

GUENTER TREITEL

Guenter Heinz Treitel

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elected Fellow of the British Academy 1977

by

FRANCIS REYNOLDS

Fellow of the Academy

Sir Guenter Treitel came to England as a German refugee on the ‘Kindertransport’ in 1939 and became a pillar of the Oxford Law Faculty, ending up as Vinerian Professor of English Law, Fellow of All Souls (previously having been a Fellow of Magdalen) and a very distinguished member of the legal academic world in the United Kingdom, who also maintained extensive connections with Law Schools in the United States. He will be remembered for a huge corpus of authoritative writings on commercial law, some of them opening up new areas, and all marked by extreme accuracy, clarity and close and careful attention to doctrine.



GUENTER TREITEL

The life of Sir Guenter Treitel is in fact already quite well documented. He himself wrote an account of his childhood, from 1933 (when he was 5 years old, living with his family in Berlin) to 1942 (when he finally went to Kilburn Grammar School in England). This story was left in typescript, not to be opened during his life, on the basis that ‘my memorialist may find it useful’: though much of the contents was in fact delivered by him orally at a Jewish meeting in Oxford some years before the end of his life, and this is still (or recently was) available on the web.¹ The written account is now being published in Germany on the initiative of Professor Reinhard Zimmermann,² who obtained permission from the family to do so, on the ground that too few people in Germany at the present day were aware of the extent to which Jewish people were discriminated against, humiliated and worse in that country during the late 1930s. The story is also well summarised in two excellent obituaries in the *The Times* and the *Daily Telegraph* during 2019.³

Guenter Treitel came from a comparatively affluent Berlin family. His father was a lawyer and notary whose uncle had been a judge (elevated to the title of *Geheimer Justizrat*) in Prussia. His father had his passport taken away by reason of political activity in 1933 and was deprived of his office as a notary because he was Jewish in the same year, necessitating some reduction of lifestyle. Much of the early story is one of the gradual increase of exclusion and discrimination and adversely changing social patterns up to the ‘Kristallnacht’ of 9/10 November 1938, after which humiliations, random arrests and punitive financial measures became even more common for Jewish people. The whole family became keen to emigrate to the United States, but the quota system for immigration then in operation there made the process very slow. One of his uncles was imprisoned in Sachsenhausen for a time, but on release was able (in fact forced as part of the terms of his release) to leave for Chile; another was imprisoned at Theresienstadt in (the then) Czechoslovakia from 1943, and probably only survived because the Russian Army arrived before the completion of gas chambers built to deal with inmates who could by that time no longer be sent eastwards to extermination camps. (The delay seems to have been at least partly caused by the fact that doors sent did not fit, whether by reason of incompetence or sabotage.)

Fortunately Guenter’s mother’s brother was married to an Englishwoman and lived in London, and both of them expended much energy in seeking to arrange for the family to come to England. For Guenter and his brother and sister places were

¹ [Vimeo.com/Oxford Chabad/videos](https://vimeo.com/OxfordChabad/videos) 29 August 2012; now available at <https://vimeo.com/48474737> (accessed 17 April 2020).

² Forthcoming in (2020) 28 *Zeitschrift für Europäisches Privatrecht*, Issue 3.

³ Obituary in *The Times*, 16 June 2019, available at <https://www.thetimes.co.uk/article/professor-sir-guenter-treitel-qc-obituary-79hzl3s0p>; obituary in the *Daily Telegraph*, 1 July 2019, available at <https://www.telegraph.co.uk/obituaries/2019/06/30/professor-sir-guenter-treitel-scholar-came-britain-kindertransport/>.

sought under the Refugee Children's Movement, under which the British Government guaranteed a number of immigration places to refugee children, and he and his brother were able to leave Germany in 1939 on a 'Kindertransport'. After a rail journey to Hamburg and being able to leave with just one mark and no gold or silver (he was concerned that he had failed to declare the gold nib on his fountain pen) he boarded an American liner, the *Manhattan*, and after a call at Le Havre arrived at Southampton on 24 March 1939. He records that the air was mild, it was obviously spring and the daffodils were out: even at the age of 10 the symbolism did not escape him.

The children were escorted by people who had given an undertaking that they would return to Germany after delivering them: it appears that all of them did so, probably a serious sacrifice. The children arriving had to have sponsors: his brother could be sponsored by his aunt and uncle, but Guenter had different sponsors who had apparently earlier wrongly identified him as a relative a few years older and immediately withdrew support when they saw him at Waterloo station. Other support was after an interval found at the Sainsbury Home in Putney, established for such refugee children by Mr Alan Sainsbury (later Lord Sainsbury of Drury Lane) and Sir Robert Sainsbury, who took a continuing interest in their former charges even to the extent of sending pocket money for them after they had been evacuated elsewhere, and of sending the Treitels (and no doubt others) a wedding present some years later. His parents and sister were fortunately able to get to England in mid-July 1939 bringing two suitcases and ten marks each.

After evacuation to Reading following the beginning of the war in September 1939, and various educational and residential vicissitudes, Guenter returned to London to be with his parents and after some doubts as to whether, not being of British nationality, he was eligible for an award, he won a local authority scholarship to Kilburn Grammar School, where he went at the beginning of 1942. After that, educational problems were over, though his family obviously remained in difficulties. His elder brother Kurt worked for a time in the tailoring industry in Yorkshire but later, by dint of working at home in the evenings, qualified as a solicitor and ended his career in the Treasury Solicitor's Department.

From here another, more substantial article of forty-six pages published in 2018, again at the instance of Professor Zimmermann, entitled 'Vicissitudes of an academic lawyer',⁴ takes over and in fact describes the rest of Guenter's academic life. The function of a memorialist becomes that of a commentator. He won a scholarship to Magdalen College, Oxford, where the then senior law tutor, the legendary

⁴G. Treitel, 'Vicissitudes of an academic lawyer', (2018) 26 *Zeitschrift für Europäisches Privatrecht* 130.

J. H. C. (John) Morris (later FBA),⁵ obviously took an interest from the start: Guenter was told that if the College wanted a candidate it would not let financial obstacles stand in the way, an encouraging start for (in effect) a member of a family of penniless refugees. However, the question of finance was solved by the awards system introduced by the Butler Act of 1944, under which both fees and maintenance were paid by the Ministry of Education, subject to a means test which the family had no difficulty in satisfying. Taught by Morris and Rupert Cross (later FBA),⁶ a formidable team, he was placed in the First Class in the Honour School of Jurisprudence (the first degree in law) in 1949, and a rather higher First in the BCL (a taught masters' degree of high standing then and since) in 1951: for this he was taught Roman law, which had been a weaker subject for him in his first examinations, by Professor Fritz Pringsheim, who was living in Oxford at the time. He took two years to complete the course, normally done in one year, because there was a local need at Magdalen for some teaching required by Morris's absence at Harvard (Morris's only venture to another law school apart from the Goodhart Chair at Cambridge after his retirement) and Guenter was able to fill part of it. From 1951 to 1953 he held an Assistant Lecturership at the London School of Economics, where he records receiving much kindness from Gower, Kahn-Freund and J. G. Griffiths and their wives, and also passed the Bar Examination in 1952. In 1953 he was appointed to a Lecturership at University College, Oxford, where he again acknowledges much kindness from A. L. Goodhart, George Cawkwell and Frederick Wells; conversations with C. K. Allen and Herbert Hart, the latter then trying out parts of what later became *The Concept of Law*; and discussions of a probably more austere sort with Mr Kenneth Diplock QC (later Lord Diplock), the Recorder of Oxford, who as an old member sometimes stayed in the College and breakfasted there while sitting at the Town Hall court. The arrangements for teaching at University College provided by Norman Marsh, subsequently a Law Commissioner, were disorganised in a way which at the time (the immediate post-war period) was typical of several colleges (though certainly not Magdalen).

One year later, in 1954, he was elected a Tutorial Fellow of Magdalen, and thereby made the formidable existing tutorial team of Morris and Cross even more formidable so long as the new combination lasted. His appointment required him, again in the practice of the time, to teach several subjects including Roman Law: at that time he gave tutorials also in at least Contract, Criminal Law and Administrative Law. Early on in his time in the Faculty he was seen gamely batting in the Law Faculty cricket team against undergraduates. The story is that the captain, R. H. Maudsley, a former captain of Warwickshire, lent him a cap, on seeing which the undergraduate fielders

⁵P. North, 'John Humphrey Carlile Morris', *Proceedings of the British Academy*, 74 (1988), pp. 443–82.

⁶H. L. A. Hart, 'Rupert Cross 1912–1980', *Proceedings of the British Academy*, 70 (1985), pp. 405–37.

retreated to the boundary, assuming no doubt that this new member of the Faculty was a star batsman: they all closed in after they saw him play one ball. Soon after, at the instigation of Morris, he read for six months in the Chambers of H. A. P. (Harry) Fisher QC, later Mr Justice Fisher, one of the sons of the then Archbishop of Canterbury, at 3 Hare Court: when Fisher was doing unenlightening work on compensation for nationalisation Guenter worked under the junior member of Chambers, Roger Parker, later Lord Justice Parker. He valued the experience but was reinforced in his wish, which had developed over the years, to be an academic.

It was around this time that he settled on Contract as his major interest. His main research interest had previously been in the law of Evidence, but with Rupert Cross as a colleague that topic was obviously unsuitable. He had undertaken to produce work on quite different topics in *Dicey on the Conflict of Laws*,⁷ which was at the time being rewritten by Morris with colleagues, and later he for a short time developed an interest in Administrative Law when the subject was first introduced into the Oxford syllabus. Nevertheless he offered a book on Contract to Stevens & Sons and signed a contract in 1958. At that time the main competitor on the subject was *Cheshire and Fifoot*, written by two Oxford scholars and published by a different publisher, which although it would have been a real breakthrough had it been published when originally envisaged in about 1941, and still was to a lesser extent when it first appeared in 1946, had been allowed to become out of date. (It was subsequently re-edited with success, and various different versions were and are produced in other common law countries.) Some competition began when *Anson's Law of Contract* was rewritten (following the practice among some legal writers to use established titles and rewrite them) by Anthony Guest in 1959, and the bigger practitioner work *Chitty on Contracts* was re-edited and published as a twenty-second edition under the supervision and general editorship of John Morris, in 1961. Treitel's *Law of Contract* appeared in 1962 as a completely new work,⁸ and was well received as such. It addressed matters not dealt with elsewhere, and had for Oxford students an incidental benefit in that it at several points considered head-on distinctions which had been commonly asked about in examination questions in Oxford at the time, concluding that there was no significance in them. (The basis of the doctrine of frustration of contract was one such, and the dismissal of its importance remains in the current edition edited by Professor Edwin Peel, Fellow of Keble College, Oxford, and in Guenter's later book *Frustration and Force Majeure*, which is referred to elsewhere in this memoir.)

⁷In fact Domicile, Substance and Procedure, Proof of Foreign Law and Lunacy.

⁸It was not his first published work: he had already published several notes and book reviews, and an article on the Infants Relief Act 1874 in (1957) 73 *Law Quarterly Review* 194.

He later wrote that:

I was not entirely satisfied with the treatment, admirable though it was, of [the subject] in other books on English contract law. Their emphasis on one particular contract (i.e. sale of goods) seemed to me hard to justify when much of the development of the subject had taken place in cases concerned with other aspects of commercial practice.⁹ The analysis of the existing books of developments in the courts also seemed to me to do less than justice to the sophistication with which the judiciary had handled these developments. In retrospect I would say that I hoped to raise the level of academic discourse in the subject. I did not put it to myself in quite this way, but (consciously or not) that was what I tried to do in the 40 years and 11 editions of the book that followed its original publication in 1962.¹⁰

That the point had been taken by readers was confirmed by a review of 1963 which said: ‘This book, with its insistence on the commercial context of any particular contract, serves [as] a valuable corrective to the notion of a general law.’¹¹

The book was immediately used by students, especially at Oxford, and is the main source justifying obituary writers in using such phrases as ‘giant in the field’ (though he subsequently also became one of the editors of *Chitty on Contracts*, some of which is, consequently and not surprisingly, similar). Its technique involves a detailed and exhaustive but succinct and clear examination of doctrine, involving the closest examination of case law (including sometimes recourse to other reports and even newspapers to disinter the full factual background¹²) and constant querying of generalisations, great and small, which on scrutiny are exposed as rather facile or even misleading. For a long time the book held, and probably still holds, the reputation of an ultimate source of analysis at the highest level. In so far as there is any problem, it is that a desire for doctrinal completeness led over several editions to the book becoming at least half as long again, as further cases were added (the preface to more than one new edition speaks of 350 new cases being added). This certainly fulfilled the writer’s objective as set out above, but made heavy going for a reader as the explanation steadily became more complex.¹³ The expansion was undoubtedly assisted by the

⁹It is likely that he was thinking especially of the law of carriage by sea.

¹⁰Treitel, ‘Vicissitudes of an academic lawyer’, 152.

¹¹Richardson [1963] *Cambridge Law Journal* 311.

¹²An amusing example was provided by the account of the difficulties of handling opera singers in London in 1874 and 1875 to be derived from in *Poussard v Spiers* (1876) 1 QBD 410 and *Bettini v Gye* (1876) 1 QBD 183 at least up to the eleventh edition. Alas, Professor Peel has removed this vignette from the current edition.

¹³An example is the treatment of topics relating to termination of contract by breach, much of which appears in the chapter on ‘Performance’: though some of the later material has been moved by Professor Peel to the chapter on ‘Breach’. Guenter would not have accepted the word ‘Termination’, and persisted to the end in using and defending the term ‘Rescission’ in this context. Again, the use of the latter term no longer appears in this context in later editions.

increase in reported cases, both in specialised reports and later on the internet, and in the length and completeness of judgments, especially commercial judgments, a far cry from the days of the freer judges of the 1880s and later. In the result the book can be said to be too difficult for many students; but to this his answer was ‘most law students, if told they were not clever enough to read a particular book, would rise to the challenge’.¹⁴

Use of books by students depends to some extent on the recommendations of particular lecturers and tutors, but it seems likely that the book, while certainly holding, and retaining under its present editor, its authoritative reputation, is principally respected as an ultimate source of guidance by lawyers arguing before appellate tribunals. Even so, what one sometimes yearns for in reading it is a suggestion that there is a number of cases out of line with some tenable proposition, cases which should simply be rejected rather than made the object of attempts to reconcile them into the general fabric. Such a suggestion is rarely made, though Guenter maintained to the end his disagreement with the judgment of Lord Justice Bingham in *The Super Servant II*.¹⁵

In 1965 the newly founded Law Commission for England and Wales identified as one of its first projects the preparation of a Contract Code. Guenter was appointed as one of the Consultants. It is clear that the idea of such a Code stemmed from an assumption, of the sort that Guenter in writing his book sought to counter, that contract was an easy subject with established principles: ‘the general principles of the law of contract are now well established and the Commission regards it as ripe for codification’.¹⁶ Work was done on the project for some time, but it was in the end abandoned, partly because the Scottish Law Commission did not remain in agreement with the project and withdrew, and partly because of concerns that codification would create something that was difficult to alter, and so impede development. But a strong reason was also that the project proved much more difficult than had been anticipated, at any rate by some.¹⁷ As Guenter later said in his Clarendon Lecture of 2002, ‘there is reason to suppose that the assertion was based on accounts of the subject which failed to give due prominence to the many areas of obscurity, uncertainty and controversy’.¹⁸ It was by a frontal attack on such problems that Guenter in his work sought to clarify the law.

¹⁴Treitel, ‘Vicissitudes of an academic lawyer’, 153.

¹⁵[1990] 1 Lloyd’s Rep.1.

¹⁶First Programme of the Law Commission (1965), Part I.

¹⁷The Draft Code was eventually completed by Professor Harvey McGregor QC and published (rather improbably) in Milan in 1993.

¹⁸G. Treitel, *Some Landmarks of Twentieth Century Contract Law* (Clarendon Lectures) (Oxford, 2002), Introduction.

Meanwhile he took up, in 1963–4, a Visiting Lectureship at the University of Chicago Law School. I remember Rupert Cross, knowing that I had myself spent a year there as a ‘Bigelow Fellow’ (a junior post for a recent graduate), asking me whether I thought he would enjoy it. I said no. He said he entirely agreed. We were both completely wrong, and that visit proved the first of many as Visiting Professor to law schools in the United States over his teaching career—to Chicago twice more, twice to Virginia, to Houston and (several times) Southern Methodist in Dallas. The American background came to form a very significant part of his life; though he also paid visits to Marburg, Frankfurt and Münster, and to Western Australia, as described later in this memoir, so it can also be said that in general academic travel was important to him. (He did not however attend conferences.) At Chicago he taught Contract initially with Professor Malcolm Sharp, one of the writers of Kessler and Sharp’s *Casebook on Contract* and a very distinguished law teacher, whose classes were sometimes referred to by the students as ‘Malcolm’s Mystery Hour’. There was a natural reluctance to entrust such an important course as Contract to a visitor, but he became aware that members of the faculty were sometimes coming to his classes, possibly to size him up, and on his next visit in 1968–9, when the teacher was Professor Grant Gilmore, he taught a section of the class: he was finally allowed to teach the whole class when Gilmore was on leave in 1971–2. At some time he received at least suggestions that he would be acceptable as a full-time member of the very distinguished Chicago faculty, but although obviously quite torn he did not in the end act on such suggestions.

Some new approaches to contract law at Chicago came in during the 1960s. Karl Llewellyn, a giant in the field, had died in 1962 (though his wife Soia Mentschikoff remained on the Faculty for some years before moving to Miami, where she later died). Coase joined the Chicago Faculty in 1964 and Posner in 1969. The law and economics movement became prominent and on one of his two visits to the University of Virginia Guenter was asked whether he had ‘heard of our theory of efficient breach of contract?’ He was not of course in sympathy with most of the approaches and factions indicated by these topics, and managed to maintain his own techniques, which restricted him to the handling of material about which he was certain of his knowledge, understanding and judgment, despite the arrival of other influences.

Back in Oxford, in the late 1960s the faculty, under the guidance of Herbert Hart, then Chairman of the Law Faculty Board, undertook a reconsideration of its own undergraduate syllabus. Guenter put forward a new subject which he entitled ‘International Trade’. This was based on his belief, already mentioned, that contract law as the foundation of commercial law must pay regard to several types of specific contracts beyond that of basic sale of goods, which was formerly the most frequently

invoked.¹⁹ The subject therefore involved overseas sales, which have specialised terms quite different from those of domestic sales; the law of carriage by sea (from which many leading English decisions on contract law came and still come); and the law of documentary credits, a distinct part of banking law addressed to international transactions. The interaction of these three types of contract formed and form a good, if intricate, example of applied contract law. This course was a forward-looking development, taught by lectures and a university class, which was then new for the first degree though, as with BCL subjects, it soon became supplemented by tutorials. It was successful for a fairly small group of good students, some of whom are now or have been on the Bench, a group which was constantly renewed; and although Guenter when presiding tended to teach it from the same material updated, a good question would show his methods of thought to those present in a most instructive way. The course was copied by other universities and institutions in the United Kingdom and in the Bar Examination. Guenter himself taught a version of it in the United States, from which he formed the view that the area required more conceptual apparatus, and more possibility of change, than was available by use only of the Uniform Commercial Code, and that this was therefore an area where English law was ahead.

Related to this was the formation in 1968 by Professor Anthony Guest of a team to produce a completely new and substantial book on Sale of Goods under the label *Benjamin's Sale of Goods*. This was published in 1974. In it Guenter wrote four chapters in the section headed 'Overseas Sales', those entitled 'Overseas Sales in General', 'CIF Contracts', 'FOB Contracts' and 'Other Special Terms and Provisions in Overseas Sales'. By the time of the last edition in which he participated, the ninth of 2014, these chapters occupied pages 1161–1982, that is to say 822 pages out of a total of 2,498, more than a third of the book. This may give the impression of detailed work of a tedious sort, but it was in fact a completely pioneering new work on a set of topics that, while undoubtedly technical, were and are of great importance in the settlement of disputes which is the function of the law of contract, and require the formulation and application of clear yet sophisticated and flexible principles for their solution. When Guenter first addressed these problems, there was no previous exposition, nothing except a huge panoply of largely unknown but carefully reasoned decisions, to work on. At the start, as he wrote, 'It became clear to me that there was a body of legal principles which applied to all overseas sales, whether they were on cif, fob or other terms or other terms commonly used for such sales, and that there was therefore a need for a separate chapter [...] devoted to the discussion of these principles. The most important group of these common principles was that relating to documents

¹⁹F. H. Lawson used to refer to it as 'the great master contract'. It has an unusual feature in, at any rate in some systems, regulating property as well as obligation.

of title to goods, and in particular to the status of bills of lading as such documents.²⁰ The chapter was in fact the longest in the book (336 pages in the seventh edition) and was a striking demonstration that overseas sales were not adequately covered by the Sale of Goods Act, the Vienna Convention on International Sales or supposed codes such as INCOTERMS, but in common law at least carried a huge baggage of specialised law for application to a particular area of commercial activity. A proper exposition and ordering of it requires the reading of a huge number of cases, themselves usually detailed in fact finding. Material of this sort is not easy reading for those not accustomed to such topics, but the exposition is thorough and complete, and extremely lucid in its reasoning. The book proved to be, and still is, immensely valuable, largely because of Guenter's contribution, which is probably consulted professionally more than the rest of the book because it is unique.²¹ Guenter himself wrote 'I have never really got over my astonishment at the very kind reception accorded to my *Benjamin* chapters':²² but the astonishment was not appropriate, as they stand as a remarkable and original contribution to professional literature, albeit of a very specialised nature useful to comparatively few.

Also in 1968 his standing brought him enquiries from Professor Arthur von Mehren, Chief Editor of the seventh volume of the *International Encyclopedia of Comparative Law* on 'Contracts in general', as to whether he was interested in participating. The results of this inquiry, which were not straightforward, took effect in the 1980s and are therefore deferred at this point and discussed further later in this memoir.

In 1970 he was one of those who introduced a new course in the Oxford BCL on the Law of Restitution. This was helped by the publication in 1966 of a new book, *The Law of Restitution*, by Robert Goff (later Lord Goff of Chieveley FBA²³) and Gareth Jones (later FBA), Fellow of Trinity College, Cambridge. A course was similarly introduced at Cambridge (in a slightly different form) the same year. The first Oxford seminars were given by Guenter, J. D. (Derek) Davies, Fellow of St Catherine's, Donald Harris, Fellow of Balliol, and Jeffrey Hackney, Fellow of St Edmund Hall. This project over the years grew in maturity and sophistication, but from the beginning Guenter (though a confessed sceptic as to the true existence of the subject) was a leading figure. Through many vicissitudes it subsequently became principally associated with the late Professor Peter Birks FBA.²⁴ Despite his being a party to its

²⁰Treitel, 'Vicissitudes of an academic lawyer', 156–7.

²¹This tends to be confirmed by the amount of internet use of the material.

²²Treitel, 'Vicissitudes of an academic lawyer', 157.

²³J. Beatson, 'Robert Goff 1926–2016', *Biographical Memoirs of Fellows of the British Academy*, 18 (2020), pp. 241–73.

²⁴A. Rodger and A. Burrows, 'Peter Birks 1941–2004', *Proceedings of the British Academy*, 150 (2007), pp. 3–34.

introduction, Guenter does not appear to have taught in the subject after 1980, though he returned at least once as an examiner, prepared to express some scepticism as to what had been taught by others. He did not write on the subject except incidentally, and his reference to it in his Contract book was limited: though it was of views expressed in that limited section that Peter Birks made use in his last work in the area.²⁵

In 1974 Guenter had been appointed All Souls Reader in English Law, a Readership which had ceased to require, if it ever did, membership of All Souls: he used wryly to point out that in the fourth edition of his Contract book he was described by an editor's or printer's error as 'All Souls Reader in English'. In 1976 he visited the University of Western Australia at the invitation of Professor Douglas Payne, his predecessor in the Readership. While there he visited most of the principal Australian universities, where he regularly found Magdalen contacts. He had meanwhile applied for the second Oxford chair in English law, held at St John's College by H. W. R. Wade (later Sir William Wade FBA). During his time in Australia he heard that the electors had appointed Professor Patrick Atiyah (later FBA),²⁶ who was at that time at the University of Warwick. Atiyah was likewise a Magdalen graduate, took his BCL in Guenter's first year as a Tutorial Fellow and had for a time been a Tutorial Fellow of New College. Guenter had cooperated with him in writing an article on the Misrepresentation Act 1967.²⁷ This rejection, as he saw it, Guenter records that he found a great disappointment. If it was desirable to recognise existing standing in and work done for the Law Faculty, such an election was inappropriate, but electors are always entitled to take into account advantages of bringing in new interests and strengths into a Faculty, and there could be no doubt that Atiyah had different and in some respects broader interests. It was also true that, as Guenter's wife Phyllis pointed out at the time, the Vinerian Chair, in many ways more suitable and certainly more prestigious, would become vacant within two years, as indeed it did. However, it could have gone to someone with different interests, and therein lay uncertainty.

In October 1976, Guenter published in the *Australian Law Journal* an article which was a direct reply to Atiyah's Inaugural Lecture 'Consideration in contracts: a fundamental restatement', which had been given at the Australian National University in 1971 while Atiyah held a chair there for a short time. This article, entitled 'Consideration

²⁵ See P. Birks, *Unjust Enrichment*, 2nd edn (Oxford, 2005), p. 113, where he cites pp. 1158–60 of the eleventh edition of *Treitel on Contract* (a passage still present in later editions) on restitution in respect of void contracts.

²⁶ J. Goudkamp, 'Patrick Atiyah 1931–2018', *Biographical Memoirs of Fellows of the British Academy*, 19 (2021), pp. 149–86.

²⁷ (1967) 30 *Modern Law Review* 369.

in contracts: a critical analysis of Professor Atiyah's fundamental restatement',²⁸ may or may not have been based on the talks which Guenter gave at universities around Australia while he was there. It is surprising that what was in effect a rebuttal should have come at this time, so long after the original lecture, but maybe this is to be accounted for the Guenters' presence in Australia during 1976 and needing topics to address. The analysis is firm and usually convincing, and the same points were made in subsequent editions of Guenter's book on Contract and in his chapters in *Chitty*: but the topic is not one that now attracts the attention that it did at that time. Guenter records that he found his time in Australia profitable, but that he never returned because of reluctance to face jetlag issues again. His many trips to the United States did not create the same problems.

After he had come back to England he was perceived as having, and probably had, an uneasy relationship with Atiyah, though I myself never heard either of them refer to it in anything but discreet terms, and in any case Guenter was away in Houston and Southern Methodist University in 1977–8 and the University of Virginia in 1978–9. In fact they were two people whose intellectual methods were totally dissimilar directing themselves (in Atiyah's case, not exclusively) to the same area. Guenter certainly became somewhat concerned that his graduate students might in examinations be put at a disadvantage by the different and more sociologically oriented approach taken by Atiyah (though such an approach was shared by others in the Faculty such as Kahn-Freund).

In 1978 the Vinerian Chair of English Law fell vacant with the retirement of Professor Sir Rupert Cross and was advertised. Guenter did not apply: he records that it seemed pointless in view of his unsuccessful application for the St John's Chair two years earlier, and that he did not want to trouble his referees a second time. However, the electors resolved in April 1978 to invite him to accept election, and this he did (though not in an entirely straightforward way, the resolution of which was complicated by the fact that the Registrar took it on himself to negotiate with him without consulting the Faculty Board). In the result his appointment ran from October 1979, no doubt partly because of his existing commitments in the United States. When the Vinerian Chair fell vacant on the retirement of H. G. Hanbury in 1964 it had been offered to John Morris, who rejected it because he did not want to leave Magdalen nor to move to All Souls. It was then offered to John Morris's colleague at Magdalen, Rupert Cross, who accepted it. When Cross retired, the chair was offered to Guenter, who had been a colleague of both at Magdalen: a remarkable achievement of the powerful team, each unique in his way, who taught law at that College for several years in the 1950s and early 1960s.

²⁸(1976) 50 *Australian Law Journal* 439.

Guenter's Inaugural Lecture, entitled 'Doctrine and discretion in the law of contract',²⁹ was given in March 1980 to a packed audience. Atiyah's earlier Inaugural Lecture, entitled 'From principles to pragmatism',³⁰ had been delivered two years before. Although the titles might suggest it, Guenter's lecture was not an answer to that: indeed the thrust of Atiyah's lecture was somewhat different, though both were rightly identifying new trends in the formulation of legislation and the writing of judgments. Guenter was concerned by what he perceived as an increased use of discretions in contract law, of which conspicuous examples appeared in Section 3 of the Misrepresentation Act 1967 and at the time much more recently in the Unfair Contract Terms Act 1977. His concern was that discretions should not normally be conferred without some sort of control. This could be done by use of 'open-textured' words (a term borrowed from Hart), wide terms that could be narrowed down to guidelines; or in the last resort conferring a discretion to make an exception where a rule operated harshly.

Professor Ewan McKendrick has recently, rather improbably in a Chinese journal, considered how things now stand as against the dangers portrayed in the original lecture, and has come to the conclusion, after a most thorough discussion, that the development of English law has proceeded acceptably since the lecture was first delivered.³¹

Some unease between its two common law professors persisted in the Faculty after Guenter's appointment. He became particularly concerned when Atiyah, supported by Harris and others, introduced in 1981–2 a new BCL subject, 'Remedies in Contract and Tort', which took in inter alia elementary forms of the law and economics reasoning then becoming popular. This proved initially attractive, but Guenter believed from his American experience that such courses took students away from Restitution (a course on which he had, as described above, been one of those taking a lead in the Faculty). His belief was correct for the United States, where Restitution was in any case becoming less significant as a subject while law and economics and the like became prominent. It was not correct for Oxford, where Restitution was and remains (partly because of the additional influence of Birks) a strong subject. Remedies in Contract and Tort started well but in the end faded out, at least partly by reason of changes in Faculty personnel, though it is the sort of subject which can always be resuscitated, and by use of more than one approach. In any case, Guenter had stopped

²⁹Published as a separate pamphlet by Oxford University Press (Oxford, 1981). The oral delivery contained a few points omitted from the printed version.

³⁰Published as a separate pamphlet by Oxford University Press (Oxford, 1978).

³¹E. McKendrick, 'Doctrine and discretion in the law of contract revisited', (2019) 7 *Chinese Journal of Comparative Law*, 1 (perhaps directed at Chinese lawyers contemplating a choice of English law in a commercial contract).

teaching Restitution around 1980. He also resigned from the Law Faculty Board (of which he had earlier been Chairman) around the same time.

The enquiry by Professor von Mehren of 1968 already referred to, for a contribution on contract law to the *International Encyclopedia of Comparative Law*, must now be returned to. It was settled that Guenter should contribute a chapter on 'Remedies for breach of contract'. He relates that from the start he took the position that he would deal only with those systems of law in which his linguistic competence gave him direct and personal access to the primary sources: this in effect meant the English, American, French and German. (Obviously, other common law systems nearer to the English than the American model, such as Australian and New Zealand law, were included.) A separate self-contained section about remedies in Socialist Legal Systems was added by Professor Gyula Eörsi of the University of Budapest, though Guenter was not keen on the split. The resulting chapter was finally published in 1975,³² but meanwhile he was approached to undertake a separate chapter on 'Breach of contract'. He accepted this on the same basis regarding use of sources, but later requests from von Mehren to 'integrate' his work with that of Professor Peter Schlechtriem, which plainly envisaged a vaguer sort of comparative law, proved difficult to comply with, and in the end adherence to his principles regarding use of original sources led to his withdrawing his contribution in 1982. To jump even further ahead, his work for the *Encyclopedia* (both chapters) and other work came to full fruition in his book *Remedies for Breach of Contract*, published in 1988 (Oxford), a fully documented and perceptive work of doctrinal comparative law. This was reviewed by Tony Weir, Fellow of Trinity College, Cambridge, known as a stern critic who also well understood the problems of comparative law but was willing to speak his mind, in terms that are worth repeating.³³

The author is sometimes supposed to have less concern for the effect of decisions than for their compatibility with rules; likewise with rules and principles. It is true that here again we are struck by accuracy of exposition rather than by range of explanation. Yet there can be no just ground for complaint. Comparisons, criticism and evaluations are often made, preferences stated, reasons for deviation offered. If the opinions and value-judgments seem hard to distinguish from the descriptions, that is because they are so reasonable and dispassionate as to seem equally objective. This is a masterly and weighty survey of an important topic. No one in England could have done it better.³⁴

³²Ch. 16.

³³He was the translator of the monumental work *Comparative Law* by Zweigert and Kötz, of which it was said that the translation was sometimes actually an improvement on the original.

³⁴T. Weir, 'Review of *Remedies for Breach of Contract: a Comparative Account*, by G. H. Treitel', book review, [1989] *Cambridge Law Journal* 152.

Though directed to a book on comparative law and not straight common law analysis, this is in fact a good overall assessment of the value of Guenter's work. In many ways this book is also the most attractive and adventurous of his writings: it is unfortunate that no second edition was ever produced. The reason for this was not the publishers' reluctance, but that by reason of financial constraints of the time the necessary source material for the method in accordance with which alone he was willing to work in comparative law was (by reason of financial stringency) no longer available in the Bodleian Library at Oxford; and doubtless the opportunity to do the work elsewhere did not arise.

The next development was that Guenter's work done for the *Encyclopedia* generated in him an interest in situations where a contract could be terminated, or at least terminate, where events occurred which were not within the contractual responsibility of either party. Guenter was given a grant by the Ernst von Caemmerer Gedächtnisstiftung to produce a short book entitled *Unmöglichkeit, "Impracticability" and "Frustration" in anglo-amerikanischen Recht*, which was published (in German) in 1991. This subsequently led to a much more substantial book, *Frustration and Force Majeure*, published in 1994 (London). This is an even more thorough examination of the case law than he had previously offered: for example, the leading case of *Taylor v Caldwell*, on the legal dispute caused by the burning down of the Surrey Music Hall in 1861, is cited nearly a hundred times in the book. The plaintiffs were to have the use of the Hall and Gardens 'for the purpose of giving a series of four grand concerts'. The plaintiffs claimed £58 for expenses which they had incurred in advertising and preparing for the concerts: this was in fact the only matter decided, but other claims could obviously be possible and there is plenty more to say.

The title of the book may be slightly misleading in that it does not claim to take in discussion of the civil law notion of *force majeure* as such; but it certainly discusses clauses dealing with similar problems and their interpretation. It is different from the substantial corpus of Guenter's common law work in being much less compressed: the exposition is expanded in such a way as to make it much easier reading than his earlier books. Some of the facts of cases are likely to have been features in the Socratic method of teaching (of which he did not entirely approve) in the United States. The difference is to be justified on the basis that the purpose of this book is different: it selects one area only and seeks to expand it. It is also very much a comparative work, taking in the United States Uniform Commercial Code, plus American and Australian cases, and also making some civil law comparisons. It is described in an English Court of Appeal judgment as 'a major work of broad, detached and exceptional scholarship'.³⁵

³⁵ Lord Justice Rix in *Edwinton Commercial Corporation v Tsaviris Russ (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634 at [102].

The broader scale of the project enabled him in respect of some cases to take in even more details (often unnoticed by readers) from the reports than usual. A good example is found in the famous ‘Coronation’ cases arising from the postponement of the Coronation of King Edward VII in 1902 and processions accompanying it. The best known is probably *Krell v Henry*,³⁶ concerning hire of a room in Pall Mall to watch the processions:³⁷ description of the facts of this and related cases in England and elsewhere occupies about six pages. Guenter’s text takes space to rebut two unsatisfactory explanations of the case given by Justice Posner in another case.³⁸ The first, an economic argument, was that the owner of the rooms was in a better position to cover his losses by insurance, which is unconvincing in respect of owners of private rooms taking advantage of a one-off occasion; the second, that the owner could make his profit on the postponed procession, did not take into account the full details of that procession, which was not simply a repeat of the first.

Guenter retired in 1996, when he was presented by colleagues and former pupils with a Festschrift edited by a former pupil, Professor Francis Rose, entitled *Consensus ad Idem: Essays on Contract in Honour of Guenter Treitel* (London). His official retirement meant that he no longer lectured, but his writing continued unabated till nearly the time of his death, and he paid visits to Southern Methodist up to 2003. He contributed to two editions of a book devised by Professor Peter Birks called *English Private Law* and first published in 2000 (Oxford). His contribution was a chapter called ‘Contracts: in general’. Birks’ plan was to produce a compendious work on English Law using a Romanistic structure of headings (Persons, Things, Actions) easily recognisable as traceable to the Institutes of Gaius. At any rate on one view the purpose was to make provision for continental lawyers wishing to have a reference work on English law organised in a way that they would recognise. But if this view is correct (as at least some of the writers thought), Birks later changed his mind about what he intended while work was in progress, without making this clear to all involved. Although prestigious writers contributed to the project, and were later rightly reluctant that their work be wasted, the final product certainly disappointed Guenter. When Birks subsequently died he took the purpose of the book with him, and Guenter, who like at least one other contributor had only undertaken the work from loyalty to Birks, withdrew after the second edition.

³⁶[1903] 2 KB 740. Guenter records that a spell of unusually cold weather led to the cancellation of a parade that was to have marked the inauguration of President Reagan’s second term in office: but unfortunately for the further development of legal doctrine it appears that money paid by would-be spectators was repaid voluntarily. See *New York Times*, 25 January 1985.

³⁷This was undoubtedly the purpose of the arrangement, though the letters which formed the contract made no reference to it.

³⁸*Northern Indiana Public Service Co v Carbon County Coal Co* 799 F 2d 265 (1986).

Guenter's last book, *Carver on Bills of Lading*, was first published in 2001 (London). It was a surviving part of an earlier and more ambitious scheme to rewrite *Carver's Carriage by Sea* (a book dating from 1885) which had foundered largely because of the death or incapacity of some of the intended contributors.³⁹ As with *Benjamin*, the practice of taking the name of an existing and long-established work was followed for a book which was in effect a completely new one. The new book was written in conjunction with myself, but our two sections are completely separate. His part of the book, the larger part, was an expansion of his work in *Benjamin*, but by no means a reproduction of it. In *Benjamin* the discussion of the contract of carriage was directed to the impact of that contract on the relations between buyer and seller. Obviously in a book directed to the contract of carriage and its documents, the emphasis was the other way round. As is the case with the later editions of his book on *Contract*, and *Benjamin*, some of the book is probably best suited to argument before appellate tribunals. Another of the sticking points on which Guenter would not give way appears in this book: he was to the last unwilling to accept that a straight bill of lading could be a document of title (except in a limited sense, for the purpose of the Hague and Hague-Visby Rules). The fourth edition of this book was published in 2017, rather over a year before his death.

Guenter was a clear and careful lecturer whose technique could be (not surprisingly) described as involving the turning on of a very powerful spotlight to a particular area (sometimes enlivened with miscellaneous information as to the facts obtained from the report and possibly other sources such as newspapers). As a tutor, it has been said by one of his pupils that while Morris and Cross excelled in ensuring that their students got a firm grasp of principles, Guenter assumed (perhaps a little naively) that his students already had such a grasp, and excelled in describing and exploring the subtleties of whatever happened to be under discussion. He was polite and considerate and never talked down to or patronised his students.

But there can be no doubt that he will go down for posterity principally as a writer, and one who was the better for not having been restricted by the impositions placed on academics today. He produced twelve editions of his *Contract* book, participated in eleven editions of *Chitty* and nine of *Benjamin*, and wrote three of *Frustration and Force Majeure* and four of *Carver*. In connection with the constant demand for new editions he rather indignantly objected to the publishers' invoice description of what he was paid royalties for as 'updating',⁴⁰ and pointed out that even 'reconceptualisation'

³⁹ An eventual companion volume, *Carver on Charterparties*, written by members of 7 King's Bench Walk and edited by Professor Howard Bennett, was published in 2017 (London).

⁴⁰ A term also applied to by publishers to journal editors.

was often required.⁴¹ In addition he produced chapters in two editions of *English Private Law* as described above, a set of Clarendon Lectures in 2002 (*Some Landmarks in Twentieth Century Contract Law*), several editions of a shorter version of his contract textbook produced by different publishers, which he called the 'Little Red Book',⁴² and a formidable list of articles and case notes on commercial law topics in leading journals.⁴³

The passage from Tony Weir quoted above in connection with his book *Remedies for Breach of Contract* is as good and perceptive a summary of his academic strengths as any. *The Times* obituary quotes a colleague as saying 'He was a black-letter lawyer: but his strength was to see solutions that others could not see.' He did not himself like the phrase 'black-letter lawyer', which he regarded as an 'Aunt Sally', though he was willing to own to or even claim the description and once said so when Kahn-Freund was at a meeting dismissing some work as coming within the phrase. Lord Browne-Wilkinson, a very early pupil of his at Magdalen, wrote: 'He does not, like some of us, throw out suggestions which, even if stimulating, have not been thought through. Few contemporary lawyers have played as big a role in developing the law, primarily because his writings are the result of careful and principled thought founded on an exact and honest analysis of the existing case law.'⁴⁴ In fact what he said was usually correct or later proved so; there is nothing old-fashioned or outdated in any of his expositions, even if they were expressed in moderate and sometimes very succinct terms; and while always confident of his views he never sought to overstate them, leaving others to assess their strength.

In addition to his legal work he was very well read, and in particular had an enormous love of the works of Jane Austen, which stemmed from having had *Pride and Prejudice* assigned as homework at Kilburn Grammar School. He had viewed the assignment with misgivings ('such an old work, and by a woman, too') but on reading it became permanently captivated. While at the University of Virginia in 1983 he wrote an article, 'Jane Austen and the law', which considered such problems as the difficulty of barring the entail over Mr Bennet's property in *Pride and Prejudice*. The article was eventually published in the centenary volume of the *Law Quarterly Review*

⁴¹Treitel, 'Vicissitudes of an academic lawyer', 159.

⁴²G. Treitel, *An Outline of the Law of Contract*, five editions of which were published by Butterworths and one by Oxford University Press; it was not published after 2004.

⁴³A list of publications up to 1995 appears in Guenter's Festschrift, F. Rose (ed.), *Consensus ad Idem: Essays on Contract in Honour of Guenter Treitel* (London, 1996). There were many more later.

⁴⁴This appears in a foreword to the above Festschrift, p. v.

and attracted a lot of interest and correspondence:⁴⁵ it led to his giving a talk at the Annual General Meeting of the Jane Austen Society at Chawton House in 1986.⁴⁶

He married Phyllis Cook in 1957 and they had two sons: he was very proud that they both won scholarships to Eton. His wife (who was for many years a reader for Sir Rupert Cross, who was blind) and children survive him: one son, Richard, is a software engineer in California and the other, Henry, a regulator at the Bank of England. The degree of DCL was conferred on him in 1976; he was elected a Fellow of the British Academy in 1977, became a silk in 1982 and was elected an Honorary Bencher of Gray's Inn (an Inn made by John Morris virtually compulsory for Magdalen graduates) in the same year. He became a Trustee of the British Museum in 1983 (a post that involved quite varied and sometimes quaint contact with legal matters) and in 1984 became a Member of the Council of the National Trust (of which he records that few decisions were reached without controversy). He was knighted for services to law in 1997, the year after his retirement. After much further work covering more than twenty years after his formal retirement, he died four months before his ninety-first birthday, in June 2019, by reason of complications that set in after a head injury. Conversation with him some months before his death suggested that he had not then entirely given up the possibility of another edition of *Frustration and Force Majeure*.

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Note on the author: Francis Reynolds QC is an Emeritus Fellow of Worcester College, Oxford, and an Emeritus Professor in the University of Oxford. He was elected a Fellow of the British Academy in 1988.

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⁴⁵G. Treitel, 'Jane Austen and the law', (1984) 100 *Law Quarterly Review*, 549.

⁴⁶The text of this appears in the *Magdalen College Record* for 1987, pp. 52–64. Guenter records that the audience, of about 400, was the largest to which he had ever lectured in England.