

Chapter 4

Conscience, Fair-dealing and Commerce – Parliaments and the Courts

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The concern of this chapter is the way certain values and principles inform commercial life, and thus commercial law. As soon as one speaks of ‘values’ and ‘principles’, one invites a debate about how law works in the pragmatic and self-interested world of commerce. It also invites a debate about the nature of law, the relationship between principle and rule, and whether one is more conducive to certainty than the other. These debates are rooted in different visions of law as command, as will, or as the expression or manifestation of natural human or societal bonds of conduct. Conscience and fair dealing have honesty and a sense of justice at their root and, in one form or another, have central roles to play in framing rules for commerce. Paul Finn has thought and written about all these inter-connections. He has influenced generations of lawyers, myself very much included. My debt can never be repaid.

In preparing this chapter, I revisited Patrick Atiyah’s *Rise and Fall of Freedom of Contract*.¹ Its preface reminded me of talking with Paul Finn. To paraphrase a sentence from that preface, this chapter should be seen as offering hypotheses rather than proposing definite solutions. Paul never declared a proposition in discussion; he brought forth an idea by thoughtful hypothesis.

One aspect of the importance of Paul Finn’s work has been his recognition of the need to conform rules to principles and to develop principles, and therefore rules, from stable foundations built on practical, honest decency. Crucial in the balance of a legal system is the relationship between rule and value, between definition and flexible evaluation. One aspect of that balance is the achievement of certainty and doing justice – not as a dialectical process of the confronting of opposites, but by the wise balance

1 Clarendon Press, 1979.

This is a preview. Not all pages are shown.