

THE HAMLYN LECTURES

TENTH SERIES

THE SANCTITY OF CONTRACTS

IN

ENGLISH LAW

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THE SANCTITY OF
CONTRACTS
IN
ENGLISH LAW

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JOHN MURRAY,
Chairman of the Trustees.

March, 1959

CHAPTER 1

GROWTH OF SANCTITY OF CONTRACTS

INTRODUCTION

WHEN we read the arguments of counsel and the opinions of judges in actions for breaches of contract during the last three or four centuries we find fundamental changes in the views held with respect to the nature of contracts, the purpose of enforcing contracts and the relation of breaches of contract to morality generally. In other words, even in modern times, the juristic conceptions of the nature of a contract and of the place of a law of contract in the scheme of things have varied to a remarkable degree.

It will be my aim in these lectures to make a general study of these changing conceptions: changes which are to be seen and felt in the field of legislation as well as in that of judge-made law. But I shall limit my study, for the most part, to the reports of cases during these last four hundred years and shall make only a brief review of relevant legislation and the works of text writers. My object is to draw attention to the different changes and to try and outline their causes and general effects.

THE MORAL BASIS OF CONTRACT

In the 1953 Hamlyn Lectures, *English Law and the Moral Law*,¹ Professor Goodhart stated that “the

¹ p. 10.

moral basis of contract is that the promisor has by his promise created a reasonable expectation that it will be kept.” He could have found support for this view in the words of a former Oxford professor, Sir Thomas Erskine Holland; for Holland (writing in 1916) in his book on *Jurisprudence*² declared that “when the law enforces contracts it does so to prevent disappointment of well-founded expectations, which, though they usually arise from expressions truly representing intention, yet may occasionally arise otherwise.” In fact, however, Professor Goodhart, not unnaturally, sought confirmation of his view on the American continent and found it in the following quotation from an American legal classic, namely, Professor Corbin’s eight-volume work on the *Law of Contracts*³: “That portion of the field of law that is classified and described as the law of contracts attempts the realisation of reasonable expectations that have been induced by the making of a promise. Doubtless, this is not the only purpose by which men have been motivated in creating the law of contracts; but it is believed to be the main underlying purpose, and it is believed that an understanding of many of the existing rules, and a determination of their effectiveness require a lively consciousness of their underlying purpose.”

There are at least three good reasons which can be advanced in support of Professor Goodhart’s view of the moral basis of contract in English law. One is

² 12th ed. (1916) at p. 262.

³ *Law of Contracts*, 1950, Vol. 1, p. 2.

historical, another commercial or economic and the third equitable.

Our early common law had no general theory of contract in the sense that, provided they satisfied certain legal tests, promises or agreements generally should be enforceable by the courts. All that it had was a system of writs designed to protect rights deriving from a few transactions giving rise to what we would now describe as contractual, but which were then regarded as proprietary, interests. When in the fourteenth, fifteenth and sixteenth centuries the King's courts of common law were evolving new and more general remedies for breaches of contracts, an all-important new departure consisted in the extension of an "action on the case"⁴ to cover instances of non-feasance—in less technical language, when a writ became available against a promisor who had made a binding promise and never performed it. The promisor had by his deceit in undertaking to do something for another and then failing to carry out his promise caused injury to that other (generally known to lawyers as the "promisee"), for which injury the promisee was entitled to recover damages. This form of action on the case, which ultimately became the normal remedy for breaches of contract generally, was evolved as a method of redressing the damage suffered by a promisee who had been disappointed by the failure of his promisor to redeem his promise.

⁴ See on this generally, Plucknett, *Concise History of the Common Law*, 5th ed., pp. 372-373, 637 *et seq.*

The second reason, as I have said, is commercial or economic. In the fifteenth and sixteenth centuries trade and commerce, national and international, were fast becoming important in the economic life of the country and they have remained of the greatest importance to us ever since. Credit has always played a vital part in trade and commerce. Merchants and tradesmen do not give credit unless they can rely upon their debtors to fulfil their promises and pay their debts; or failing payment, can enforce those promises in the courts of the land. As Sir George Paton has so well put it,⁵ "Credit depends essentially on ability to rely on the promises of others and thus can flourish only where there is a fully developed law of contract." Economic self-interest cannot afford the general disappointment of creditors' expectations.

The fact that all persons whose interests are affected by an arrangement have freely and with full knowledge agreed on that arrangement is, in general, cogent evidence in favour of its justice. When all persons interested in a particular transaction have given their consent to it and are satisfied, the law may safely step in with its sanctions to guarantee that right be done by the fulfilment of reasonable expectations. This constitutes a third clear reason why the law should enforce agreements or promises.

But reasons other than that advanced by Professor Goodhart have at different times been put forward to

⁵ *Jurisprudence*, 2nd ed., p. 350, citing Cairns, *Law and the Social Sciences*, p. 82.

justify the legal enforcement of promises; and some of those reasons have in their day had wide currency and considerable influence. Indeed traces of these influences may be discerned even into modern times. As a distinguished American scholar has observed,⁶ “Even when a new generation of judges no longer holds the same philosophic and economic views, it is hard to escape the authority of previous decisions, and previous grounds of decision. The change takes place more slowly.”

Before entering upon a consideration of other reasons put forward in their day, it may not be without interest to mention a fact noted by Holland⁷: “It has been paradoxically maintained,” he writes, “by more than one writer of eminence that no assistance should be given by law to the enforcement of agreements on the ground that they should be entered into only with those whose honour can be trusted; and the laws of Charondas and the ancient Indians are stated to have proceeded on this principle.”

THE INFLUENCE OF THE ECCLESIASTICAL COURTS

Before the common law courts had evolved a general remedy for breaches of simple contracts, both the ecclesiastical courts and the Court of Chancery had, in some measure, tried to fill the wide gap in the law left open by the common law writ system. Where a promisor had pledged his faith to perform his promise—that is to say, had made a promise or

⁶ Williston, 6 Cornell L.Q. 365.

⁷ Holland's *Jurisprudence*, 12th ed., p. 260.

entered into an agreement ratified by an oath—and then failed to fulfil that promise or agreement, his failure constituted an ecclesiastical offence for which he was answerable in the Church courts as a sinner in need of correction. The King's courts, however, seem to have steadfastly refused to enforce contracts made or ratified only under such a pledge of faith: and the Constitutions of Clarendon, 1164,⁸ discouraged the ecclesiastical courts from attempting to enforce them. Nevertheless these latter courts, in spite of many prohibitions, continued from time to time to exercise jurisdiction over persons who had pledged their faith to perform contractual obligations and then failed to honour their word.⁹ Professor Plucknett sums up the situation in these words: "The Church very early took a strong view of the sanctity of contractual relationships, insisting that in conscience the obligation of a contract was completely independent of writings, forms and ceremonies, and tried so far as she could to translate this moral theory into terms of law."¹⁰

The point I want to make is that although "sin," on the one hand, and "crime" and "breach of contract" on the other are to us today quite distinct conceptions, this was not always so; for the obligations of religion and of law in the field of promises were in medieval times almost indistinguishable. Throughout the medieval period, a pre-eminently

⁸ See generally Plucknett, *A Concise History of the Common Law*, 5th ed., p. 17.

⁹ See generally on this Holds. H.E.L. Vol. III, pp. 414-415.

¹⁰ Plucknett, *op. cit.* at p. 627.

formative period in English law, there was an insistence by canon lawyers that it was a religious duty to keep faith, and notwithstanding the discouragements of the Constitutions of Clarendon the influence of the ecclesiastical conception of breaches of contracts must have been considerable at a time when the foundations of contract law were being discussed.

CONTRACTS IN THE COURT OF CHANCERY

During this same medieval interregnum, in the absence of an adequate common law remedy for breach of contract, the Court of Chancery, as well as the ecclesiastical courts, was approached by petitioners seeking redress for breaches of contract; and as the great majority of the medieval chancellors were ecclesiastics it was only natural for them to follow much the same lines as the Church courts.¹¹ Accordingly they offered remedies in cases where good faith and honest dealing demanded enforcement of promises. Sir William Holdsworth observes¹² that this might well have brought the whole of the law of contract under the jurisdiction of the Court of Chancery, had not the common law courts awakened

¹¹ See Plucknett, *op. cit.* at p. 627. For a contrary view, see Ames, *Select Essays in Anglo-American Legal History*, Vol. III, p. 309, where it is stated that there seems to be no reason to suppose that the chancellors, in giving relief, were influenced, even unconsciously, by any recollection of ecclesiastical traditions in regard to *fidei laesio*. "It was so obviously just that one who had intentionally misled another to his detriment should make good the loss, that we need not go further afield for an explanation of the chancellor's readiness to give a remedy upon such parol agreements." *Op. cit.*

¹² *History of English Law*, Vol. 1 (7th ed.), p. 456.

in time to the necessity of providing a remedy for the breach of simple contracts.

There is no doubt but that the association of a breach of contract with the sin of breach of faith in the ecclesiastical courts and the readiness of the Court of Chancery to regard failure to perform one's promises as tantamount to bad faith and dishonest dealing, combined to give to contracts a measure of religious blessedness and to breaches of contract a mark of sinful or unethical aberration.

ENFORCEABILITY OF CONTRACTS AT COMMON LAW

Throughout the seventeenth and eighteenth centuries when the writ of *assumpsit* had opened the door wider to provide a general remedy for the breach of an agreement and before the doctrine of consideration had been fully defined as a workable criterion for determining what agreements should be legally enforceable, there was much discussion among the judges of the duty to enforce moral obligations. Thus in *Dutton v. Poole*¹³ a promise, made by a son to his father, to pay £1,000 to his sister, was held enforceable by the sister. Chief Justice Scroggs expressed the view that "there was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children."¹³ Mr. Fifoot's apt commentary on the case is that "the warmth of natural affection and the recollection of paternal care sufficed to generate legal

¹³ (1677) 2 Lev. 210, 211-212.

obligations between the members of a family.”¹⁴ Conveyancers had already recognised that such “good” family consideration (as opposed to what later became known as “valuable” consideration) was sufficient for their purposes.

In *Dutton v. Poole*^{14a} and similar cases the judges, while feeling their way, in manner characteristic of the development of judge-made law, towards a satisfactory test of enforceability of promises, edged towards the establishment of morality as that test. As Mr. Fifoot has observed,¹⁵ “the pressure of morality had long been felt upon the practice of the courts, and it needed only courage to transform its maxims into a general principle of liability.”¹⁶ And so it was not surprising that Lord Mansfield “with his flair for rationalisation” should launch the principle of moral obligation “upon a career which promised to be triumphant.”¹⁵ Thus in *Atkins v. Hill*,¹⁷ a successful action in *assumpsit* by a legatee upon a promise by an executor with sufficient assets to pay a legacy, the learned Chief Justice observed: “. . . in the present case there is not only an assent to the legacy, but an actual promise and an undertaking to pay it: and that promise founded on a good consideration in law; . . . it is the case of a

¹⁴ *Lord Mansfield* at p. 135.

^{14a} (1677) 2 Lev. 210.

¹⁵ *Op. cit.* at pp. 136, 137.

¹⁶ Compare the position in the U.S.A. as regards liability to a beneficiary on a third-party promise made for his benefit. “It is just and practical to permit the person for whose benefit the contract is made to enforce it against one whose duty it is to pay”: Pound J. in *Seavey v. Ransom*, 224 N.Y. 233. 237.

¹⁷ (1775) 1 Cowp 284, 288.

promise made upon a good and valuable consideration, which in all cases is a sufficient ground to support an action. It is so in cases of obligations which would otherwise only bind a man's conscience, and which without such promise, he could not be compelled to pay."¹⁸

In a similar action brought seventeen years later in *Hawkes v. Saunders*,¹⁹ Lord Mansfield restated his view even more forcibly in these words²⁰: "Where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration. As if a man promise to pay a just debt, the recovery of which is barred by the Statute of Limitations: or if a man, after he comes of age, promises to pay a meritorious debt contracted during his minority . . . or if a bankrupt, in affluent circumstances after his certificate, promises to pay the whole of his debts; or if a man promises to perform a secret trust, or a trust void for want of writing, by the Statute of Frauds."

Lord Mansfield's advocacy of the doctrine of moral obligation was so constant and pressing that we are in some danger today of regarding him as almost its

¹⁸ Compare Lord Coleridge C.J.'s observation in a case of manslaughter by neglect to provide food or medical attendance for an aunt helplessly ill in the same house: "It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement": *The Queen v. Instan*, [1893] 1 Q.B. 450, 453.

¹⁹ (1782) 1 Cowp. 289.

²⁰ At p. 290.

sole protagonist.²¹ That would be quite wrong, for the reports show that many of the other judges of his time shared his partiality for it; thus, to give only one example, Buller J., also in *Hawkes v. Saunders*, observed²²: “I agree with my Lord, that the rule laid down at the Bar, as to what is or is not a good consideration, is much too narrow. The true rule is, that wherever a defendant is under a moral obligation, or is liable in conscience and equity to pay, that is a sufficient consideration.”

But the tide of judicial opinion had already begun to flow against this general doctrine. In *Rann v. Hughes*²³ Skynner L.C.B. had already declared his attitude in the following unmistakable terms:

“It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration.”

And as the technical doctrine of consideration was more closely defined the more general test of morality became less and less acceptable to the judges and the profession. Thus in *Littlefield v. Shee*²⁴ Lord Tenterden C.J. observed that “the doctrine that a moral obligation is a sufficient consideration for a subsequent

²¹ Sir William Holdsworth describes him as having “wrested the meaning of the cases to justify his view that a moral obligation was a sufficient consideration”: Holdsworth, *Some Makers of English Law*, p. 152.

²² At p. 294. See also *Trueman v. Fenton* (1777) 2 Cowp. 544.

²³ (1765) 4 Brown, P.C. 27; 7 T.R. 350, n.

²⁴ (1831) 2 B. & Ad. 811, 813.

promise, is one which should be received with some limitation.”

But that it did not completely disappear before nearly the middle of the nineteenth century is obvious from the cases of *Lee v. Muggeridge*²⁵ and *Eastwood v. Kenyon*.²⁶ In the former case, the Chief Justice²⁷ of Common Pleas observed²⁸: “. . . it has been long established, that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action. The only question, therefore, is whether upon this declaration there appears a good moral obligation.”

It was in the well-known case of *Eastwood v. Kenyon*²⁹ that the doctrine received its death blow, for it was in that case that Lord Denman declared that “the doctrine would annihilate the necessity for any consideration at all, in as much as the mere act of giving a promise creates a moral obligation to perform it. The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequence to Society; one of which would be the frequent preference of voluntary undertakings to claims for just debts.”

Mr. Fifoot sums up³⁰ the influence and ultimate

²⁵ (1813) 5 Taunt. 36.

²⁶ (1840) 11 Ad. & E. 438.

²⁷ It is not without interest that the Chief Justice's name was Mansfield (but not of course, Lord Mansfield).

²⁸ 5 Taunt. at p. 46.

²⁹ (1840) 11 Ad. & E. 438, 450.

³⁰ *Op. cit.* at pp. 140-141.

fate of the conception of morality as a general test of actionability in these words :

“The invocation of morality had the virtue of presenting a definition, which, if comprehensive, was without a coherent competitor and which could be used to discipline a quantity of refractory precedent. It escaped serious challenge for a generation and was not expelled from the law until the middle of the nineteenth century.”

THE INFLUENCE OF BENTHAMISM

Long before Lord Mansfield and the judges of his time had made their effort to press the claims of morality upon the courts, political philosophers such as Bodin and Hobbes had publicised their rationalistic speculations on government, sovereignty and the nature of law. The new gospel of reason moved forward hand in hand with varying conceptions of natural law, many of them based upon a clear distinction between law and morality. The general trend of the movement proved in due course to be in the direction of recognising utility rather than morality as the justification for the enforcement of obligations. David Hume provided the philosophical background by his teaching that everything which contributes to the happiness of society “recommends itself directly to our approbation and goodwill.”

Jeremy Bentham propagated and elaborated this new philosophy of utilitarianism, concentrating in particular on its application to government and constitutional and legal reforms. Nature, he proclaimed,

has placed mankind under the governance of two sovereign masters, pain and pleasure. They govern us in all we do, in all we say, in all we think. John Austin worked out the juristic implications of this new school, starting with his emphasis on sovereignty, which he proceeded to analyse at some length, and his treatment of law as a command of the sovereign. For our immediate purposes we can safely generalise that he separated jurisprudence from morals and specialised in the scientific and philosophical study of established legal institutions and leading legal concepts such as rights, duties, property. The purpose of the school of Analytical Jurisprudence founded by Austin is well and succinctly described in the current edition of Salmond on *Jurisprudence*³¹ as “to analyse without reference either to their ethical origin or development or to their ethical significance or validity, the first principles of the law.”

Austin's followers,³² for example, Holland, Salmond and Gray, followed suit; and their conclusion is that contracts should be enforced so as to prevent disappointment of well-founded expectations.

NINETEENTH CENTURY VIEWS OF CONTRACTS: THE HISTORICAL SCHOOL

Side by side with the analytical school's conception of contract there flourished from time to time other philosophical and economic doctrines which had their influence on contemporary ideas of the nature and

³¹ 11th ed. at p. 4.

³² For a full list of his followers and their works, see Salmond on *Jurisprudence*, 11th ed., p. 13, note (r).

purpose of the law of contract. There was for example the historical school with its emphasis on the gradual evolution of legal institutions, its appreciation of the social and economic background of those institutions and its great respect for the national and individual characteristics in which legal systems developed. Thus Maine declared that "the jurist, properly so called, has nothing to do with any ideal standard of law or morals."³³ Its outlook was markedly traditionalist and it was on the whole passive in its general attitude to law. Nevertheless for this school the law of contract was specially important; for it was at the same time a medium whereby different communities and individuals gave natural spontaneous expression to their convictions and aspirations, and part of a process inevitable in the general march of the spirit in history, evolving liberation from the bonds of status. To use the words of Sir George Paton in a somewhat different context, since contract was the legal category which gave the greatest means of self-expression its sphere was not only increasing, but ought to be increased. The dictum "status to contract" became not merely a convenient generalisation of certain aspects of legal history but an external principle the onward march of which could not be stayed.³⁴

THE "WILL THEORY" OF CONTRACTS

Another theory that had considerable influence during the latter part of the nineteenth century was

³³ *Early History of Institutions*, 360-370.

³⁴ *Jurisprudence*, 1st ed., p. 293.

“the will theory.” This was founded on the view that a contract was the result of a real agreement between two or more parties and that such a union of wills was inherently worthy of respect; for it extended the reach of an individual’s personality and thereby tended to increase his freedom and worth in the community.

The view that the essence of contract is agreement, and the essence of agreement is a union of wills, was not a new nineteenth-century conception. For as Sir William Holdsworth has pointed out,³⁵ it was clearly recognised by the lawyers of the sixteenth century. Thus in *Browning v. Beston*³⁶ (a case which was much argued in 1552 and 1553) Counsel (Serjeant Catline by name) contended in his argument that “in contracts it is not material which of the parties speak the words, if the other agrees to them, for the agreement of the minds of the parties is the only thing the law respects in contracts, and such words as express the assent of the parties, and have substance in them, is sufficient.”

But it was throughout the nineteenth century that the doctrine bloomed in all its glory. Unfortunately its protagonists were divided over one fundamental aspect of it. Some argued that the wills of the parties had to be in reality at one, others that it was sufficient that the parties could be taken objectively to have expressed their agreement without having been really *ad idem*. Sir William Anson writing in

³⁵ See H.E.L., Vol. VIII, p. 1.

³⁶ (1555) 1 Plowden 131, 140-141.

1882 stated his position in the controversy as follows³⁷:

"While the consensus *ad idem* or agreement is the ideal basis of contract, the court will assume the existence as a necessary sequence of certain overt acts of the parties. Their minds must needs be out of reach of a court of law, but where they exhibit all the phenomena of agreement the existence of agreement will be taken for granted."

In the latest edition of Cheshire and Fifoot on the *Law of Contract*³⁸ the matter is put in this way:

"A contracting party . . . is bound because he has agreed to be bound. Agreement, however, is not a mental state but an act, and, as an act, is a matter of inference from conduct. The parties are to be judged not by what is in their minds, but by what they have said or written or done."

While the positive school drew a sharp line between positive law on the one hand and morals and ethics on the other, the advocates of the will theory saw in law a rational means of attaining a spiritual end through the freedom of the will. So they threw into some confusion once more the place of the moral and the ethical elements in legal conceptions.

CONCLUSION

The conclusion at which I have arrived during my study of the development of the general law of

³⁷ *Principles of the English Law of Contract*, 2nd ed., p. 13.

³⁸ 4th ed. at pp. 21 22.

contract in England and of the remedies provided by English law for the redress of breaches of contract is that throughout the greater part of that development the giving of a promise or the conclusion of an agreement involved a solemn undertaking the breach of which amounted in the eyes of the Church to a sin and in the eyes of the general body of contemporary lawyers to an immoral or unethical act. With the special emphasis placed by the nineteenth-century philosophers and jurists on the importance of freedom and the manifestation and extension of an individual's freedom through contract, it was not surprising that contracts developed a juristic blessedness or halo and were so often regarded as sacred. Their sanctity is directly traceable to their early religious and ecclesiastical associations, their protection by the Court of Chancery as a court of conscience, their importance to international merchants as the foundation of credit, and the prominent place that the individual freedom which they fostered held in the eyes of nineteenth-century jurists and political philosophers.

CHAPTER 2

ENCROACHMENTS ON SANCTITY OF CONTRACTS

CONTRACTS WHICH EQUITY DECLINED TO ENFORCE

NOTWITHSTANDING the rejection by the courts of the moral obligation test of actionability of contracts and the evolution and adoption by them, in preference, of the indifferent or neutral technical test of consideration, ethical or moral as well as social and economic problems have kept intruding into the field of enforceability of contracts. The intrusions have come from courts of equity, from the legislature and from the common law courts. We are so used to the operation of the Court of Chancery as a Court of Conscience that its refusal in certain instances positively to assist a promisee by making an order directing a promisor to fulfil a positive undertaking, or by an injunction to restrain the breach of a negative stipulation, seems natural. And even where Equity gives its aid to cancel a formal agreement or to rescind a parol one, the intrusion on moral or ethical grounds for the purpose of treating a contract as voidable or invalid which would otherwise seem valid, causes no juristic qualms.

From what I have already said in my first lecture, one would be ready to assume that even though the Court of Chancery was during the seventeenth and eighteenth centuries ready to assist in the enforcement of contractual undertakings, it could not very

well be expected to do so where the petitioner who sought its aid had not acted honestly or fairly. The relief or aid which that court has extended in practice to a petitioner has at all times been of a discretionary character; and so it has been natural for it to refuse its discretionary remedy in any case where the conduct of the petitioner is shown to be the result of dishonesty or sharp practice. A note in *Equity Cases Abridged*¹ (an Abridgment of Cases in Equity argued and adjudged in the Court of Chancery between 1667 and 1744), sums up the position as follows: "But now the power of Chancery and other courts of equity, in enforcing the execution of articles and agreements, is so well established, that in many cases, money agreed to be laid out in lands shall be considered as lands and lands as money; *Vide. 1 Chan.Ca. 39*, and though a losing bargain will sometimes be decreed, as well as a beneficial one *2 Vern. 423*, yet it must ever be observed that articles or agreements, out of which an equity can be raised *in specie*, ought to be obtained with all imaginable fairness, and without any mixture tending to surprise or circumvention; and that they be not extremely unreasonable in any respect; or otherwise a court of equity will according to the circumstance of the case, either set the agreement quite aside, send the party to law, or direct a trial in a *quantum damnificat.*"²

¹ Eq.Ca.Abr. 17.

² It is interesting to compare this statement with that in the last edition (6th) of Fry on *Specific Performance*. "If the defendant can show any circumstances *dehors*, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a Court of Equity, having

Three cases are cited in illustration of the statement which I have quoted from *Equity Cases Abridged*. In all three, Equity refused to decree specific performance of the contract. In one,³ A had contracted to purchase B's estate, pretending that he was buying it "for one whom B was willing to oblige," and thereby got it "somewhat the cheaper, when in truth he bought it for another." "There had not been fair and open dealing" in the matter. In the second case,⁴ before Lord Chancellor Thurlow, there was an agreement to purchase an estate. Afterwards it transpired that the vendor had concealed a substantial annual outgoing on an obligation to repair a wall to protect the estate from the river Thames. The third case⁵ was concerned with an agreement by an attorney to buy property from an old lady of ninety years of age and there were several suspicious circumstances appearing. In this last case the Lord Chancellor would neither decree specific performance of the agreement against the heir, nor, in a cross suit, order it to be delivered up.

A later case illustrative of the same attitude is *Webster v. Cecil*.⁶ There a plaintiff claimed specific performance of a contract to sell property to him for £1,250. The defendant had in the first instance refused to sell certain property to the plaintiff for £2,000, and then had by mistake written offering the

satisfactory information upon that subject, will not interpose."

See also *Holliday v. Lockwood* [1917] 2 Ch. 50.

³ *Phillips v. Duke of Bucks* (1682) 1 Vern. 227.

⁴ *Shirley v. Stratton* (1785) 1 Bro.Chan.Cas 440.

⁵ *Green v. Wood* (1708) 2 Vern. 632.

⁶ (1861) 30 Beav. 62.

same property for £1,250. So the plaintiff was well aware of the error. Nevertheless he purported to accept the written offer; and when the defendant had without delay drawn his attention to the mistake, the plaintiff sued for specific performance. Sir John Romilly M.R. in refusing this remedy observed that the court could not compel a person to sell property for much less than its real value and for £1,000 less than he intended. The plaintiff, he added, might, however, bring such action at law as he might be advised.

The development of the equitable doctrine of Part Performance offers a curious example of an apparent conflict between the common law, legislation and equity. The Statute of Frauds, 1677, s. 4, provided that, among others, a contract for the sale of land should not be enforceable by action unless it was in writing or evidenced by a note or memorandum in writing. That is to say, even though the existence of a promise or agreement could in fact be proved by oral evidence and the contract would accordingly have been enforceable at common law, the Statute forbade its enforcement by action if there was no written evidence of it. But the judges of the Court of Chancery made it clear⁷ that they would not allow the Statute "to be made a cloak for fraud," and it would be something very much like fraud on the part of a promisor not to carry out his contract.

⁷ *Halfpenny v. Bollet* (1699) 2 Vern. 373; cited in *Bawdes v. Amhurst* (1715) Prec. in Ch. 402, as *Mollett v. Halfpenny*. See also *Butcher v. Stapely* (1685) 1 Vern 363; *Lester v. Foxcroft* (1700) Collis 108.

So they would order specific performance of an oral agreement and this notwithstanding the absence of written evidence, provided that suitable acts of part performance of the agreement were proved.

I have drawn attention to this treatment of contracts by the Court of Chancery because it illustrates two general trends. In the first place, it shows that although good faith and honest dealing demanded the observance of promises and agreements in general, circumstances might occur in individual cases where a plaintiff had obtained a promise or assent from another by unfair, dishonest or fraudulent means thereby disentitling him to the assistance of equity to force the promisor to fulfil this promise. Secondly, notwithstanding the prescription by the legislature of a minimum requirement to prove certain contracts, fraud on the defendant's part might, again in individual cases, and in the interests of fair and honest dealing, drive the courts to compel the promisor to carry out his promise or agreement in spite of the absence of the statutory, requisite, written evidence.

I have dwelt on these perhaps rather obvious points simply to show how in certain circumstances although a promise had been given, the law would not give its aid to compel its performance, and how in other cases although the legislature might prescribe a minimum of proof for a promise, yet the Chancery judges might by-pass the prescription in order to prevent the promisor from getting away with his fraud.

CURTAILMENT OF FREEDOM OF CONTRACT
BY THE LEGISLATURE

The circumstances in which the legislature has declared that agreements or promises however solemnly made shall be treated as void are by now numerous; and the reasons for such declarations vary greatly.

CONTRACTS ENTERED INTO ON SUNDAY

In the first place religious, ethical or moral considerations have prompted legislative action in some instances. One example of that is the Sunday Observance Act, 1677. A promise made on a Sunday appears to have had the like validity at common law as a promise made on any other day. But under the Sunday Observance Act, 1677, no tradesman, artificer, workman, labourer or other person whatsoever shall do or exercise any worldly labour, business or work of their ordinary calling⁸ on Sunday. Works of necessity and charity are, however, excepted. Any person over the age of thirteen years offending against the prohibition is liable to forfeit the sum of 5s. in respect of each offence and a contract which involves a contravention of the Statute is illegal and so cannot be enforced.

The Act applies to transactions in private as well as in public⁹; but it has been narrowly construed in

⁸ Thus in *Drury v. Defontaine* (1808) 1 Taunt. 131, a private sale of a horse on a Sunday by an auctioneer who exercised his calling as an auctioneer at public sales was held not to be void as not having been made by him in exercise of his ordinary calling; while twenty years later a sale of nutmegs through a broker on a Sunday was held not to be actionable: *Smith v. Sparrow* (1827) 4 Bing. 84.

⁹ *Fennell v. Ridler* (1826) 5 B. & C. 406.

the sense that only those persons falling strictly within the categories of tradesman (a person not carrying on the business of buying and selling things is not a tradesman), artificer (a person who does not actually make things is not an artificer), workman, labourer (a person who is not employed to work for another is not a workman or labourer¹⁰) or other person *ejusdem generis* and so he is not within the statute.

Whatever may be the true reasons for the continued retention of this enactment in the Statute-book, and, however technical and haphazard its modern application may appear, I think it must be agreed that its enactment was prompted by the puritan influences which were still potent in the early days of Charles II's reign.

WAGERING CONTRACTS

Another field in which considerations of religious or moral welfare have been similarly operative is that of betting or wagering.

Neither the legislature nor the judiciary in this country have ever been able to make up their minds definitely to what extent, if any, gambling or betting as such is immoral or contrary to the public interest. This is well borne out by the attitude of the courts and Parliament towards wagering contracts. The comments of two outstanding jurists on this matter are somewhat caustic. Sir William Holdsworth's is

¹⁰ See *Palmer v. Snow* [1900] 1 Q.B. 725.

as follows: "In 1664 the struggle of the legislature with the gambler began."¹¹

And this is what Sir Frederick Pollock wrote with reference to legislative action: "The tale begins as early as the Restoration. . . . it is a tale of some permanent value as an example of blundering good intentions and a warning (if such people could take a warning) to hasty, piecemeal reformers."¹² With reference to the judiciary Sir Frederick observed: "If our judges had taken a larger and more courageous view in the eighteenth-century they would have held as a matter of principle that the concern of the law is to protect and uphold men's honest dealings in matters of serious business and not to let the decision of such matters be delayed and hampered by the hearing of suits brought on merely sporting promises; not to mention the ill-effects of excessive and systematic gambling on the general welfare of the realm. The courts could not prevent men from gambling or from regarding payment of gaming debts as a 'debt of honour'—taking precedence of much more important commercial liabilities; but that was no reason for allowing such debts to be sued on. But the judges lacked courage to break the shackles of mere form . . ."¹³

Wagering contracts were not as such illegal or void or even unenforceable at common law; but in view of a tendency for the parties to bring frivolous and sometimes indecent matters connected therewith

¹¹ Holdsworth, H.E.L., Vol. VI, p. 404.

¹² Pollock on *Contracts*, 13th ed., p. 282.

¹³ Pollock, *op. cit.* at p. 279.

before the courts when wagers were sought to be enforced, the rule became established that it was against public policy to enforce such as were provable only by evidence which was indecent, painful to third parties or against public policy.¹⁴

By a statute passed in the reign of Charles II, in the year 1664, a limit of £100 was placed on the amount recoverable on a gaming or wagering contract. And by a statute¹⁵ passed in 1845 all contracts or agreements by way of gaming or wagering were declared null and void. It was further declared that no action was to be entertained in any court to recover money won on any wager or deposited as a stake except where it was a contribution towards a lawful prize.¹⁶ This did not make such agreements illegal in the strict sense of that word; it only deprived them of legal effect. Henceforth they could subsist only as "gentlemen's agreements"¹⁷ or "contracts of honour."

To complete the picture with respect to wagering debts, it should be added that the Gaming Act, 1892, made void any promise to pay any person money paid by that person under the Gaming Act, 1845, or any

¹⁴ See *per Hawkins J.* in *Carlill v. Carbolic Smoke Ball Co.* [1892] 2 Q.B. 484, 491-492.

¹⁵ Gaming Act, 1845, s. 18.

¹⁶ On which see *Ellesmere v. Wallace* [1929] 2 Ch. 1.

¹⁷ A gentlemen's agreement is reported to have been defined recently in a lecture at the University of Edinburgh by a learned Chancery judge (Mr. Justice Vaisey) as "an arrangement which is not an agreement, between two persons, neither of whom is a gentleman, with each expecting the other to be strictly bound, while he himself has no intention of being bound at all."

agreement to pay a sum of money by way of fee or reward in respect of any services relating to such contract.¹⁸

The statute of 1664 which I have already mentioned, as well as making all wagering debts over £100 on players irrecoverable, declared all securities given for such debts void. The statute 9 Anne, c. 14, was more sweeping: it declared void all securities given for money lost in playing at games or pastimes or in betting upon players or knowingly advanced for such purposes. The Gaming Act, 1835, s. 1, modified that sweeping provision and introduced the modern rule whereby securities caught by the Act of Anne are deemed to have been made or accepted on an illegal consideration.

The net effect of the betting legislation in the field of contracts was to make bets as such and securities given for lost bets unenforceable (as between the immediate parties) in the courts, leaving them to be treated as debts of honour or gentlemen's agreements.

INFANTS' CONTRACTS

Yet another line of country in which the legislature has from time to time declared contracts void is where, owing to the presumably inferior bargaining position of one of the parties, the other party might take advantage of this weakness. The obvious example is that of the infant. At common law the contracts of an infant other than those for goods

¹⁸ Thus reversing the rule in *Read v. Anderson* (1884) 13 Q.B.D. 779, which requires a principal to indemnify his agent.

which were necessities or those for the infant's benefit were voidable at the infant's option. He could exercise his option to avoid them either before attaining his majority or within a reasonable time afterwards. He could, however, himself enforce them. The Infants Relief Act, 1874, declared three classes of contracts entered into by an infant "absolutely void." These were contracts to repay money loans, contracts for goods supplied or to be supplied (other than necessities) and all accounts stated. Moreover, the same Act forbade an action being brought on any promise or ratification of a contract made during infancy. In the words of Anson's *Law of Contract*¹⁹: "The Infants Relief Act of 1874 appears to have been designed to guard not merely against the results of youthful inexperience, but against the consequences of honourable scruples as to the disclaimer of contracts upon the attainment of majority."

TRUCK ACTS

At one time no doubt a master paid his servant's wages in kind; but the trend away from the truck system in the direction of a free money economy and the payment of wages in money became general. Even in the early nineteenth century, payment for services continued in many instances to be made partly by money and partly by the supply of goods and services. Such a system of payment was liable to abuse; and in fact was not infrequently, directly or indirectly, abused by the employer. Thus wages

¹⁹ 19th ed. at p. 125.

might be paid partly in cash and partly in food or clothes of inferior quality and at prices above their proper value; or part of the wages might take the form of vouchers exchangeable for food, clothes or household goods at the employer's shop at the employer's price. To remedy these abuses there was passed the Truck Act, 1831, which made it an offence for an employer to contract that wages payable to his servant should be paid otherwise than in current coin of the realm and declared a contract to that effect to be illegal and void.²⁰ Nor must a contract of service contain a provision indicating how or where the wages are to be spent.²¹ The entire amount of the wages must be paid to the worker in current coin.²² Where in contravention of the Truck Act wages have not been paid in current coin of the realm, the workman is entitled to recover the whole or such part of the wages as have not been so paid. Thus, a plaintiff employed as a draper's packer, at 53s. a week, and supplied in addition with dinner and tea of the value of 10s. weekly, was held entitled to recover the value of such meals because they represented a deduction from his wages.²³

MONEYLENDERS ACTS

In the present century the legislature has adopted somewhat different techniques in dealing with cases

²⁰ Truck Act, 1831, s. 1. Certain exceptions were allowed; see *ibid.*, s. 23.

²¹ *Ibid.*, s. 2.

²² *Ibid.*, s. 3.

²³ *Pratt v. Cook, Son & Co. (St. Paul's), Ltd.* [1940] A.C. 437. For extensions and amendments of the Truck Act, 1831, see Truck Acts, 1887 and 1896.

of economic inequality in the contracting parties; but in both instances the net effect may be to interfere with promises or agreements intended by the parties to have full legal effect. Under the Moneylenders Acts, 1900 and 1927, no contract for the repayment of a moneylender's²⁴ loan or the payment of interest thereon and no security given in respect of it can be enforced unless there is a note or memorandum in writing of the contract signed personally by the borrower,²⁵ and unless a copy thereof was delivered or sent to the borrower within seven days of the making of the contract. Furthermore, no such contract or security is enforceable if it is proved that the note or memorandum was not signed by the borrower before the money was lent or the security given.²⁶

HIRE-PURCHASE ACTS

Again the Hire-Purchase Acts, 1938 and 1954, provide that hire-purchase and credit-sale agreements, to which the Acts apply, guarantees relating thereto and the right to recover the hired goods shall not be enforceable by the vendor or owner of the goods comprised therein unless the requirements of the Acts have been observed. The Acts now apply to agreements relating to livestock the total price of which does not exceed £1,000, and to any other agreement

²⁴ For definition of "moneylender" for the purposes of the Act, see the Money-lenders Act, 1900, s. 6, as amended by Moneylenders Act, 1927, s. 19 (3).

²⁵ Where the borrower is a company the memorandum may be signed by any person acting under its authority: *Re British Games* [1938] Ch. 240.

²⁶ Moneylenders Act, 1927, s. 6 (1).

where the price does not exceed £300. The main requirements are (a) a pre-contract statement to the hirer of the price at which the goods could be purchased by him for cash, (b) a note or memorandum containing a statement of the hire-purchase price and the cash price of the goods, the amount of each instalment payable and the date for payment of it, a list of the goods, and (c) the delivery of a copy of the note or memorandum to the hirer within seven days of the making of the agreement.

Obviously the legislature's objective was the protection of hire-purchasers in the lower income groups. Instead of declaring certain types of such agreements "absolutely void," it sought to provide for such disclosure of certain vital terms of the contract as directly to influence the terms of hire-purchase agreements generally and to open the eyes of the hirer to see the full implications of his bargain. Restrictions were imposed by these two sets of modern statutes on the freedom of contract in the interests of fair dealing between parties and to protect persons whose acquisitive instincts may be greater than their economic resources.

LABOUR LEGISLATION

Even in the eighteenth century, Acts of Parliament regulating the conduct of sundry trades and occupations were strangely multiplied; but most of these restrictive regulations were swept away during the Benthamite campaign for freedom of contract. Largely, however, as the result of the Industrial

Revolution and of the social and economic changes following two World Wars, the legislature has remodelled much of the framework and contents of our industrial law. In no part of it has this been more pronounced than in the law of contracts. Examples can be given from the fields of Factory and similar legislation and of Trade Union law.

Speaking generally English law secures to an employed person the freedom to work and use his skill and to decide for whom he shall work; and it secures to an employer formal freedom to determine whom he shall employ.²⁷ This is the freedom to which particular regard is had when reference is made to the movement from status to contract. But even throughout the nineteenth century the legislature introduced many and varied restrictions on this freedom. Thus, for social and humanitarian reasons, women were prohibited from working underground in mines; boys and girls (now up to the school-leaving age of 15) were debarred from employment in factories, mines, quarries and other industrial undertakings. Prohibitions or limitations have been imposed on the employment of young persons (male and female employees between school-leaving age and 18 years) in connection with dangerous machinery and the lifting and moving of heavy weights.

Furthermore, during the last century and the present one, the legislature has imposed numerous

²⁷ The legislature has now created an important exception to this right. Under the Disabled Persons (Employment) Act, 1944, an employer of 20 or more persons must give employment to a quota of registered disabled persons or at least be ready to allocate vacancies for that purpose.

restrictions as part of the terms on which a person can be employed. For example, agricultural workers and catering staffs have their minimum wages determined by boards or councils and those wages are given legal force in a wages regulation order. The minimum rate so fixed becomes binding on employer and employee as a term implied by statute in each individual contract of employment. The Merchant Shipping Acts have established what has been described as "an almost comprehensive statutory code" prescribing the terms of employment by shipowners of the merchant seamen who man their ships.

The general result is that agreements made between employers and employed persons which would otherwise be upheld in the courts will not be legally enforced if they contravene the provisions of such regulatory enactments.

TRADE UNION LEGISLATION

There is one field in particular where legislative interference with contracts has been most noteworthy and that is the field of Trade Union law. The association of workmen to defend and advance their interests was treated by the courts of common law as contrary to public policy. So also was the association of employers for similar objects, in particular where it was for the regulation and maintenance of prices. With the growth of trade unions following the Industrial Revolution the legislature (no doubt by way of reaction to the excesses of the French

Revolution) sought at first to repress them generally. The Combination Act, 1800, made illegal and void all contracts and agreements between journeymen, manufacturers or other persons for obtaining advances of wages, or altering hours of work, or preventing employers from employing whom they liked, or for controlling the management of other persons' business. It also established machinery for the summary settling of disputes between masters and workmen. When the feared perils of the French Revolution appeared to have receded and the influence of Benthamism had grown, a new and more tolerant set of combination laws replaced the older repressive measures. The Combination Act, 1824, declared that combinations of workmen to advance or fix wages should no longer be subject to prosecution for conspiracy or to any punishment, and that combinations of masters should enjoy a similar freedom. In the Combination Act, 1825, the legislature, caught in a reactionary mood, redefined and restricted the freedom of association granted in 1824. It in effect tolerated collective bargaining over wages and hours of work but left such bargains without sanctions for their enforcement. The Trade Union Act, 1871, provided that the purposes of a trade union should not, by reason only that they were in restraint of trade, be treated as unlawful either (a) so as to make members of the association criminally liable for conspiracy or (b) so as to render void or voidable any agreement entered into by them. The same Act²⁸ declared

²⁸ s. 4.

unenforceable as many as five types of contracts, namely :

1. Agreements between trade union members concerning conditions on which they should sell or not sell their goods, transact business or employ or be employed;
2. any agreement for the payment to a trade union of any subscription or penalty;
3. any agreement to apply the funds of a trade union to provide benefits to members, or to furnish contributions to any person not a member for acting in conformity with the rules or resolutions of the union, or to discharge any fine imposed upon a person by a court of justice;
4. agreements between one trade union and another; and
5. any bond to secure performance of any of the four foregoing types of contracts.

The general effect of this enactment was described by Fletcher Moulton L.J. in the celebrated *Osborne* case²⁹ as follows: “ . . . if the trade union . . . chooses to refuse to make any of the stipulated payments, neither the aggrieved party nor any other person can compel it to do so. The law refuses its assistance in the matter, and thus in effect leaves it entirely at the option of the trade union whether it will or will not fulfil its engagement. The only disability therefore under which a trade union or its

²⁹ *Osborne v. Amalgamated Society of Railway Servants* [1911] 1 Ch. 540.

members lie relates to the enforcement of contracts and not to their validity.”

Although the courts cannot entertain proceedings to enforce, or recover damages for breach of, the agreements which I have enumerated they are not debarred from granting some other kind of relief or assistance, such, for example, as a declaration on the interpretation of the rules of a union, or on the validity or invalidity of an expulsion from membership of a union; and in the recent case of *Bonsor v. Musicians' Union*³⁰ the House of Lords decided that a registered trade union could be sued for breach of contract by the wrongful expulsion of a member and that the union was liable in damages for such breach. The expulsion was wrongful because the power to expel given by the union membership rules had not been exercised in accordance with those rules.

I am not concerned to explain in detail the position of trade unions and their members with respect to their contractual liability. Nor am I concerned to express a view as to whether industrial relations and industrial progress would be better served if group or association regulations and agreements were given the full force, effect and sanctions associated with enforceable contracts. This is obviously a matter on which there can be differences of opinion. That question is discussed at some length by my colleague Professor Kahn Freund in an article in the *British Journal of Sociology*.³¹ In that article³² he points

³⁰ [1956] A.C. 104.

³¹ Vol. V, No. 3, pp. 193 *et seq.*

³² At p. 203.

out that "the most highly developed form of inter-group relations in Great Britain might be described as collective administration rather than as collective contracting. . . . The collective agreement appears as a 'resolution' or 'decision' of a joint institution . . . and loses its outward resemblance with a contract . . . [The] obligations and liabilities defy verbal definition. They are as manifold as they are subtle, and they do not lend themselves to enforcement by state-created legal machinery. They presuppose a spirit of co-operation which cannot be engendered by the application of legal sanctions. There is thus . . . a close connection between the largely 'dynamic' character of collective bargaining in Britain and its *praeter legem* character, *i.e.*, the insignificance of the law in the regulation of inter-group relations which have developed into a higher community. Legal norms and sanctions are blunt instruments for the shaping of inter-group relations which have developed into a higher community."³³

What I have had in mind in my reference to the treatment by the legislature of trade union contracts is to draw attention to the fact that for political and industrial reasons certain classes of contracts, not by any means small in numbers, have been made by the legislature by express statutory provisions directly unenforceable by the courts.

³³ See also "Comparative Observations on Legal Effects of Collective Agreements" by Jean de Givry, 21 M.L.R., pp. 501-509.

CHAPTER 3

CURTAILMENT OF FREEDOM OF CONTRACT BY THE COMMON LAW COURTS

IMPLIED TERMS

THE emphasis during the nineteenth century on individual freedom and the role of agreements in extending that freedom would seem to have required that no obligation in the nature of a contract should be enforced unless willed by the parties; yet the judges were ready to import terms into contracts and develop and enlarge restrictions in the public interest although the parties themselves had not expressed those terms or established those restrictions. There is no doubt but that the early common law rules whereby a man was held strictly to his promise, no more and no less, might operate harshly and unfairly in many instances. In consequence the lot of a person who, for some good reason, found himself unable to secure all that he thought he had bargained for, or to discharge his contractual obligation as he had conceived it, might be a hard one. The somewhat exaggerated endeavours of the courts to find a fair solution to such cases is most interesting. One of the most popular techniques utilised by the courts for this purpose was "the implied term."

As Sir Frederick Pollock has written, our courts formerly "were averse to going beyond the strict

letter of instruments, and would only in extreme cases imply terms that were not expressed or at least imported by some generally understood custom.”¹

Parties, however, often enter into many well established types of contracts, such as contracts for the sale of goods, or for the sale or lease of land, or for the hire of goods, against a background of previous dealings between them, and of common trade usage, or of local custom, or of conveyancing practice. They take that background for granted and do not trouble to provide expressly for it in their contract. If disputes arise between them as to the exact nature or extent of their commitments under the contract, the courts have been ready to respond to counsels’ invitations to imply terms giving effect to the understood, but unexpressed, intention of the parties.

One example will, I think, suffice to make the point clear. The owner of a horse might agree to sell it to a person at a particular price and a dispute might arise between the parties as to the full rights and obligations of the parties. The courts, having regard to previous dealings between the parties, local usages in the horse trade, and possible other factors in the case, would imply terms for giving full commercial efficacy to the contract. “In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the

¹ Pollock on *Contracts*, 13th ed., p. 227, citing *Paradine v. Jane* (1647) Aleyn 26.

perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.”²

In due course these implied terms contained in contracts for the sale of goods, introduced and developed in the common law courts, were codified in the Sale of Goods Act, 1893. Their evolution and exact definition was a slow process; and it is important to realise that this kind of implied term is not a recent development. Indeed Baron Parke referred to it in these words as far back as 1836³: “It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages.”

I must make it quite clear that the courts in their evolution of implied terms and, of course, the legislature when it codified those relating to the sale of

² *Per* Bowen L.J. in *The Moorcock* (1889) 14 P.D. 64, 68. See also *Sethia, Ltd. v. Partabmull Rameshwar* [1951] 2 All E.R. 352.

³ In *Hutton v. Warren* (1836) 1 M. & W. 466, 475.

goods in the Sale of Goods Act, were endeavouring to give effect to the intention or will of the parties. So long as there was a background of trade usage, or past professional dealings between the parties the implication of unexpressed but understood intentions was reasonable and not too difficult. But in the absence of such background the position was not so simple. Indeed in ascertaining the implied intention or will in those latter circumstances the courts often went far beyond "the regular process of judicial construction."⁴ In effect they proceeded to estimate what provision the parties would have made, as reasonable people, if they had contemplated facts which had proved to be beyond their prevision. The process was described by Lord Watson in these words⁵: "I have always understood that, when the parties to a mercantile contract such as that of affreightment have not expressed their intentions in a particular event, but have left these to implication, a court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a

⁴ See Pollock on *Contracts*, 13th ed., at p. 224.

⁵ *Dahl v. Nelson, Donkin & Co.* (1881) 6 App.Cas. 38, 59.

fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.”

A long catalogue could be compiled of cases in which the legislature, as well as the courts, has in different circumstances and in many and various types of agreements added to the list of implied terms. Examples of statutory implied terms are found in the Bills of Exchange Act, 1882, Sale of Goods Act, 1893, Merchant Shipping Act, 1894, Marine Insurance Act, 1906, Landlord and Tenant Act, 1927, Housing Act, 1936, Hire-Purchase Act, 1938, to name only a few of the better known enactments. And the common law courts continue to add to the list as new circumstances and facts demand.

So long as the courts adhered to the view that the object of implying a term was to give effect to the parties' intention, they had of necessity to recognise that they could not imply a term which would contradict or vary the express terms of a contract. In other words, positively, a term could only be implied if it was necessary in the business sense to give efficacy to the contract as intended by the parties and it could confidently be said that the term left to be implied, though unexpressed, was so clear and

obvious that it went without saying.⁶ And, negatively, no term could be implied if it would conflict or be inconsistent with the intention of the parties as expressed in their agreement.⁷

The doctrine of implied terms has not been uniformly popular; yet in recent times the circumstances in which terms will be judicially implied seem to have been extended and the justification for their imputation in those circumstances has been stated somewhat differently. In a recent note in the *Law Quarterly Review*⁸ it is observed that: "It is obvious that no contract can ever be drawn in so complete a form that it may not become necessary, if unforeseen circumstances arise, for the court to imply terms which were never contemplated by the parties when the contract was made." Denning L.J. went a good deal further in his famous judgment in the *Movietonews* case⁹ when he declared that "the day is gone when we can excuse an unforeseen injustice by saying to the sufferer 'It is your folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself.' We no longer credit a party with the foresight of a prophet or his lawyer with the draftmanship of a Chalmers."

In recent cases a tendency has appeared to make wider use of the doctrine so as to enable the courts

⁶ See *per* Scrutton L.J. in *Reigate v. Union Manufacturing Co.* [1918] 1 K.B. 592, 605; and *per* MacKinnon L.J. in *Shirlaw v. Southern Foundries, Ltd.* [1939] 2 K.B. 206.

⁷ See *per* Lord Parker in *Tamplin SS. Co. v. Anglo-Mexican Petroleum Products Co., Ltd.* [1916] 2 A.C. 397, 423.

⁸ Vol. 71, p. 457.

⁹ *British Movietonews v. London & District Cinemas, Ltd.* [1951] 1 K.B. 190, 202.

to adjust the rights and obligations of the parties having regard to circumstances not provided for by their contract. Thus a company engaged in the manufacture of valves to be used in the construction of "aids for the deaf" discovered that some of its workmen were secretly working in their spare time for another company engaged in the production of similar appliances. It successfully sued for an injunction to restrain the workmen from so working. The court considered that there should be implied into the contract of employment a term that the servant undertakes to serve his master with good faith and fidelity.¹⁰ In another case¹¹ there was implied into a contract of manufacturing agency which contained no provision for its determination a term to the effect that the contract could be determined on the serving of a reasonable notice of twelve months' duration. Perhaps the most far-reaching implication was made in *Romford Ice and Cold Storage Co., Ltd. v. Lister*,¹² where the House of Lords (affirming a majority decision of the Court of Appeal) held that a term could be implied into a lorry driver's contract of service that he would carry out his duties with reasonable skill and care, and so would be liable for damages for negligence in the performance of his duties. The defendant in that case was employed to drive a lorry and he had backed it in a private yard

¹⁰ *Hivac, Ltd. v. Park Royal Scientific Instruments, Ltd.* [1946] Ch. 169.

¹¹ *Martin-Baker Aircraft Co., Ltd. v. Canadian Flight Equipment, Ltd.* [1955] 2 Q.B. 556.

¹² [1957] A.C. 555.

into his father, another employee of the same employers, and injured him.

Despite quite a number of cases in which the doctrine of implied terms has been applied by the courts, it can be stated that the prevailing judicial attitude towards it is still one of some caution.¹³ For example, MacKinnon L.J. in 1939¹³ observed as follows: "I recognise that the right or duty of a court to find the existence of an implied term or implied terms in a written contract is a matter to be exercised with care; and a court is too often invited to do so upon vague and uncertain grounds." The attempt to make use of it to enable the courts to review generally and entirely readjust the rights or obligations of the parties to a bargain when they have run into some unexpected difficulties has met with a rebuff.¹⁴ Had it been so extended, the consequence described by Denning L.J. would have ensued, *i.e.*, the courts would have "seriously damaged the sanctity of contracts."¹⁵

IMPOSSIBILITY OF PERFORMANCE

The implied term doctrine proved a most useful instrument in the hands of the judges in developing measures of relief in cases of supervening impossibility of performance or the frustration of contracts. At common law if a person bound himself by contract,

¹³ *Shirlaw v. Southern Foundries, Ltd.* [1939] 2 K.B. 206, 227.

¹⁴ See *British Movietonews, Ltd. v. London District Cinemas, Ltd.* [1952] A.C. 166; *Davis Contractors, Ltd. v. Fareham U. D. C.* [1956] 1 Q.B. 302.

¹⁵ [1956] 1 Q.B. 302, at p. 308.

without any qualification, to perform an act, he could not excuse himself from the obligation to pay damages for failing to carry out his promise merely by proving that his failure was due to physical or legal impossibility of performance.¹⁶ Where there is a positive contract to do a thing the contractor must perform it or pay damages for not doing so, although in consequence of unforeseen accident the performance of his contract has become unexpectedly burdensome, or even impossible. But during the last one hundred years the courts have been evolving a doctrine to the general effect that if there should occur some intervening event or change of circumstances so fundamental as to strike at the root of the agreement, the contract should be treated as brought to an end forthwith, quite apart from the expressed volition of the parties themselves.¹⁸

Whatever may be the correct way of expressing the justification for the doctrine today, I believe that its theoretical basis in its early stages was the implied term. A term was implied by the courts discharging a contract in the events which had happened on the ground that the court found itself able to "infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was the foundation upon which the parties contracted."¹⁹

¹⁶ See, for example, *Paradine v. Jane* (1647) Aleyn 26.

¹⁸ *Taylor v. Caldwell* (1863) 3 B. & S. 826; *Krell v. Henry* [1903] 3 K.B. 740; *Joseph Constantine SS. Line, Ltd. v. Imperial Smelting Corporation* [1942] A.C. 154.

¹⁹ *Per* Lord Loreburn in *Tamplin SS. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* [1916] 2 A.C. 397, 404.

The following passage from Lord Russell of Killowen's speech in *Re Badische Co.*²⁰ contains a clear exposition of the doctrine: "The doctrine of dissolution of a contract by the frustration of its commercial object rests on an implication arising from the presumed common intention of the parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances. The dissolution lies not in the choice of one or other of the parties, but results automatically from a term of the contract. The term to be implied must not be inconsistent with any express term of the contract."

In at least two types of cases the implied term doctrine seemed inadequate and restrictive. If the contracting parties had adverted to the possible happening of the frustrating event and had nevertheless decided to do nothing about it, the implication of a term was not easily justified. This was made clear by Lord Wright when delivering the opinion of the Judicial Committee of the Privy Council in *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*,²¹ when he said: "The authority [*of Krell v. Henry*²²] is certainly not to be extended; it is

²⁰ [1921] 2 Ch. 331, 379.

²¹ [1935] A.C. 524, 529.

²² [1903] 2 K.B. 740. In the case of *Krell v. Henry* the contract was for the hire of a window on a particular day. It was not expressly stated in the contract, but was mutually

particularly difficult to apply where, as in the present case, the possibility of the event relied on as constituting a frustration of the adventure . . . was known to both parties when the contract was made, but the contract entered into was absolute in terms so far as concerned that known possibility." Again, in *Tatem v. Gamboa*²³ Goddard J. (as he then was) expressed the view that the cases "show in effect that, although the parties may have had or must be deemed to have had the matter in contemplation, the doctrine of frustration is not prevented from applying."

Similarly, where the parties to a contract had provided in general terms what was to happen if the frustrating event did occur, a term could not be implied if it would conflict or be inconsistent with the parties' express provision. Yet the House of Lords in *Bank Line, Ltd. v. Capel*²⁴ actually decided that the doctrine of frustration was not rendered inapplicable by the express terms of a charterparty and that the contract was discharged notwithstanding that the parties had provided generally what was to happen on the occurrence of the contemplated event.

In those cases, therefore, the implied term theory was not easy to apply; and so it must now be taken to be the law that the contract is frustrated by the occurrence of the frustrative event immediately and

understood, that the window was required to view King Edward VII's coronation procession. When the coronation was postponed by reason of the King's illness, the contract was held to be avoided.

²³ [1939] 1 K.B. 132, 140.

²⁴ [1919] A.C. 435.

irrespective of the volition or the intention of the parties or their knowledge as to that particular event.²⁵ "Their own belief and their own intention is evidence, and evidence only, upon which the court can form its own view whether the changed circumstances were so fundamental as to strike at the root of the contract and not to have been contemplated by the parties."²⁵

Consequently, other juristic justifications for the dissolution of certain contracts by impossibility have had to be explored. The conclusion I have reached is that the doctrine of the implied term has served a useful purpose: it has enabled the courts, as it were by a legal fiction, to assume the jurisdiction, to modify or dissolve contractual obligations so as to dispense justice to the parties having regard to fundamental changes in circumstances outside their control. The doctrine of frustration is now so well recognised and established that it no longer needs the fiction of an implied term to support it. So it is generally, but gradually, being displaced by the theory that a change of circumstances that fundamentally strikes at the root of a contract justifies the imposition by the court of a solution that is just and reasonable in the new circumstances.²⁶ The truth is, as Lord Wright has written in one of his Essays,²⁷ "that the court or jury as a judge of fact decides the question in accordance with what seems to be

²⁵ See *per* Streatfeild J. in *Morgan v. Manser* [1948] 1 K.B. 184, 191.

²⁶ See *Joseph Constantine SS. Line, Ltd. v. Imperial Smelting Corporation* [1942] A.C. 154, 183.

²⁷ *Legal Essays and Addresses*, p. 259.

just and reasonable in its eyes. The judge finds himself the criterion of what is reasonable. The court is in this sense making a contract for the parties, though it is almost blasphemy to say so.”

CONTRACTS CONTRARY TO LAW OR MORALITY

ALMOST contemporaneously with the evolution by the courts of common law by means of decided cases of the doctrine of general enforceability of promises or agreements, limits to this enforceability were, as we have seen, being established by the Courts of Chancery and by the legislature and, as we shall now see, by the common law courts themselves. Those were the days when moral obligation was regarded as the primary factor making promises enforceable; and the general climate—social, economic and legal—favoured freedom of contract and the enforcement of all contracts freely entered into. Yet bounds were beginning to appear beyond which the freedom would not be legally recognised. Mr. Fifoot has described the position in this way :

“The intention of the parties, while it was the basis of the law of contract, was not conclusive. The judges could not be expected to sanction an agreement opposed to the interests of the State,¹ and they were already reconciled

¹ It is a noteworthy fact that when the doctrine of public policy or State interest was being developed in the courts the judges had already ceased to be appointed during the King's pleasure. They had, by the Act of Settlement, been given statutory independence through security of tenure in their office and so there was no longer any pressure on them to support government measures or policy. “They were no

without evident reluctance, to the necessity of choosing the obligation which they were prepared to enforce.”^{1a}

It seems almost paradoxical that whilst emphasis was laid in the courts on the sanctity and freedom of contracts, a doctrine was introduced in the same courts and as a corollary of contractual freedom which could well be used to its destruction.

This implication was obviously in the mind of Lord Mansfield in the celebrated case of *Holman v. Johnson*,² when he observed that :

“The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff’s own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the

longer jackals of government, but independent umpires between the Crown and the subject”: Trevelyan, *English Social History*, p. 350.

^{1a} C. H. S. Fifoot, *Lord Mansfield*, at p. 122.

² (1775) 1 Cowp. 341.

sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*"

Three things are implied in this general exposition of the attitude of the common law courts. In the first place, it is more often than not distasteful for the judge to have to listen to a person who has promised to do something and then finds it inexpedient to fulfil that promise, plead that what he promised to do was illegal or immoral and so he need not perform it. This was made clear in a recent case in these words ^{2a}: "We are all familiar with the many cases which arose when building work was found to have been done without a building licence under the defence regulations having been obtained. Although it was not always other than distasteful, it enabled a defendant, who had had work done and who had enjoyed the benefit of it, to say that he was not bound to pay for it; because he and the builder had been party to what was in effect an illegal contract."

In the second place Lord Mansfield only contemplated contracts that were "immoral or illegal as between plaintiff and defendant." The immorality or unlawfulness of the contract itself weighed more heavily against the plaintiff in the scales of justice than the lack of faith shown by the defendant by his

^{2a} *Per* Lord Evershed M.R. in *Townsend (Builders), Ltd. v. Cinema News, etc., Ltd.* [1957] 1 W.L.R. 119, 124; and see *Strongman v. Sincock* [1955] 2 Q.B. 525.

failure to discharge his obligation. In the third place it was the principle of public policy that justified the court in refusing its aid. The interests of the State in agreements involving crimes, immorality and breaches of positive law are obvious. For as Mr. Justice Cardozo observed in an American case³: "If the moral and physical fibre of its manhood and womanhood is not a State concern, the question is what is?"

Moreover it was not (particularly during the eighteenth or nineteenth centuries) imposing an unusual, or perhaps a very difficult, duty upon a judge to decide what was or was not contrary to positive law or morality. But when account had to be taken of the advantages and disadvantages to the community of competing social and economic policies in arriving at legal decisions the task of the judge was more complex and difficult. Though this is seen most clearly in the field of contracts in restraint of trade where economic interests are affected, it is also manifest in cases such as *Fender v. Mildmay*⁴ and *Beresford v. Royal Insurance Co.*,⁵ where the implications are predominantly domestic or social.

In *Fender v. Mildmay*⁶ a promise by a married man, after a decree nisi of divorce had been pronounced in his case, to marry a spinster after the decree had been made absolute, was enforced by a majority of three to two in the House of Lords, as not being

³ *Adler v. Deegan* 251 N.Y. 467, 484.

⁴ [1938] A.C. 1.

⁵ [1938] A.C. 586.

⁶ [1938] A.C. 1.

contrary to public policy. A promise of marriage made by a man to a woman who knows him to be married to another woman is contrary to public policy as conducing to immorality or crime,⁷ but in *Fender v. Mildmay*⁶ the distinction was taken by the majority of the members of the court that the consortium of the spouses had already been broken, their matrimonial obligations had ceased to be effective and so the promise to marry could not be taken manifestly to affect injuriously the public interest. It was in this case that Lord Atkin emphasised that “the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds”⁸; and that in the particular case “the contract should be given the benefit of the doubt.”⁸

In *Beresford's* case⁹ a person had entered into a contract of insurance on his life for the sum of £50,000. A few minutes before the policy was due to expire he shot himself. An action by his executors to recover on the policy failed, because it would be contrary to public policy for the court to assist the suicide's personal representatives to recover the fruits of the insured person's crime, notwithstanding that the insurers had (as the court found) issued the policy and taken the premium covering suicide. The position is well summed up in Lord Wright's judgment in the Court of Appeal¹⁰:

⁷ *Wilson v. Carnley* [1908] 1 K.B. 720. ⁸ [1938] A.C. 1, 12.

⁹ *Beresford v. Royal Insurance Co. Ltd.* [1938] A.C. 586.
¹⁰ [1937] 2 K.B. 197, 219.

“ Opinions may differ whether the suicide of a man while sane should be deemed to be a crime, but it is so regarded by our law. . . . While the law remains unchanged the court must, we think, apply the general principle that it will not allow a criminal or his representative to reap by the judgment of the court the fruits of his crime.”

CONTRACTS IN RESTRAINT OF TRADE

A contract is said to be in restraint of trade when its performance would limit competition in any trade or business or profession or would restrict one of the parties in the exercise of his trade or occupation. It appears from a case ¹¹ decided in the reign of Queen Elizabeth I, that all such restraints were even then regarded as void having regard to their tendency to create monopolies. This has throughout remained the general reaction of the courts. The justification for this attitude was expressed in modern terms by Lord Macnaghten in the celebrated *Nordenfelt* case ¹² in these words: “ The public have an interest in every person’s carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule.”

¹¹ *Colgate v. Batchelor* (1596) Cro.Eliz. 872.

¹² *Nordenfelt v. Maxim Nordenfelt, etc., Co.* [1894] A.C. 535, 565.

But the justification advanced in the *Tailors of Ipswich* case¹³ is in more picturesque, seventeenth-century terms: "At the common law no man could be prohibited from working in any lawful trade, for the law abhors idleness the mother of all evil . . . and especially in young men who ought in their youth . . . to learn sciences and trades which are profitable to the Commonwealth, and whereof they might reap the fruit in their old age . . . ; and therefore the common law abhors monopolies which prohibit any from working in any lawful trade."

The court if it is satisfied that the restraint was reasonably necessary to protect the interest of the promisee and was not inimical to the interests of the State, will treat it as valid. Section 21 of the Restrictive Trade Practices Act, 1956, is in line with the common law tradition. It enacts that all registrable, restrictive agreements within the Act are presumed to be contrary to the public interest unless and until they are justified in manner described by the Act.

In giving effect to the foregoing principles governing contracts on restraint of trade the courts have had to surmount many difficulties. The first and obvious one is the difficulty of defining what is meant by public policy. As is so often the case, it is much easier to say what it is not than what it is. "Certain specific classes of contracts," observed Asquith L.J. in 1951,¹⁴ "have been ruled out by authority to be contrary to the policy of the law, which is, of course,

¹³ (1615) 11 Co.Rep. 53b.

¹⁴ In *Monklands v. Jack Barclay, Ltd.* [1951] 2 K.B. 252, 265.

not the same thing as the policy of the government, whatever its complexion.”

On the whole one must agree with Kekewich J. that the expression does not admit of precise definition¹⁵: “All authorities,” remarked the learned judge, “from first to last, concur in one thing—viz., that the doctrine on this subject is founded on ‘public policy’; and I cannot but regard the jarring opinions as exemplifying the well-known dictum of Mr. Justice Burrough in *Richardson v. Mellish*¹⁶ that public policy is a very unruly horse, and when you once get astride it you never know where it will carry you. Public policy does not admit of definition and is not easily explained.” One must, in the circumstances, be satisfied with a general description rather than a definition. Sir Percy Winfield described public policy as “a principle of judicial legislation or interpretation founded on the current needs of the community.”¹⁷ Lord Truro in *Egerton v. Brownlow*¹⁸ described it as: “that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good—which may be termed the policy of the law, or public policy in relation to the law.”

In its application to the field of contract Lord Wright has described it as “considerations of public interest which require the courts to depart from

¹⁵ *Davies v. Davies* (1887) 36 Ch.D. at p. 364.

¹⁶ (1824) 2 Bing. 229, 252.

¹⁷ 42 Harv.Law Rev. 76, 92.

¹⁸ (1853) 4 H.L.C. 1 at p. 196.

their primary function of enforcing contracts and exceptionally refuse to enforce them.”¹⁹

The unsatisfactory nature of such a vague, indefinable test of invalidity of contracts has often been critically commented upon.²⁰ Lord Lindley once described²¹ it as: “a very unstable and dangerous foundation on which to build, until made safe by decision.”²²

Another criticism of it is that it must inevitably be a variable quantity²³—influenced by the judge’s training, outlook and philosophy,²⁴ varying with the prevailing fashions in moral, economic or social principles,²⁵ or even with changing economic or social practices. As Lord Wright observed in *Fender v. Mildmay*²⁶ “certain rules of public policy have to be moulded to suit new conditions of a changing world.”

Public policy in its application to legal situations generally has in its effects been disabling and prohibitive. This is most clearly illustrated in the field

¹⁹ See *Fender v. Mildmay* [1938] A.C. 1, 38; *Legal Essays*, pp. 66–96.

²⁰ See Cheshire and Fifoot, 4th ed., p. 277.

²¹ In *Janson v. Driefontein Consolidated Mines, Ltd* [1902] A.C. 484, 507.

²² And see *per Burrough J.* in *Richardson v. Mellish* (1824) 2 Bing. 229, 252. See also R. E. Megarry, *Miscellany at Law*, pp. 270 *et seq.*

²³ See *Davies v. Davies* (1887) 36 Ch.D. at p. 364.

²⁴ See *Fender v. Mildmay* [1938] A.C. 1; *Hill v. Wm. Hill (Park Lane), Ltd.* [1949] A.C. 530.

²⁵ See Art., “Economic Theories and English Case Law,” 47 L.Q.R. 183–202; and see Friedmann *Legal Theory*, 3rd ed., pp. 335–342.

²⁶ [1938] A.C. 1.

of contracts as is brought out strikingly in the quotation which I have already made from Lord Mansfield's judgment in *Holman v. Johnson*.²⁷ Where a contract is invalidated by considerations of public policy the result is simply to disable a plaintiff from enforcing it. There are very few circumstances (though the number now tends to increase) where the court assumes to adjust the rights of the parties having regard to the respective degrees of blameworthiness. The loss and gains generally remain where they happened to be at the time when the defendant refused to carry out his promise.

The negative, prohibitive character of public policy tends to have a cumulative effect since a contract as an institution is necessarily a static and not a dynamic piece of machinery for the government and guidance of complex, fast-moving and ever-changing modern business, industrial and human relations. That no doubt accounts in large measure for the practice of Trade Unions and Trade Associations in relying upon their own arrangements and not to seek legal sanctions for them.

It is interesting, therefore, to consider the new machinery set up in recent years to protect the public from restrictive and monopolistic practices.

MONOPOLIES AND RESTRICTIVE PRACTICES

The Monopolies and Restrictive Practices Act, 1948, provided for the setting up of an independent Monopolies Commission to investigate and report on such

²⁷ (1775) 1 Cowp. 341.

restrictive trading agreements as were expressly referred to it by the Board of Trade. After examining the agreements or arrangements factually and objectively the Commission was to say whether or not in its opinion they were against the public interest. If they were, Orders could be made by Ministers to terminate them. This machinery was found to be slow in operation in the main because it had to ascertain the facts for itself without any specially provided assistance, and had to break new ground in wide and complex fields.

So after a trial period of some eight years provision was made by the Restrictive Trade Practices Act, 1956, for setting up a new piece of machinery. The machinery consists of two main parts. The first is a Registrar of Restrictive Trade Practices whose functions are twofold, namely, (a) to compile and maintain a Register of agreements registrable under the Act, and (b) to take proceedings before the Restrictive Practices Court in respect of agreements entered or filed in the Register. The other part of the machinery consists of a new kind of court, the Restrictive Practices Court, consisting of five judges and not more than ten other persons appointed by the Queen, on the recommendation of the Lord Chancellor, and qualified by virtue of their "knowledge of or experience in industry, commerce or public affairs."

The agreements to be registered are those between persons carrying on business in the United Kingdom in the production or supply or manufacture of goods

under which restrictions are accepted in respect of such matters as prices and control of supplies or manufactures. Jurisdiction is conferred on the Restrictive Practices Court to declare whether or not any restrictions contained in any registered agreement are contrary to the public interest. Where any such restrictions are found to be contrary to the public interest the agreement is by the Act made void in respect of such restrictions.

An article in the *Financial Times* recently²⁸ drew attention to the fact that the Restrictive Practices Court (which had then delivered judgment in only one case) has assumed an importance to British industry out of proportion to the work that it has so far done. "It has caused a re-examination amounting to a major shake-up in almost every section of industry." The result has been that since the Register was compiled a total of 146 agreements have been terminated or varied so as to remove them from the scope of the Act. Even before the Register was compiled quite a number of firms decided as a matter of policy to withdraw from registrable agreements; and agreements "that might not look well in public"²⁸ were not proceeded with; and then, as I have mentioned, 146 (out of about 2,000 in all) were abandoned.

All this goes to show that the new machinery has begun its operations effectively. Whether it will continue to do so time and events will show. From the point of view of my special study three things are of special importance in this experiment in the control

²⁸ Wednesday, January 7, 1959.

of agreements. The first is the underlying assumption by the legislature when establishing the machinery that all restrictive trade practices were not necessarily economically undesirable²⁹ or that the agreements combining them were necessarily void on the ground of illegality or immorality. The second is the nature of the machinery, the Register and the court consisting of High Court judges and men of knowledge or experience in industry, commerce or public affairs. And the third is the power given by the legislature to this mixed court to declare agreements freely entered into void in whole or in part on the ground that they are contrary to the public interest.

The newly reported decision³⁰ of the Restrictive Practices Court in *Re Yarn Spinners' Agreement* is of very great general interest. It shows how the court of seven persons, three High Court judges and four laymen of varied experience, sought to discharge the complex and difficult problems prescribed for it by the Act. One judgment was delivered by the President of the Court, Devlin J. The registered agreement under consideration provided for minimum prices to be charged for various kinds of cotton yarn manufactured and supplied by members of the association. Under the provisions of section 21 of the Act the agreement was *prima facie* contrary to the public interest, and it was for the association to satisfy the court that it was justifiable on some of the statutory grounds. This the association failed to do. The court decided that although the removal of the

²⁹ Contrast in this respect the U.S.A. Sherman Act, 1890.

³⁰ *The Times*, January 27, 1959.

restrictions imposed by the agreement would have a serious effect on the general level of employment in the manufacturing area, that did not outweigh the detriment to the public generally by the preservation of excess capacity in the industry resulting in waste of national resources. "The court was required to act without certainty and on the balance of probabilities and to arrive at a general conclusion in the terms used by the Act"; but having on that balance reached a conclusion it declared the agreement to be contrary to the public interest and, therefore, it could no longer be enforced.

EXECUTIVE ARRANGEMENTS

A substantial number of agreements or arrangements in the nature of contracts are regarded by the courts as falling rather within the category of executive acts or governmental directives than within the field of enforceable contracts. The attitude of the judiciary is that neither the Crown nor any other public authority can be held to an agreement that purports to bargain away its fundamental discretionary powers. "The principle is simply that in the last resort the law permits a governmental agency to fulfil the fundamental purposes for which it was created, even though so doing may involve interference with vested contractual rights which an individual may have against that agency."^{27a}

^{27a} *Per* Professor J. D. B. Mitchell in *Contract of Public Authorities*, at p. 17.

To illustrate this proposition I would like to refer to the case of *The Amphitrite*.²⁸ In that case the owners of a Swedish ship of that name had, before sending her to England in March, 1918 (*i.e.*, during the First World War), obtained from the British Legation in Stockholm an undertaking that the ship would "earn her own release" if she carried a cargo of at least 60 per cent. approved goods. As it happened, this undertaking was contrary to the then usual practice of the British Government; but without it the ship would not have sailed to England. On the ship's first voyage to England the undertaking was honoured; but on the second voyage the British Government refused clearance from a British port and the ship was detained and eventually sold. The owners of the ship thereupon petitioned for damages for breach of the undertaking given by the Legation. Their claim was rejected on the main ground that an intention to act in a particular way in a certain event could never be made binding on the government.^{28a}

The field of conflict between the concept of the sanctity of contractual obligations and the general powers of the State, whether they be legislative or administrative, is fully and authoritatively discussed by my former colleague, Professor J. D. B. Mitchell of Edinburgh, in his study of *The Contracts of Public Authorities*.²⁹ The type of case falling within the field studied by Professor Mitchell is liable to occur

²⁸ [1921] 3 K.B. 500.

^{28a} For a criticism of some of the wide expressions used in that case, see Mitchell, *op. cit.*, at p. 55.

²⁹ Published by the London School of Economics, 1954.

much more often in the political and economic climate of today than it was when the doctrine of *laissez-faire* prevailed. The State through its manifold agencies and with its many and increasing activities touches the citizen, whether as an individual or as a member of some association or group, at so many points. It seems almost inevitable that it should be so if the functions of government are to be adequately performed in a highly organised modern society. What I am drawing attention to is the fact that there are these arrangements which were meant by the parties to be legally enforceable, which may appear to the layman as agreements or promises indistinguishable from enforceable contracts, but which, as one of the contracting parties is a governmental agency in the service of the community, are not treated as enforceable by the courts.

One of the conclusions which Professor Mitchell reaches after a detailed survey is that in the case of public authorities generally the obligatory force of contract may be weaker than in the case of private contracts. "The special purpose for which governmental agencies exist, the service of the community, requires that on occasions those agencies must be released from, or may be able to override, their obligations. . . . This limitation of the obligation of contract depends not upon the acceptance of any particular theory of political philosophy but upon practical necessity."³⁰

³⁰ Mitchell, *op. cit.*, at p. 222.

CHAPTER 4

A COMPARISON AND CONCLUSIONS

THE OBLIGATION OF CONTRACTS CLAUSE IN THE AMERICAN CONSTITUTION

THE rise and decline of general respect for contracts in the United Kingdom make an interesting comparison with the movements in the judicial interpretation by the United States Supreme Court of the "Obligation of Contracts" clause in the American Constitution and the "Due Process" Amendments to that Constitution. The "Obligation of Contracts" clause provides (among other things) that "no State shall . . . pass any law impairing the obligation of contracts." It appears that the clause was framed originally for the purpose of preventing the States from passing laws to relieve debtors of their legal obligation to pay their debts and this restricted view of its object was at first taken by the Supreme Court. But, particularly under the influence of Chief Justice Marshall, this narrow view of the objects of the clause was afterwards rejected and a broad application was given to it, at least for some time. A plea for this broader application is contained in a dissenting opinion¹ delivered in 1827 by Chief Justice Marshall: "The power," he observed, "of changing the relative situations of debtor and creditor, of interfering with

¹ *Ogden v. Saunders*, 12 Wheaton, at p. 213.

contracts, a power which comes home to every man, touches the interest of all and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State legislatures as to break in upon the ordinary intercourse of society and destroy all confidence between man and man. The mischief had become so great, so alarming as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith.”

Too much was unquestionably made of the clause by describing its effect as being to enshrine the freedom of contract in the Constitution. Its context and immediate surroundings were ignored as was also its original express purpose as stated by Chief Justice Marshall. It was intended to restrict State activities in absolving debtors from paying their debts, not to proclaim for future guidance a general principle of freedom of contracts.

Similarly the Supreme Court in 1905² seems to have deduced from the “Due Process” clauses of the Fifth and Fourteenth Amendments to the Constitution a prohibition against State legislative interference with freedom of contract. The point in issue was whether a State-enacted maximum-hours law was unconstitutional. There is no express provision in the Constitution saying that a State shall not have power to regulate hours of labour. The Fifth and Fourteenth amendments, however, provide that no

² In *Lockner v. New York*, 198 U.S. 45 (1905).

person shall be deprived of life, liberty or property without due process of law. In the Supreme Court opinion in the case³ it was declared that: "The Statute necessarily interfered with the right of contract between employer and employee, concerning the number of hours in which the latter may labour in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment. . . . The right to purchase or to sell labour is part of the liberty protected by this amendment." For this reason the Statute in question was declared unconstitutional.

The emphasis in the common law countries on the beneficent economic effects of freedom of contract and the consequent belief in contract as an institution making for general economic welfare brought in their train an enhanced respect for contractual obligations as an extension of individual liberty. This prompted over-statements of the degree of protection given to freedom of contract in the Constitution.

A distinguished American author⁴ has recently declared that "generally speaking, the protection afforded by clause 1 does not today go much, if at all, beyond that afforded by Section 1 of the Fourteenth Amendment." The learned author cites in support of his opinion the words of the Supreme Court⁵: "It is settled that neither the 'contract'

³ *Lockner v. New York*, 198 U.S. 45 (1905).

⁴ Edward S. Corwin: *The Constitution and What it Means Today*, 11th ed., at pp. 82-83.

⁵ *Atlantic Coast Line Co. v. Goldsboro*, 252 U.S., at p. 558.

clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community."

It is true that taken together these provisions did and still do provide a considerable safeguard to the contractual rights of individuals. Nevertheless, as we have already seen, their influence has not been strong enough to counteract the tendency to weaken obligations in the field of contracts with public authorities so that their force is not so great as that of private contracts.

CONCLUSIONS

I SHALL now proceed to summarise the developments which I have tried to trace in my first three lectures drawing attention to some contemporary trends in the treatment of contracts; and in conclusion I will venture to make some general observations on those developments and trends.

We are so familiar with the broad definitions of a legally enforceable contract framed during the nineteenth century and with the statement in general terms of the governing principles of the law of contract that we are inclined to lose sight of the fact that this broad definition and these governing general principles have been assembled from masses of separate rules applied by the courts from time to time in the decision of issues between individual litigants. It is a corollary of that generalisation that just as an edifice of broad principles can be erected by decision after decision so

sections of the edifice can be pulled down by one decision after another, until whole sections have to be discarded and the whole edifice may appear to become obsolete or threatened with destruction.

Morris L.J. in his recent address to the Holdsworth Club on "Law and Public Opinion"⁶ has strikingly and most aptly described an aspect of the same feature from a different angle. "The practising lawyer," he observes, "and the judge in office must . . . at all times remember that though the history of the law fascinates and though the theories and the principles of legal philosophy are rich in interest, the interest of the litigant is in his own case."

All this leads me to the view that we must at all times keep in mind the question whether the time is not fast approaching when the whole structure of contract law, with its preconceived ideas and nineteenth-century doctrines, has not become so rigid and static that it cannot be expected to bear on all fronts the strains and stresses of modern economic and social pressures.

As I have already indicated, there is a considerable measure of stability and fixity about legal machinery when it operates to determine human relationships. Indeed this has in the past been one of the great assets of the common law. It has served, among other purposes, to create security and calculability in the life of the community. As Judge Cardozo has emphasised,⁷ "What has once been settled by a

⁶ At p. 3.

⁷ In *Paradoxes of Legal Science*, pp. 29-30.

precedent will not be unsettled overnight, for certainty and uniformity are gains not lightly to be sacrificed. Above all is this true when honest men have shaped their conduct upon the faith of the pronouncement." But as social and economic changes tend now to take place with much greater rapidity than formerly, the comparatively static machinery of law does not seem to be so apt for the adjustment of the rights of citizens. It is not only the ever-changing needs and circumstances of our society but also the complex situations which it provides that call here and there for some modifications of the older machinery. I have seen no better observation on this complexity than one recently made by Professor C. F. Carter,⁸ of Manchester: "The purposes of economic policy are contradictory, so that only in rare cases is it possible to make one thing better without making another worse. The main instruments of economic management turn out to be weak or to have undesirable side-effects."

One suggested explanation of the restrictions on the freedom of contract apparent in the last hundred years is that collectivism curtails, as surely as individualism extends, the area of contractual freedom.⁹ This is seen more clearly perhaps in the field of legislation than in the decisions of the courts. For example, much of the law governing the relation of landlords and tenants is now statutory and the parties are expressly forbidden to contract out of these

⁸ In an article entitled "Can We Control the Economy?" *District Bank Review*, Dec., 1958, at p. 17.

⁹ Roscoe Pound, *Interpretation of Legal History*, p. 264.

statutory regulations. Many other examples could be given from the law governing masters and servants and overseas trade.

But the foregoing "explanation" is really no explanation at all: it is a simple description of a general political trend. The root causes lie deeper. One commentator has observed that we are today confronted with the paradox that man is at once a social being, and therefore co-operative, and an individual personality, and therefore competitive. More and more, it is becoming apparent in the field of economics and political science that one of the great contentious issues of modern times is whether the State should intervene to regulate certain aspects of our daily lives; and if it should, to what extent such intervention should be carried. In other words the line between the provinces of State activity and individual enterprise is indistinct. It would be generally agreed that it is for the legislature rather than the courts to draw that line. Indeed, as Professor Friedmann has pointed out,¹⁰ the English judiciary accept for practical purposes the doctrine of separation of powers and are consequently reluctant to compete with the legislator in the application of legal policy. In this respect their attitude can be contrasted with that of the American Supreme Court, which, through its role as guardian of the Constitution, has decisively influenced American social policy for almost a century.

The English Statute-book in recent years is full of enactments reflecting prevalent political, economic and

¹⁰ *Legal Theory*, 3rd ed., at p. 334.

social theories. But in its interpretation of social legislation, as well as in applying and advancing well-established legal principles, the judiciary is inevitably called upon "to reconcile the freedom which is necessary if the individual is to give of his best to mankind, with the compulsion which is necessary if the community is to exist in which alone he can enjoy his freedom."¹¹ When in the past the courts have been engaged in this task, they have often shown a special virtue in moulding and adapting time-old principles to fit new situations. And this they must at all cost continue to do; for the common law is "a living organism constantly readjusting itself to its environment, and it is in that power of constant readjustment that its supreme merit resides."¹² Yet when all this is taken into consideration the role of the courts in reshaping and readjusting and guiding the affairs of the community must from the very nature of modern government be secondary.

I think we would be deceiving ourselves if we were to believe that the respect of the ordinary citizen for his formal contractual obligations is as great today as it was, say, a hundred years ago. Evidence to support this view is forthcoming from the developments within the law of contract itself during the present century. As we have seen, a whole area of excuse for non-performance of obligations has been opened up and developed under the title of frustration. This is the outcome of pressure by litigants for release from promises which they find onerous having regard to

¹¹ Lord Macmillan, *Law and Other Things*, at p. 18.

¹² *Ibid.*, at p. 54.

fundamental changes of circumstances. Similarly a good deal of pressure is continually exercised for the importation of terms to relieve situations of hardship if performance is insisted upon according to the strict letter of the contract. And there is a whole host of recent cases in which a promisor, after he himself has performed his promise, finds the other contracting party ready to take the benefit of the performance while declining to discharge his own obligation and, distastefully so far as the judges are concerned, relying on the defence of illegality or immorality or public policy.

Considerable significance must also, I think, be attached to the fact that so many arrangements, indistinguishable almost from enforceable contracts, are today made with the clear intention that they are not to be justiciable as contracts in the ordinary courts.

As a background there are a number of other considerations that may be influencing the public in their attitude to the fulfilment of their contracts. In the first place there are more circumstances now than formerly in which the legislature and the courts have for reasons of government or public policy imposed restrictions on the parties' freedom to contract. There is not the same measure of faith in the beneficence of contracts or of fervour for freedom of contract as there was during the nineteenth century. The environment has changed; and the climate in which contracts have been entered into is not so favourable.

Secondly, an increasing number of contracts is now entered into by the acceptance of standard forms

containing many terms which the acceptor often never reads and often also which, if he did read, he could not fully comprehend. The printed or typed form of contract is presented to the customer, whose alternatives are, either to do business on its terms, or to decline to do business at all and do without the service or commodity. It may well be that a person who concluded the bargain in such circumstances cannot have the respect for his obligations that he ought to have, and when he finds his position difficult may press for relief from what he regards as a "technical" obligation of which he was not fully aware or which he only imperfectly understands or which he only unwillingly accepted.

A third influence may well be the complexity of modern activities and the consequent difficulty of providing for every eventuality. I have already quoted from Denning L.J.'s judgment in the *Movie-tonews* case that "we cannot any longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of a Chalmers." Here again a party may regard the matter in issue as a "technicality" the import of which he did not comprehend.

All these circumstances in my view tend to diminish the regard of the promisor for his promise or contractual obligation. And it is not without interest that in the United States also the nineteenth century faith in the freedom of contract is neither so universally nor so potently felt.

One never appreciates more fully the truth of a profound observation by that great American judge

Mr. Justice Holmes than when studying developments and trends in the law of contracts during the last three or four hundred years. "The law," he observed, "is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other. . . . It will become entirely consistent only when it ceases to grow."

