125.

dogmatically, but because it is appropriate to the context: Stephen openly considers the demands of "international commercial comity" as well as of the domestic public interest [258-9]; Murphy explicitly adopts these passages [285].

(b) By the bill of lading the stevedore was to have, "while acting in the course of or in connection with his employment", "every . . . immunity of whatsoever nature applicable to the Carrier". It was also provided: "Delivery ex ship's raile shall constitute due delivery . . . and the carrier's liability shall cease at that point". The consignee argued that even if the stevedore had the benefit of the bill of lading, immunity ceased along with the carrier's liability on discharge from the ship. As the goods here had been misdelivered from the stevedore's store some time after discharge, the stevedore was not protected. The majority accepts this argument; again this looks, at first sight, like *Freeze*, since the literal meaning is being applied. But of the three majority judgments none rests merely on the plain meaning rule; each makes some attempt to rest not merely on the words of the bill of lading but on the aptness of the chosen reading in the circumstances (esp at 266, 281, 286). This is true of Barwick's dissent as well: in a critical sentence "reasonable commercial expectation" is invoked first, "the language of the bill" second [252]. On this issue, therefore, the whole court, though not unanimous as to outcome, shows FIGHT.³⁰

13. *DTR Nominees P/L v Mona Homes P/L*, (1978) 138 CLR 423.

Buyer's action for a declaration that it had validly rescinded a contract for the sale of land, and for return of the deposit and damages. The seller argued valid rescission on its side. The buyer's rescission rested on the seller's failure to lodge the plan of subdivision annexed to the contract within 12 months as required. The seller's counter-rescission treated the buyer's rescission as unjustified and therefore repudiatory. The seller argued that the contract referred only to "the relevant plan", and that the relevant plan, one relating to an earlier stage of subdivision, had in fact been lodged.

The court holds: (a) The relevant plan was the annexed plan, so that failure to lodge it in time was a breach, but it was not such a breach as entitled the buyer to rescind. It was not breach of an essential term; nor was it repudiatory, as it proceeded from a bona fide interpretation of the contract. (b) But, though therefore the buyer's rescission was an anticipatory breach, the seller could not rescind either: 'A party to be entitled to rescind for anticipatory breach must be willing to perform the contract in its proper interpretation. Otherwise he could profit from his misinterpretation. [433]' (c) Though neither party had, then, validly rescinded the contract, neither 'intended that the contract should be further performed. The parties must be regarded as having so conducted themselves as to abandon the contract. [434]' In the result, neither party was entitled to a declaration or damages, but the deposit was returnable.

The reader of the majority judgment in this case is apt to be too dazed by the pyrotechnics of analysis which precede the ultimate descent of *deus ex machina* (in the form of the notion of abandonment by conduct) to apprehend the major premise on which it turns, and from

30 The decision of the High Court was overturned on appeal to the Privy Council, which adopted Barwick's dissent: (1980) 144 CLR 300.

which, in fact, it is taking FLIGHT. That premise is the notion that a justifiable rescission necessarily entitles the rescinding party to the normal fruits of rescission, for example return or retention of the deposit. A court treating this notion as a working rule (on the analogy of the rule that the right to rescind must itself be exercised conscientiously³¹) might have relied more directly on the salient fact that the parties were in bona fide dispute as to the meaning of the contract by making *this* the reason for returning the deposit, *even if* the seller's rescission was valid. This point applies equally, of course, to the buyer's justifiable rescission; hence Murphy's dissent, which rests on legitimation of the buyer's rescission, is equally FLIGHT.

14. *Codelfa Construction Pty Ltd v State Rail Authority of NSW*, (1982) 149 CLR 337.

Codelfa contracted to excavate two tunnels for the Authority at a specified price, to be completed within a specified period. Both parties assumed that Codelfa would work three shifts a day, and at least six days per week; the methods and programmes agreed on could not otherwise be implemented [397]. Both parties also assumed that the noise and disturbance generated by the works could not be restrained by private action because of statutory immunity [398]. In this they proved mistaken; residents succeeded in obtaining injunctions restraining Codelfa from working continuously. Codelfa was given an extension of time under the contract, but the Authority resisted Codelfa's claim for additional payments in respect of added cost and lost profit. Codelfa's claim to such payments was put on three grounds: (a) There was an implied term that if Codelfa should be restrained by injunction from working continuously the Authority would compensate it. (b) The contract had been frustrated and Codelfa was entitled to a reasonable sum for work done. (c) A rise and fall clause applied.

(a) Implied term. Only three of the five judgments offer explicit analysis of this issue. (Stephen agrees with Mason, Wilson with both Mason and Aickin). All three agree that whether a term should be implied depends here on two separable factors: (i) the admissibility of evidence of the parties' assumptions as manifested in their pre-contractual negotiations; (ii) satisfaction of the criteria of implication.

(a)(i) Brennan: FREEZE. 'Where the term propounded is said to be implied in a contract, that term must inhere in its express terms. Reference to extrinsic circumstances is permissible only to construe the contract and to understand its operation. [402]' The often-heard counterpoint of Freeze is not missing: 'Refusal to go outside the four corners of a contract may be productive of hardship in particular cases. But the remedy is not to apply some inevitably imprecise notion of what is fair or reasonable to alter what the parties have agreed. The court simply gives effect to their agreement, and leaves in their hands the arrangements which must be made for their protection. [406-7]' Mason: FLIGHT. Evidence of prior negotiations is admissible insofar as it establishes 'objective background facts known to both parties and the subject matter of the contract. But statements and actions of the parties reflective of their actual intentions and expectations are not receivable. [352]' Here the evidence was of the former and not of the latter kind,

31 See *Godfrey Constructions P/L v Kanangra Park P/L*, (1972) 128 CLR 529; *Pierce Bell Sales P/L v Frazer*, (1973) 130 CLR 575.

and was therefore admissible. But this course of analysis only reconstitutes the dogma, in narrower form it is true, but without any indication that the rules governing the admissibility of extrinsic evidence are working rules only. Aickin: FIGHT. Though Aickin makes no explicit reference to the question of admissibility, his short discussion of the implied-term issue is consistently pragmatic in tone (see below), and the query which he would prefer to put to the officious bystander, “What will be the position if the Authority’s legal advice about immunity is wrong?”, clearly incorporates the extrinsic facts at stake.

(a)(ii) Mason: FLIGHT. The term to be implied must be ‘necessary to give the contract business efficacy and so obvious it goes without saying’ [354, also 346-7], criteria which must count as standards and therefore as producing a working rule. Here “necessity” might be present [see esp 355], but no term went without saying: ‘negotiation might have yielded any one of a number of alternative provisions, each being reasonable [ibid]’.

Aickin: FIGHT. As has already been noted, Aickin’s discussion of the implied term issue is notably in the spirit of working rule. His criterion of implication is the “officious bystander”, but he is careful to note that this is not “the exclusive means of approaching the question” [374], that there is room for implication even in the case of standard form contracts [ibid], and that for the purpose of the exercise the parties must “be considered to be “reasonable men” and not subject to such human failings as pride of authorship or sudden caution” [ibid]. His ultimate refusal to imply a term rests, like Mason’s, on the number of equally plausible alternatives which might be put forward. Brennan: FIGHT 80%, FREEZE 20%. Although Brennan, as we have seen, refuses to admit the extrinsic evidence on which implication of a term rested in this case, he nevertheless goes on to consider the criteria of such implication, adopting all five rules put forward by the Privy Council in *BP Refinery (Westernport) P/L v Shire of Hastings*.³² Two of these employ the standards “necessary to give business efficacy” and “so obvious that it goes without saying” with which we are already familiar; two more also employ standards (“must be reasonable and equitable”, “capable of clear expression”); thus far we are concerned, therefore, with working rules. Only the fifth rule, requiring that the implied term “must not contradict any express term of the contract”, amounts to dogma: hence once fifth of Brennan’s analysis here must be counted Freeze.

(b) Frustration. FIGHT. Although the court’s decision that the contract had been frustrated was not quite unanimous, the dissenting opinion (Brennan) and the majority agree on the test to be applied: that there must be such a change in circumstance as to render the performance a thing “radically different” from that which was undertaken.³³ “Radical difference” is, of course, a standard, and the rule therefore a working rule.

32 (1977) 52 ALJR 20 at 26; these rules were adopted by the High Court in *Secured Income Real Estate (Aust) Ltd v St Martins Investments P/L*, (1979) 144 CLR 506 at 606.

33 This is the Radcliffe formula: see *Davis Contractors Ltd v Fareham Urban District Council*, [1956] AC 696 at 729. It is here adopted expressly by Mason [357], Aickin [380] and Brennan [408]. It had previously been adopted by Stephen in *Brisbane City Council v Group Projects P/L*, (1979) 145 CLR 143 at 160.

(c) Rise and fall clause. This provided for variation of the contract price if the contractor's cost rose or fell because of changes in standard wages, hours or conditions of employment; calculation of the adjustment was to be based on the "value of the uncompleted portion of the contract", determination of which was, subject to some qualifications, left to be "determined from time to time by the Engineer." Codelfa argued³⁴ that the value of the uncompleted portion at any given time must be determined so as to incorporate any previous escalations of the contract price by virtue of the operation of the clause. Aickin (with whom Stephen, Mason and Wilson agree): FIGHT. In accepting Codelfa's argument Aickin relies on a passage from the judgment appealed from, according to which Codelfa's interpretation of the contract is the one 'which the words of the clause considered *in their context* [my emphasis] most readily yield, consistent with business expectation [389]'. Moreover, an absurdly literalistic infinite regress suggested by the Authority is rejected as departing from common sense [390]. Brennan: FREEZE. Since the engineer's only available referent for calculating the value of the uncompleted portion was the schedule of item rates and sums according to which the contract price was to be computed, and the contract did not provide for a variation of those rates and sums, they fell to be applied on each occasion on which the rise and fall clause was activated [412-3].

15. *Legione v Hateley* (1983) 57 ALJR 292

Buyers' action for specific performance of a sale of land. The buyers had gone into possession (and built a house) after payment of the deposit under a contract which required the balance after a year. The buyers did not pay on the due date, 1 July. On 26 July the sellers, acting under a default clause in the contract, gave 15 days' notice of rescission, expiring on 10 August. On 9 August the buyers' solicitor telephoned the seller's solicitors. He was put onto Ms. Williams, a partner's secretary, as acting in the matter. He told Ms. Williams that the buyers had arranged finance and that the bank would be ready to settle on 17 August. Ms. Williams said "I think that'll be all right but I'll have to get instructions." On the same day the buyers' solicitor wrote referring to the telephone conversation, confirming 17 August as settlement day, stating the amount to be paid, and concluding: "Kindly confirm that the above is in order." On 14 August the seller's solicitors wrote saying that the contract was rescinded. According to the buyers' solicitor funds could and would have been made available on 10 August but for Ms. Williams statement.

The buyers conceded that the sellers had a legal right to rescind under the default clause, but argued (a) that the notice of rescission was invalid because it claimed too much interest, (b) that the sellers were estopped in equity from exercising their legal right, (c) alternatively that in equity the buyers were entitled to specific performance by way of relief against forfeiture.

(a) Gibbs/Murphy, Brennan (Mason/Deane do not mention the point):

34 *Codelfa* also made other arguments concerning the scope of the rise and fall clause, not here treated because the court's response, equally characterized by close textual analysis and abstention from explicit dogma, is unclassifiable in terms of my categories.

FIGHT. The dogma in issue here is that a notice of rescission must be formally correct in every detail, so that even where it correctly specifies a default entitling to rescission, the incorrect specification of an additional default is invalidating.³⁵ The High Court in *Green v Sommerville*³⁶ had in 1979 by majority³⁷ rejected this dogma, a rejection which must be construed as Fight. Gibbs/Murphy: ‘We [do] not consider it appropriate to allow this question, so recently decided in this Court, to be reopened. [296]’ Brennan’s more fleeting reference to *Green* [311] is clearly in the same vein.

(b) FLIGHT. Attentive readers will have noted that history contrived to make pass a quarter century (near enough) before Dixon’s bird came home to roost: Legione raises squarely for decision the issue of his hypothetical case, examined at the outset of this paper. For the renunciation of part of a debt by the creditor is exactly analogous to an extension of time for its due payment (which is what the postponement of rescission in this case amounted to): both are voluntary abstentions from the exercise of a legal right arising from non-payment, and precisely for that reason appear, if considered as promises to refrain, to be gratuitous. Dixon’s flight paths, it will be recalled, were (a) the discovery, by appropriately ingenious analysis, of some forbearance on the part of the promisee which would, after all, supply consideration; (b) resort to estoppel, via erosion of the fact/promise distinction if required. The High Court of 1983 goes for estoppel, though in the form which has become known as “equitable estoppel” or “promissory estoppel” (which has the virtue of eliminating the knotty problems posed by the fact-promise distinction). Although the majority decides that on the facts no estoppel arose (because Ms. Williams’ statement could not be read as conferring an extension), all five judgments acknowledge the doctrine of equitable estoppel to be part of Australian contract law.³⁸

(c) The sellers’ main argument was that equity did not grant specific performance where (as here) the buyer had failed to perform in time an obligation in a contract which made time of the essence. This argument, based on decisions of the Privy Council,³⁹ attempts to construct an enclave of dogma into which equity shall not reach. Gibbs/Murphy: FIGHT. ‘A court of equity will grant specific performance notwithstanding a failure to make a payment within time if there is nothing to render such an order inequitable. The fact that time is of the essence generally makes the grant of specific performance inequitable. Nevertheless on principle we see no reason why such an order should not be made if it will prevent injustice. [300]’ The nuance of Fight could not be struck with greater economy. Mason/Deane: FIGHT. ‘The result of

35 “The notice must be framed in strict conformity with the vendor’s rights.” *Green v Sommerville*, (1979) 141 CLR 594 at 613, per Wilson J (dissenting). See generally Butt, “The Modern Law of Notices to Complete” (1985) 59 ALJ 260.

36 (1979) 141 CLR 594.

37 The majority view on this point actually consists of a cursory pronouncement by Mason [607], in whose judgment Murphy and Aickin concur without comment, set against the explicitly dissenting views of Barwick [600] and Wilson [613], quoted in note 35 supra].

38 Gibbs/Murphy and Mason/Deane explicitly [296-7, 302]; Brennan must be taken to do so implicitly [311]. For comment on the case, see Morgan, “A Comparative Analysis of the Doctrine of Promissory Estoppel,” (1985) 15 MULR (forthcoming); Lindgren and Nicholson, “Promissory Estoppel in Australia” (1984) 58 ALJ 249.

39 *Steedman v Drinkle*, [1916] 1 AC 275; *Brickles v Snell* [1916] 2 AC 599.

the [Privy Council] decisions was an inflexible rule that specific performance will never be granted where there is a breach of an essential condition. A preferable course is to adjust the availability of the remedy so that it becomes an effective instrument in situations in which it is necessary to relieve against forfeiture. The rule would then be that it is only in exceptional circumstances that specific performance will be granted at the instance of a purchaser in breach of an essential condition. Whether exceptional circumstances exist in a given case hinges on the existence of unconscionable conduct. It is impossible to define or describe exclusively all the situations which may give rise unconscionable conduct of a vendor in rescinding. [309]’ The nuance of *Fight* could not be struck more emphatically or comprehensively; this passage might, indeed, serve as a paradigm of the transformation of dogma into working rule. Brennan: FREEZE. ‘There is no equitable jurisdiction to relieve against failure to pay by the due date when the parties have agreed that the time of payment is of the essence. The purchaser has lost the expenditure which she outlaid in putting a dwelling on the land. The appellants have obtained the benefit of that expenditure, but that circumstance does not sterilize the stipulation that time should be of the essence. [313]’ (But the judgment trails an olive branch of potential Flight in its last sentence: ‘Perhaps it should be mentioned that the respondent sought no remedy for unjust enrichment, and therefore that question has not been considered [ibid].’)’

16. *Commercial Bank of Australia v Amadio*, (1983) 57 ALJR 358.

Action to set aside a guarantee and mortgage executed by the respondents in favour of the bank. The primary argument was that the bank had acted unconscionably, and that the court has the power in equity to set aside any contract on this ground.

The power of the court to set aside a contract for unconscionability is a formal touchstone of any law of contract. Its open recognition orients the entire apparatus of doctrine: it might be said, in fact, that with a single shift of gear that apparatus is thus made a “working system”, and every rule within it a “working rule”. Its antithesis is, of course, the proposition that a contract freely entered into⁴⁰ must be enforced by the court.⁴¹

“Unconscionability” (or its synonym “unconscientiousness”) may seem the quintessential standard, and the equitable discretion to set aside a contract the quintessential working rule, but everything depends, of course, on whether the ambit of that discretion is unfettered, and the criterion “unconscionability” is preserved as a true residual category, potentially applicable in any context; any qualification or confinement in this respect amount to FLIGHT. And all members of the court in *Amadio* in fact take FLIGHT in this sense, by requiring the presence of “disadvantage”. Gibbs: ‘A transaction will be unconscientious only if the party seeking to enforce the transaction has taken unfair advantage of

40 The notion of voluntariness in contract, on which this principle hinges, has, of course, been subjected to increasing scrutiny in recent times. See, eg, Kronman, Contract law and distributive justice (1980) 89 Yale LJ 472 (esp 477ff); Eisenberg, “The bargain principle and its limits” (1982) 95 Harvard L Rev 741.

41 “Where parties have agreed the court will not refuse specific performance on the ground of unfairness”: *Axelsen v O’Brien*, (1949) 80 CLR 219 at 226 (per Dixon J); cf *Huppert v Stock Options of Australia P/L*, (1965) 112 CLR 414 at 427-30.

superior bargaining power, or of disadvantage in which the other was placed. [362] Here the bank was disentitled from enforcing the mortgage not because of unconscientiousness, but because it had failed to make relevant disclosures to the respondents. Mason: 'Unconscionable conduct is unconscientious use of superior position to the detriment of a party who suffers from some special disability or is in some special situation or disadvantage. [363] Here the respondents were in such a situation by virtue their reliance on their son and their infirmities. [364] Deane (with whom Wilson agrees): 'Unconscientious dealing looks to the conduct of the stronger party dealing with a person under a special disability. [389] Here 'Mr and Mrs Amadio were the weaker party to the transaction. The result of the combination of their age, their limited grasp of written English, the circumstances in which the bank presented the document to them, and their lack of understanding of the contents, was that they lacked assistance where assistance and advice were plainly necessary. [370] Dawson (dissenting): 'What is necessary is exploitation by one party of another's position of disadvantage. [375] Here nothing had indicated to the bank that the plaintiffs were 'ignorant, decrepit, senile or ill-informed [ibid]'. Such statements are not affected by ameliorative concessions, contained in all of the last three judgments, that the circumstances which may induce a court of equity to set aside a transaction are various and cannot be satisfactorily classified [363, 369, 375]; once disadvantage or disability are required components, the power of the court to act on unconscionability is no longer at large.

17. *Thomas v Hollier (5 June 1984, unreported)*

Hollier sued on the following instrument, handwritten and signed by Thomas: "I owe Neale Hollier the sum of forty eight thousand two hundred and ninety six dollars and seventy one cents (\$48296.71). Payable on demand." Hollier's case was that the document evidenced a contract by Thomas to assume personal liability for a debt owed by his company to Hollier's company arising from the sale of a business by the latter to the former. Thomas argued that there was no consideration. None of the three judgments show any inclination to treat the requirement of consideration as a working rule. Mason/Wilson: FREEZE. We are unable to find any consideration for the personal promise given by the appellant. [13] Brennan: FLIGHT. The document did not amount to any undertaking at all, hence the issue of consideration did not arise [see 16 esp]. Gibbs (dissenting): FLIGHT. Consideration could be found with the help of a double dose of inference: 'On the evidence the proper inference to be drawn was that the appellant agreed to assume liability for the debt formerly owed by the purchaser [company] . . . There is no direct evidence that the respondent gave any promise in return, but it is inconceivable that either party intended that the purchaser should remain liable once the appellant assumed liability. It can readily be inferred that the parties agreed to replace inter-company liability with inter-personal liability. [5]'

18. *Sindel v Georgiou, (1984) 55 ALR 1. (Also 58 ALJR 515)*

Action for specific performance by the buyer of land. The seller's major points were: (a) No contract had been concluded as the counterparts signed by the parties differed in material respects. (b) Alternatively, the contract had been terminated (i) by the buyer's failure to comply with a notice to complete, (ii) by notice of termination following the buyer's repudiation. The court (Mason, Murphy, Wilson,

Brennan, Dawson): (a) FIGHT. The court rejects any hard-and-fast rule that exchange of two (even materially) identical copies of the contract is crucial to the formation of a contract. 'We must take account of the real intention of the parties, giving due weight to their objective — the making of a binding contract by means of the exchange of parts. [6]' (b)(i): FIGHT. Failure to comply with a notice to complete does not necessarily bring the contract to an end; here the notice had not allowed a reasonable time. (b)(ii) FIGHT. The seller relied on the buyer's procrastination, but delay gives the other party the right to terminate the contract only if 'so gross and protracted as to amount to repudiation [7].' The seller also relied on a letter from the buyer's solicitors, enclosing a copy of a letter from a finance company stating that a loan had been approved "subject to funds being available, and at the discretion of the Company": this, he argued, showed that the purchaser intended to complete the contract if and when it could obtain finance, and not otherwise. The court refuses to apply the terms of the letter literally, reading its enclosure as carrying no repudiatory intent, but 'as a statement that the purchaser was taking steps to complete the contract, albeit at a pace unacceptable to the vendor [8]'

SECTION 3

"Know the male but keep the female." Lao-tzu⁴².

In this section I make some brief generalizing remarks; although they are not, by and large, explicitly linked to the case analyses given above, they should nevertheless be understood as arising from the experience of compiling those analyses.

Freeze

Freeze and flight belong together, since both start with the authentication of some dogma. But Freeze is adherence to dogma without amelioration (even if necessity is often invoked, and regret sometimes implied). The absolutist conception of law thus enacted has, of course, an ancient history, and cannot be discussed merely as a matter of legal theory, but leads unavoidably to fundamental issues of self and civilization.⁴³ In an age in which there is not only no diminution in the bloodletting traditionally sanctioned by law (whether by individual execution, so quaintly labelled "capital punishment", or by more collective measures, as in the officially sanctioned oppression of race or class), but in which the threat of global nuclear or ecological disaster is daily enhanced by activities which are impeccably lawful, it is legitimate to ask whether habits of mind grounded in the transmission of dogma have not become anachronistic. Such habits affect not merely the process of law, but the social consciousness. The excesses of Nazi Germany, which are so surprising when considered against that country's rich cultural tradition, have been plausibly attributed to the degree to which the concept of authority had come to be institutionalized, and

42 Lao Tzu, *Tao Te Ching I*, 28. My conflation of this passage most resembles the translation by D C Lau (Penguin, 1963) 85.

43 Thus in ancient Mesopotamia "an orderly world is unthinkable without a superior authority . . . The Mesopotamian feels convinced that authorities are always right: The command of the palace . . . cannot be altered. The king's word is right; his utterance, like that of a god, cannot be changed." Frankfort, Frankfort, Wilson and Jacobsen, *Before Philosophy* (Pelican, 1946) 218. See also Ehrenzweig, *Psychoanalytic Jurisprudence* (1971) 146 ("The hopeless craving for the absolute").

disseminated among the broad majority.⁴⁴ A similar process can be observed at work in some contemporary societies (eg. South Africa).

It cannot, of course, be denied that the application of dogma can produce desirable effects in a particular context, but, as Schopenhauer prophetically pointed out to his country, while dogma has indeed a powerful influence on external action, on inner virtue it has none: "On virtue, that is goodness of mind, abstract dogmas have indeed no influence: the false ones do not disturb it, and the true ones hardly further it."⁴⁵ Is it fanciful to strike such a note in an essay on contract law? It does not seem so when one recalls the bloody struggles which have historically attended the transfer of property and services, a process which the law of contract is supposed to regulate in the name of peace and order based on right.⁴⁶

No rule of contract law that I have come across has seemed safe to elevate to the rank of dogma. Dogmas defended by majorities in the cases above include the following: that consideration is necessary to make a promise binding (*Legione, Thomas*); that an option is not binding if the price is still to be agreed (*Prior*), or if the offer and its acceptance do not match exactly (*Cavallari*); that unambiguous language must be applied literally (*ABC, Laybutt*); that failure of a condition or of an interdependent promise excuses performance (*Peter Turnbull, Brooks*); that contracts can be enforced only by the parties (*Port Jackson*); that rectification is available only where there has been a mistake as to which words the writing contains (*Maralinga*); that specific performance is not available for contracts for services (*Suttor*); that contracts are set aside in equity only if one party was disadvantaged (*Commercial Bank*). Any of these doctrines may be applied so as to cause injustice between parties, and any substantial survey of cases will uncover instances of their rejection or evasion. In only two of the instances just given was the majority united in Freeze; in all the others it was a majority augmented by Flight. These factors indicate that fact situations arise in which these principles do not work. It is, indeed, trite to say no rule can be expected to provide the right solution for every problem. In our century (as it is now trite to point out) a major revolution in our conception of physical reality has restored an ancient conception of it as flux rather than fixity, as dynamic rather than static, as evolving rather than finally formed.⁴⁷ In the face of a thoroughly dynamic conception of physical reality it seems somewhat archaic to regard the tangibles of a mental universe (such as a collection of rules) as inherently static. And it is, in fact, not difficult to detect the archaic flavour in some of the dogmas listed earlier. Thus the requirement that offer and acceptance must match

44 For example, in Shklar, *Legalism* (1964) 16 (et ubiq).

45 Schopenhauer, *Die Welt als Wille und Vorstellung I*, (Zurich edition, 1977) 457.

46 That there is only a short step from, say, the literalistic interpretation of contracts to strict adherence to the letter of the law in matters of social morality is demonstrated by the use of the word "legalism" so as to cover both cases; thus Blackshield, supra, n 14 at 137, contrasts "a 'purposive' or 'expansive' or 'social engineering' approach to interpretation . . . of legal instruments with 'strict and complete legalism'", while for Shklar, supra, n 44 at 1, legalism "is the ethical attitude that holds moral conduct to be a matter of rule following".

47 See Capra, *The Tao of Physics* (1975) esp ch 13; Capra, *The Turning Point* (1982). The implications for philosophy of the transition from the Newtonian to the post-Einsteinian world-view have, of course, been explored at length by Karl Popper; for a convenient summary, see Magee (ed), *Modern British Philosophy* (1973) 92-5.

exactly reminds one not only of the medieval indenture, but of considerably more ancient Chinese practice: "The terms of a contract or agreement were inscribed on a slip of wood, which was then divided into two, each party having one half of it. At the settlement, if the halves perfectly fitted to each other, it was carried through."⁴⁸ A similarly primitive cast of mind is reflected in many of the rules relating to such concepts as consideration, condition and privity.

Flight

If doctrine must be accommodated, without open resort to the qualifications which are permitted when only working rules are involved, ingenious or even merely diligent analysis will recommend themselves as tools towards the desired outcome. In this vein, it will be recalled, Dixon thought the problem of the reneuing creditor best solved not by open assault on the notion that consideration for his promise was required, but by discovering a latent consideration, or by lateral resort to estoppel. In either case, however, the preservation of dogma has a discernible cost. It is the etiolation of meaning. If consideration can be found in an implied promise to refrain from any action or inaction legally open to the promisor, then consideration is very nearly a formal requirement only, for in most situations only a modest ingenuity will suffice to uncover such a promise. Similarly, if parties who agreed to the substitution of a smaller sum thereby "concurred in adopting the assumption that the lesser sum was in fact nominated in the earlier obligation", then the boundary between promise and assumption of fact has become hopelessly blurred.⁴⁹

A similar blurring of boundaries occurs in many of the Flights recorded in Section 2. The cases document close distinctions between a price to be fixed by, and one based on, valuation (*Prior*), employing and entering into a deed of employment (*Sutor*), wholly and partly stipulatory sentences (*Cavallari*), plain and ambiguous meaning (*ABC*), objective background facts and parties' expectations (*Codelfa*), acknowledgement of indebtedness and promise to pay (*Thomas*); they demonstrate the pitfalls of exercising an option (*Cavallari*, *Laybutt*); they shift smoothly from descriptive to prescriptive use of concepts ("condition", *Peter Turnbull*; "privity", *Port Jackson*), and from fact to presumption (*Port Jackson*) or inference (*Thomas*). Dixon's recommendation of Flight is based on its suitability for fulfilling "the combined purpose of developing the law, maintaining its continuity and preserving its coherence".⁵⁰ But if the result of this technique is to exhaust the categories of contract of meaning, then coherence and continuity have been preserved only in form, a form which may in fact conceal quite radical interior alterations.⁵¹

Analytical ingenuity and diligence, moreover, make for a sometimes overwhelming technicality in exposition. Any reader who has, for instance, trod the labyrinth of *Legione* on equitable relief against

48 Legge, *The Texts of Taoism I*, (1891) 121.

49 Ironically Dixon himself notes: "Equity once began to develop a doctrine of making representations good, but it was afterwards condemned as an attempt to find a promissory obligation where there was no contract." Dixon, *supra* n 5 at 160-1.

50 Dixon, *supra* n 5 at 164.

51 See, for example, Gilmore's account of the genesis and development of s 90 of the Restatement of Contracts: Gilmore, *supra* n 1 at 60ff.

forfeiture, or attempted the byzantine complexities of *Codelfa* on the meaning of the rise and fall clause in that case, will have no difficulty in understanding what one commentator meant when referring to “the court’s aridly formalistic approach”.⁵² Certainly the litigants themselves, supposing them inclined to try, would be hard put to make sense of those passages, or to relate them to the actualities of their dispute.⁵³

There is a paradoxicality in such exegetical Flights. If contract doctrine is indeed a matter of such great subtlety and complexity, favouring lateral evasion above linear confrontation, one might expect a certain reluctance to put forward any kind of dogma. For, as Freud once wrote, “We have no other way to give an account of complicated adjacencies [Nebeneinander] but that of sequential description, and for that reason our expositions all suffer from the outset from biased simplification, and fall to be augmented, built on, and so corrected.”⁵⁴

Fight

Taking Corbin’s notion of the status of contract rules seriously seems at first sight to introduce a disconcerting fluidity into an area of law in which “certainty” is often considered to be peculiarly important.⁵⁵ But his theoretical stance did not prevent Corbin from stating the law with exemplary clarity. The truth is that a rule the ambit of which is conceded in course of evolution is not thereby deprived of content. Nor is it more uncertain in operation than a rule which, though absolute in tenor, is (as a result) in constant jeopardy of being sidelined by Flight. It is Flight, in fact, which induces the greater uncertainty: as Llewellyn famously remarked, “Covert tools are never reliable tools”.⁵⁶ Dixon himself, one suspects, placed no great hope in the capacity of his method to operate predictably: he once gave it as his view that in the High Court “It is not case law which determines the result; it is a clear and definite solution, if one can be found, of the difficulty the case presents — a solution worked out in advance by an apparently sound reconciliation of fact and law.”⁵⁷ In this truly sybilline utterance the words “if one can be found” and “apparently” succeed in further veiling a substance itself indefinite enough.

As the cases exhibited above show, a good deal of contract law is, in fact, already stated in the form of working rules.⁵⁸ It is difficult to see how case-law systems can survive on any other basis. It is precisely this quality which distinguishes them from statute law. Faced with a statutory obstruction to an outcome which it favours, a court can only resort to Flight; it cannot very well declare that the statute contains only working rules.⁵⁹ It can (and does) adopt this approach when applying case-law.

The conception of contract law as a collection of working rules serves the best interests of both theory and practice. If indeed it is endemic of

52 Stewart, Book review, (1984) *Adel L Rev* 307.

53 Complexity of doctrine may also affect litigants adversely by causing delay and added cost in the preparation and administration of the case. Attempts to reduce delay and cost seem often to focus exclusively on procedural reform.

54 Freud. *Abriss der Psychoanalyse* (1953 Fischer ed.) 59.

55 Thus Pound thought the use of standards less appropriate to commercial and property law: *supra* n 19 at 70.

56 Llewellyn. *The Common Law Tradition* (1960) 365.

57 Address on first presiding as Chief Justice at Melbourne, Dixon, *supra* n 5 at 251.

58 My sample of cases is too small to allow for reliable generalization, but, for what it is worth, records 25 instances of Fight, 18 of Flight, and 15 of Freeze.

lawyers to think in terms of systems of rules,⁶⁰ such a habit is made more tolerable by this conception. It encourages counsel to formulate issues not merely in terms of existing authority.⁶¹ It allows the court to be flexible without defiance of authority *or* resort to conceit. It allows judges (and para-constructors of doctrine, such as authors) the exercise not merely of diligence and ingenuity, but of imagination. It rescues case-law from the monopolization of technocrats, and preserves it as a human artefact.

59 For instance, in *McRae*, discussed above at p 37, the court shows Flight on all issues of common law, but Flight when confronted with the Goods Act 1928 (Vic.). Section 11 of that Act provided (as s 11 of the 1958 Act still provides) that where unknown to the seller the goods had perished at the time of contract the contract was void. The court holds the section inapplicable: "Here the goods never existed. [411]" This could not only be asserted only by way of inference, but postulates a distinction which defies common sense. In some areas judges have shown a quite conscious desire to exercise their ingenuity "to get round, or out of, the legislator's 'clear' language": Lord Wilberforce, "A Judicial Viewpoint" in Attorney-General's Department, *Symposium on Statutory Interpretation* (1983) 5 at 7.

60 See Wallace. "Current problems in legal theory" (1978) *Monash Univ L Rev* 230 at 238.

61 In his paper, "The role of Counsel and Appellate Advocacy" ABA Annual Conference, (1984). Mason J in criticizing current standards of advocacy by counsel in the High Court, said: "Persuasion calls not only for mastery of the materials but also for an element of constructive imagination and boldness of approach." See (1984) 58 ALJ 479.