FREEDOM OF CONTRACT

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> And the moral of that is :
> The more there is of mine,
> the less there is of yours.
> Alice in Wonderland

One of the fundamental dogmas of the law is that everyone is free to contract as he wishes, as long as no illegality is involved. The author examines this belief and assesses its credibility and value in the light of modern developments. To do this, he investigates certain key areas of the law of contract, namely, agreement as to terms, contracts in restraint of trade, contracts involving a penalty, contracts requiring the implication of a term or providing for the exclusion of some otherwise relevant liability and frustration. Reference is also made to contracts with a conflictual element. The conclusion of the author is that the idea of freedom of contract is more mythical than real.

I

Prominent among nineteenth century judicial statements that have an air of profundity and seem to enshrine some underlying assumption of law is the remark by Sir George Jessel, M.R., that "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 when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." [1] More recently, the same sentiment was voiced by Lord Morris in the House of Lords when he said : "the policy of the law is to uphold freedom to contract." [2] On the surface, therefore, little seems to have changed. English law still appears to hold firmly to the view that the parties to a contract are free to enter into what-

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[1] Printing & Numerical Registering Co. v. Sampson, L.R. 19 Eq. 462, at 465 (1875).

[2] Esso Petroleum Co. v. Harper's Garage (Stourport) Ltd., [1967] 1 All E.R. 699, at 712.

soever bargain they may desire, subject only to the bounds of legality, which no judge has ever stated to be irrelevant. The late Dean Pound pointed out that this assertion of the idea of freedom of contract was a nineteenth century development, taking the place of earlier notions, such as the theory of an equivalent and the theory of the inherent moral force of a promise made as such. [3] In the light of the comments made by Professor Wolfgang Friedmann on the changing nature of the social function of contract, [4] the re-affirmation of this notion in England in 1967 may be received with some surprise. But does the categorical, emphatic pronouncement of Lord Morris, with its echoes of the classical age of English jurisprudence, truly represent the present state of the English law of contract? Is there complete freedom of contract in modern English law? Beyond this there lies the further question: should freedom of contract be permitted in any absolute form? My intention in the present essay is to consider some at least of the ways in which English law restricts and regulates freedom of contract, and to examine the desirability or otherwise of control over such freedom.

For this purpose a threefold division may be made between the existence of a contract, its terms and content, and its termination. Litigation between contracting parties, arising out of their attempts to regulate their rights and duties by agreement, may give rise to a number of different issues. The reported cases would appear to indicate that these issues, diverse though they may be on the surface, centre around one of the three issues mentioned above. The difference between the parties stems from some dispute as to the contractual nature of their arrangement, or its precise scope and effects, or its continuance. The crucial question that is raised is as to the function of the court. Is a court bound and restricted by the language of the parties in such a way that only by seeing what the parties have said can a decision be reached? Or is it open to a court to interpret for itself the true nature of the relation between the parties, if necessary by arriving at its own, independent conclusion as to that relation? If the first view is correct, then it would seem to follow that the role of the courts in matters of contract is a somewhat passive, even neutral one: that of transplanting into legal language, or giving legal effect to, the efforts of the parties. If the latter view is to be preferred, however, then it is suggested that the courts can be considered as more actively participating in the creation and regulation of contractual relationships, perhaps even to the extent of making a bargain for the parties that they had not made for themselves.

The present discussion, therefore, is concerned with what may be called intrinsic control over contracts: that control which is, or may be exercised by the courts through the medium of interpreting and giving force to agreements made between the parties. Other writers, notably Professor

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[3] R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 144-51 (Rev. ed. 1954).

[4] W. FRIEDMANN, LAW IN A CHANGING SOCIETY 97-113 (4th ed. 1964).

Friedmann, have considered what Friedmann calls the "transformation of contract" [5] from the point of view of extrinsic factors, for instance the standardization of contract in certain spheres of activity such as travel or insurance, the intervention of the state in such matters as contracts of employment, the rise in importance of government departments as contracting parties and the socialisation of the economy, which has had effects upon the nature of commercial and industrial contracts. With these it is not my purpose to deal. There can be little doubt that such developments have materially affected not only the utility of contracts but also their nature and function. For instance, whereas earlier the contents of a contract of employment were to be found either in the express terms agreed upon by the parties, which might well be very limited in the scope, or in such terms as the general common law implied into a contract of that kind, [6] at the present time the relationship of employer and employee is in large measure controlled and regulated not so much in those ways as by the provisions of important statutes which deal with notice, [7] redundancy, [8] and minimum wages, [9] and by the contents of collective "agreements" (if such they may be called, using the term loosely [10]) between trade unions and employers' organizations, not themselves directly involved in any contract of employment. That being so, the contract of employment plays a secondary role in this context. There is more outside such contract than within it. [11] Although such contract cannot be ignored, the position of the employer or his employee is, for practical purposes, to be defined otherwise than in terms of the contract between them. In other contexts a similar situation may be said to have arisen. In respect of sale of goods, for example, the provisions of the Sale of Goods Act of 1893 [12] and the cases decided thereunder are of less importance than the practice of shopkeepers, the realities of business life, or the exigencies, financial and otherwise, of the judicial process. Such examples may be multiplied. Enough has been said, however, to establish that the law of contract cannot be viewed in isolation, away from the surrounding commercial, industrial and social factors which influence and affect the impact of contractual agreements upon everyday life. External pressures and considerations may be of greater importance than the free expression of their wills by the parties.

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[5] *Id.* at ch. 4.

[6] *Cf.* G. FRIDMAN, THE MODERN LAW OF EMPLOYMENT chs. 2, 15, 25, 28 (1963).

[7] Contracts of Employment Act 1963, c. 49.

[8] Redundancy Payments Act 1965, c. 62.

[9] Wages Councils Act, 7 & 8 Eliz. 2, c. 69 (1959).

[10] Since such "agreements" are not contractually binding unless and until they have been incorporated into individual contracts of employment by the contracts themselves, as in Rookes v. Barnard, [1964] A.C. 1129, or as a result of a determination by the industrial court under the Terms and Conditions of Employment Act, 7 & 8 Eliz. 2, c. 26, § 8 (1959). For details, see G. FRIDMAN, *op. cit. supra* note 6, at 420-21, 840-41.

[11] *Cf.* also statutes which regulate hours of work, and safety, health and welfare, G. FRIDMAN, *op. cit. supra* note 6, at chs. 7-14, 16-24.

[12] 56 & 57 Vict., c. 71 (1893).

It is not this that raises doubts about freedom of contract. Were these external factors the only relevant consideration it might be said that, although the function of the contract had changed over the years, the basic, fundamental principle of freedom to contract had not altered. What suggests that a radical change may have taken place in the legal nature of contracts or contractual relations is the attitude of the courts themselves to problems which come before them, the way in which they view their task when called upon to decide some dispute emerging from a contract or alleged contract.

II

Let us take first of all the problem of deciding whether or not parties are in contractual relations. I have considered one aspect of this in detail elsewhere, [13] and it is not necessary to repeat what has already been said. In effect what the courts have done sometimes is to implement clumsy efforts of the parties to reach a contractual situation by means of the application of several different ideas. For example, there is the notion of validation, supported by the vaguer idea that commercial contracts are worthier of validation than others. There is the distinction between merely inconsistent language and meaningless words, the former requiring some reconciliation of their repugnancy, the latter being capable of excision or rejection. There is also the possibility of distinguishing executory from executed arrangements. What is shown by the cases which illustrate these different methods of resolving conflicts about the existence of a valid, binding contract, is that the courts will make strenuous efforts to uphold and declare the existence of a contract between parties who have indicated by their language and conduct a general intent to enter into a contractual relationship. Despite protestations to the effect that the courts are not making contracts for the parties which the parties did not think fit to make for themselves, it is possible to interpret the actions and decisions of the courts as involving the conclusion that, where there is uncertainty about the existence of a contract, but a contractual purpose is evident, the courts can, and do, effectuate such purpose in an appropriate manner, as they think fit.

There is another aspect of this question which merits consideration. In several English cases, courts have been concerned with the problem of dealing with an agreement which expressly or otherwise seems to preclude the operation of the law of contract. Sometimes the parties have been engaged in a commercial relationship, [14] in respect of which it would normally be assumed that they intended their position to be subjected to the rule

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[13] Fridman, *Construing, Without Constructing a Contract*, 76 L.Q.R. 521 (1960).

[14] *E.g.*, Rose & Frank Co. v. Crompton & Bros. Ltd., [1925] A.C. 445; Jones v. Vernon's Pools Ltd., [1938] 2 All E.R. 626 (K.B.); Appleson v. Littlewood Ltd., [1939] 1 All E.R. 464 (C.A.).

of the law of contract; at other times the parties have been connected in some other way, [15] *e.g.*, matrimonially, when the desire to have their affairs regulated by the ordinary law of contract may not so obviously be inferred. So far as the former are concerned, it would seem at first sight that all the courts are doing, when they state that no contractual relationship binding in law arises, is giving effect to the free choice of the parties. Insofar as cases of the second category are concerned, this appears to be less obvious: in such instances, the parties have said nothing, but their underlying assumptions or intentions, according to the interpretation placed upon them by the court, have been to the effect that, despite the formal appearance of contract, their agreement was a mere "social arrangement," not a legally binding contract. It may be suggested, however, that there is less difference between these situations than seems to exist on the surface. Whether a court is interpreting the explicit language of the parties, or their latent intent, what is being done is not so much recognizing and enforcing the freedom of parties to do as they wish, as it is applying judicial policy, *i.e.*, the desire not to impose the rule of the law upon the parties in question. Even though the parties may have evinced the desire to put their relations outside the law, to be binding "in honour" only, the effect of any such attempt is a question of law. The fact that parties do not want to be subjected to the law of contract is not in itself sufficient to achieve such purpose if the courts were not willing to permit such rejection of the normal consequences of agreement. The attempt to oust the jurisdiction of courts by agreement not to resort to judicial settlement of disputes was long thought of as improper and illegal. [16] In some respects it is still not possible completely to opt outside the ordinary legal process. [17] While commercial arbitration is now recognised as a legitimate method of resolving arguments, that does not mean that the courts can be kept out entirely. There may be reference to the courts despite an agreement to arbitrate; there may be an appeal to the courts from an arbitration. In the same way, it is suggested, the attempt to oust the operation of the law of contract by some appropriate form of words need not have been successful. The fact that it has been held so is not proof of the effectiveness of the parties' choice, or their freedom to invoke or not to invoke the law. It is proof of the supremacy of the law, in that, paradoxically, it is the law which says that the law is inapplicable. Is this recognition of the inherent freedom of parties or a concession by the law? In other words the parties are free to "agree" without contracting, but only to the extent to which the courts permit them to do so. The courts could decide that their language or intentions did

[15] *E.g.*, Balfour v. Balfour, [1919] 2 K.B. 571; Parker v. Clark, [1960] 1 W.L.R. 286 (C.A.) (Devlin, J.); Ferris v. Weaven, [1952] 2 All E.R. 233 (C.A.); Simpkins v. Pays, [1955] 1 W.L.R. 975 (Q.B.).

[16] This is what, for long, stood in the way of the development of commercial arbitration.

[17] *Cf.* the situation with respect to "domestic" tribunals, *e.g.*, Lee v. Showmen's Guild of Great Britain, [1952] 2 Q.B. 329 (C.A.); White v. Kuzych, [1951] A.C. 585 (P.C.).

not have the effect of rendering the law of contract inapplicable. In the decided cases the courts have not done so. But there is no reason why, in the future, in cases of a similar kind, or where some distinction can be drawn, a different conclusion could not be reached. Similarly, where what has been called a "collateral warranty" [18] is involved, the decision to treat the suggested agreement as such a warranty, having legal, binding effect, or as a "mere representation," involving no such consequences, is one for the courts, not for the parties. [19] Whatever the parties may have intended, it is the effect of their conduct in the eyes of the court which is important. Thus whatever freedom there may be to reject supervision of a relationship by the law of contract is derived from the law itself. Only when the law grants such freedom may it be said to exist. All of which suggests that what the courts are doing is deciding for themselves whether or not a contract exists between the parties, not leaving it to the parties to do so.

Is this so far removed from the attitude of the courts in those cases in which there is ambiguity about the effect of the language or conduct of the parties? Whereas such cases involve the courts in constructing or refusing to construct a contract for the parties, the cases concerned with agreements "in honour" or "social arrangements" have involved the courts in deciding whether the parties have or have not contracted. Any difference that there might be between these situations and the reaction they provoke is one of emphasis rather than of substance. Whichever type of situation is involved, the courts are effectively determining for the parties, irrespective of their contentions, the exact nature of their legal position. [20]

III

The extent of the control of the courts over the question whether or not a valid, binding contract has been created by the parties is one thing. The situation where there is no doubt about the existence of a contract, and the issue is as to its scope or effects, is another. I have suggested, perhaps in a tendentious manner, that any freedom of the parties to contract or not to contract is illusory, in the sense that, once parties have purported to enter into some kind of relationship, the contractual or non-contractual character thereof is not something which they can effectively control. Rather, it is

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[18] Wedderburn, *Collateral Contracts*, [1959] CAMB. L.J. 58; G. FRIDMAN, SALE OF GOODS, 137-39, 143-48 (1966).

[19] The situation here may well have been materially affected by the Misrepresentation Act 1967, c. 7, which enlarges the extent to which a contract may be upset when a misrepresentation has induced one party to make it, albeit that the misrepresentation was not fraudulent.

[20] In this context it may not be irrelevant to notice the problem of mistake. Much has been written, and no doubt much will continue to be written, about the nature and effect of mistake. Suffice it to say that in deciding whether a contract is void on the ground of mistake, or is valid and binding, the courts appear to be ascertaining for themselves what were the true intentions of the parties or at least of the party who alleges the mistake. Whether the test be objective or subjective, it is suggested that the function of the courts in such cases is to decide what is just having regard to all the circumstances.

a matter for the courts. They may have believed that they were contracting, yet the courts can decide that no contract has emerged. And vice versa. In this respect, the freedom of the parties is a freedom to refrain from any kind of negotiation. As soon as they have acted in a significant way, the precise significance of their actions may not be for them to define. Something which one, or both, may have said or done may be interpreted in quite a different way from what was expected. It may not be possible to explain it away and prevent it from having an important effect upon the decision of the court. *Nescit vox missa reverti.*

How much more is this so where what is involved is the effect of the contract itself. Whatever the parties may have said, written, or done, with whatever intent they may have contracted, whether consciously expressed or inherently latent, the determination of the legal consequences that will flow from their bargain is ultimately one for the court. Parties may propose, but the judges, in the last analysis, dispose. And while the courts may state that all they are doing is giving effect to the avowed intentions of the parties, by interpreting their language or conduct, it may be suggested that such statements are misleading. As with statutory interpretation, in respect of which the courts declare that their aim is the limited one of realising the intent of the legislature by construction of the language of an enactment, while in subtle ways they really create law and, within the bounds permitted to them by the ambiguity and opacity of parliamentary terminology, give effect to their own ideas of what legislation ought to mean, so in respect to the interpretation and enforcement of contracts the courts, paying lip-service to the shibboleths of freedom of contract and effectuating the will of the parties, really put into effect their own ideas on what parties should or must have intended to provide as regards the regulation of their affairs. This does not always happen, it must be admitted, just as it does not always happen where a statute is involved. Everything depends upon the tautness and breadth of the language employed in the document or documents concerned. Where it is possible, however, the courts appear to exercise some kind of "police" jurisdiction, if such it may be called, by virtue of which they direct the parties in the way the courts think they ought to be going, rather than in the way they may have believed they were going.

Such control is exercised under different guises. Sometimes it is blatantly expressed to be on grounds of "public policy." At others, the less contentious basis of "interpretation" is stated to be the foundation for the way a contractual relationship is regulated. An examination of certain key areas of contract law, particularly in the light of more recent cases, will show what is meant by these assertions.

The influence of the doctrine of "public policy" may best be seen operating in respect of contracts involving penalties and contracts which raise the problem of restraint of trade. The effect of the cases is that the

declared aims and intentions of the parties, freely concurred in by both sides, will be stultified by the courts if, in their opinion, what the parties have agreed upon is not to be considered in the general public interest, in that it offends certain fundamental principles to which the courts have given utterance over the years. Common to the "penalty" cases and the "restraint" cases is the idea that undue harshness should not be permitted on the part of one party to a contract against the other, even where the party now being subjected to what may be regarded as an excessive or unconscionable demand has earlier agreed to place himself under the liability subsequently called into question. The courts in such cases have applied what might be termed, in a very broad sense, an "equitable" approach to the problem of defining the contractual obligation of the parties.

In this respect, the approach to be found in some cases amounts in effect to a rejection of the view expressed by Lord Justice Harman when the Court of Appeal had before it the case of *Campbell Discount Co. v. Bridge.* [21] What the learned Lord Justice said was :

> Equitable principles are... perhaps rather too often bandied about in common law courts as though the Chancellor still had only the length of his own foot to measure when coming to a conclusion. Since the time of Lord Eldon the system of equity for good or evil has been a very precise one, and equitable jurisdiction is exercised only on well-known principles. There are some who would have it otherwise, but as at present advised I am of opinion that, at any rate, in the instant case, there is no equitable principle that can be called in aid.
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> Similarly I rather deprecate the attempt to urge the court on what are called equitable principles to dissolve contracts which are thought to be harsh, or which have turned out to be disadvantageous to one of the parties. The observation of Lord Nottingham in *Maynard v. Moseley* is still true that : 'the Chancery mends no man's bargain,' [22] and I do not therefore see my way to call in aid equity to mend what may be an unfortunate situation.... [23]

That case concerned the effects of a clause in a hire-purchase contract under which the hirer determining the contract had to pay a sum by way of depreciation, thereby guaranteeing the owner of the article sold on hire-purchase a minimum payment in the event of the contract not being fully implemented by the eventual sale of the article to the person buying on hire-purchase. The idea that such a clause could well amount to the imposition of a penalty upon the buyer on hire-purchase, so as not to be enforceable, has been taken up and applied in later cases. [24] Such cases are only a more modern instance of the way in which an agreement freely entered into by

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[21] [1961] 1 Q.B. 445 (C.A.), *rev'd* on other grounds, [1962] A.C. 600.

[22] 36 Eng. Rep. 1009, at 1011, 3 Swans. App. 651, at 655 (Ch. 1667).

[23] [1961] 1 Q.B. at 459.

[24] Lombank Ltd. v. Excell, [1964] 1 Q.B. 415 (C.A.); Anglo-Auto Finance Co. v. James, [1963] 3 All E.R. 566 (C.A.); E.P. Finance Co. v. Dooley, [1964] 1 All E.R. 527 (Q.B.). *Cf.*, also, Robophone Facilities Ltd. v. Blank [1966] 3 All E.R. 128 (C.A.) (a case of hire).

the parties has not been upheld. On the other hand, it must be admitted that, when a similar approach, based on the argument of harshness, was made in relation to a contract of hire, not hire-purchase, which provided for a somewhat similar type of clause, by which the hirers could repossess the article hired and retain the initial payment made by the hirer, it was held in *Galbraith v. Mitchenall Estates, Ltd.* [25] that the court had no inherent power to interfere with a freely negotiated contract in respect of which there were no allegations of fraud, misrepresentation or unconscionable conduct. It may be pointed out that one reason for this reluctance to adjust the relations of the parties, apart from the promptings of authority, was the trial judge's uncertainty as to how any such adjustment could be made, on what basis a court could determine the extent to which the terms of the contract could be departed from so as to avoid any excessive hardship. Such a case, and the dicta in other decisions which have dealt with the "minimum payment clause muddle," as it has been called, [26] suggest that the courts have not always been anxious to interfere with contracts, even where there is some merit in the contention that the original terms of the bargain were excessive. The problem is connected with the issue of standard form contracts. In other words, while the courts appear to have stressed the importance of the factor of free negotiation, one party has not been quite as free as the other when it comes to settling the terms of the contract, since some kinds of contracts, *e.g.*, those of hire or hire-purchase, are usually in a printed form which the other party either accepts without qualification or rejects. Freedom of choice in such circumstances is a myth. The only choice is between signing or not signing, and failure to sign would involve deprivation of the benefits of acquisition of some necessary or desired article, or some other advantage. While it might be argued that anyone who quibbles about the terms on which he is contracting should forego the benefit or advantage which he is seeking by the contract in question, on the other hand it might be said that there is little equality or fairness about compelling people to agree to harsh, or potentially harsh terms, or to do without what may well be useful or needed things. In relation to other contracts, where there has been more scope for real bargaining, the courts have not been reluctant to invoke the doctrine of "penalty," so as to protect a party from the direr consequences of his own agreement. The decision in the *Galbraith* case, carrying into effect as it does one of the conflicting views expressed in the Court of Appeal in *Stockloser v. Johnson*, [27] in which the "equity" of the court was also propounded, [28] seems to stand out against the general tide of decisions which justify courts in watering down the strict language of a contract, on the ground that it would be wrong and contrary to the general

[25] [1964] 2 All E.R. 653 (Q.B.). *Cf.* Robophone Facilities Ltd. v. Blank, *supra* note 24.
[26] Ziegel, *Minimum Payment Clause Muddle*, [1964] CAMB. L.J. 108.
[27] [1954] 1 Q.B. 476. The view adopted is that of Romer, L.J. *Id.* at 495, 499 & 501.
[28] *Id.* at 492 (Denning, L.J.).

notions of justice and the public interest to enforce strictly what the parties have apparently freely and mutually accepted.

This is brought home even more clearly by the decisions and the reasoning to be found in cases of restraint of trade. Indeed the recent decision of the House of Lords in *Esso Petroleum Co. v. Harper's Garage (Stourport) Ltd.* [29] shows that, even where the contract concerns or relates to land, involving a mortgage, to which perhaps different principles might be thought to apply, it is still possible for the terms of a contract to be repudiated by a court and not enforced, on the ground that the contract is one in unreasonable restraint of trade, therefore against the public interest and not to be upheld despite the agreement of the parties. That was a case concerned with a "solus" agreement, requiring a garage proprietor to buy and sell exclusively the fuel of a particular fuel producer. The fact that this agreement was tied up with a mortgage on the garage in question did not render the agreement subject to the law of mortgages, to the exclusion of the general law of contract. Hence the agreement had to be considered in accordance with the ordinary principles applicable to contracts in restraint of trade, under which one of the agreements involved in the case was invalid. The language of the members of the House of Lords indicates that though commercial requirements may affect the position of the law, it does not follow that the parties are entirely free to contract as they will, without regard to the policy of the law, and relying completely upon the justification of commercial convenience or commercial practice. It is always a question of law for the court whether a particular contract may be left unhampered by any intervention on the part of the courts.

The approaches of the courts to the "penalty" and the "restraint" cases may have different points or origin, but they are much the same. The "penalty" cases start from the proposition that parties may not impose unconscionable or unjust demands upon each other. The "restraint" cases stem from the idea that the public interest requires that men be free to act as they will, in respect of the giving or withholding of their services, or the use of their talents or property, subject only to the demands of legality. But the prohibition of unconscionable conduct and the limitations upon the power of parties to impose restraints upon each other's conduct *in futuro* derive from the unwillingness of the law to permit parties to fetter themselves beyond reasonable limits. One might, indeed, regard the attitude of the courts as being almost paternalistic. It is not without relevance that the law relating to restraint of trade originated in times when the law was much more paternalistic than it subsequently became in the nineteenth century, a period of *laissez-faire*, and that the "penalties" doctrine is equitable in origin, the Court of Chancery being much more concerned than the courts of common

[29] *Supra* note 2. The court distinguished the decision of the Court of Appeal in Petrofina (G.B.) Ltd. v. Martin, [1966] Ch. 146.

law about protecting people from the consequences of their own folly. Freedom may be all very well, but an excess of freedom can lead to danger and self-infliction of injury. Such would appear to be the feeling of the law in these respects.

A somewhat similar explanation may lie at the bottom of the way the courts have dealt with the problem of interpretation or construction of a contract, particularly where the inclusion or exclusion of terms has been involved. Two main questions have been raised. The first is the extent to which a term not expressly included in a contract may be inserted to explain what it means. The second is the extent to which parties may exclude from their contract terms which would otherwise normally apply. Though apparently different, these issues share a common feature. They are both concerned with the degree to which parties are truly free or are subjected to judicial control as respects the terms which bind them.

Take the problem of implied terms. Where the parties have expressed their contract to involve certain obligations, rights, duties or exemptions, to what extent can the courts qualify such expression of intention by importing into the apparent agreement of the parties some term or terms not specifically mentioned by them? There are various grounds on which this may be done. Custom, for instance, is one of them. Past dealings between the parties is another. So, too, is the very nebulous doctrine of "business efficacy." They are all well known. Indeed the attempt by Lord Devlin in *McCutcheon v. David MacBrayne Ltd.* [30] to restrict the operation of the doctrine of implication of terms on the basis of reasonable notice from past transactions or the surrounding circumstances was obliquely criticised by Lord Justice Sellers and more directly and forcefully rejected by Lord Justice Diplock in *Hardwick Game Farm v. Suffolk Agricultural & Poultry Producers Ass'n.* [31] What this means, it may be suggested, is that, even by reducing their contract to a document in writing, the parties may not have limited the scope and content of their agreement, if and when a court determines that some further requirements must be imported into such agreement on the basis of what is reasonable and necessary having regard to the circumstances of the case. The exigencies of business, the obviousness that there has been an omission, even the demands of justice, may all be relevant. The decision in the *McCutcheon* case, that the normal term excluding liability had been omitted from the written contract and could not be implied even though it had been expressly incorporated many times before in contracts between the same parties, meant that, by accident, one party derived a benefit over and above other contractors with the carriers, despite the fact that their goods travelled on the same ship and were also lost. Thus, although the particular owner was paying the same reduced freight charge in the light of the exemption of the

[30] [1964] 1 All E.R. 430, at 437-38 (H.L.).
[31] [1966] 1 All E.R. 309, at 322, 344-45 (C.A.).

carrier from liability, and not some additional charge in order to cover possible liability, he obtained the benefit of chance and oversight. On the facts of this case, as Lord Justice Sellers said in the *Hardwick* case, "the wily, in future, may be tempted to wait for the official clerk to go for his lunch." [32] What was said in *Hardwick* suggests that the courts might be unwilling to permit such fortuitous advantages to be gained by refusing to incorporate unexpressed terms in a contract when all the surrounding circumstances support the contention that they ought to be included. The question, in such cases, must always be, as it was in *Lister v. Romford Ice & Cold Storage Co.*, [33] whether any such incorporation is reasonable and justified. Sometimes this may depend upon what the courts think is fair as between the parties; sometimes it may turn on what the courts think is required by some more general notion of "policy." The *Lister* case is an instance of this, for the implication of a term as to the exercise of care and skill by the lorry driver and the refusal to imply a term exonerating him from liability for his negligence both seem to have depended upon the policy to be served in the context of vicarious liability for the negligence of a driver. Similarly in *Luxor (Eastbourne), Ltd. v. Cooper*, [34] the House of Lords, considering whether a term ought to be implied into a contract of agency so as to entitle an agent to his commission despite the failure of his efforts to come to fruition, the property being sold by the principal personally, decided that no suitable term could be devised for insertion into such a contract, on the ground that any term would conflict with the fundamental nature of the agency relationship. Therefore to have implied a term would have been out of step with the policy of the law in regard to agency.

The converse of this is presented by the problem of exclusion or exemption. Here the question is not whether something omitted should be inserted but whether something normally applicable should be excised. This usually arises in relation to contracts in which liabilities or obligations are implied by statute or under some rule of law, even though they are not spelled out in precise words by the contract. Sale of goods is an excellent example. So is the contract of affreightment. Other instances will come to mind. English cases, notably those concerned with sale of goods, have developed to the stage of accepting that, by appropriate wording, parties may exclude all the duties or liabilities that would otherwise be implicit in a contract of sale of goods by virtue of the relevant provisions of the Sale of Goods Act, 1893. [35] However, other cases, some concerned with sale, others with hire, hire-purchase, produced a doctrine, variously known as the doctrine of "fundamental breach" or "breach of fundamental term," under which certain obligations were not capable of being excluded. The effect of this

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[32] *Id.* at 322.

[33] [1957] A.C. 555.

[34] [1941] A.C. 108, on which see G. FRIDMAN, LAW OF AGENCY 133-36 (2d ed. 1966).

[35] G. FRIDMAN, SALE OF GOODS 186-88 (1966).

doctrine, it would seem, was that, despite the precise language used by the parties, by reason of which they appear to have accepted freely and utterly that one party would not be liable for any deficiency in the performance of the contract, there might nonetheless be liability in respect of certain kinds of improper performance. Where the line was to be drawn was a question of great subtlety, and the decisions sometimes seemed conflicting and inconsistent, not to mention inexplicable on rational grounds.[36] The decision of the House of Lords in *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*,[37] while giving rise to problems of its own, seems to have settled one thing: that whether parties have effectively excluded all liability for defective performance by the terms of their contract is a matter of construction or interpretation. To a limited extent, *viz.*, to the extent to which an exemption clause cannot operate so as to deprive one party's stipulations of all contractual force, else the contract would be reduced to a mere declaration of intent, "it may be correct to say that there is a rule of law against the application, of an exceptions clause to a particular type of breach. But short of this it must be a question of contractual intention whether a particular breach is covered or not, and the courts are entitled to insist, as they do, that the more radical the breach the clearer must the language be if it is to be covered," in the words of Lord Wilberforce.[38] What does this mean? It may be suggested that it means that whether an exclusion is operative to exempt a party from liability, or the breach is such that it cannot be, or has not been effectively excluded by the contract, is a question for the courts to decide, not for the parties. Whatever they may have stated in their contract, the final decision rests with the courts. Even if the parties thought that they had drafted a suitable exclusion clause, they may discover that they were mistaken.

Thus, what the parties have adopted as the regulations governing their relations may not be in accord with what the courts consider to be the terms under which they contracted. The last word lies not with the parties but with the courts. While the parties may have negotiated on one basis, with a particular intent in mind, so far as their rights and duties were concerned, they may find that the courts take a different view of the meaning of their words. In arriving at such meaning it may be suggested that the courts can look outside and beyond the particular transaction between the individual parties before them, and have regard to more general considerations of business and public policy. Lord Reid seems to deny this when he states in the *Suisse Atlantique* case, speaking of the difference between an exemption clause in a standard form contract, where there is no freedom of choice, and a clause in a contract where the parties are bargaining on

[36] *Id.* at 188-91.
[37] [1966] 2 All E.R. 61 (H.L.).
[38] *Id.* at 92.

terms of equality and the clause is accepted for quid pro quo or other good reason: "There is no indication in the recent cases that the courts are to consider whether the exemption is fair in all the circumstances or is harsh and unconscionable, or whether it was freely agreed by the customer." [39] But it may be argued that the fairness of the exemption clause, in all the circumstances, notably in relation to general commercial practice and the position of the parties, may be very relevant in considering the proper construction and scope of any such clause. It is too soon to appreciate the precise effects of the *Suisse Atlantique* case. What is awaited with interest is some indication of the way the courts will take up and follow the hints therein contained as to the right way to deal with exemption clauses in contracts.

IV

The problem of frustation of contract may be looked at either as an example of interpretation of the contents of a contract or as raising an entirely different question, namely, under what circumstances the courts are entitled to hold a contract discharged despite the fact that it has not been and cannot be performed. Whether frustration relates to the definition of the obligations of the contract or to its duration depends upon the juridical nature of the doctrine. Various explanations have been given. One is that frustration depends upon the addition to the contract of an implied term. Looked at in this way, it would seem that frustration creates no new problem. Whether or not a contract has been frustrated is a question of the same order as, for example, the question which was raised in cases such as *McCutcheon v. MacBrayne*, that is to say, whether the contract provided by necessary and reasonable implication for the limitation of the carrier's liability, although nothing had been included to such effect in the written contract. If this is so, then what has already been said in relation to implied terms is also relevant in respect of frustration. The implication of the requisite term is a matter of law, as the House of Lords stressed in *Tsakiroglou & Co. v. Noblee & Thorl G.m.b.H.*, [40] in which it was held that a contract of sale of goods c.i.f. was not frustrated by the closure of the Suez Canal in 1956, because the obligation of the seller was to send the goods by some reasonable and practical route, which meant that he could and should have sent them by way of the Cape of Good Hope. However, as Lord Radcliffe pointed out, this legal question depended ultimately upon commercial usage and practice. [41] He emphasised the close connection between commercial law and such usage and practice, suggesting by this that the line between issues of fact and those of law was a fine one, not clearly

[39] *Id.* at 76.

[40] [1961] 2 All E.R. 179 (H.L.). This is one of the cases which arose out of the Suez crisis of 1956. Whether similar problems are likely to emerge as a result of the occurrences in 1967 was considered in an article in The Times (London), July 5, 1967, at 25, col. 3.

[41] *Id.* at 188-90.

distinguishable in this context. What the courts appear to be doing is giving legal effect to the general course of business or commercial conduct, interpreting an individual contract in the light of general principles. Looked at in this light, it may be argued that all the courts are doing is viewing what the parties have expressly agreed in terms of what is usual, what is tacit, what does not require stating in precise language. Such an approach would appear to emphasise the freedom of the parties rather than the converse. It would indicate the anxiety of the courts to seek to discover what the parties themselves wanted or intended. But this approach seems to conflict with two generally accepted maxims applicable with respect to the construction of contracts, particularly those which are in writing: *expressum facit cessare tacitum*; *expressio unius est exclusio alterius.* In that respect this approach is suspect. Indeed in the *Tsakiroglou* case some doubt was cast upon the "implied term" explanation of the doctrine of frustration by Lord Guest, [42] and in the later case of *Ocean Tramp Tankers Corp. v. V/O Sovfracht*, [43] in which a contract of affreightment was held not to be frustrated by the closure of the Suez Canal, Lord Denning, M.R., definitely rejected the "implied term" theory.

The alternative referred to by Lord Guest and accepted with approbation by Lord Denning was that a contract would be frustrated where the situation rendered performance of the contract, in the words of Lord Radcliffe in *Davis Contractors Ltd. v. Fareham U.D.C.*, "a thing radically different from that which was undertaken by the contract." [44] Such an approach makes frustration a question concerned with the termination, rather than with the contents of a contract. How is it to be determined whether a "fundamentally different situation" has arisen? Lord Reid in the *Tsakiroglou* case considered that it meant "fundamentally different in a commercial sense." [45] That involved taking commercial considerations into account, even though the question was one of law, not of fact.

Lord Guest appears to have stressed that much depended on the type of contract involved,[46] in this regard distinguishing a contract of sale of goods c.i.f. from one of affreightment, a distinction which appears to be rendered obsolete by the *Ocean Tramp Tankers* case. In that later case, Lord Denning put the whole matter on the basis of justice. The fact that the contract had become "more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound."[47] If this indeed is the true explanation of the doctrine of

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[42] *Id.* at 194.
[43] [1964] 1 All E.R. 161, at 166 (C.A.).
[44] [1956] A.C. 696, at 729.
[45] *Supra* note 40, at 187.
[46] *Id.* at 194-95.
[47] *Supra* note 43, at 166.

frustration, then it would seem that the way is open to the courts to re-interpret contracts, in accordance with their ideas of what is or is not just as between the parties, except where the parties have stipulated in precise terms, and in advance, as regards the new situation which has arisen. In the *Ocean Tramp Tankers* case it would seem that the fact that the parties were aware of the danger that the Suez Canal would be closed was a material fact. Hence it was difficult to conclude that frustration had occurred. Wherever the parties have not clearly adverted to future possibilities, the explanation of the doctrine of frustration now being considered seems to entitle the courts to impose their own solution of the difficulties upon the parties. Admittedly Lord Radcliffe's marriage of commercial law and commercial practice suggests that the scope of the courts is limited by reference to the usages of business and trade. But it must be recollected that it is for the courts to determine the existence and force of any such alleged usages. In this way extensive power is vested in the courts to regulate the manner in which a contract may be discharged on the basis of alleged frustration.

The idea that the test utilised by the courts in such cases is what is just is reminiscent of the attitude of the courts in the "penalty" cases earlier considered. There is a difference, however. In dealing with instances of the attempted imposition of a penalty by one party on another, the courts are faced with the problem of contractual terms which offend principles of equality and equity. The problem of frustration is one which affects only the parties to a contract. Whether or not a contract is declared frustrated is not something which concerns the wider community, in that the convenience or hardship of one party in such instances is unconnected with wider, more basic notions of right and justice. Nonetheless, perhaps at a deeper level, there is a connection. The exoneration of a party from his contractual obligations on the basis of frustration does have this relevance to the community at large: that community, particularly such members of it as have commercial interests, is vitally concerned in the question of contractual sanctity, *i.e.*, the extent to which a bargain is to be kept and cannot be evaded by some plea of extrinsic factors, or *vis major*. The more lax and tolerant the courts are in dealing with such a plea, the less certain and less safe will commercial men feel. In the long run is it to the advantage of the community at large to engender such uncertainty and insecurity? Would it be better to uphold the strictness of contractual obligations, even at the expense of justice as between the parties? To this problem a return will be made. For the moment it suffices to note the features shared by the problems hitherto considered.

V

Standing quite apart from what has been discussed up until now is the question of contracts involving a foreign element, thus giving rise to

problems in the conflict of laws. Such contracts, perhaps even more so than purely internal ones, raise the issue of freedom of contract in a very forcible way. Hence, although this essay is primarily concerned with contracts wholly subjected to the rule of domestic English law, it would be a serious omission to refrain from some consideration of contracts involving the application of the conflict of laws.

The question which presents itself for resolution may be stated in this way: to what extent can parties to a contract subject themselves to a particular system of law without having their choice struck down on the ground that it would involve the exemption of their contract from legal rules otherwise applicable? The problem stems from the doctrine, which appears to be the governing principle at the present time in the English conflict of laws, that prima facie a contract which contains a foreign element is regulated by its "proper law." Two issues arise. The first is the determination of the "proper law." The second is the freedom of parties to reject or exclude such "proper law."

If the parties have said nothing as to the legal system which is to govern their agreement, have made no attempt to exercise any alleged "freedom" of choice as to the system of law that is to regulate their rights and duties, it is clear that it is entirely the function of the courts to decide for them. On what basis? Two theories have been propounded. One is that the "proper" law is that legal system with which the contract has the most real or substantial connection. This may be called the theory of the objective proper law. The other, more modern, perhaps, is that the proper law is that which the parties seemingly intended to apply, though they made no express statement to such effect. This may be called the theory of the subjective proper law. Plainly, the latter gives more force to the choice, the free expression of their desires, by the parties. The former leaves much more to the courts. Support for the subjective proper law theory seems to be contained in the judgment of Lord Justice Diplock in the recent case of *Mackender v. Feldia A. G.*[48] This decision was concerned with the effect of a clause in a contract of insurance providing that the policy in question should be governed by Belgian law, and that any dispute arising thereunder should be subject exclusively to Belgian jurisdiction. The Court of Appeal held that a claim that the policy was voidable on the ground of non-disclosure of a material fact, *viz.*, that the assured was a diamond smuggler, was justiciable in Belgium under the foreign jurisdiction clause. It was not a claim that the contract was void ab initio; therefore, it was not justiciable in England, so as to permit service of a writ out of the jurisdiction. Lord Justice Diplock, discussing the position where a contract might be illegal under English law, though valid

[48] [1966] 3 All E.R. 847 (C.A.).

by its proper law, said: "The prima facie rule of English conflict of laws—more liberal in this respect than many continental systems—is that the proper law of a contract is that system of law which the parties themselves have agreed shall regulate the legally enforceable rights and duties to which their agreement gives rise." [49] The purpose of the Lord Justice in identifying the proper law was to show that, where a contract was valid and legally enforceable elsewhere than in England it might be of no avail in an English court but could still be considered a legal, binding transaction. To that extent, therefore, the choice of the parties would be of some effect, even though not in England. Possibly such a contract could be recognised in England, even though illegal or void by English law, so far as its existence was concerned, where the existence of a contract between the parties was a material factor in assessing their legal position. This, it must be admitted, is highly debatable. The position with respect to a contract illegal by English law but valid by some other system with which it is connected either by virtue of the subjective proper law theory or in consequence of a deliberate choice by the parties is open to question.

If the dictum of Lord Justice Diplock is correct, and the proper law is what the parties have indicated it should be, then the situation where parties have done more than reveal a connection between the contract and a specific system of law, and have gone to the lengths of stating that they wish the contract to be governed by a named legal system, would appear to be even clearer. On this basis the parties' choice must be respected. This is what happened in the *Mackender* case, where the insurance company attempted to argue that the contract was invalid by English law, therefore the question of its validity could be dealt with in an English court, notwithstanding the express declaration in the contract submitting the parties to the governance of Belgian law and Belgian courts. What was admitted, however, was that, if the issue had been one of the existence of the contract, it might have been possible for an English court to have jurisdiction and to determine such issue by reference to English, not Belgian law. This does suggest that, despite the apparent willingness of English courts to permit parties to invoke foreign systems of law, whether expressly or by tacit conduct indicating that they considered some other system of law than English to have the greatest connection with the contract, there remains some residual jurisdiction in the English courts to decide certain questions arising under a contract. This bears some resemblance to the situation, already considered, where parties may or may not have contracted, depending upon the construction placed upon their language and conduct by a court. Before a valid choice of law may take place, there has to be a valid contract. This may involve a reference to English law, in spite of, or perhaps because of its deliberate exclusion, to discover whether there is a contract on the

[49] *Id.* at 852.

basis of which some reference to a foreign system may take place. So far as essentials are concerned, *e.g.*, issues of mistake, fraud, and so forth, the *Mackender* case makes this clear. Where what is involved is some formality, *e.g.*, consideration, offer and acceptance, the question is more open. In many ways the problem is just like that in cases of uncertainty as to the effect of what the parties have done. Similar guides may be invoked to aid the courts to arrive at the right conclusion. Inevitably, however, the problem is more intractable because of the foreign element that is involved. It is difficult to avoid circularity of argument and reasoning. Perhaps what may occur is a somewhat Alexandrian approach. As yet, however, there are no decisions which throw any light on the way an English court would deal with this particular problem. All one can say is that English courts would seem to be free to adopt whatever attitude they like to such situations and to be able to arrive at their own conclusions, rejecting any solution suggested by the parties. [50]

VI

The time has come to draw together all these strands and see what results. The present situation, insofar as the above, necessarily brief and general discussion indicates, is that there are significant areas in the law of contract where the courts feel free, and do not hesitate to give voice to their feelings, to interfere with contractual arrangements between parties, and to substitute what they think are more logical or reasonable ones. Various grounds are put forward to justify this approach. Sometimes they are strictly doctrinal, *e.g.*, those involving issues of construction. Sometimes, however, they are more in the nature of assertions of judicial policy, *e.g.*, in conflicts cases in which the parties' free choice of law has been subjected to criticism. If the policy of the law is to uphold freedom to contract, as Lord Morris stated, it would seem by this that what is meant is very restricted. All it would appear to involve is that everyone who is of full age and not in some way incapacitated by law may or may not make a contract as he wills. Even this is subjected to some control, in that, to enter into a valid contract certain requirements must be fulfilled, and the courts have the final word as to whether or not such fulfillment has occurred.

This raises an important question about the nature of contractual obligation. Is it a matter of freedom of will, expression of the intention to be bound, purchase of a bargain, or indulgence in conduct which, according to the rules laid down by the courts, effectuates a contract? In the

[50] Mention must be made of a recent statutory change. By the Uniform Laws on International Sales Bill, passed by Parliament on July 13, 1967, the Uniform Laws on International Sale of Goods and the Formation of Contracts for the International Sale of Goods contained in the Hague Convention of 1964 have been incorporated into English law. Under this bill parties to an international contract of sale of goods, or even to a *municipal* one, can choose to have their contract governed by the Uniform Laws rather than by English law or the proper law, even where this means ousting the otherwise applicable provisions of the Sale of Goods Act, 56 & 57 Vict., c. 71 (1893). There appears to be no qualification of the freedom of the parties' choice.

Mackender case,[51] Lord Justice Diplock differentiated agreement from contract. It may be that in this difference lies the kernel of the whole question. Parties may attempt to arrive at some form of agreement, but the legal effect of any such attempt is not necessarily a matter for their decision. Agreement is a factual matter : whether an agreement amounts to a contract is a question of law, sometimes of great subtlety. Even where a contract may be said to have arisen, its nature and effect are dependent upon the interpretation placed by the courts upon the language and conduct of the parties. The legal scope of their agreement is as much a matter for judicial determination as the issue whether a contract has been concluded. What remains to be considered are the criteria on which judicial decisions are founded.

At the present time emphasis is still placed upon the importance of consideration, in other words upon the notion of equivalence or bargain. Yet simultaneously references to the relevance of intent to contract and freedom of action may also be discovered in the cases. Though consideration may exist, in the technical sense, the courts seem willing to dispute the existence or precise validity of a contract where there are other factors which can be said to affect the desirability of enforcing the bargain apparently entered into by the parties. Too much reliance ought not to be placed, it would seem, upon the presence of consideration, the fulfillment of the technical requirements of a doctrine that was debated even past the threshold of the nineteenth century. Moreover, recent developments in the field of "promissory estoppel" indicate that some alternative basis for imposing contractual obligations may sometimes be found, as long as the desire to be bound, the wish or the will to enter into an obligatory relationship, can be discovered or spelled out from what the parties have done. This, when considered in conjunction with some of the situations which have been considered earlier, such as those in which an exemption or exclusion has been involved, suggests that in modern times perhaps greater emphasis is being placed upon the notion that, as far as possible, the courts seek to investigate the real will of the parties and give effect to it. As against this, however, must be balanced the idea that too much freedom should not be allowed : that there are limits to the extent to which the will of the parties, as expressed in what they have said or done, should be accorded paramountcy. Such limits are dictated by technicality or by policy. Technicality is most in evidence where uncertainty or estoppel are involved : policy, for example, where it is a question of exclusion of liability or imposition of penalties.

Obviously there is much to be said in favour of such limitations. True freedom of contract can only exist where the parties are on equal terms.

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[51] *Supra* note 48, at 851.

Very often, in modern society, they are not. Enough has been said by other writers on the subject of standard-form contracts, governmental agreements, and similar arrangements, to make it abundantly plain that the courts are justified in scrutinizing with great care such bargains, in the hope of protecting the unwary, the inferior party, the weaker, from over-reaching by the other contractor. This can be carried too far, however. It must be remembered that there may be no absolute compulsion to contract in the manner involved. Where a contract is made, it ought to be adhered to, in the absence of fraud or similar conduct. *Pacta sunt servanda* must still be a cardinal principle of law—else there will be little foundation for any law. Perhaps it may be argued that the courts seem to have arrogated to themselves too much power to interfere and intervene in bargains "freely" arrived at, *i.e.*, in the sense of without any duress, mistake, fraud, and so on. The recently passed Misrepresentation Act, 1967, [52] increases the power of courts to upset contracts where, at common law, no such power existed. This is not rejected as unwarranted. Clearly the previous law erred too greatly on the other side : in favour of maintaining the "sanctity" of a contract where it had been induced by some "innocent" deception. The act is cited, however, to show how the tendency of the law is towards regulation and control of contracts, rather than leaving parties to the fate they have engineered for themselves. Where the common law could not allow such control it was necessary for the law to be changed by statute. That it was, suggests a climate of opinion in legal circles in favour of greater control, more interference, no doubt in the interests of justice, but, inevitably, having the effect of making the courts more and more the protectors of those who have allowed themselves to be inveigled, or persuaded, into an unsatisfactory bargain. In this respect the courts appear to be undertaking the older functions of the Court of Chancery, that of *procurator fatuorum*. While it may be necessary to provide remedies for those who have been led into inequitable, unjust bargains, it may be contended that this parental attitude should not be carried to extremes. It is interesting to note that, so far as maintenance agreements between spouses were concerned, the common law did not permit any re-arrangements to take place where circumstances had so altered as to render the particular agreement unjust to one spouse or the other. This was eventually remedied by the Maintenance Agreements Act, 1957. [53] There is much to be said for permitting such judicial supervision of contracts under statutory authority and with due statutory safeguards and limitations. Allowing the courts equivalent freedom without such regulation may be more unwise. To be fair, the courts are not always all that eager to enjoy such powers—witness the speech of Lord Reid in the *Suisse Atlantique* case. [54] There are other judges, however, who

[52] *Supra* note 19.

[53] *See* now, the Matrimonial Causes Act 1965, c. 72, §§ 23-25.

[54] *Supra* note 37, at 76.

welcome the opportunity to supervise contracts and would welcome even wider, stronger powers of intervention. Before any such increase in judicial powers is granted, or assumed, thought should be given to the wisdom of allowing too great a role to the courts in the determination of contractual relations. A contrast may be drawn with the situation in the law of torts. Whereas the extension of judicial creation of liability for wrongful acts is to be encouraged for the greater protection of the individual, any extension of judicial control over contractual relations is to be deprecated. What is surprising is that the courts are often loath to broaden the scope and instances of tort liability while at the same time not revealing the same disinclination to interfere where contractual rights and duties are involved. There is something strangely inconsistent here.

The tendency of modern law, therefore, is away from the principle of freedom of contract. It may be that there is a long way to go before utter regulation of contractual relationships is the rule, rather than the exception. But the signs to be found in the cases, it is suggested, point to a movement towards such a situation. The nineteenth and early twentieth centuries produced the golden age of contract. Are we seeing a gradual decline in the importance of contractual relations, a revulsion from the supremacy of the individual and the individual's will ?