BOOK REVIEWS

Contract And the Freedom of the Debtor in the Common Law: By I.S. Pawate 1953, M/S. N.M. Tripathi Ltd., Princess Street, Bombay. Price 7·50 nP.

This is a challenging little book. Mr. Pawate deserves to be congratulated. One may not agree with his views and may often find generalisations from insufficient data, but the generalisations themselves are thought provoking and original.

Mr. Pawate presents a moral case and asserts that it has the binding quality of a legal act. From the internal evidence of the common law itself he tries to show that a promisor's promise is binding on him without 'acceptance' or 'consideration.' These later only give a right to the promisee to enforce a cause of action. The liability of the promisor remains unaffected. In the absence of 'acceptance' and 'consideration' there is no right in another to benefit by the promise. Let us hear Mr. Pawate speak:

> "We have to take it, therefore, that acceptance is not necessary to make a promise in a simple contract binding. But yet the law regards acceptance and consideration as necessary. So we have to conclude that acceptance and consideration are required, not to make the promise binding on the promisor but to give the promisee the corresponding right and to strengthen that right."[1]

The writer builds his case from a promise by deed in common law. In English law the duty of a promisor by deed arises as soon as the deed is executed even though the promisee may not have yet entered on the scene and may be ignorant of it. Mr. Pawate observes:

> "Obligation is seen to be, not a tie binding one man to another with the result that one of them, the creditor or the promisee, has power over the conduct of the other, the promisor or the debtor, but a tie binding a man to a particular course of action or forbearance ..... this tie.....is nothing more than his will."[2]

The author thus argues that the debtor is completely free being bound to a course of conduct and not to another will. He sees this

1. I.S. Pawate, *Contract and the Freedom of the Debtor in the Common Law*, 144
2. *Ibid*,

as equally true of simple contracts in English law. He bases this extension on two early English cases.[3] He finds that obligation being a tie between the persons is gradually breaking down both in England and the U.S.A. He illustrates this through the recognition of the rights of the beneficiaries under a contract to which they are not parties.

Thus, according to him, in English law contractual duty may exist without a corresponding right. "Conscience is an entity known to and within the field of the law of England and those that be learned in the law of England hold that a promise made for a past consideration is binding in conscience on the promisor but yet the promisee has no right to enforce it."[4] So the right is not necessary for the duty and the duty should be able to survive the extinction of the right. An example from Hindu law is cited. *Smriti-Chandrika* says on the authority of *Narada* and *Prajapati* that when a creditor dies without leaving any heir or other person entitled to recover the debt, the debtor should either make a gift of the money to Brahmins, or if there are no Brahmins, throw it into fire or water. Such an act creates 'non-indebtedness.' Mr. Pawate says that it is this desire to achieve non-indebtedness that is at the bottom of the common law rule as to tender. The author examines specific instances from the common law and the American Restatement on the law of contract to support this view.

In a world torn with ideological conflicts and uncertain social and economic mores, Mr. Pawate's assertion is very welcome and one would like it to be an augury for the future, however difficult it may be of achievement. The conception of contractual obligation as a duty or obligation of the promisor and promisor alone and of an intensity which can rest satisfied only by achieving non-indebtedness through whatever means possible is an ideal which may not be an unmixed good. While the duty to keep one's promise is one without which rational society would be impossible, it is doubtful whether there are many who would prefer to live in a rigid world in which one would be obliged to keep all one's promises instead of the present viable system in which a vaguely fair proportion is sufficient. It would leave no chance of letting increased wisdom undo past foolishness.[5] Perhaps Mr. Pawate was not aware of Prof. M.R. Cohen's article on 'The Basis of Contract.' Prof. Cohen's searching

3. *Greenleaf* v. *Barker* (1590) Croke, Elizabeth, 193: 78 E.R. 449; *Jordan's* case (1528) Y.B. Mich. 19 Henry VIII, fo. 24, pl.3. Fifoot, *History and Sources of the Common Law* (1949) 418; Cheshire & Fifoot, *Contract* 4th ed., 11
4. Pawate: *Contract and the Freedom of the Debtor in the Common Law* p.2
5. See M.R. Cohen, "The Basis of Contract," 46 *Harvard Law Review*, 553, *et seq.*

analysis and brilliant generalisations, I am sure, would have given greater precision to Mr. Pawate's ideas and it is not unlikely that they would have undergone a change of mould. The author's approach is what Prof. Cohen calls the intuitionist approach. According to him (Prof. Cohen) the theory is inadequate, vague and unrealistic. Prof. Cohen observes:

> "No legal system does or can attempt to enforce all promises. Not even the canon law held all promises to be sacred. And when we come to draw a distinction between those promises which should be and those which should not be be enforced, the intuitionist theory, that all promises should be kept, gives us no light or guiding principle."[6]

As an attempt, however, at creating a climate of security in an interdependent and multirelational world, Mr. Pawate's thesis cannot be overemphasized. He has tried to show that the basis of a promisor's obligation is not only moral, but legal also and that, if, due to certain events, the obligation becomes unenforceable, it does not by that token alone acquire the high pedestal quality of a merely moral expectation and get thrown out of the more practical and viable world of normal legal behaviour. I strongly recommend Mr. Pawate's work to the legal world and fervently hope that it will start a controversy.

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The Law of Insolvency in India: By the Rt. Hon'ble Sir D.F. Mulla (Tagore Law Lectures, 1929); 2nd edition 1958, by the Hon'ble Mr. Justice N.H. Bhagwati, Published by N.M. Tripathi (Private) Ltd., Bombay. Pages CVII and 1139 and (index) 55 pp. Price Rs. 30/-.

This edition is welcome, coming as it does at a very appropriate time during the period of the growth and reform of the various branches of the laws of India.

The Tagore Law Lectures form an unique institution in the Law Faculty of the Calcutta University. Over these long years distinguished judges, jurists of distinction, learned professors of law and leading lawyers have delivered the lectures. They cover a wide range of subjects, and some of them have become classical in their own field.

The Tagore Law Lectures on the Law of Insolvency in India were delivered in 1929 by Sir D.F. Mulla (who later became a member

6. *Ibid*, 572, 573.

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