STANDARD FORM CONTRACTS

THE increasing use of standard form contracts is a subject which concerns everybody much more than is commonly realised and one to which lawyers have paid only casual attention. Neither the expression "standard form contract" nor any variant of it has acquired the status of a term of art or, indeed, any recognised and distinctive meaning: it is, therefore, as well to define what is meant by the expression in this article. The words "standard form contract" will be used to include every contract, whether simple or under seal and whether contained in one or more documents, one of the parties to which habitually makes contracts of the same type in a particular form and will allow little, if any, variation from that form. The average man, the man in the street or on the Clapham omnibus, is continually making such contracts and the probability is that they are the most important contracts that he ever makes. If he rents his house from the local authority or the owner of an estate his tenancy agreement will be in a standard form; he will have been supplied with gas and electricity only if he has signed a printed form of agreement; any item of furniture which he has bought on the hire-purchase system will be the subject of an agreement designed by a finance company; his wireless set, his motor-car and most of his electrical equipment will have been sold to him subject to standard terms. His work, if he is a manual worker in a large undertaking, a civil servant,[1] a local government officer or an employee of a big organisation, will almost certainly be based upon a contract of service, the conditions of which are set out in a printed document. His journey to and from work will be the subject of a contract of carriage on abstruse but unalterable conditions, and at least one of his leisure time activities, his football "pools," will be carried on subject to the most rigid regulations.[2]

In all these transactions the bargaining power of the parties is unequal: on the one side there is the ordinary individual and on the other a monopoly or powerful organisation with desirable goods or services to supply. The choice between not making a contract or making it on the only terms available is no choice at all and docile submission to the standard form, meek signature "on the dotted line," is the general rule. The method of creation of this type of

[1] *Cf. Rodwell* v. *Thomas* [1944] 1 All E.R. 700.

[2] Such regulations will, however, be binding "in honour only" and a clause even stronger than that used in *Rose and Frank* v. *Crompton Bros.* ([1925] A.C. 445) will bar any approach to the courts: *Appleson* v. *H. Littlewood, Ltd.* [1939] 1 All E.R. 464.

contract is well conveyed by the expression, originated by Saleilles,[3] contrats d'adhésion. The potential customer has the choice either to adhere to the standard form or not and the printed document which sets out the standard conditions will never see the red, green and purple ink beloved of the conveyancer when negotiating his terms.

Other transactions take place on standard forms of contract where the bargaining power of the parties is more equal. This is especially the case in what may be called commercial contracts, that is, contracts between parties both of whom are engaged in trade, business or commerce.

Standard form contracts have a long history in various fields of commerce, particularly in that of shipping. Charter parties and bills of lading are still based on ancient forms and even the complicated marine insurance policy has changed little during the centuries. The problems arising from the use of such documents are mainly problems of construction and, in seeking to find a solution, the lawyer has the benefit of the many decisions interpreting nearly every phrase that is used in the traditional forms. The problems which are discussed in this article arise comparatively rarely.

In other fields of commerce the use of standard form contracts is a new phenomenon and there is a general tendency for more and more contracts to be embodied in elaborate printed documents where previously they were made in a simple form, the parties relying on the common law and statutes, such as the Sale of Goods Act, 1893, to establish their rights and liabilities. The more that monopolies and combines extend their activities the less bargaining power remains and there may be just as much inequality between a small trader and a large combine as there is between a railway company and a passenger.[4]

It is, however, mainly with transactions between private individuals and large organisations that this article is concerned.

The position of standard form contracts under the common law can be summarised in a series of divisions of possibilities. These all assume the absence of duress, fraud or misrepresentation. They are best expressed numerically :—

1. A person who accepted an offer which is based on standard conditions, the terms of which were all specifically brought to his notice, is bound by these conditions, even if he expressed his objections to them.[5]

2. If a person accepted an offer made subject to standard conditions, but was unaware of their contents, the first question to ask is whether he signed the form containing the conditions or not :—

[3] *De la Declaration de Volonté*, 1901.
[4] *Cf. Palmolive Co.* v. *Freedman* [1928] Ch. 264.
[5] *Walker* v. *York and North Midland Ry.* (1853) 2 E. & B. 750; *Eric Gnapp, Ltd.* v. *Petroleum Board* [1949] 1 All E.R. 980.

(I) If he signed the form he would be bound by the conditions,[6] even if he did not know the language in which they were printed.[7]

(II) If he did not sign the form the second question to ask is whether he knew of the existence of the conditions :—

(i) If he knew of the existence of the conditions he will be bound by them.[8]

(ii) If he was ignorant of the existence of the conditions the third question to ask is whether some, though not necessarily adequate, notice of the existence of the conditions was given :—

(*a*) If no notice of the existence of the conditions was given he will not be bound by them.[9]

(*b*) If notice of the existence of the conditions was given, the fourth question to ask is whether or not the document in which they were contained or referred to was a "common form" document[10] :

(A) If the document was a "common form" document he will be bound by the conditions set out or referred to in it.[11]

(B) If the document was not a "common form" document, the fifth question to ask is whether he knew there was writing on the document :—

(α) If he did not know that there was writing on the document he will not be bound by the conditions.[12]

(β) If he did know that there was writing on the document, the sixth question to ask is

[6] Lord Cairns in *Henderson* v. *Stevenson* (1875) L.R. 2 H.L.(Sc.) 470, 474; Mellish L.J. in *Parker* v. *S.E. Ry.* (1877) L.R. 2 C.P.D. 416, 421; Atkin J. in *Roe* v. *Naylor* [1917] 1 K.B. 713, 716; and Lord Haldane in *Hood* v. *Anchor Line* [1918] A.C. 837, 845.

[7] *Canadian Pacific Ry.* v. *Parent* (1917) 116 L.T. 165, and *The Luna and The Kingston* (1919) 36 T.L.R. 112.

[8] *Parker* v. *South Eastern Ry.* (1877) L.R. 2 C.P.D. 416, *per* Mellish L.J., at p. 421. *Harris* v. *Great Western Ry.* (1876) 1 Q.B.D. 515. See particularly the judgment of Blackburn J. at p. 532. See, similarly, Lord Haldane in *Hood* v. *Anchor Line* [1918] A.C. 837, 845.

[9] *Henderson* v. *Stevenson* (1875) L.R. 2 H.L.(Sc.) 470, *per* Lord Cairns L.C., p. 476; *Walls* v. *Centaur Co., Ltd.* (1922) 126 L.T. 242; *Fosbrooke-Hobbes* v. *Airworks, Ltd.* (1936) 53 T.L.R. 254; *Chapelton* v. *Barry U.D.C.* [1940] 1 K.B. 532; *Olley* v. *Marlborough Court, Ltd.* [1949] 1 All E.R. 127, 134.

[10] *Watkins* v. *Rymill* (1883) 10 Q.B.D. 178, in which Stephen J. first drew the distinction between common form documents and others, although Mellish L.J. in *Parker* v. *South Eastern Ry.* (1877) L.R. 2 C.P.D. 416, 422, had also drawn a similar distinction without using the words "common form."

[11] *Watkins* v. *Rymill, supra.*

[12] *Parker* v. *South Eastern Ry., supra.* The opinion here expressed by Mellish L.J. as to what was the proper direction to give to the jury was approved by the House of Lords in *Richardson* v. *Rowntree* [1894] A.C. 217.

whether the notice given to him of the existence of conditions was reasonable notice.[13]

(*aa*) If it was, he will be bound.[13]

(*bb*) If it was not, he will not be bound.[13]

This tabulation appears to offer only three chances of escape [14] to a person ignorant of the contents of conditions which a company with whom he is dealing are seeking to thrust upon him. In practice the odds are even heavier against him because of the special treatment given in the last 30 years to one of the most important documents of the type with which we are concerned, the railway ticket. Although these have never authoritatively been raised to the rank of " common form " documents,[15] they have been given special treatment and although the courts have gone through the motions of asking the questions suggested in *Parker's Case*, they have ignored any answers given by juries unfavourable to the binding quality of conditions incorporated in a normal railway ticket.[16]

There are still some forms of tickets which are not treated in the same way as railway tickets and in respect of them a jury's answers to the questions suggested in *Parker's Case* are given more respect.[17] But, if it is possible to generalise on such a wide subject, it is probably true to say that there is a tendency for printed conditions of all kinds to be held to be binding whether or not both parties are aware of their effect.

It is probably also true to say that the vast majority of conditions appearing in the countless types of standard form contracts are designed only to clarify the bargain and to facilitate the operation of the contract. The only cause of complaint against such conditions is that they are frequently unnecessarily prolix and, therefore, are seldom read by the person who signs or receives the document incorporating them. Other conditions are, however, designed purely to protect the party who produces the standard

[13] *Richardson* v. *Rowntree*, *supra*. The questions put to the jury in the court of first instance in this case were slightly different from those designed by Mellish L.J. in *Parker* v. *South Eastern Ry.*, *supra*, and are more simple. They are substantially those at (B), (II) and (*β*) in that order.

[14] Those at (a), (*a*) and (bb).

[15] It is true that Swift J. in *Nunan* v. *Southern Ry.* (1923) 130 L.T. 131, 134, talks of railway tickets as " common form " documents, but he only assigns to them the attributes of a common form document so long as there is no " issue as to whether the document does contain the real intention of both parties."

[16] *Thompson* v. *L.M.S. Ry.* (1930) 141 L.T. 382, 385; *Penton* v. *Southern Ry.* (1931) 144 L.T. 614. If the customary works " For conditions see back " (which, as Professor Hughes said in 1931 (47 L.Q.R. 462) have acquired a " mystical significance ") are missing, the answers to the questions are given proper weight: *Sugar* v. *L.M.S. Ry.* [1941] 1 All E.R. 172.

[17] See, for example, *Skrine* v. *Gould* (1912) 24 T.L.R. 19, 21 (football ticket); *Chapelton* v. *Barry U.D.C.* [1940] 1 K.B. 532 (deck chair ticket); *Henson* v. *L.N.E. Ry. and Coote & Warren, Ltd.* [1946] 1 All E.R. 654 (railway " walking pass "). *Cf. Ashby* v. *Tolhurst* [1937] 2 All E.R. 837, in which the terms of a car park ticket were treated as binding.

form from liability, and it is these conditions which merit further consideration.

In 1859 Erle J., in *McManus* v. *Lancashire and Yorkshire Ry.*[18] said that:

> "The notion that customers of railways require protection on account of incapacity to resist oppression, is not more true than the notion that, against a large proportion of customers, railway companies stand in need of every aid the law can afford."

The big organisations producing standard form contracts certainly take advantage of such aids. They can afford the best legal advice and most of them employ competent legal staffs.[19] On the other hand, neither the persons with whom they make contracts nor any body representing their interests are consulted about the form the contract should take, unless statute law dictates that they should be so consulted. If at any time a condition designed by a big organisation is construed adversely to it by the courts it is an easy matter for the condition to be redesigned. In 1884, in *Woodgate* v. *Great Western Ry.*,[20] an action for damages caused by the failure of a train, shown in timetables, to run as a through train, Smith J. remarked that he had very little doubt that the condition which was printed on the Great Western timetable was altered or printed for the purpose of getting out of the decision in *Le Blanche* v. *London & North-Western Ry.*[21]

The following year Huddleston B., in giving judgment for the railway company in *McCartan* v. *North-Eastern Ry.*, [22] an action brought for expenses caused by the unpunctuality of a train, said:

> "Now it is quite obvious that it was the intention of the railway company to exclude themselves from every species of liability that they could exclude themselves from. They had the advantage of previous cases in this and other courts from which they might be able to draw up their conditions, and I have no doubt that they availed themselves of that."

So confident have the judges been that companies using standard form contracts are both hard-headed and well advised, that they have from time to time interpreted such contracts in favour of the companies designing them, holding that the companies must have

[18] 4 Hurlst. & N. 327, 346.

[19] Scrutton L.J. in *Great Northern Ry.* v. *L.E.P. Transport and Depository, Ltd.* (1922) 127 L.T. 664, 670, confessed that his speculation as to what railway companies were after was futile because their intelligence was far beyond him!

[20] (1884) 51 L.T. 826, 832.

[21] (1876) 1 C.P.D. 286. This decision is not material to this argument.

[22] (1885) 54 L.J.Q.B. 441, 443. He went on to point out that it was quite clear, since the case of *Haigh* v. *Royal Mail Steam Packet Co.* (1883) 52 L.J.Q.B. 640, that if a company used apt words for the purpose they might make a contract excluding themselves from all liability.

intended the words of the contracts to give them the utmost protection.[23] The basis of these decisions seems to have been that if the doubtful clauses in the contracts were interpreted one way they would give some protection to the companies who designed them; if they were interpreted a second way they would add nothing to the general law: therefore they must be interpreted the first way. Many other types of contract, however, contain unnecessary or redundant conditions: it seems a false conclusion that, because a clause is inserted in a contract, that clause must cover some point upon which the general law is silent.

These authorities were followed in the recent case of *Alderslade* v. *Hendon Laundry, Ltd.*[24] in which the company pleaded, in defence to an action for the loss of handkerchiefs sent to their laundry, a condition endorsed on the laundry book in these words: "The maximum amount allowed for lost or damaged articles is 20 times the charge made for laundering." The Court of Appeal held that this clause, which was a common one in laundry contracts, must extend to cover the company's negligence because otherwise it would lack subject-matter.

It is difficult to reconcile these decisions with the principle of construction that *verba fortius accipiuntur contra proferentum*. An attempt to do so was made by Scott L.J. in *Beaumont-Thomas* v. *Blue Star Line, Ltd.*[25] in which case the plaintiff, who sued for damages for personal injuries caused by the defendants' alleged negligence whilst he was a passenger on their ship, had received a ticket containing a condition that passengers took upon themselves "all risk whatsoever of the passage" and another condition exempting the company from liability for loss or damage arising from a list of causes "or from any other cause whatsoever." Negligence was not specifically mentioned. Scott L.J. drew a distinction between the common law duty of a carrier of passengers to use due skill and care and the double duty of the carrier of goods to ensure their safe delivery as well as to use skill and care. He said that:

> "This fundamental difference in the basic contract caused the common law courts of England during the last 100 years to make a difference in the interpretation of general words of exception from liability according as the contract to be construed was one imposing the double duty or only the one duty. In each interpretation they had two principles to guide them, (1) the rule of construction *contra proferentum*, and (2) the natural reluctance to read into a contract a release from the

[23] *Rutter* v. *Palmer* (1922) 127 L.T. 419; *Turner* v. *Civil Service Supply Association, Ltd.* (1925) 134 L.T. 189; *Fagan* v. *Green & Edwards, Ltd.* (1925) 134 L.T. 191. Compare Devlin J. in *Alexander* v. *Railway Executive* [1951] 2 All E.R. 442, 447.

[24] [1945] 1 All E.R. 244. *Cf. Davies* v. *Collins* [1945] 1 All E.R. 247.

[25] [1939] 3 All E.R. 127, 130. See also *Canada Steamship Lines* v. *Regem* [1952] 1 All E.R. 305, at p. 310. (In this case the Privy Council applied the principles stated by Lord Greene M.R. in the *Alderslade Case* so as to restrict the operation of an exemption clause.)

> duty of skill and care unless quite unambiguous language made that construction unavoidable. . . . In the case of double duty, the courts have treated the exception as prima facie directed to the absolute undertaking of safe delivery, but as not applying to the performance of the duty of skill and care. On the other hand, in a contract where there was no duty except the duty of skill and care, the courts have construed the same words of exception in the opposite sense—namely, as directed to the duty of skill and care for the two simple reasons (1) that some meaning must be given, and (2) that no other meaning than an exception of liability for negligence was left."

The Court of Appeal applied the second interpretation and held that the conditions excluded a right of action for negligence.

There seems to be no good reason why the courts should have adopted two different interpretations: if they had not done so but had maintained the same interpretation for both double duty and single duty contracts the practical result would have been that, in the case of the latter, the parties producing the forms of contract would have taken steps to see that the words they used specifically excluded claims for negligence and every other type of claim which they wished to exclude. This would have been desirable because it would have left their customers in less doubt about their rights. With all due respect to Scott L.J.'s "simple reasons," it seems strange logic that, because a party to a contract designs a condition which, interpreted in a way in which the courts interpret similar conditions in other types of contract, would not affect the common law position of that party, therefore another interpretation must be resorted to which will alter the common law position of that party. It is almost like saying that, because a man puts a notice board on his land to the effect that trespassers will be prosecuted, therefore, because the common law knows no crime of trespass, such a crime should come into existence to give efficacy to the landowner's words.

The rule of interpretation adopted in all these authorities is now so well established that, whatever its merits as a guide to the actual intention of both parties to a contract, the party who designs a form of contract containing an exclusion of liability may, unless he owes a double duty of the type mentioned by Scott L.J., deliberately frame his clause in a vague way, relying upon the rule to bolster it up.

Are there, however, in any types of contract, any lengths to which such a person may not go in excluding his liability or in giving himself rights to which he would not be entitled at common law? Obviously he may not commit fraud, use duress or make misrepresentations [26] but may he insert conditions which are not

[26] *Curtis* v. *Chemical Cleaning and Dyeing Co., Ltd.* [1951] 1 All E.R. 631. See also *Harling* v. *Eddy* [1951] 2 All E.R. 212.

likely to be noticed and which a reasonable person would not expect to encounter?

From time to time there have been *obiter dicta* indicating that unreasonable or irrelevant conditions would not be binding in such circumstances. For instance, Byles J., in *Van Toll* v. *South Eastern Ry.*,[27] considered that a person taking a document, such as a cloakroom ticket, containing conditions and putting it in his pocket without reading it, assented to its terms conditionally on those terms being reasonable. Similarly, Bramwell L.J., in *Parker* v. *South Eastern Ry.*,[28] thought that there was an implied understanding that there was "no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read—no condition not relevant to the matter in hand." On the other hand he thought that people did not ordinarily put unreasonable terms in their contracts and if they did the fact would soon be known. This refreshing piece of naïvety from the judicial bench is only to be understood when one sees what Bramwell L.J. instanced as an unreasonable condition—one whereby the owner of goods deposited at a cloakroom should forfeit £1,000 if the goods were not removed in 48 hours.

Some more modern *obiter dicta* in favour of treating unreasonable conditions as invalid can be found in *Thompson* v. *L. M. S. Ry.*[29] where both Lawrence and Sankey L.J. expressed the view that if there was a condition unreasonable to the knowledge of the company tendering a ticket, the passenger would not be bound. They gave no indication of the degree of unreasonableness that would suffice to invalidate a condition, except that Sankey L.J. spoke of conditions "so unreasonable that nobody could contemplate that they exist" and gave an example similar to that of Bramwell L.J. They both held that the condition with which they were then concerned was reasonable.

On the other hand there have been several decisions in favour of the validity of conditions alleged to be unreasonable. In some of these cases the court came to its decision because it did not consider the condition in question to be unreasonable[30]; in others the court has given a twofold reason for its decision, saying that the condition was reasonable but if it were not it would still be valid[31]; and in still others the court has declined to consider the question of reasonableness. This last attitude was taken by the court in the case of *Gibaud* v. *Great Eastern Ry.*[32] in which

[27] (1862) 12 C.B.(N.S.) 75, 88.
[28] (1877) 2 C.P.D. 416, 428.
[29] (1930) 141 L.T. 382, 390, 391.
[30] For example, *The Luna and The Kingston* (1919) 36 T.L.R. 112, *per* Hill J.
[31] For example, *Woodgate* v. *Great Western Ry.* (1884) 51 L.T. 826, 830, *per* Hawkins J., and *Pratt* v. *South Eastern Ry.* [1897] 1 Q.B. 718, 720, *per* Cave J.
[32] (1920) 125 L.T. 76, 78. See also the penultimate paragraph of the judgment of Scott L.J. in *Couchman* v. *Hill* [1947] 1 All E.R. 103, 105.

Bray J. expressly disagreed with the dicta of Bramwell and Byles JJ. and then went on to say that:

> "Every contract is avoided by fraud, and if the condition is so irrelevant or extravagant that the party tendering the ticket must have known that the party receiving it could never have intended to be bound by such a condition, then I do say that the assent of the party receiving the ticket was obtained by fraud and he would not be bound. The mere fact that the judge or jury considered the condition unreasonable would not, in my opinion, be sufficient justification for a finding that the assent was obtained by fraud." [33]

The judgment of Sankey J. followed very closely the lines of that of Bray J. It is worth noting, however, that he did not put irrelevance under the heading of fraud but considered conditions not binding if they were so irrelevant as to be entirely foreign to the contract. He gave, as an instance of a fraudulent condition, one whereby the article deposited would be forfeited if not reclaimed in five minutes and, as an instance of an irrelevant condition, one requiring the depositor to become a shareholder in the company's undertaking before he was entitled to reclaim the article deposited.

Certainly terms of that kind are not inserted in their contracts by such sober bodies as railway companies or their successor, but this is not to say that harsh, unfair or unreasonable conditions might not be imposed by companies having the necessary economic power to refuse to bargain or the good fortune to escape detection until the contract is concluded. There has, however, never been a case decided in the plaintiff's favour because a condition of a contract, not subject to statutory restriction, was unreasonable,[34] harsh, or unfair and it is apparent that no conditions in a standard form contract could, apart from statute, be invalidated on the score of unreasonableness, unless they were of a fraudulent nature. As has been tersely said by Viscount Haldane L.C.,[35] "if the law authorises it, such a contract cannot be pronounced to be unreasonable by a Court of Justice."

This being so, a very wide field is left to the person preparing a list of printed conditions to appear or be incorporated in a standard form contract. That full advantage is taken of this

[33] Pollock, *Contracts*, 13th ed., p. 42, uses the words "*Per* Bray J., *Gibaud* v. *G.E. Ry.*" to cover a statement which seems to be in direct contradiction to the judgment of Bray J. and in accordance with the dicta with which he was expressly disagreeing. Pollock's statement is that "P. (the party whom the party tendering the conditions seeks to hold to them) is entitled to understand that conditions offered by reference are not manifestly irrelevant or unreasonable." There is, however, no authority for the use of the disjunctive in this sentence.

[34] The case of *Clarke* v. *West Ham Corporation* [1909] 2 K.B. 858 is no exception, although Farwell L.J., in the Court of Appeal, said that if the question of reasonableness were relevant, he thought the proposed contract would be clearly unreasonable.

[35] *Grand Trunk Ry. of Canada* v. *Robinson* [1915] A.C. 740, 747.

position is evident from the fact that the legislature has, in a number of cases, found itself obliged to curb the enthusiasm of such persons. By the same criterion it is evident that the originators of such contracts take no trouble to see that their terms are made available to their customers unless they are obliged to do so.[36] It is impossible to set out within a reasonable compass every Act of Parliament which restricts the freedom of a person designing a form of contract. Such enactments take many patterns: they may make the insertion of certain clauses illegal or ineffective or both; they may make compulsory the insertion of certain clauses; they may make compulsory the adoption of a certain form of contract; they may provide that certain clauses shall be deemed to have been incorporated or adopted unless they have been expressly or impliedly negatived; they may provide that certain clauses shall not be incorporated in a contract unless special steps are taken to bring them to the attention of the customer; or they may simply require that certain steps shall be taken to bring to the notice of the customer certain clauses of the contract or provisions of statutes relating to it.

Examples of this type of legislation can be found in the fields of carriage,[37] pawnbroking,[38] bills of sale,[39] moneylending,[40] hire-purchase[41] and industrial assurance.[42] It is remarkable that the legislation in three of these six examples was introduced not by the Government of the day but by a private Member,[43] and that the relevant section in the Railway and Canal Traffic Act, 1854, was the result of a clause introduced into the Bill by a member of the House of Lords, not a member of the Government, after another clause, intended to protect the consignors of goods by railways from the unreasonable conditions imposed by the railway companies, had been expunged in the House of Commons "through the powerful influence of the railway interest."[44]

Perhaps these examples will suffice to show that there are types

[36] See, *e.g.*, Industrial Assurance Act, 1923, s. 9; Moneylenders Act, 1927, s. 6; and Hire Purchase Act, 1938, ss. 2 (2) and 6 (1).

[37] See Carriers Act, 1840, s. 4; Railway and Canal Traffic Act, 1854, s. 7; Railways Act, 1921, ss. 42 to 45; Transport Act, 1947, ss. 76 to 80; Road Traffic Act, 1930, s. 97.

[38] See succession of Acts starting with 1 Jac. 1, c. 21, and ending with the Pawnbrokers Acts, 1872 and 1922. (See particularly ss. 12, 15 and 24 of 1872 Act.)

[39] Bills of Sale Act (1878) Amendment Act, 1882, s. 9. See *Polsky* v. *S. and A. Services* [1951] 1 All E.R. 185 for an interesting application of this Act.

[40] Moneylenders Act, 1927, s. 6.

[41] *Hire Purchase* Act, 1938, s. 2 *and Sched., and ss.* 4, 8 *and* 11–13.

[42] Industrial Assurance and Friendly Societies Act, 1948, s. 12 (2), and Third Schedule.

[43] Mr. Monk introduced the Bills of Sale Act (1878) Amendment Bill (*Hansard*, Vol. 267, col. 394); Mr. Burman introduced the Moneylenders Bill (*Hansard*, Vol. 203, col. 727); Miss Wilkinson introduced the Hire Purchase Bill (*Hansard*, Vol. 330, col. 729).

[44] *Per* Earl Gray: *Hansard*, Vol. 133, col. 604. The clause which became s. 7 of the Railway and Canal Traffic Act, 1854, was drawn by Lord Lyndhurst: *ibid.*, col. 1141.

of contract with which the legislature has interfered in order to check the growth of unreasonable conditions, to secure fair bargains and to provide that the parties have means of knowing their rights. What is not so well known is the extent to which the Government has acted in an indirect way to persuade offenders to mend their ways, preferring to avoid direct action in favour of intimidation. This intimidation takes the form of an implied threat of legislation if a satisfactory attitude is not taken by the bodies who have given cause for complaint.

The first example of this new approach concerns contracts for the carriage of passengers by railway. At common law there was nothing to prevent all responsibility for negligence causing death or bodily injury to be avoided by conditions on a ticket, provided that the tests laid down in *Parker* v. *South Eastern Ry.* were satisfied. The practice of excluding liability in this way was developed by the railway companies in respect of all contracts for carriage at reduced rates, which are, in number, a high proportion of the contracts which a railway company makes.

The fear of legislation on the same lines as section 97 of the Road Traffic Act, 1930,[45] had a beneficial but belated effect on the railway companies. In 1937, in reply to a question in the House of Commons, in which the practice of the railway companies and road transport companies was compared to the detriment of the former, Mr. Burgin, the then Minister of Transport, said that he had been in communication with the railway companies, who had informed him that they were not prepared to accept liability for accidents to passengers travelling by train with cheap daily tickets. He was considering what was the most useful action he could take in the matter.[46] The implied threat in this statement was apparently sufficient, for a few months later he was able to make an announcement in these words:—

> "The four main line railway companies have informed me that they will not in future seek to exempt themselves by special contract from their liability at common law in respect of injury, fatal or otherwise, to passengers (other than those holding privilege tickets or free passes) when travelling in the companies' trains or whilst in the act of entering, or alighting from, such trains. Where in the case of passengers holding workmen's tickets who may be injured in such circumstances the railway companies' liability is limited by special Act, the railway companies will not plead such limitation. The conditions of issue of cheap day, half day and evening tickets and

[45] This section provides that any contract for the conveyance of a passenger in a public service vehicle shall be void so far as it purported to negative or to restrict the liability of any person in respect of the death of, or bodily injury to, 'the passenger while being carried in, entering or alighting from the vehicle, or purported to impose any conditions with respect to the enforcement of any such liability.

[46] November 3, 1937. *Hansard*, Vol. 328, col. 931.

workmen's tickets will be amended accordingly in due course."[47]

A natural but incorrect assumption to make after reading this answer was that, except in the case of privilege tickets and free passes, no special exemptions of liability to passengers remained. On March 8, 1948, in reply to questions,[48] the Minister of Transport stated that the Railway Executive and the London Transport Executive would, in accordance with the practice of their predecessors, exempt themselves from their liability at common law in respect of injury, fatal or otherwise, to railway passengers holding workmen's tickets or certain tickets issued at reduced fares, only when the accident happened whilst the holders of such tickets were not travelling in a train or entering or alighting from a train. This answer contains a positive statement that exemption would be sought in certain cases, defined only by exceptions, these exceptions being in substance the same as the subject-matter of the 1938 answer.[49] What are these cases and why should the railway companies and now the Railway Executive exempt themselves from liability in respect of them? The cases apparently include all accidents at railway stations in which holders of cheap day or workmen's tickets are injured otherwise than when actually travelling, entering or alighting from a train. Such an accident occurred in March, 1947, when a Mrs. Palmer, who had a workmen's ticket, tripped and fell under a train at Seven Kings station, as a result of which she lost both her legs. The fact that she was unable to obtain compensation from the railway company[50] caused women in the district to organise a petition calling on the Government to provide compensation in cases like hers.[51] The petition was presumably effective, because on July 19, 1948,[52] the Minister of Transport, in reply to a question by Mr. D. N. Pritt, K.C., said:

"I have been in consultation with the British Transport Commission. The conditions of issue of workmen's and other types of cheap tickets on all parts of the Commission's undertaking will be considered in the preparation of charges schemes under Part V of the Transport Act, 1947. In the meantime, a more liberal view will be taken of claims made by the holders

[47] April 14, 1938. *Hansard*, Vol. 334, col. 1129.

[48] *Hansard*, Vol. 448, col. 775. Both the questions asked for legislation to be introduced prohibiting the practice of contracting out of liability for negligence to passengers carried on workmen's tickets or on cheap fares. The Minister said there was no present intention to introduce legislation on this subject.

[49] These exceptions must not be confused with the exceptions (privilege tickets and free passes) to the subject-matter of the 1938 answer. In the way that the March, 1948, answer was worded it was unnecessary to refer to privilege tickets and free passes, and one is left to infer that they still incorporate complete exemptions from liability.

[50] The railway undertakings vested in the British Transport Commission on January 1, 1948: Transport Act, 1947, s. 12.

[51] See *The Star* newspaper (London) for February 26, 1948.

[52] *Hansard*, Vol. 454, col. 2.

of tickets issued at less than ordinary fares where such claims, though strictly untenable in law, may, on general grounds, when the ticket holder is in no way to blame, warrant an *ex-gratia* payment."

Nobody could grumble about the "more liberal view" eventually taken of Mrs. Palmer's case because she received an *ex-gratia* payment of £8,500[53]: what people could grumble about is the fact that a claim for compensation in cases like this should be entirely at the mercy of the British Transport Commission or their agent, the Railway Executive.[54]

The concessions obtained from the railways are the first example of a reform of standard form contracts by Government intervention without legislative action. It has not been uncommon, however, during the last decade, for the Government of the day to make some form of "gentleman's agreement" with monopolies or the leaders of a trade, usually acting through an association. An important instance of this is the agreement made in 1942 between the Government and the employers' organisations and insurance interests generally, by which these organisations and interests undertook not to rely on the receipt by a workman of compensation under the Workmen's Compensations Acts as a defence, under section 29 of the Workmen's Compensation Act, 1925, to an action at common law, provided that he brought his action within three months of the accident.[55] Mr. R. E. Megarry, in a note on Administrative Quasi-Legislation in *The Law Quarterly Review*,[56] points out several defects inherent in such agreements. The main flaw is that any person who is not a party to the agreement retains his common law or statutory rights. This was not so important in the case of the agreement with the railway companies because, apart from the four main line companies who were parties to the agreement, there were probably only a few miniature or mountain railways in the country, and these probably did not issue excursion tickets incorporating the objectionable clause. In the case of the workmen's compensation agreement, however, it was impossible that this could be made effective in every case because there was no obligation on an employer to join an "employers' organisation" or to insure, and there must, therefore, have been thousands of employers who did not consider themselves bound by the agreement.[57]

[53] *The Star* newspaper for August 26, 1948.

[54] The London Area Passenger Charges Scheme confirmed in 1950 now provides that no condition purporting to limit or exclude the liability of either the Railway Executive or the London Transport Executive to a passenger, not being the holder of a free pass, in respect of personal injury or death shall have effect. A similar provision has been included in the draft Charges Scheme for the railways outside London.

[55] July 2, 1942. *Hansard*, Vol. 381, cols. 500, 501.

[56] 1944. Vol. 60, pp. 125–9.

[57] Both workmen's compensation and the railway system have now been nationalised. The agreement about the former plays no part in the new industrial injuries scheme but the agreement about cheap fare tickets has been adopted and extended by the British Transport Commission.

The agreement about workmen's compensation did not concern standard form contracts, but is a very good example of the way a Government can avoid its obligation to legislate for social needs.[58] A more recent example, and one that does concern standard form contracts, is the vague and unenforceable arrangement made with the Institution of British Launderers in 1944.

Laundry companies commonly leave with their customers two or three "washing books," one of which is sent in with each consignment of laundry. These books usually contain a number of conditions, compiled by the Institution of British Launderers, including one about insurance and compensation. Under this the laundry company undertakes to make good loss by fire,[59] and to compensate for loss or damage caused by negligence to any article whilst in their possession. This latter liability is limited by the statement that "In no case shall compensation exceed an amount equal to twenty times the amount charged for laundering any such article."

On February 7, 1944, Judge Trevor Hunt, at Ilford County Court, held that such a limitation did not serve to protect a laundry company which had lost an article sent for laundering by the plaintiff, and which was worth much more than 20 times the laundering charge.[60] On February 22, 1944, Mr. Driberg called the attention of the President of the Board of Trade to this judgment, and asked whether he would make an order revising the customary limitation of liability. Mr. Dalton replied that there was no need to make an order because the court had allowed full compensation; that the judgment simplified the position and, in reply to a supplementary question, that a customer would be able to draw the attention of a laundry to the judgment just as easily as he might draw the attention of the laundry to any order that he might make.[61] Apparently neither the Ilford County Court decision nor the threat, implied in Mr. Dalton's replies, that he might take some action to prevent the practice if the judgment did not do so, had the desired effect, although it secured some relaxation of the practice: on June 6, 1944, Mr. Driberg again drew the attention of the President of the Board of Trade to the practice which had been "upheld by the courts" (presumably other county courts), and asked if he would take steps to make the limitation illegal. Mr.

[58] Another similar agreement affecting matters of tort rather than contract is that made in 1945 between the Minister of War Transport and insurers transacting compulsory motor-vehicle insurance business, and the supplemental agreement made in 1946 between the Minister of Transport and the "Motor Insurers' Bureau" set up by the insurers as a result of the first agreement.

[59] The liability for loss by fire is limited to the amount which the launderers receive from their insurance company in respect of the goods, notwithstanding the fact that there is no obligation on the launderers to insure those goods at all.

[60] *Smith* v. *Romford Steam Laundry*, *News Chronicle*, February 8, 1944, and *Law Journal*, April 22, 1944, p. 130.

[61] *Hansard*, Vol. 397, col. 626.

Dalton agreed that the practice was continuing, but said that the Institution of British Launderers, at the request of his Department, had advised its members to waive this limitation when they were satisfied that a larger claim would be justified.[62] He also said that he was advised that an order making the limitation illegal would not be within the scope of the Defence Regulations.[63] In January, 1945, the Court of Appeal allowed an appeal from a decision of the Willesden county court judge and decided that the customary limitation clause did protect a laundry in respect of lost goods,[64] but, presumably, the advice of the British Launderers' Institution, given at the request of the Board of Trade, is still in force. But what sort of protection does this advice give to the laundries' customers; and how many people, laymen or lawyers, know of its existence? The General Secretary of the Institution, in a letter to a legal paper,[65] says that "laundry proprietors, in assessing the value of a lost article, take into account the past history of the customer." To say the least, this is an unorthodox way of assessing a loss and one which can only be applied when the party making the assessment has the whip hand. One would have thought that if a customer had made previous claims which were genuine he should not be penalised by the use of a clause which is normally ignored; if, on the other hand, he had made false or inflated claims the laundry should have refused to make further contracts with him. The right arbitrarily to impose or disregard a condition which is forced upon customers by the united action of the laundries is one that causes hardship to the individual and makes the task of his lawyer impossible.[66]

The consideration of these various examples of types of common form contracts in which unreasonable conditions have at some time been prevalent does not exhaust the subject. As social conditions change, new types of common form contracts will be used and abused. New forms of service are constantly being offered by persons who are aware of modern requirements, or who are able to create a demand, and contracts will be devised, whenever the bargaining power of the person providing the service becomes sufficient, which protect him from contingencies the risk of which should fall on his own shoulders. An important example of this

[62] The General Secretary of the Institution claims that it was giving this advice before it received the Departmental request: *Law Journal*, July 15, 1944, p. 231.

[63] *Hansard*, Vol. 400, col. 1198.

[64] *Alderslade* v. *Hendon Laundry, Ltd.* [1945] 1 All E.R. 244. See *ante*, p. 323.

[65] *Law Journal*, May 20, 1944, p. 167.

[66] Apart from pure benevolence on the part of the launderer, there is no reason whatever why he should not refuse to pay more than £1 for a valuable lace table cloth worth £20 which has been destroyed by the grossest negligence of his servants if the laundry charges for it happen to be a shilling. However, according to a paragraph in "A Woman's Viewpoint" in the *Observer* of March 23, 1952, "laundries in the important 'Combined' group have changed to a policy of full compensation . . . compensation will be paid without argument."

phenomenon is the increasing practice of excluding the warranties and conditions otherwise implied under the Sale of Goods Act, 1893, in contracts for the purchase of goods, and substituting printed "Guarantees" of more doubtful value.[67]

The increase in the use of standard form contracts in the present century has been phenomenal. This is not so much due to the sudden increase in the number of Government boards and commissions, which in the main have taken over businesses and industries in which common form contracts were already in vogue, as to the steady, but less advertised, tendencies of trades and industries of various types to pass from the hands of the small man to the multiple firm or combine, and of other businesses to be formed into trade associations.[68]

It is expecting too much of the man in the street to ask him to discover his rights and liabilities under the many contracts he makes each day; to delve into the labyrinth of railway by-laws, time-tables and bills in order that he may find the conditions under which he is travelling; to read the small print on his laundry book before he sends his shirt to be cleaned, or to make a close study of his elaborate removal contracts before he moves house. Certain sets of standard conditions are adopted almost universally within a trade, for example, those prepared by the Institution of British Launderers, Ltd., but, nevertheless, nobody can be expected to become familiar with them. How much less can the layman be expected to realise the implications of the equally long, but completely variable, documents which emanate from the various business houses who have no strong trade association. He is constantly being asked to "sign on the dotted line," but rarely appreciates the legal consequences of his signature. Ignorance by

[67] Such "Guarantees" take many forms. The following are two examples taken from the "Guarantees" of reputable firms: "The '—— Brand' guarantee is liberally interpreted and is in lieu of any implied condition of trade usage or under the Sale of Goods Act"; "This warranty does not apply to damage arising from accident, misuse or fair wear and tear. . . . Under no circumstances whatever are we responsible for injury, damage, direct or consequential, arising from the operation, failure or breakdown of any machine or plant supplied by us, and any warranty at common law is hereby expressly excluded." These guarantees are invariably limited in time, usually to six or 12 months, and though they may be of great value during this time, a purchaser who discovers a serious fault in his purchase after the guarantee has expired is completely without remedy. Even their value during the guarantee period may be nullified by a condition making the selling company's judgment on all claims made under the guarantee final and conclusive and binding the purchaser to accept its decision. This is done, for instance, in the "Manufacturer's Warranty" of Ford cars. This warranty only covers the replacement of defective parts and not the cost of repairs. The exclusion of liability is a very wide one and covers not only rights under implied guarantees but also claims for negligence or breach of duty by the company or its servants. *Cf. Andrews, Bros. (Bournemouth), Ltd.* v. *Singer & Co., Ltd.* (1934) 150 L.T. 172.

[68] For some details of these tendencies, see the 77th (1945) *Annual Report of the Trades Union Congress*, pp. 183 to 192, and the figures there quoted from a paper by the Board of Trade statisticians, H. Leak and A. Maizels, on "The Structure of British Industry."

itself may cause no hardship, but if it is coupled with unfairness inherent in the conditions he has cause for complaint.

Competition should be based solely upon the quality and price of the goods or services to be provided, not upon the financial gain to be obtained from imposing unjust or unreasonable conditions. If the conditions of contract are the same for all who take part in a particular trade or business, they are left free to compete amongst themselves within the proper sphere of competition. At present this desirable state of affairs may exist in three types of cases: first, the trade or business may be one to which the use of standard form contracts has not spread and therefore all engaged in it are dependent equally upon the common law and general legislation; secondly, legislation relating to the particular trade or business may have ensured uniformity of terms; and thirdly, there may be a trade association or other organisation so effective as to secure that only one set of conditions is used throughout the trade or business.

Whilst in all these three types of cases the evil of competing forms of contract within a trade is eliminated, there is in the third type of case a danger of a still greater evil. The trade association, when drawing forms of contract, will have only the interests of its members at heart, and if its membership is sufficiently strong and the goods or services which its members offer are sufficiently in demand, it will be able to impose unreasonable conditions on the customers of its members. This is an advantage which such associations share with monopolies and both are liable to seize the advantage.[69] The former Master of the Rolls has summed up the position in the following words [70]:

> "Under present circumstances, large numbers of persons of comparatively humble means enter into legal relationships which were unknown 50 or so years ago. Houses are bought through building societies, furniture is bought on hire purchase, insurances of all kinds are effected, and in many other ways the lives of such people are involved in legal transactions of a kind which their grandfathers never knew. The other parties to those transactions are in many cases powerful corporations whose forms of contract leave much to be desired from the point of view of clarity, and often, I am bound to say, from the point of view of fairness."

[69] See, for instance, *Henson* v. *L.N.E. Ry* [1946] 1 All E.R. 653, *per* Scott L.J., at p. 657. "The attempt made by the railway company in the pass to put on an ordinary working man employed by others the very burdensome term in question shocks my mind. . . . It is such misuse of contract which makes the legislature tend to substitute status." In this case the Court of Appeal held that the document in question (a "walking pass" issued by the railway company to an employee of a firm of waggon repairers) did not constitute or form part of a contract between the railway company and the man concerned and did not debar him from recovering damages from the railway company for negligence.

[70] "Law and Progress," the Haldane Memorial Lecture for 1944, by the Rt. Hon. Lord Greene M.R. Printed in the *Law Journal Newspaper* for 1944, at p. 367.

The need to enact the various statutes mentioned earlier provides evidence of the tendency of people to impose unreasonable terms when they are able to do so. The passing of the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, is a further recognition of the fact that most powerful firms and combines act in the interests of themselves rather than of the public, and are capable of acting completely against the public interest.

All the statutes mentioned so far have a limited subject-matter. The question arises whether anything could and should be done of a more general nature. The first possibility which suggests itself is the passing of an Act of Parliament, completely general in its scope, making void all unjust or unreasonable conditions in contracts. This was the solution applied to a limited field by section 7 of the Railway and Canal Traffic Act, 1854, which makes all conditions limiting a railway company's liability for neglect or default in the carriage of merchandise subject to the test of being just and reasonable.[71] This section remains in force in relation to passengers' luggage and special contracts coming within section 44 (3) of the Railways Act, 1921, but hard words have been said about it by the judges who have had to determine the question of reasonableness.[72] In *Manchester, Sheffield and Lincolnshire Ry.* v. *Brown*,[73] Lord Bramwell took the opportunity to say:

> "It seems to me perfectly idle and I cannot understand how it could have been supposed necessary, that it should be referred to a judge to say whether an agreement between carriers, of whose business he knows nothing, and fishmongers, of whose business he equally knows nothing, is reasonable or not."

This was the typical reaction of the judges to their unwonted task of deciding not only whether a condition had been agreed upon but also whether or not it was "just and reasonable."[74] If the field in which they had to make such decisions was suddenly widened from the present very restricted one to the whole range of

[71] It is interesting to note that in *Taubman* v. *The Pacific Steam Navigation Co.* (1873) 26 L.T. 704, in which case the plaintiff, a passenger on the defendants' vessel had signed a contract excluding the defendants' liability for loss of or damage to luggage, it was urged that the defendants could not screen themselves from liability for their own wrongful act and the Railway and Canal Traffic Act was designed to prevent such attempts. Bramwell B. dealt with this point in these words: "Then it is urged that in certain cases the legislature have interfered. That, so far as it goes, is against the plaintiff's case. And the court will not extend the Railway and Canal Traffic Act further than they can help, for it has been already the cause of more dishonest transactions than any Act of Parliament."

[72] It is not, however, the only enactment under which the ordinary courts have had to decide whether conditions of contract are reasonable. The private Act of the Electric Telegraph Company (16 & 17 Vict. c. ciii) provided (s. 66) that the public, without preference, should have the use of the company's telegraph, subject to reasonable regulations to be made by the company. See *M'Andrew* v. *The Electric Telegraph Co.* (1855) 25 L.J.(N.S.)C.P. 26.

[73] (1883) 8 App.Cas. 703, 718.

[74] See also the vigorous language of Lord Bramwell (*ibid.*, 720).

contract,[75] it would justify a revolt by the judges. It is true that they have now become accustomed, particularly in actions for tort, to consider what a " reasonable man " would do in given circumstances, but they never do so unnecessarily,[76] and to throw open for consideration the question of the reasonableness of the conditions of a contract would be an unmerited and unpopular increase of the judges' already onerous tasks of deciding whether or not a contract was made, what its terms were and how they should be interpreted. Even if the judges were prepared to accept this extra burden, however, it is doubtful whether they could discharge it satisfactorily. What appears to a lawyer to be a most reasonable condition may represent the harshest of bargains between economically unequal parties, whereas what seems an unfair and restrictive condition may be cheerfully agreed to in the normal course of a certain trade, financial advantages outweighing the disadvantages of the restrictions.

Quite apart from this question, the simple requirement that all conditions in contracts should be reasonable would not remedy two other main defects in the present system. The first of these is the unsatisfactory state of the law relating to standard form contracts under which completely ineffective methods of publishing conditions to be incorporated in such contracts suffice to make them binding. The second defect is the growing tendency for all and sundry to produce their own standard form of contract. This tendency leads to complete confusion of the man who deals with several such firms and increases his natural reluctance to study the documents which he is called upon to sign.[77]

Lastly, in matters of contract the parties wish to know, so far as is possible, how they stand from the outset. It is better for the question of reasonableness of a particular condition to be judged before it is inserted in a contract than after there has been some dispute on a contract: otherwise the parties will never know until

[75] It would be impossible to confine the scope of the Act to standard form contracts because there is no clear boundary between such contracts and contracts in general: to restrict it to printed contracts would be purely arbitrary.

[76] In tort, when this question arises, it is usually fundamental to the action or defence that the plaintiff or defendant acted unreasonably. Similar questions sometimes arise in contract cases because of an express condition introducing the word " reasonable," for instance, requiring that an act be done within a " reasonable time " or to the " reasonable satisfaction " of one of the contracting parties. Again the law of landlord and tenant frequently requires the court to decide whether consent to an assignment has been unreasonably withheld. But in all these matters the issue is relatively simple compared with the question of whether the insertion of a particular condition in a contract was reasonable. To decide this question in each case it would be necessary to consider the whole structure of the particular trade and the differing bargaining powers of the parties to the contract.

[77] For a typical example see *The Book of the Horse* (Brian Vesey Fitzgerald), p. 717. " Would-be purchasers get confused with the various descriptions and definitions under the clause (*sic*) of warranties, which have variations or additions according to the respective horse repositories."

it is too late whether or not the condition forms part of the contract.

Is there, then, any alternative to the present practice of dealing with each type of contract separately by special legislation when, but only when, it becomes obvious that nothing short of legislation will prevent harsh bargains being made? The simplest solution would be for an Act to be passed [78] setting up a tribunal or commission composed partly of lawyers, partly of business men and partly of representatives of people who, for want of a better word to describe those who suffer from the imposition of standard form contracts, can be called the customers. This commission could have the power and duty to prepare standard forms of contracts to be used in the trades or businesses specified in the Act.[79] Such forms would be embodied in statutory instruments and their use would be compulsory except to the extent that the commission thought fit to make certain clauses in them optional or alternative. The standard form would be incorporated in all contracts of the stipulated type whether or not the contract contained express reference to it, and any attempt to avoid or vary the standard form would be made nugatory and subject to penalties. In certain types of contract, notably contracts for the sale of goods, and certain types of contracts of bailment and carriage, the commission might well come to the conclusion that the general law was adequate to lay down the legal relationship of the parties, that no standard form

[78] The writer has gone so far as to prepare, using much of the material relating to the Transport Tribunal in the Transport Act, 1947, ss. 76 to 80, a rough draft of a Bill. The operative clauses provide for: (1) the establishment of a "Contracts Commission" consisting of three permanent members, who are experienced lawyers, and four *ad hoc* members to be selected, for each form of contract, two from a customers' panel and two from a contractors' panel, or, in the case of a form of contract used by a government department, public board, etc., from the appropriate department or board: the panels are to be made up after consultation between the appropriate government departments and organisations representative of business and trading interests for the one panel and consumers' and customers' interests for the other; (2) the reference to the Commission by any Minister of the Crown or by the permanent members of the Commission of any form of contract used in the transactions scheduled in the Bill; (3) the consideration of the form of contract and the preparation of a draft standard form of contract which might contain alternative and optional clauses; (4) the holding of a public inquiry into the draft form, at which objections to it can be made, followed by the settlement by the Commission of the standard form of contract; (5) the submission of the standard form to the Lord Chancellor who shall embody it in a statutory instrument stipulating the circumstances in which it is to be used and in which the alternative or optional clauses may be used and the method by which it is to be published; (6) the implied incorporation of the standard form into all appropriate contracts, all conditions inconsistent with it being null and void; (7) the supply to customers of copies of the standard form by the contractor; (8) the power to forbid the use of certain types of clauses in contracts for which no standard form has been settled; and (9) penalties for attempted evasions of the Act.

[79] Not to specify the trades or businesses in the Act would lead to the danger of the commission going to one extreme or the other and either restricting themselves to too narrow a range of contracts or attempting to legislate for every conceivable contract. It might frequently be found necessary to extend the list, but this could be done by extremely short amending Acts.

of contract was required, and that all that was necessary was that the use of certain types of clauses should be forbidden. To deal with this they should be given power to forbid, again through the medium of a statutory instrument, the use in particular trades of, for example, clauses contracting out of liabilities and conditions implied by law.

What are the defects and disadvantages of this solution? What are its merits and advantages, and do the latter so outweigh the former as to justify such a radical change in the English law of contract?

Defects and Disadvantages

1. *Unpopularity.* By far the most serious disadvantage of remedying the present system by means of a series of statutory instruments is the popular dislike of delegated legislation. This dislike has been intensified by the press campaigns against restrictions and controls which followed both world wars. For this reason the introduction of a new system would need careful explanation, both in Parliament and in the press, and all the advantages mentioned below would have to be made apparent. In particular, it would have to be made clear that this was a case of control for the direct benefit of the individual members of the State rather than for the benefit of the State itself, and that the traditional obscurity and inaccessibility of delegated legislation would not feature in the products of the commission.

2. *Litigation.* A possible defect in the scheme is that it might lead to increased litigation. This would depend upon the ability of the commission and the skill in draftsmanship of their staff. No doubt many of the conditions contained in their forms would follow the wording traditional in a particular trade or business,[80] the meaning of which has already been judicially interpreted, and, for the rest, good clear language would be preferable to the welter of words and jargon used at present by some commercial firms in their contracts. In any litigation that does take place the contents of the contract should at least be known, which is more than is often the case in present contract litigation.[81]

3. *Variety of contracts.* A third disadvantage or defect arises from the fact that many people nowadays profess to do their business in a slightly different way from that of their competitors. It might be that when the commission started their task they would find themselves almost overburdened by the number of special cases for which they would have to cater. Any attempt on their part to secure uniformity of method of business, as distinct from uniformity of form of contract, would be bitterly resented: it would also, of

[80] This would be particularly the case in the sphere of insurance.

[81] The dispute in nearly all the "ticket cases" was about whether or not the contract of carriage included certain terms.

course, be outside their terms of reference. There are, however, many ways in which they could deal with a special case: they could carefully limit the description of the trade or business for which a form of contract was designed, so as to exclude the special case; they could design optional or alternative clauses which could be used by the special case [82]; or they could design an entirely separate form of contract for the special case. This would all demand much hard work on the part of the commission, but on the other hand it would save the time of the people who at present draft the various special types of contract forms. If the commission think fit merely to use their negative powers of proscribing clauses in a particular type of contract the difficulty will not arise.

4. *Lack of knowledge.* The possible defect that would jump to the mind of most business men if they heard of this scheme is the likelihood that members of the commission would know little or nothing of their particular business. The commission's ability to learn would depend upon the quality of its members and staff and, if this quality were good, business men would be able to complain of nothing except that their subterfuges were being discovered.[83]

5. *Novelty.* To the minds of some people the very novelty of the scheme will itself be a defect. But the scheme is not altogether without precedent: the Transport Tribunal set up under the Transport Act, 1947, and its predecessors, the Railway Rates Tribunal, the Railway and Canal Commission and the Railway Commissioners have exercised since 1873 within their limited sphere [84] functions similar to those proposed for the commission. Joint Industrial Councils, Whitley Councils and the like are examples of machinery at work which are fundamentally akin to the proposed commission but which were completely novel when they were first constituted. To take another example from amongst many in the sphere of agriculture, the Pigs Marketing Board has the power [85] to determine the form of contract to be used for sales to registered curers of pigs.

[82] Permission to use optional or alternative clauses would have to be conditional upon steps being taken by the person using them to bring to the notice of his customers the fact that he was using them.

[83] The commission might well be guided by the words of Collins J. when sitting as a Railway Commissioner in the case of *Rickett, Smith & Co.* v. *Midland Ry.*, 9 R. & C.T. Cases 107, 112; [1896] 1 Q.B. 260, 264: "Vast interests have been committed to our keeping and a jurisdiction of great delicacy has been conferred upon us. . . . And yet I cannot suppose that Parliament intended to take the management of these great trading concerns out of the hands of the practical men who work them and to place it in the hands of the Railway Commissioners. It is of the utmost importance, therefore, that we should not travel beyond our proper province in exercising this novel jurisdiction."

[84] s. 76 of the Transport Act, 1947, now requires the British Transport Commission to submit to the Transport Tribunal for confirmation schemes which provide, where necessary, for determining the terms and conditions applicable to the services provided by the Commission.

[85] Bacon Industry Act, 1938, s. 20. Now temporarily suspended under the Defence (Agriculture and Fisheries) Regulations, 1939.

Merits and Advantages

1. *Fairness.* The great merit of the scheme is that it would ensure that, in general, conditions in contracts were fair. By so doing, it would help to remove the element of suspicion from all transactions between big companies and ordinary people.

2. *Certainty.* From the lawyer's point of view, the biggest advantage is that the terms of the greater number of contracts made in the future would be certain, and would be the same in all contracts for similar transactions. As a result, the number of different forms of contract for lawyers and the courts to interpret would decrease substantially and far less time would be wasted in solicitors' offices, barristers' chambers and the courts in trying to find out which documents, if any, formed part of the contract, and how they could be read together, if at all.[86] The effect might be less litigation instead of more.

3. *Uniformity.* There is no virtue in uniformity for the sake of uniformity, nor is there in variation for the sake of variation, but when two identical transactions take place it is convenient that the form of contract should be identical. Persons conducting many identical transactions with various customers have realised the benefits to be obtained from imposing on the customers a standard form of contract. What is now proposed is that the benefits should be reciprocated so that a customer trading with more than one firm would know that the same form of contract was being used in each transaction. As a result, he might acquire some knowledge of the contents of his contracts in cases where now he is hopelessly confused. The trader or business man will also benefit from this uniformity inasmuch as he will be saved the effort of preparing his own standard forms or the lawyers' fees for preparing them for him.[87]

4. *Flexibility.* A standard form of contract produced by the commission for a particular trade or business should be so well prepared that it could, in normal circumstances, last for many years without variation, but whenever an alteration is required it would be a comparatively simple matter to make it. For this reason, it is desirable that all the present forms of contract contained in Acts of Parliament, such as the Bills of Sale Act (1878) Amendment Act, 1882, should be replaced by forms in statutory instruments issued by the commission.

[86] Sometimes it is necessary to go beyond the contract documents and study the pages of *Hansard*. See *supra*, pp. 329 *et seq*.

[87] Uniformity of contracts can save money in another way: according to the 1948 report of the London Master Builders' Association there is a growing use by local authorities of the Royal Institute of British Architects' standard form of contract. Many authorities, however, still use their own non-standard contract: "In the view of the Association this can only lead to higher prices because the careful builder will wish to cover himself against unknown eventualities."

5. *Accessibility.* All the products of the commission would be easily available to the public, through H.M. Stationery Office and booksellers. Laymen who are interested in any particular type of contract [88] could purchase the form whilst lawyers would no doubt all obtain a complete set, which, if kept in a loose-leaf binder, could be added to as new forms were designed.[89] This would be a great improvement on the present state of affairs both because everyone would know, as a result of appropriate advertising, where to turn for their forms of contract and also because, having found the form, they would be able to read it without difficulty : statutory instruments are well-printed documents and compare favourably with the average forms in use by business houses.

6. *Knowledge of existence of conditions.* It is now possible in law to bind oneself to conditions about which one knows nothing when making a contract, whether it is embodied in a signed document or not. Comparatively few people probably realise that when they receive an excursion ticket, a laundry book or a rent book they are making a contract on the basis of conditions prepared by the other party as distinct from conditions implied by law. Nor do many realise that, when they buy some electrical gadget and receive a guarantee of it, they have been deprived of rights which the law would otherwise have given them. In other cases they are led into traps and pitfalls but can never plead ignorance as an excuse [90]: their signature on a document or tacit acceptance of it binds them to it.

If, however, all the common types of contracts were made on terms embodied in statutory instruments, the knowledge would soon get abroad that such terms did exist and could easily be found if wanted.

Sir Henry Maine, writing in 1861,[91] concluded a chapter on "Primitive Society and Ancient Law" by saying that the movement of progressive societies had hitherto been a movement from Status to Contract. The dictum is completely untrue of the twentieth century. Legislation by governments of differing political creeds has all tended to accentuate the "status" of people,

[88] *Cf.* Bentham's belief that if, amongst other requirements, "the laws which concern every member of the community were arranged in one volume and those which concern particular classes in little separate collections . . . the law would then be truly known; every deviation from it would be manifest; every citizen would become its guardian; its violation would not be a mystery, its explanation would not be a monopoly; and fraud and chicanery would no longer be able to elude it." *The Theory of Legislation, Principles of the Civil Code*, Part I, Chap. 17.

[89] The statutory instruments would also appear automatically in various legal works already published and would there be annotated.

[90] Hire purchase contracts were full of such pitfalls before the passing of the Hire Purchase Act of 1938.

[91] *Ancient Law*, Chap. V. It is true that he assigned a restricted meaning to the word "status," which was to signify the personal conditions of the member of the Family, as distinct from the Individual, but his famous dictum has commonly been taken to apply to the whole field of civil law.

particularly of people employed by others, and to ensure that their rights and obligations are dependent not upon their bargains with their employers but upon Acts of Parliament or statutory instruments. [92] The scheme suggested in this article would accelerate this return to " status," and give to many people, including the owners of businesses, a " status " which they have never enjoyed before. The only harm done by this would be to those who seek to profit by unfair bargains. The positive advantages far outweigh the disadvantages, all of which can be overcome.

A final word must be reserved for the contracts of Government Departments, boards, corporations, " authorities " and " executives." These contracts commonly suffer from the same defects as those of other monopolies, except that they are not usually open to attack on the grounds of deliberate unfairness.[93] There is no reason why the scheme should not apply to them and every reason why it should. By continuing (under the new title of the Transport Tribunal) the Railway Rates Tribunal, with increased functions, Parliament has admitted [94] that the form of public contracts may be determined by a body other than the responsible department. If the contracts of other government monopolies were dealt with in the same way, public confidence in their fairness would undoubtedly increase.[95]

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[92] N.B., the remark of Scott L.J., quoted *supra*, footnote 69.

[93] *Cf. Evans* v. *Rogers* [1946] 2 All E.R. 64, 65, in which Lord Goddard C.J. said: " This case raises a question of some difficulty by reason of the form of contract which every milk producer is now obliged to make with the Milk Marketing Board. As has been pointed out before in this court, it is one which may inflict considerable hardship on the farmer because he is bound to sell to the board and to nobody else. He has no voice in the form of contract; the board prescribe it, and they are the only possible purchasers." See also the remarks of Singleton J. at p. 67, and those of Humphreys J. in *Watson* v. *Coupland* [1945] All E.R. 217, 218.

[94] Transport Act, 1947, s. 72.

[95] The provisions for the setting up of " Consultative Committees " for transport (Transport Act, 1947, s. 6) and " Consultative Councils " for electricity and gas (Electricity Act, 1947, s. 7; Gas Act, 1948, s. 9) show that the Government recognises that the customers are entitled to have some say in the management of these undertakings. The Postmaster-General has seen the advantage of imposing conditions under a statutory instrument rather than by a standard form contract and has recently terminated all agreements made by him for the supply of a telephone service, intending to replace such agreements by regulations to be made under the Telephone Act, 1951.

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