THE PRINCIPLES OF THE LAW OF CONTRACT

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PREFACE

It may fairly be said that in the five years since the second edition of this work was published there have been more developments and more references to possible future developments in the law of contract, than in many comparable periods in the past. This has resulted in the reconsideration of a number of topics and the expansion of the work as a whole.

I have not repeated details found in the other volumes in the series, namely *The Law of Agency* and *The Law of Lease,* but have given cross-references where necessary.

A. J. KERR

Grahamstown
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Chapter One

The Nature of a Contract

In contract the legal bond, the *iuris vinculum*,[1] is formed by the parties themselves,[2] and, within the limits laid down by law, the nature of the obligations is determinable by them.[3] In some cases their agreement is actual,[4] in others apparent,[5] and in yet others partly actual and partly apparent.[6]

ACTUAL AGREEMENT

Because the parties themselves[7] form their contractual legal bond their intention is of fundamental importance. This is the classic doctrine of Roman law, found for example in Ulpian's statement that

"[i]n stipulations and other contracts we always follow that which the parties intended."[8]

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[1] Inst. 3.13pr; Huber 3.1.5; Voet 44.7.1; Pothier, *Obligations,* preliminary article.

[2] Or their agents: see *Agency,* chapters 1 and 3.

[3] Contrast the position in the law of delict: *Law and Justice,* 6, 10.

[4] E.g. both parties understand and concur in all the provisions of a simple sale of goods.

[5] E.g. one of the parties, being in a position to understand what is written on a form containing the proposed provisions of a contract, but without coming to any agreement, signs the form without bothering to read it.

[6] E.g. the parties agree on the main provisions of their contract and then sign a standard form which contains these provisions and also others which at least one of them does not understand but does not question.

[7] Or their agents: see above, note 2.

[8] D.50.17.34. The translation is that of Mr. Justice Van den Heever in *The Partiarian Agricultural Lease in South African Law,* 36. Scott's translation is similar. The original is: *"Semper in stipulationibus et in ceteris contractibus, id sequimur quod actum est . . ."* The statement is repeated by Voet in 23.2.85 in his argument concerning community of property in marriage: "'In stipulations and in other contracts,' quoth Ulpian, 'we always follow what has been done . . .' Just as with other contracts, so too with the contract of marriage we should thus look first and before everything at what has been arranged by dotal agreements." For the fact that *id quod actum est* means "what was really intended by the parties" as opposed to *id quod dictum est* see Professor LC Hofmann, *The Basis of the Effect of Mistake on Contractual Obligations,* (1935) 52 SALJ 432 at 439. See also Papinian in D.50.16.219: "It has been established, that, in agreements, the intention of the contracting parties should rather be considered than the terms of the stipulation". (Scott's translation).

It is also the approach of modern courts, as in *Collen* v *Rietfontein Engineering Works,* 1948 (1) SA 413 (A) at 435, where Centilivres JA said:

"The question at issue really resolves itself into [this;] what was the intention of the parties at the time they entered into the contract?"

Again, in *Jonnes* v *Anglo-African Shipping Co (1936) Ltd,* 1972 (2) SA 827 (A) at 834 D, Potgieter JA said:

"In the interpretation of a contract the general rule is that the court should determine what the true intention of the parties was."[9]

The phrase "the intention of the parties" draws attention to the fact that there are at least two parties to a contract[10] and that it is their agreement,[11] or, as Pothier has it, their "concurrence of intention",[12] which is being considered. A person is bound not merely because he has a certain intention but because an offer which he has made to another is accepted or because, in response to a question, he makes a promise to another. Thus the declaration by a person of an intention which is his alone, is not in itself sufficient to constitute a contract.[13] Even the declaration of similar intentions by two persons independently of each other does not bring a contract into being.[14] To establish a contractual bond between themselves the parties must

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[9] See also *Russell NO and Loveday NO* v *Collins Submarine Pipelines Africa (Pty) Ltd,* 1975 (1) SA 110 (A) at 129 G-H. See further Winn LJ in *Adams and others* v *Richardson and Starling Ltd,* 1969 (2) All ER 1221 (CA) at 1230 B-C; "It must . . . always be kept in mind by any court that the legal effect of any contract is that which the parties both understood or must be taken to have understood it to have, and not that for which the court thinks that they should have contracted; still less is it open to the court to substitute for words used by either contracting party language which would convey the intention which the court thinks he ought to have had".

[10] D.2.14.1.2-3; D.50.12.3pr; Huber 3.1.20; *Strydom* v *Protea Eiendomsagente,* 1979 (2) SA 206 (T) at 208 H. Wessels, paras. 9, 55; Halsbury, vol. 9, para. 204, 81; Williston, §18.

[11] D.2.14.1.2-3 (Ulpian): "*Pactio* means the consent and agreement of two or more persons to the same effect . . . The word *conventio* is a comprehensive term applying to all matters about which persons who have dealings with one another agree by way of forming a contract or compromising a dispute . . ." (Monro's translation). In his translator's note to Voet 2.14 Mr Justice Gane says: "The Latin words *pactum, pactio, conventio* mean exactly what is meant by the English word 'agreement'. That *pacta* in Roman law did not have the consequences which agreements have in modern law was a consequence of the formal rules by which contracts were fettered in Roman law, and not of any inherent differences in the nature of the *pacta* themselves." Cf. also D.50.12.3pr; Huber 3.1.20.

[12] Pothier, *Obligations,* para. 4. Cf. Inst. 3.15.1 *in fine.*

[13] Wessels, para. 56; Halsbury, vol. 9; paras. 227-8, 98-9; para. 261,139; Williston, §23. Cf. TB Smith: *Pollicitatio — Promise and Offer,* 1958 Acta Juridica 141.

[14] Cf De Wet and Yeats, 27; Williston, §23. E.g. suppose that A and B have begun negotiations for a sale. Suppose further that A in conversation with his friend C says: "I intend to sell my car to B for R1 250" and that B says to his friend D; "I intend to buy A's car for R1 250." Such declarations of intention do not bring into being a contract between A and B. Hence the terminology in certain cases in which it is said that the minds of the contracting parties have not met: e.g. *Joubert* v *Enslin,* 1910 AD 6 at 23; *Collen* v *Rietfontein Engineering Works,* 1948 (1) SA 411 (A) at 428.

communicate with each other.[15] Thus in *Swart* v *Vosloo,* 1965 (1) SA 100 (A) at 104 H, Holmes JA said:

"Reasoning from basic principles of law, a lease is a mutual contract, flowing from agreement of the minds of the parties, a *concursus animorum animo contrahendi,* as Mackeurtan says in regard to *Sale,* 3rd ed. 4."[16]

The full text of the passage in Mackeurtan refers to the need for communication. He says of the contract of sale:

"There must be an agreement of the minds of the contracting parties, mutually communicated, with the intention of contracting a sale — or in other words a *concursus animorum animo contrahendi.*"

As Lord Atkin put in in *Rose and Frank Co* v *Crompton & Bros Ltd and others,* 1923 (2) KB 261 at 293:

"To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly".

To say that a contract is founded on agreement, that it includes a concurrence of intention in at least two parties, does not mean that the parties are bound only by those obligations which at the end of the negotiations each has come to regard as favourable in all respects to himself. In a large number of important contracts the parties do not negotiate from a position of equality and the one who is in a dominant position often takes the opportunity to lay down the terms of the contract.[17] In what sense, in such circumstances, are phrases about "a common intention", "an agreement", to be understood?

Some examples will assist the discussion. An owner of a house in an urban area will not normally make much progress if he seeks to negotiate with the municipality for water and electricity at rates different from those laid down in advance by the municipality. The only practical alternative to paying the normal rates is to do without the services altogether. Similarly, though no one is bound to own a motor-car, anyone who has one is compelled to enter into a contract of third party insurance,[18] and insurance companies are unlikely to alter the terms of their standard third party contract to suit an individual. Again, while in theory anyone may refrain from travelling by bus, by train, or by air, a person who does so travel will find that his contract

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[15] The methods of communication are discussed in Chapter II below, (communication with an agent is to be understood as communication with his principal).

There is an exception and a quasi-exception to the general rule. The exception is to be found in footnote 1, page 35 below. The quasi-exception is that a transfer of contractual rights (and obligations too in the case of a lease where the lessor sells and transfers the property to another) results in a contractual *vinculum iuris* between persons who have not communicated with each other. As the original parties communicated with each other this is not as exceptional as the competition case in footnote 1, page 35 below.

[16] In the 4th edition of Mackeurtan the page is 28.

[17] Cf. Turpin, *Contract and Imposed Terms,* (1956) 73 SALJ 144; Hahlo, (1956) 73 SALJ 443; Hahlo and Kahn, *South Africa,* 442-3; Friedmann, 119 ff; Cheshire and Fifoot, 23-6; Treitel, 2-3, 136 ff; Anson, 4; Atiyah, 11-14; Aronstam, 1-25.

[18] Section 2 of the Compulsory Motor-Vehicle Insurance Act, No. 56 of 1972.

is made subject to a large number of terms, which in practice he will not even have the opportunity to study, let alone to negotiate about.[19]

Often the ordinary man has a choice of persons or firms or societies with whom to contract though little freedom of negotiation after he has made his choice. Anyone who wishes to enter into a contract of life insurance or fire insurance may compare different forms of contracts, with, perhaps, different premium rates and benefits, and may prefer one company to another because its standard contract is more favourable or for some other reason such as the fact that it is believed to be in a better overall financial position. But once the proposal is made to a particular company there is little further to be expected in the way of modification of terms. So also with building societies: if one wants to invest money or borrow money to build a house one may choose between different societies; but rates of interest are not normally varied to suit individual preferences.

For the majority of citizens, contracts of employment present the same characteristics. A man may choose to whom he will offer his services, but within the field which is normal for persons having his qualifications he may find that the terms he can obtain from one employer differ very little from those he can obtain from the others. Even where employers have different standardised contracts offering different inducements[20] the prospective employee will find that many clauses, such as membership of a compulsory pension scheme, leave privileges, etc., are not subject to debate.

Contracts of the kind described above have attracted much attention recently and a special name has been given to them. The French term *contrats d'adhésion* has passed over into English and one finds Professor Friedmann quoting Pasley to the effect that "a contract of adhesion" is "a contract with standard terms and conditions, prepared by one party and offered to the other on a take-it-or-leave-it basis".[21] Cheshire and Fifoot refer to "standardised contracts"[22] while other writers[23] speak of "standard form contracts". The widespread use of these contracts in modern times has raised special problems in law, particularly in interpretation.[24]

There is, however, nothing new about the legal nature of the contracts themselves. About the beginning of the 3rd century A.D., when Ulpian wrote the passage quoted at the beginning of this chapter,[25] municipal corporations and the State frequently granted land on contracts of

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[19] Below, 214-6.

[20] E.g. where they have to compete for labour and offer different conditions of service and salary scales and where they negotiate with each applicant on his starting salary.

[21] Friedmann, 404; cf Hahlo and Kahn, *South Africa,* 443; Smith, 755; Aronstam, 16-25.

[22] Cheshire and Fifoot, 24, in margin.

[23] E.g. Hahlo and Kahn, *South Africa,* 443; Smith, 755; Treitel, 136; Anson, 150.

[24] Below, 241. Cf. Hahlo and Kahn, *South Africa,* 443; Cheshire and Fifoot, 23-6; Friedmann, Chapters 4 and 11; Smith, 756.

[25] Above, 1.

emphyteusis,[26] and it may be surmised that the Roman State took up a bargaining position similar to that occupied by the State leasing public land today. When Justinian incorporated the passage in the *Corpus Iuris Civilis* in the 6th century so many people were in such a disadvantageous economic position that there was need of a rule on *laesio enormis* to assist those who sold their land at less than half its value.[27] At the end of the 17th century, when Voet quoted the passage,[28] Dutch shipbuilding had for some time been a flourishing standardised industry attracting orders from many foreign countries[29] and the bargaining position of an artisan seeking employment in the shipyards of Holland was in all probability no better than that of the corresponding person today.

It is characteristic of the contracts mentioned above that one party is in a position to dictate terms. Terms may, however, have to be included in these or other contracts not because one or other of the parties so decides but because the law so decrees. The duty of support, for example, is an obligation in every marriage whether the parties intend it to be so or not.

Terms or obligations imposed by law which the parties cannot escape should be distinguished from those which are determined by law only if the parties make no other arrangements. Thus in lease the parties may determine which of them shall be responsible for repairing the property. If they do not apply their minds to the problem the lessor is responsible because the law so rules. Obligations of this kind may be described as residual obligations.

When it is remembered that residual obligations and inescapable obligations imposed by law have been known throughout legal history it becomes clear that the fact that the terms of standardised contracts may be dictated by one of the parties in this as in earlier centuries does not mean that consent and agreement are no longer to be considered as basic to the formation of contracts. Professor Friedmann has pointed out that "Neither in the common law nor in any other developed system of law has there ever been absolute freedom of contract, or complete passivity in the face of patent inequality between the parties."[30] By "absolute freedom of contract" the learned author apparently means a "meeting of free wills" where neither party acts "under pressure of external forces".[31] If this meaning is attached to the phrase and if economic and social pressures are meant then it is clear

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[26] Moyle, *Institutes*, 5th ed., 323-5. Cf. Inst. 3.24.3.
[27] Buckland, *Textbook*, 486.
[28] Voet 23.2.85; see above, 1, note 8.
[29] Barbour, *Dutch and English Merchant Shipping in the Seventeenth Century*, (1929-30) 2 Economic History Review, 261.
[30] Friedmann, 126.
[31] Friedmann, 1st edition, 1959, 93. (The passage is omitted from the second edition. The passage referred to in note 30 above appeared at page 96 of the first edition).

that South African common law does not, and did not at any earlier period, make such absolute freedom a requirement of the formation of contract.[32]

What has to be understood is that the parties agree upon the main object of the contract and accept or have imposed upon them, or one of them accepts or has imposed upon him, additional terms or obligations. In lease the parties may be said to agree on the main object of the contract when they come to a decision on the property to be let and the rent to be paid, even though the lessor would have preferred a higher rent or the lessee would have preferred a more luxurious flat or a house in a different area if he could have afforded it. In addition the lessor may be in a position to require that the contract is to include a clause entitling him to claim forfeiture for non-payment of rent; and if nothing more is said or implied there will be residual obligations defined by law relating to other matters such as the lessor's duty to pay rates and taxes on the property and the lessee's duty to take proper care of the property. The position in regard to standardised contracts (or other standardised contracts, as many leases today are standardised) is no different. There is "agreement" or "a concurrence of intention" or "a common intention" when a person desiring to achieve the main object of his contract insures his life or property or enters the service of another or borrows money from a building society to enable him to purchase a house.

Modern discussion of the problem is both necessary and valuable in that it draws attention to the possibilities of misuse of economic or social power and highlights the need for restraint and fairness in the exercise of power. As the present writer has pointed out more fully elsewhere,[33] an authority such as the Legislature which is in a position to make changes and to impose controls should keep legal rules and institutions under review and should impose restraints where individuals take too great advantage of very favourable conditions.[34] External restraints are not in themselves ideal and

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[32] Certain encroachments on a party's freedom to contract are, however, against the law. See below, 191-8.

[33] *Law and Justice*, 15-16, 59-61, 70.

[34] See further Aronstam, Chapter III; the same learned author's *Unconscionable Contracts: the South African Solution?* (1979) 42 THR-HR 21; Evert P van Eeden, *Rescission of Consumer Contracts*, (1976) 39 THR-HR 315. For the position in England see JH Baker, *The Freedom to Contract without Liability*, (1971) 24 Current Legal Problems 53; F Wooldridge, *Inequality of Bargaining Power in Contract*, 1977 Journal of Business Law 312; WVH Rogers and MG Clarke, *The Unfair Contract Terms Act 1977*, 1978. Lord Devlin *Morals and the Law of Contract* in *The Enforcement of Morals*, 1965, has a partial justification of some standardised contracts on economic grounds and an English example of parliamentary intervention. If the ordinary man has the choice of two different rates in a contract of carriage of goods (e.g. owner's risk or carrier's risk) the difference can be justified economically; but such a difference could also result from individual negotiation where the contract is not standardised. It is the multiplicity of instances which results in standardisation. The expectation of a multiplicity of transactions no doubt affects the calculation of the amount to be charged.

For an account of methods of control see Ewoud H Hondius, *Unfair Contract Terms: New Control Systems*, (1978) 26 The American Journal of Comparative Law 525.