

CONTRACT LAW AND
THE COMMUNITY

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I propose in this talk to consider some aspects of the modern South African law of contract in relation to society. But although my concern is with the modern law, I cannot escape a brief backward glance at the origins of the South African law of contract, for the present structure of this branch of the law, and to a great extent also its limitations, can be understood only in relation to its history.

The origins of our law of contract must be sought in Rome. In spite of a certain serious limitation, the Roman law of contracts reached a very mature stage of development, whereby it was able to serve the needs of a considerable international commerce. The limitation was the failure of the Romans to achieve any general theory of contract - one may go further and say, any general law of contract. The Romans recognised and enforced a number of particular contracts - such as sale, letting and hiring, partnership and some others. Outside of these actionable contracts, an agreement was a mere nudum pactum, and unenforceable. On the other hand, the rules of the recognised contracts were thoroughly worked out, and could later be generalised without much difficulty or conflict.

The Classical Roman law, which was the Roman law at its greatest level of achievement, was strongly individualistic in character: it accorded a great measure of liberty in the field of private law. The law of contract shared this characteristic: within very broad limits the parties to a contract could determine their obligations as they pleased.

When the Roman law was received in Western Europe in the fifteenth and following centuries, the Roman law relating to particular contracts was generalised. The principle was adopted that every agreement which was seriously made and which was not contrary to public policy or good morals, was enforceable as a contract. A body of principles was elaborated which was common to all types of contract: today we speak of the general principles of contract, and these are more numerous and important than the rules which apply only to particular types of contract.

The other great influence upon the South African law of contract has been the English law of the nineteenth century. During that century the Roman-Dutch law was strongly influenced in almost every department by the English law, and the law of contract was affected by this influence to a greater extent, perhaps, than was any other branch of law. It is necessary, there-

fore, to know something of the character of the English law of contract of that time. During the nineteenth century, English law was profoundly transformed by that body of economic theory which is often roughly if somewhat inaccurately described as laissez faire. The need of the age was for a law of contract which would set as few impediments as possible to initiative, to the movement of goods and of labour, and the response to this need finds its highest expression in the words of Sir George Jessel in a case decided in 1875:1)

"If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts shall be enforced by Courts of Justice".

"The utmost liberty of contracting" became a watchword of the day. Contractual theory adjusted itself to this need and response. Parties to a contract were conceived as lawmakers in their field: within broad limits they made law for themselves by their contract. They exercised a sovereignty, with which courts of law were extremely reluctant to interfere. Thus a writer²⁾ on the philosophy of law in 1884 said: "It is impossible to draw a distinction between a contract and an Act of Parliament", and again: "The whole operation of preparing contracts, agreements, settlements, conveyances and such deeds is purely legislative".²⁾ In accordance with this theory the courts adhered to an extremely narrow conception of their function in the field of contract. This judicial reticence found expression in such dicta as the following: "The dealings of men must as far as possible be treated as effective, and the law must not incur the reproach of being the destroyer of bargains"³⁾ and the oft-repeated dictum that "the court must not attempt to make a contract for the parties".

There can be little doubt that this individualistic conception of contract, this doctrine of freedom of contract, accorded both with the spirit of the times and with its greatest needs. The doctrine rested, however, upon at least one assumption which was always partly false, and which has become falsified with the passage of time. The typical transaction envisaged by the doctrine of freedom of contract was that between two individuals of approximately equal bargaining power. These two individuals would reach agreement by negotiation of their transaction clause by clause, and the contract which resulted was the expression of their united wills - an exercise of their joint

sovereignty. The role of the court was to do no more than to give effect to their intentions, and if necessary enforce the contract which was their creature according to its terms.

As time went on, however, the negotiated agreement between individuals of substantially equal bargaining power became less and less typical. It was superseded to a great extent by agreements between organised groups of individuals on each side, or an organised group on one side and an individual on the other. In this latter type of transaction, in which there is usually a very marked imbalance of economic power, there has been a strong tendency for the element of negotiation to disappear, and the sovereignty which is exercised is not that of the parties jointly, but that of the party which is an organised group.

The basic theory of contract, however, continues to postulate as typical the negotiated contract between individuals; it continues to assert the dogma of freedom of contract and the passive role of the court; and it continues to affirm that contracts must be enforced in accordance with what is still called the 'intention of the parties'. Today these assumptions and doctrines are preventing the courts from moulding the law of contract to the changed needs of contemporary society. They are frustrating the natural growth of this important branch of the law.

These effects are being felt in South Africa as well as in England. The generalised law of contract of the received Roman law of Western Europe retained the individualistic character of the Classical Roman law of contracts. To this tradition South Africa has been heir. Upon it have been superimposed the even more uncompromisingly individualistic doctrines of the English law. Observations like that of Sir George Jessel have been echoed many times in the South African courts, and the doctrine of freedom of contract and the emphasis upon the intention of the parties are as entrenched here as in England.

Against this background I want to indicate some few of the weaknesses of modern contract law, and some of the ways in which these weaknesses are exploited, and to consider what remedies for the situation may be available.

Probably the most significant development in the present century in the law of contract of most western countries has been the vastly increased importance of the standard con-

tract, sometimes called contract of adhesion. This phenomenon is of course familiar enough in everyday life: most important contracts with which we come into contact are of a standardised character. Contracts of sale or lease of land are very commonly standardised, and contracts for the carriage or storage of goods, hire-purchase contracts, air and steamship passenger contracts, insurance contracts and a great many others are generally contained in printed forms prepared by the dealer or business party, and used without variation in all his transactions. The terms of these contracts are not - in the main - negotiated between the parties: they are dictated by one party to the other. The only freedom of one of the parties is the freedom to contract or not. In some cases, indeed, he will find that a particular contract form is standardised throughout the trade or business, and it is of no use to him to shop elsewhere for different terms.

This standardisation of contract is not something to be deplored. It is simply one aspect of the streamlining of business. It is a means of reducing costs, eliminating risks - usually, it must be said, by the device of passing the risks on to the customer, who has less ability to insure against them - and facilitating administration. But it remains true that many of the present abuses in the law of contract are closely associated with the standard contract.

The truth is that these contracts not infrequently contain terms which are unreasonably oppressive upon one of the parties - that one whom we may describe, loosely, as the consumer party. It is perfectly true that these terms are not always invoked - the tyrant is benevolent, or the need to invoke them does not arise - but the cases are not few in which they are brought into operation. I would like to give an example of such a term, although in this instance the attempt to enforce it was unsuccessful. This was in the recent case of *Linstrom v. Venter*.⁴⁾ A car was sold under a standard form hire-purchase contract for the price of £576. The price was to be paid as to £150 in cash and the balance in two instalments of £213 each. The car was delivered and £150 paid in cash, but the purchaser failed to pay the two instalments when they became due. The seller cancelled the sale and then sought to invoke a clause in the contract in terms of which, if the buyer defaulted in his payments, the seller should be entitled to the return of the car, forfeiture of the arrear instalments, and any further damages suffered. This attempt was resisted by the purchaser, and the Court, when the case came before it, refused to allow enforcement of the term, pointing out that the effect

of enforcing it would be to leave the seller with both the car and the full purchase price.

This case, then, had a reasonably satisfactory outcome, but three things about it should be noticed.

1. The purchaser lost his deposit of £150, although there was no evidence that the seller had suffered loss in this or in any amount. This is because it is well established in our law that a deposit or instalments actually paid may be retained by the seller if so provided by the contract irrespective of the amount or its relation to actual loss.
2. It does not follow from this case that similar clauses resulting in total forfeiture will not be enforced in the future. The case is not a binding authority, except in South West Africa where it was decided, and dissent from it in principle has been expressed in at least one subsequent case. In fact, this branch of law is in a state of considerable confusion and uncertainty.
3. Many purchasers, whatever their ultimate rights may be, will bow to the imposition of unfair contractual terms rather than incur the hazards and expense of litigation - especially when the law itself is doubtful.

An unfair type of clause which is almost ubiquitous in standard form contracts is that which is usually phrased somewhat on these lines:

"The purchaser hereby agrees that this document constitutes the sole agreement between him and the seller, and that no act, representation, guarantee or warranty of any nature whatsoever was given to him by the seller or any of his authorised agents".

This is intended, and substantially has the effect, that the seller or his agent may procure the purchaser's assent by making positive statements of fact, the truth of which cannot later be canvassed, or by giving undertakings which the seller can honour or not in his discretion. The only limitation so far admitted upon the power to contract out of one's own positive undertakings is that of fraud, always difficult to establish. Indeed the meaning and effect of fraud in this context are matter of much uncertainty.

Similar to this type of standard clause is another, equally common, which is phrased substantially as follows:

"The purchaser acknowledges that he has carefully inspected the goods; that he purchases them as they stand; and that the owner has given no warranties, express or implied in law".

This goes further than the last in that it excludes also the common law liability for latent defects in the property sold, and leaves the purchaser with no remedy, even if he sees the goods for the first time when they are delivered to him in a defective condition.

A particularly mischievous abuse resorted to by some firms was unwittingly made possible by a decision of the highest court in the land - the Appellate Division. There are some types of contractual clause whose object is so manifestly to penalise the other party and to make a profit out of his misfortune that courts of law refuse to enforce them. Very commonly a standard form contract includes both legally permissible and legally unenforceable conditions, generally in the same clause. Such a clause cannot, of course, be enforced as a whole, because of the presence of the unlawful conditions, but in the case of *Baines Motors v. Piek*,⁵ decided in 1955, the Appellate Division held that a court should in such a case sever the lawful provisions from the unlawful, and enforce the former while disregarding the latter.

The result of this case has been that many firms include clauses of this kind in their standard contracts, well aware that some of the provisions embodied in them cannot be enforced because of their penal nature. These penal clauses then serve a strictly temporary purpose: they are used in *terrorem* against the consumer-party, as a means of bringing pressure to bear upon him if he is having difficulty with his instalments. If in the last resort the firm is obliged to bring action on the contract, it drops the penal provisions and seeks enforcement only of the others. But not infrequently, the consumer-party will render this unnecessary by compliance with both the enforceable and the unenforceable provisions, in ignorance of the law or under threat of expensive litigation.

It would not be difficult to multiply instances of abuse of the contractual freedom which our law allows. Insurance contracts which enable the insurer, to which premiums may have been paid for the lifetime of the insured, to escape its oblig-

ation of payment of the sum assured on a technical or purely formal breach by the insured; contracts of employment which deprive the employee of the entire benefit of any invention made by him during his employment; contracts by firms which repair, clean or store property, in terms of which they exempt themselves from liability of all kinds and cannot even be called to account for proved negligence - these are some of the cases in which one party finds himself at the mercy of the other, and dependent entirely upon its benevolence.

The situation in South Africa is already sufficiently serious; in other countries, particularly in Britain and in the United States, it is worse, and is causing great concern. It will become worse in South Africa with the working out here of the inevitable trend of competitive capitalism towards monopoly. It is difficult to make any realistic attempt to deal with the problem as long as the legislature and the courts adhere to the myth of freedom of contract. These remarks of an American lawyer⁶⁾ are worth quoting:

"Society, by proclaiming freedom of contract, guarantees that it will not interfere with the exercise of power by contract. Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms. Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals".

What, then, is it possible to do about the problem? The courts already do what they can, and I do not want to underestimate their achievement in this regard. In those cases, for instance, in which contractual terms are contained in tickets or other documents which are not signed, the courts can do a great deal, and have done much, to protect the holder of the ticket from attempts to deprive him of common law rights, without taking adequate steps to make him aware that that is being done. In this way they do at least ensure a measure of publicity for unfair terms. In the interpretation of contracts, also, the courts have various weapons at their disposal for attributing to a contract its least objectionable meaning. But it has to be recognised that the judicial armoury is not really equal to the task; the dogma of freedom of contract, and the

consensual theory of contract which is its corollary, forestall any really fundamental reform at the hands of the courts. Moreover, nearly all judicial achievement in this field is of a temporary nature; is, indeed, self-defeating; because each set-back received by the draftsmen of standard form contracts educates them in more effective draftmanship. Every holding of a court that a certain contractual clause is ineffective, indicates at the same time the way in which it can be made effective. And the draftsmen are quick to learn.

We must, then, look elsewhere than to judicial initiative for substantial reform, which is to say that we shall almost certainly have to put our faith in legislation. The apologetic manner in which I make the suggestion is due to my legal training - in the course of his education the lawyer absorbs from his academic mentors an unbounded respect for the common law, because it is old and picturesque, and an acute distaste for legislation, because it is new and he plays no part in it. Thus there will have to be overcome the professional suspicion of all encroachments by legislation in the fields of common law, and the legislature itself will have to be persuaded of the necessity for action - no easy task. I have little doubt, however, that eventually legislative intervention will be recognised as necessary. What forms should such legislation take?

The suggestion has been made that approved standard forms of contract should receive legislative force, and be made obligatory in certain trades and businesses dealing with the public. Some individual variation in these contracts would be permissible, but not in regard to the liabilities assumed or contracted out of by the parties. This is a suggestion calculated to cause alarm amongst staunch upholders of freedom of contract, especially those who regard it as one aspect of personal freedom. But once it is realised that in many fields freedom of contract no longer exists, this type of objection may subside. It may even be hoped that some restoration of real contractual freedom may be brought about by this means. In the words of the writer of a recent article in the Columbia Law Review,⁷⁾

"by judicious legal limitation on the bargaining power of the economically and legally stronger, it is conceivable that the economically weak would acquire greater freedom of contract than they now have - freedom to resist more effectively the bargaining power of the strong and to obtain better terms".

Certainly this proposal has the advantage that it retains the benefits of standardisation, and involves recognition and even extension of established business usage.

In trades or businesses where authoritative standardisation of contracts is not practicable, an alternative method would be to prohibit certain terms of an objectionable nature, or to require inclusion of certain terms - in effect, partial standardisation. In cases where even this is not practicable, the courts may be given an overriding power to disregard terms of an unreasonable or unjust nature. The former measures will give greater certainty; this last, greater flexibility, at the expense of some certainty.

Precedents exist for legislative intervention of these kinds. Hire-purchase contracts are already partially standardised by law, and in addition the courts have certain overriding powers in regard to them, in the exercise of which they can disregard express terms of the contract.

Whatever proposals for reform are made will have to reckon with the magical significance which is at present attributed to the act of signature. By and large it is true that the man in the street exercises some measure of caution before signing a document. He is aware that signature will have legal consequences. But the legal inference which is drawn from the fact of signature, that it implies consent to all the terms appearing in the document, is to my mind nothing better than a fiction, and one which has no reference to the probabilities of the situation. The significance which people attach to signature was formerly much greater than it is today, for the reason that the juristic acts to which assent was indicated in this matter were for the most part important transactions entered into by merchants or by proprietors of land - the great mass of the people had no occasion to execute deeds of conveyance or of trust, and charter parties and bills of lading were not within their ken. With the great extension of credit facilities in more recent times, with the growth of insurance in its many ramifications, and with the general increase in domestic consumption, the ordinary man, if the term is permissible, enters into contracts of an importance and complexity quite outside the experience of his ancestors. Many of these contracts are of long duration, the legal techniques which they employ may be far from simple - for example, those involved in the process of purchasing a flat - and more often than not they are couched in a jargon which is both obscure and technical, in the interpretation of which even courts of law

are apt to have difficulty. In contracts like this, what does the signature of the consumer-party really express? Does he really mean by it that he is willing to commit himself to whatever terms are there, whatever their true interpretation, however grossly unfair, however misunderstood by him? Is it reasonable to attribute such an intention to him as a matter of law, as is at present done? I would suggest that what signature really does express is that the signatory intends to contract on a basis which has already been reached orally, and on the assumption that the written document does not depart from that basis; and, furthermore, that it contains only terms which are usual, reasonable and fair. This assumption is not uncommonly disappointed. In that event the law offers at present very limited relief.

A further obstacle to reform, which proceeds from the consensual theory of contract, is that a court's attention is always focussed upon the time of making of the contract. Subsequently occurring events are evaluated in terms of what the parties said and did, and what it is pleased to suppose they had in their minds, at the time the contract was made, even though they could not possibly have foreseen the events in question. The court has in general no power to consider the facts as they exist at the time the action is brought, and how these facts may put the relation between the parties in a different light - what gain either party might have had to that point, or what loss incurred, or how property may have appreciated or depreciated in value. This is another illustration of the doctrine that the court's role in the law of contract is a passive role, and that it should do no more than lend the state machinery of enforcement to one party on the theory that the parties are sovereign; with the consequence that it takes no account of the fact that one only of the parties was sovereign, and the other not sovereign but subject.

I think it is not too much to say that an entirely new conception of contract is needed in these times. It needs to be recognised that the parties to a contract do not dwell in a private legal domain of their own making, and that where contracts have the character of legislation imposed by powerful organisations upon large sections of the public, the content of such legislation is a matter of public interest, and if necessary of public control. The law of contract, in short, needs to be seen as an instrument of social engineering, and one which must be used in the best interests of society as a whole.

NOTES

- 1) Printing Co. v. Sampson (1875) L.R. 19 Eq. 462.
- 2) Quoted Pound, an Introduction to the Philosophy of Law, 162.
- 3) Lord Tomlin in Hillas and Co. v. Arcos Ltd. (1932) 38 Commercial Cases 23.
- 4) 1957 (1) S.A. 125 (S.W.A.).
- 5) 1955 (1) S.A. 334 (A.D.).
- 6) Kessler, Contracts of Adhesion, 43 Col.L.Rev. 629, 640.
- 7) Robert L. Hale, Bargaining in Economic Liberty, 43 Col.L.Rev. 603, 628.

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