THE FREEDOM OF CONTRACT*

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One realises correctly what law is only by knowing what it was and how it has grown. I say this for emphasizing that the historical study of the law should be considered fit and useful not only for the academic student or the researcher. It is of no less value for the every day work of the practitioner.

Is there such a thing as freedom of contract in the world of today or is it a mirage which we ignorantly and fondly believe exists, though it has disappeared? I am speaking not of the erosions in the law regarding the enforceability of contracts, made by the development of the doctrine of an implied term which proceeds on the imputation of an intention or by the doctrine of frustration which might operate even without reference to such an intention.

Undoubtedly the Law of Contract is the foundation of all Mercantile Law and therefore any enquiry or examination of Mercantile Law demands an analysis of the developments in the Law of Contracts. When Sir Henry Maine stated that the progress of society was from status to contract, the idea underlying the concept was the recognition and emphasis of the freedom of the will as the determinant of legal rights and relations and it is this freedom that forms in theory the corner-stone of modern economy. The moral foundation for the enforceability of contracts is that contracts stem from a bargain freely entered into by the parties who have the option to enter into it or not and on terms freely negotiated between them. In other words, it proceeds on a presumed equality of bargaining power between the parties. The common law and the statutes, such as they are at present in this country, intervene only to rectify specified species of inequality or want of free will which affect freedom to contract such as infancy, lunacy, fraud, undue influence and misrepresentation. The criterion applied as the basis for the grant of equitable reliefs might be slightly wider but it is still limited to defined categories of inequality or to prevent particular

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types of over-reaching. It would be seen that the principles that underlie the right of the courts to interfere equate freedom with absence of positive, external and tangible restraints, but this equation hardly squares with the facts of modern life. With individuals functioning as such, these rules might suffice but with the rise of the joint stock companies and the giant corporations which control production and distribution of commodities essential to the life of the community, law has ceased to be in accord with the reality of the situation. Freedom of contract would be merely fictional, if one has no option but to accept the terms offered or go without the things one imperatively needs. Though the more advanced countries have been attempting adjustments to redress this imbalance and strengthen the individual against group interests and group activities, we in this country have not even attempted it. Probably the problem itself has not been realised in its stark reality, with its economic and legal implications. The economic pressure exerted by groups or even by individuals who have in themselves concentrated economic power has brought new problems which profoundly affect the concept of contracts as a bargain freely entered into between individuals in a position to bargain and gravely imperil the sanctity of contracts in the eyes of the discerning and possibly even of the ordinary citizen. Courts, with their powers limited by statutes and by precedents coming down from times when these problems did not exist or did not exist in this form or in this magnitude, are ill-fitted instruments to effect that co-ordination which is needed to straighten the law and produce equality in this ocean of inequality. This is the problem which the legislature has to grapple with by appropriate enquiry and then devise measures to weed out the mischief and correct the imbalance. The Money Lenders' Act and the Usurious Loans Act or even the Hire-Purchase Act, 1938, on the lines of the United Kingdom do not touch even the fringe of the problem — a problem which stems from a deeper malady, *viz.*, the imperative needs of individuals in juxtaposition with the desire and opportunity of others to exploit their need to their private advantage on terms which on cold analysis would be considered extortionate. There is here inequality produced by economic pressures which the law should step in to redress. The field in which such inequality exists is wide. The giants permit no freedom to the individual except on their own terms and hold the public to ransom by reason of the practical monopoly of goods and services essential to the community which they enjoy, thanks to the close-knit structure of their organisation and the utter inadequacy of the law to counter their stranglehold.

The decisions of the House of Lords in *Moghul Steamship* v. *Macgregor*,[1] *Allen* v. *Flood*,[2] *Thorne* v. *Motor Trades Association*,[3] *Crofter* v. *Veitch*,[4] serve to illustrate the ineffectiveness of the common law which we find embodied in the Indian Contract Act to effect the adjustments by which alone the inequality produced by the newly emerging economic pressures against those in the group and outside may be rectified. Possibly no case illustrates this feature of modern life with its economic pressures better than the litigation connected with the attempt of the United States Government to have their contract with Bethleham Steel Corporation revised.[5] The American Government had entered into a contract with the corporation for the supply of steel materials urgently needed for the prosecution of the war; it was found that the prices charged and which the government had no option but to accept, were too high and yielded unreasonably large profits to the corporation. The Supreme Court held that the government could not resile from their agreement and had no legal right to re-negotiate the terms. The fact that subsequently Congress passed legislation to achieve this purpose and that the constitutional validity of this enactment was upheld by the court does not militate against the point to which I wish to draw attention but serves to underline the point about the inadequacy of the common law rules for avoiding contracts. In this field we have a strange spectacle of parties pleading for freedom to contract—the plea being raised by those who desire to have that freedom to suppress that of others and eliminate them completely from the field. I do not wish to be misunderstood as standing against co-operation between rivals. Such competition may be beneficial but it is necessary to recognise that co-operation may reach dimensions which stifle competition and impede the economic progress, if not, the economic life of the community. Monopoly by any group has this effect unless controlled by law. Not that the state when it has a monopoly created by the law uses its power differently. Socialisation, it has been said, is no guarantee against exploitation, but this raises problems of public law into which I have no desire to enter.

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1. (1889) 23 Q. B. D. 598 (Lord Esher, M. R., dissenting) in H. L. [1892] A. C. 25.
2. [1898] A. C. 1.
3. [1937] A. C. 797.
4. [1942] A. C. 445.
5. *United States* v. *Bethleham Steel Corporation*, 315 U.S. 289 (1942).

In this connection, I might be permitted to place before you certain recommendations which I made as a single-member committee to advise the Government on the revision of the law relating to Patents. I then said: "I have set out these facts to emphasise that monopolistic combinations and restrictive trade practices are a universal feature of capitalistic economy and that special legislation is needed to protect the public from these practices. The rule enacted in section 27 of the Indian Contract Act regarding contracts in restraint of trade is much too weak to touch even the fringe of the problem".

"I am however not dealing with this matter in any detail for two reasons: first, though patents might sometimes form a convenient nuclei on which monopolistic combinations (and restrictive practices which are the concomitant of combinations and to effectuate which the combination might come into existence) are based, the problem cannot be solved by any amendment of the Patents law but only by dealing with it comprehensively so as to touch the manifold forms which these combinations might assume and in which they could operate. This has been the manner in which the legislation in other countries has tackled the problem and with reason. Secondly, any solution that is offered must be related to the precise manifestations of the combination or restraint which obtains in the country at present. There are no materials available on the basis of which this information could be gathered. It does not need any argument to establish that without an evaluation of the evil, its nature and extent, the remedy to counter it cannot be devised. In this connection I will with advantage extract a passage from a recent work on the subject. The authors observe: [6]

'Restrictive trade practices are as old as trade itself. They represent nothing more than the attempts of intelligent men to interfere, to their own advantage, or that of the industry in which they are engaged, with the free working of supply and demand and with the results of competition. As to practices, the advantages of cornering the market were known to the ancient Egyptians; papyri are in existence which show the existence of private monopolies in wool and cloth, and a schedule of merchandise which dates from about 3000 B.C. is known, which shows an

6. Wilberforce, Campbell and Elles, *The Law of Restrictive Trade Practices and Monopolies*, (1957) pp. 2-3.

attempt to fix prices as against those prevailing in free competition. In Greek times the astronomer, Thales, having ascertained from the stars that the olive crop for the forthcoming season was likely to be particularly copious, arranged some months in advance to hire all available olive presses, thus proving that philosophers, as well as academic economists can achieve economic independence...'

Moreover, just as the practice of restriction is endemic in commerce, so the State has from the earliest time sought to interfere by legislation with sectional profit making. There are monuments in India, dating from some centuries before Christ, recording regulations to prohibit merchants and producers from making collective agreements to influence the natural market practices of goods by withholding them from trade: boycotts are mentioned amongst other punishable offences as well as any interference with buying and selling of others, and throughout history sovereigns, constitutional or otherwise, have attempted to repress private monopolies with one hand while often granting monopolistic privileges with the other ".

" For these reasons I have not thought it possible to make any recommendations in regard to this matter. I cannot however pass from this topic without stating that I do not believe India to be an exception to the general rule regarding the existence of combinations and restrictive trade practices which are contrary to the public interest ".

" I would therefore recommend the appointment of a Commission to enquire into the existence of monopolies in the country in the sense in which the term is understood in this field of the law and the prevalence of restrictive trade practices which are detrimental to the interests of the public generally and to suggest measures to remedy the evil if found to exist. In the context of the large scale industrialisation of the country that is proceeding apace, I consider that such an enquiry would be found to yield fruitful results and constitute an assurance to the general public that the economic advantage resulting from the country's advance are not being diverted to individual aggrandisement ". [7]

This Institute which is founded for the purpose of encouraging research in every field of law could well undertake a scientific and systematic investigation and study of the problem created by economic

7. Rajagopala Ayyangar, *Report on the Revision of the Patents Law,* (1959) pp. 84-; (Paras. 200, 201, 202 and 203).

and social pressure of groups which produce real though not legally redressible inequality of bargaining power, so that by reason of such studies, there could be created an intelligent and informed public opinion conscious of the inadequacies of the law. This will provide a climate which will lead the way to legislation to bring the law into accord with the needs of growing social consciousness and fill that gap which is necessary to be filled, if faith in contracts which is a dynamic and not a static institution, is to be restored as an instrument of economic stability and progress.

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THE WRITING OF JUDGMENTS

The best judgments are those which clearly state the legal principle on which they are based. I dislike the method sometimes adopted of assembling an array of previous cases, like an excerpt from a Digest, and after painstakingly examining their points of resemblance to or distinction from the case in hand, deciding according to the precedent most nearly in point. In the process of reaching a decision precedents are very properly read and studied as evidence of the law, but they should be used for the purpose of extracting the law from them. It is undesirable to cumber a judgment with all the apparatus of research which Bench and Bar have utilised in ascertaining the principle of law to be applied.

Without entering upon the familiar controversy whether judges make law or only declare existing law, all will agree that the functions of the Judicature and the Legislature are distinct. But it is inevitable that the judge in deciding the cases that come before him must incidentally modify, adapt and develop the law by his interpretation of it. Yet he should always remember that his duty is to apply to the case in hand the law as he conceives it to be and not as he might wish it to be. Nevertheless there is an undefined intermediate zone within which the judge in effect makes law and it is just here that restraint on his part is necessary if he is not to trespass outside his proper sphere. The attempt not infrequently made to escape from distasteful authority by resort to casuistical and unreal distinctions is not to be commended. Where a binding authority exists it must be followed, even if it leads in the judge's opinion to injustice, for, as Lord Bramwell said, "it is much better that a wrong decision should be set right by legislation than that idle distinctions should be drawn...and the law thrown into confusion".

—Lord Macmillan "The Writing of Judgments" *26 Canadian Bar Review* 491 at 498-499.