BOOK REVIEWS

THE LAW OF CONTRACT, by G. H. Treitel, B.C.L., M.A. Third edition. London. Stevens & Sons 1970. Liii plus 884 pp. (including index). New Zealand price, $10.30 (bound), $6.65 (limp).

The second edition of this book was published in 1966 so that in this new edition much rewriting has been necessary to take account of recent developments (resulting, incidentally, in an increase in length from 723 to 884 pages). For example, the decisions of the House of Lords in *Beswick* v. *Beswick* [1968] A.C. 58, *Koufos* v. *Czarnikow* (*The Heron II*) [1969] A.C. 350, and *Esso Petroleum Ltd.* v. *Harper's Garage* (*Stourport*) *Ltd.* [1968] A.C. 300 have led respectively to changes in the treatment of privity of contract (Chapter 15), remoteness (Chapter 22) and the restraint of trade (Chapter 11). Account has also been taken in Chapter 9 of the Misrepresentation Act 1967.

The passages dealing with fundamental breach have, of course, had to be altered in the light of *Suisse Atlantique Société d'Armement Maritime S.A.* v. *Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361. Predictably in view of his note on that case in (1966) 29 M.L.R. 546, Mr Treitel's book expresses a restrictive view of its effect. The report of *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank Co. Ltd.* [1970] 2 W.L.R. 198 must have come too late to be incorporated in the text and it appears only in footnotes. So far as the effect of discharge by breach on exception clauses is concerned, this can have made no difference since Mr Treitel had already (both in his Modern Law Review notes and in the text at page 196) anticipated the result of that case. On the other hand, the statement on page 731 that "A breach which justifies repudiation does not, however, automatically determine the contract" calls for more than a footnote reference to *Harbutt's "Plasticine"* and would no doubt have received it had the report been available in time. In that case, Lord Denning M.R. makes the point that, in the ordinary case, destruction by fire would have frustrated the contract and terminated it automatically. Ought it, as it were, to be revived and have to be terminated by the one party just because, years afterwards, the frustrating event is found to have been caused by the default of the other of them? As against this argument, one can think of cases of frustrating breach where the presence of fault would be immediately apparent and where to hold that the contract had terminated automatically might work injustice to an injured party who, despite the frustration, wished to affirm. How would all this fit in with received ideas about self-induced frustration? The point needs to be thought through, particularly if, as Mr Treitel seems to imply (pages 687-702), discharge by the effects of breach always involves frustration.

In a subject like contract, there is plenty of scope for disagreement and it is no criticism of a text book that one might oneself treat differently subjects like mistake, illegality and exception clauses. Other, smaller, points come to mind. Is it, for example, self-evident that an adult party can recover moneys paid to an infant on grounds of total failure of consideration (page 482)? The summary dismissal on page 548 of a suggestion, in a note by Professor C. J. Hamson, of a way in

which vicarious immunity can be explained, quite misses the point because it focuses on the act rather than on its legal consequences. Again, is any account (pages 741-745) of the development of the doctrine of frustration adequate which makes no reference to the nineteenth century cases on the "frustration of the adventure"? And is it fair to rest the case for the implied term theory of frustration on Lord Loreburn's version of it (pages 779-780)? Does Lord Reid's rather tentative suggestion that there may be an equity which requires a "substantial or legitimate interest" in the enforcement of a remedy justify the limitations confidently placed (at page 734) on *White and Carter (Councils) Ltd.* v. *McGregor* [1962] A.C. 413?

A passage which the author might perhaps look at again when he comes to prepare the next edition is the section on pages 710-712 headed "Rescission of Executed Contracts for 'Fundamental Breach'." The section starts with the statement that where a fundamental breach is of the nature of a breach of condition the right to rescind for breach may be lost by "execution" of the contract, as by "acceptance" of defective goods. But where the fundamental breach constitutes a "performance totally different from that which the contract contemplates", execution of the contract, it is stated, is not necessarily a bar to rescission. Three examples are given.

The first is *Dakin* v. *Oxley* (1864) 15 C.B. (N.S.) 646 where it was said (page 667) that freight would not be payable to a charterer where "a valuable picture had arrived as a piece of spoilt canvas, cloth in rags, or crockery in broken shreds, iron all or almost rust, rice fermented or hides rotten." This case can be understood only in the context of liability for freight generally. The ordinary rule is that freight is payable contemporaneously with delivery. No freight is payable if the goods are not delivered and this is so even if they have perished by inherent vice or other cause beyond the control of the carrier. The problem with which *Dakin* v. *Oxley* was concerned was whether goods which have ceased to exist for any commercial purpose must be taken to have "arrived" or been "delivered" so as to incur liability for freight. The answer was that there was no such liability. But the reason was not that an executed contract could subsequently be rescinded but simply that the contract had not been executed in the first place. The second example given is of the delivery of peas rather than beans under a contract of sale, it being said that in such case the buyer will not lose his right to rescind *merely* because his conduct amounts to "acceptance". The authority cited is the famous dictum of Lord Abinger in *Chanter* v. *Hopkins* (1838) 4 M. & W. 399, 404, a passage in which that learned judge was trying to make the rather different point that claims for failure to comply with the contract description of goods ought to be brought in contract rather than in the tort of warranty. In any event, there can be no question of repudiation after an actual acceptance. The problem raised in the text only arises because acceptance can be deemed to have taken place in certain circumstances under the Sale of Goods Act and so would appear to be one, essentially, of statutory interpretation. The third example given is *Rowland* v. *Divall* [1923] 2 K.B. 500, once again a sale of goods case, where it was held that the purchase price of a car could be recovered once it was discovered that the vehicle had been stolen and this, despite the fact that the "buyer" had resold it to a third party in the meantime. The point here, surely, was that the contract was for the transfer of title

and in that respect there had been no performance capable of acceptance.

The section then goes on to state that a right to rescind may be lost by execution despite the presence of a fundamental breach of a kind that prevents a party relying on an exception clause. The example is given of goods accepted and paid for notwithstanding the presence of a breach which would have justified rejection. This, of course, simply restates the ordinary rule. Finally it is pointed out that some fundamental breaches do not deprive the other party of what he bargained for and the example is given of goods carried safely to their destination by a ship which has deviated. In this case, it is said, there is no doubt that the cargo owner can rescind though he may nevertheless come under some obligation to pay for the carriage of the goods. The point here, though, is that *at the commencement of a deviation,* according to the House of Lords in *Hain* v. *Tate & Lyle* [1936] 2 All E.R. 597, the contract rescinds automatically unless the goods owner elects to affirm it. No question of rescission after execution can therefore arise. And on the reasoning in the *Hain* case, the liability to pay freight in case of delivery arises not because the contract has been affirmed or executed but under some form of quasi-contract.

The section as a whole, then, is intended to show that in the case of certain types of fundamental breach, but not in others, a contract can be discharged for breach notwithstanding that it has been executed or that the tendered performance has been accepted. It is submitted, however, that as the above analysis shows, the cases cited are not authority for the existence of any such dichotomy. The cases which are supposed to show that a contract can be rescinded after execution or acceptance are in fact concerned with the prior question of whether execution or acceptance has occurred in the first place. The other examples merely support the ordinary rule. Deviation is anomolous, but in quite different respects.

According to its Preface, this edition, like its predecessors, is intended primarily for students. As an undergraduates' text, however, it does have its drawbacks. It contains a good deal more material than would be required in most courses and if it is read consecutively its very exhaustiveness produces an oddly "miscellaneous" effect. On the other hand, it is a rather conservative work in that it tends, for the most part, to take the cases at their face value and its format (in general, a narrative account of the decisions, grouped under categories and subcategories) is in the tradition of practitioners' manuals. These factors, together with its very extensive coverage of the authorities, should make it a useful aid to practitioners.

The unique thing about *Treitel on Contract* is that it has been produced by one man. At this stage in the development of the subject one cannot but admire the industry this must represent and, like the inhabitants of the Deserted Village, wonder "that one small head could carry all he knew".

Brian Coote