THE COMMON LAW AND THE WELFARE STATE*

By The Hon. SIR STANLEY BURBURY, K.B.E.†

I count it a real privilege to be invited to deliver the E. W. Turner Memorial Lecture for 1959.

The late Ernest William Turner was a lawyer of great integrity. He had a high sense of public responsibility and was a champion of the individual rights of the ordinary citizen.

I have not found it easy to devise an address which might have something of interest both to the layman and the lawyer and also serve as a suitable Memorial Lecture. But I would like to think that Mr. Turner would have approved of the main theme of my paper — which is that notwithstanding the change in the pattern of society brought about by the rise of the Welfare State, there remain certain basic human rights which our legal order must always preserve.

The Welfare State has grown up in little more than half a century. There are many features of it which are accepted without question by those of all political persuasions. No one would now dispute that employers should legally be bound to secure to their employees just terms and conditions of employment and pay them compensation for industrial accidents; few would disagree that a paternal government should improve living conditions by housing schemes and slum clearance and should set up town planning authorities with power to control in the public interest the use to which land can be put; few would deny the right of governments to acquire property for schools, hospitals and other public purposes; the view is widely held that governments should protect the public against the abuse of economic power by business and industrial monopolies; many would readily concede that some industries and businesses should be the subject of regulation in the interests of public health or in the interests of a stable economy. Many of such functions of the Welfare State have long since passed out of the field of political controversy. We accept many of them as postulates of the legal order of our modern society.

Yet a century ago restrictions of this kind upon freedom of contract, upon the carrying on of business, and upon the use of property would generally have been regarded as entirely indefensible infringements of

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† The Honourable the Chief Justice of the Supreme Court of Tasmania.

basic individual rights. And the exercise of most of these functions of the Welfare State involves substantial modifications of common law rights of individuals once thought to be absolute. To appreciate this we must know something of the social and political atmosphere of the period when these common law rights were formulated. The common law personal and proprietary rights of the individual were developed by the courts under the influence of seventeenth and eighteenth century legal philosophy with its main emphasis upon individual liberty and individual rights of property. No one would pretend that the great common law judges who moulded our law were unaffected by the religious, political and social outlook of their times. They did not work out the principles of the common law by mere exercises in logic. They were men of practical wisdom. They did not work in a vacuum.

Until at least the end of the eighteenth century the concept of natural law, both as proclaimed by the Church and as expounded by the philosophers of the Age of Reason, directly influenced the development of the common law.

In the natural law philosophy in the classic scholastic tradition certain rights of man are both natural and inalienable because they spring from his nature as a human being. They are given to him by his Creator and may not be taken away by positive law. The law must therefore secure him against any arbitrary or unreasonable interference with his right to life, to personal freedom of action, to the integrity of his body and to private ownership of property as a realisation of his personal liberty.

The emphasis shifted from natural law to natural rights. As Dean Pound puts it:[1]

> The ultimate thing was not natural law as before, not merely principles of eternal validity, but natural rights, certain qualities inherent in man and demonstrated by reason, which natural law exists to secure and to which positive law ought to give effect. . . . Under the influence of this theory jurists worked out a scheme of "legal rights" that effectively secures almost the whole field of individual interests of personality and individual interests of substance . . . the common law rights of Englishmen (became) the natural rights of man.

The truth is that much of the seventeenth and eighteenth century individualistic philosophy became frozen common law.

The common law is written in terms of individual rights securing the maximum self assertion of the individual. It therefore remains the great bulwark of individual liberty in the modern state.

While it is implicit in the concept of the modern Welfare State that some restrictions in the public interest on the assertion of individual rights once accepted as absolute are necessary, the rule of law demands that the authority for any such restrictions must be found in words plainly spoken by Parliament in a statute. Common law rights are not to be taken away or whittled down except by the clearly expressed will

[1] An Introduction to the Philosophy of Law (1922), pp. 42-3.

of a democratically elected legislature. If your right to carry on your business as you please or use your property as you please is to be interfered with by government departments or government authorities, clear authority for such interference must be found within the four corners of an Act of Parliament or of regulations authorised by it — otherwise the interference will be unlawful and will be restrained by the courts. That is what the rule of law means.

Perhaps the highest expression of the basic common law rights of the individual is to be found in Sir William Blackstone's *Commentaries* (1758). He formulated certain absolute natural rights enshrined in positive law —rights to life, personal security and personal liberty, and the right of private property. Blackstone stated that,[2] 'The principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature.' He held that 'the absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called their liberties) as they are founded on nature and reason so they are coeval with our form of government.' Blackstone reduced these absolute rights to three principal or primary articles:[3]

> I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation.
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> II. Personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law.
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> III. Right of property consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The origin of private property is probably founded in nature.

At the core of eighteenth century philosophy was a profound belief in the individual and individual liberty. It was held that man had certain inalienable rights founded on the law of nature and that the right of property as a realization of liberty was one of these rights. Blackstone identified the absolute rights of Englishmen with the natural rights of man and treated them as inviolable. These basic rights so interpreted took deep root in our English common law and were the subject of constitutional guarantees in America. The Fifth and Fourteenth Amendments to the Constitution of the United States of America as interpreted judicially embody frozen eighteenth century political and legal philosophies expounded by John Locke and Sir William Blackstone. By the Fifth Amendment (1789) it was provided that 'no person shall be deprived of life, liberty or property without due process of law; nor shall private property

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[2] Commentaries, 8th ed., Vol. I, p. 124.

[3] Ibid., at pp. 129, 134 and 138.

be taken for public use without just compensation.' These constitutional guarantees have been vividly described by Dean Roscoe Pound as 'the stonewall of natural rights against which the seas of social legislation have lashed in vain.' [4]

The personal and proprietary rights of British subjects are secured for the most part by the more flexible medium of the common law. But the eighteenth and nineteenth century judicial interpretation of common law rights has been much on the same lines as the interpretation of the rights the subject of constitutional guarantees in the United States Constitution. Section 51 (xxxi) of the Commonwealth Constitution is an interesting example of a constitutional guarantee in respect of private property. It provides that the Commonwealth may acquire property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws. Rich J. in *Australian Apple and Pear Marketing Board v. Tonking*[5] said of this constitutional provision:[6]

> This limitation or restriction is an "affirmance of a great doctrine established by the common law for the protection of private property" (Story on the Constitution, 3rd ed. (1858), vol. 11, p. 596, para. 1790) and is in accordance with Magna Carta which "protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land." (Blackstone 4th ed., vol. IV, p. 417).

In Tasmania we of course share with other parts of the British Commonwealth and many of the American States this great heritage of the English common law with its emphasis on the rights of the individual.

I want tonight to consider how far these basic common law rights have really been affected by the growth of the Welfare State.

FREEDOM OF CONTRACT

The common law relating to contracts was developed in an age of individual bargaining and the freedom of individuals to settle their own contractual terms was regarded as fundamental. But unrestricted freedom of contract as an abstract philosophical ideal is one thing; unrestricted freedom of contract as it works out in practice in a particular society is another.

The first inroads into freedom of contract were made in the field of industrial relations, but so strong was the influence of the notion of freedom of contract that in some of the earlier industrial legislation 'contracting out' was permitted which made much of it entirely illusory.

The concept of freedom in the context of an individualistic society did not really fit into the late nineteenth century and the twentieth century industrial and economic order. A contract between an individual employer and a few employees is a vastly different matter from a contract between a large corporation and thousands of employees in an

[4] I have, regrettably, mislaid the reference to this quotation.
[5] (1942) 66 C.L.R. 77.
[6] At p. 106.

undertaking where work can only be obtained upon standardised conditions of employment. The common law knew nothing of the economic forces of capital and labour or collective bargaining — it only knew individuals. And for the purposes of the law of contract and the law of competitive trading, it was logical enough for the common law to treat a company consisting of thousands of shareholders and representing vast economic wealth as a legal entity and to clothe it with all the rights of an individual. It was much tidier to treat a corporation as a single juristic entity for the purposes of the common law. To the common law a corporation was a legal person and was treated in the same way as a single individual entering into a contract or a single individual engaging in competitive trade. Whether it was an economic empire or a small private company was not the concern of the common law. All this was logical enough. But to apply the philosophical ideals of freedom of contract and freedom of trade to such an entity was completely unreal. By so doing the law really enabled a corporation (public or private) to legislate by laying down standard conditions on which it would trade or engage employees and enabled it to exercise unrestricted economic power. It was a case where the common law did not, as recommended by the Roman Lawyers, keep the corporate form under lock and key. What were essentially the title deeds of freedom of individual human beings were delivered to large industrial, business and public corporations. Human individual rights had been transferred to joint stock companies.

Industrial relations are now virtually completely removed from the field of freedom of contract except as to the right of a man to work for whom he pleases. The right of the employer to hire and fire has also been the subject of direct and indirect inroads. But what remains is important. A man who is not free to work for whom he pleases is not free at all. That a choice of avocation is basic was emphasised by Lord Atkin in *Nokes v. Doncaster Collieries*[7] in which his Lordship said:[8]

> My Lords, I confess it appears to me astonishing that apart from overriding questions of public welfare power should be given to a court or any one else to transfer a man without his knowledge and possibly against his will from the service of one person to the service of another. I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve: and that this right of choice constituted the main difference between a servant and a serf.

The prescription of minimum wages and just terms and conditions of employment does not amount to any real invasion of freedom of contract except as a metaphysical ideal. Real freedom of contract in industrial relations is only endangered where freedom of choice of avocation is denied. The Welfare State could only take the final step of legally securing employment to all its citizens at the expense of the negation of choice of avocation.

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[7] [1940] A.C. 1014.

[8] At p. 1026.

STANDARDISED CONTRACTS

A subject which is engaging much attention today is that of standardised contracts. Here again, it is unreal to treat the principles of the law of contract which developed upon the assumption of individual bargaining as having any sensible application to such things as bills of lading, hire purchase agreements, insurance policies, conditions of carriage of passengers and goods and other standardised forms of contract adopted by modern companies and public corporations. Many trades have adopted standardised conditions which they impose on their customers. It has been suggested that to apply the idea of freedom of contract to this situation is to give to a corporation the power of *legislation* because it is clearly in a position (and the larger the corporation is the more clear it becomes) to prescribe standard conditions and refuse to sell its goods or perform its services except upon those conditions. The common law rule is quite simple and logical. If a person signs a document he is presumed to have read it and he is presumed to have understood it. If he knows the general nature of the document he has signed he cannot be heard to say that he has not read it and does not understand it. This of course is quite unreal, because no one reads hire purchase agreements, bills of lading or insurance policies. To the individual who signs one of these documents and is bound by its terms he is in exactly the same position as if he found that he was bound by the provisions of an Act of Parliament or a set of regulations made under an Act of Parliament. The only difference is that his legal rights are affected by private legislation instead of by public legislation in which indirectly he may have a voice. As Lord Greene, M.R., said:[9]

> Under present conditions, large numbers of persons of comparatively humble means enter into legal relationships which were unknown fifty 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 these 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."

The legislature has recognised the unreality of the common law position as applied to standardised contracts by legislation in many fields which has often been opposed by the catchcry that it is interference with freedom of contract. Many examples might be given: The Hire Purchase Act, the Commonwealth Life Assurance Acts, the Sea Carriage of Goods Act, legislation relating to conditions of carriage of passengers by land, sea and air. An interesting suggestion has been made in England that Parliament should pass an Act establishing a Commission to prepare standard forms of contract in a number of trades.

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9 'Law and Progress' (Haldane Memorial Lecture for 1941), 94 L.J. News 367.

Legislation of this type does not involve any real interference with basic individual rights. The necessity for the interference has come because of the logical but unreal extension of the individualistic common law learning to contracts entered into between corporations (or groups of companies) and individuals.

FREEDOM OF TRADE

The law of competitive trading developed when trade was carried on by individuals the size of whose business undertakings was limited by their own private wealth. It was entirely consistent with common law principles that no right of action would lie if a man carrying on a business were economically injured by a competitor. So long as he did not resort to unlawful means he could take any measures he pleased to drive his competitor out of business. As Alderson B. said in 1855, '*Prima facie*, it is the privilege of a trader in a free country in all matters not contrary to law to regulate his own mode of carrying it on according to his own discretion and choice'.[10] This was treated as an individual absolute right. And again, logically enough, the common law said that if X has a right to carry on his trade as he pleases, even if part of his policy to further his own business is to drive a business competitor out of business, then if X combines with Y, both exercising these lawful rights, no right of action will lie at the suit of a business competitor who is injured by the combination. And again, it was logical enough to apply these principles of the common law developed in an individualistic society to large corporations. All this was reasonably sound so long as those engaged in competitive trading were on an equal basis.

But it has taken almost a century for even a substantial body of opinion to realise that the common law conception of an individual's right of freedom of trade cannot with any reality be applied to the large corporation and that some restrictions upon trading practices may be necessary in the public interest and in the interests of small traders to prevent abuse of economic power. Economically the old atom of industrial and business ownership has been split into two — into management control on the one hand, and beneficial ownership on the other. The spectacular rise of the joint stock company making possible the pooling of vast capital resources and the amalgamation of large undertakings produced private economic empires wielding tremendous power. In highly industrialised America as early as 1890 came the Sherman Act forming the basis for 'busting the trusts.' That Act has been followed by other supplementary legislation in America. The problems in Australia have not been as acute elsewhere and I must beware of coming too close to the political arena. Suffice it to say that in England the Restrictive Trade Practices Act 1956 was passed by a Conservative Government.

I again suggest that legislation of this sort does not really detract from any basic individual rights. It is a recognition that the common law of competitive trading based on freedom of the individual may result in

[10] Hilton v. Eckersley (1855) 6 E. & B. 47 at p. 74-5.

the very negation of freedom of the individual when it is applied to large industrial and business undertakings.

USE OF PROPERTY

I have already said that the eighteenth century philosophers regarded the right of property as a corollary of liberty, a realisation of liberty. Samuel Adams wrote:[11]

> The rights of nature are happily interwoven in the British Constitution. It is its glory that it is copied from nature. It is an essential part of it that the supreme power cannot take from man any part of his property without his consent.

That, of course, is completely unacceptable in the modern Welfare State. The development of the twentieth century Welfare State has brought the right of property into sharp conflict with the public interest. Most governments have virtually unrestricted power to resume land and buildings for public purposes and extensive powers of compulsory acquisition are by modern statutes vested in local authorities and governmental and semi-governmental instrumentalities responsible for public transport, supply of electricity and essential services, water and drainage schemes, housing schemes, city improvement, town planning schemes and a variety of other functions.

And in the interests of town planning, public health and generally in the public interest, local authorities are given power to restrict the kind of buildings which may be erected and restrict the uses to which land may be put.

This is one of the most obvious and direct ways in which individual rights have been affected in the modern Welfare State. Yet the concept of just compensation requires that if a man's property is taken or its value is depreciated by the exercise of the powers of a public authority he is to be compensated in money — much in the same way as he would be compensated in money if a private citizen interfered with his property rights.

Most people would now accept the proposition that this is a field where the private interest must give way to the public interest, but it is still a vexed question as to how far absolute powers of acquisition should be exercisable. An extraordinary but apparently workable compromise has been reached in England where under the Acquisition of Land (Authorisation Procedure) Act 1946 an acquiring authority must give an opportunity for the public hearing of objections before the submission of the acquisition order to the confirming authority — usually a Minister of the Crown. This form of restriction provides a political rather than a legal curb on the exercise of such powers.

While it may be true, as Sir Ivor Jennings has said,[12] that 'the fundamental assumption of modern statute law is that the landowner holds

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11 Collected Works (1774).
12 'Courts and Administrative Law' (1936) 49 Harv. L.R. 426, 436.

his land for the public good' it is equally true to say that if his land is compulsorily acquired for the public good it is a fundamental assumption that the community will pay him the full money equivalent of the asset he has lost — or, in the case of interference with use, for the resultant depreciation in value. Thus in the ultimate analysis the right of property is protected.

RESTRICTIONS UPON TRADE AND COMMERCE — MARKETING LEGISLATION — LEGISLATION PROVIDING FOR A LICENSING SYSTEM FOR CERTAIN TRADES AND CALLINGS

The history of marketing legislation in Australia gives many striking examples of conflicts between the private interest and the public interest in trade and commerce. The extent to which government interference in individual freedom of trade and commerce in the interests of a stable economy is a very vexed economic and political problem. But I must not stray from the common law to section 92.

For completeness I make passing reference to legislation restricting the exercise of certain trades and callings to persons granted licences by government departments or public authorities. Non-restrictive licensing systems in the interests of public health in industries and trades concerned with foodstuffs do not involve any real modification of common law rights. Restrictive licensing systems for the alleged purpose of avoiding wasteful competition—such as in the field of transport services —constitute, of course, direct interference with freedom of trade. Such systems pose the difficult problem of devising just administrative or judicial procedures for determining the allocation of licences among competing applicants.

FREEDOM TO ACT WITHOUT LIABILITY EXCEPT IN THE CASE OF FAULT

The common law in furtherance of its object of protecting the rights of individuals accepted as a basic principle that no one should have to pay compensation for harm inflicted on another unless it was due in some way to his fault. Liability without fault was rare at common law. But with increased industrialisation in nearly every country bringing with it a heavy toll of industrial accidents not attributable to the fault of the employers this concept did not fit. And so came workers' compensation legislation providing for a partial system of compensation for industrial accidents without the necessity of proving fault.

In this highly mechanised age with thousands of motor accidents and industrial accidents each year the common law of compensation for injuries based on fault or negligence is by way of being a misfit. Ultimately it may merge in a national scheme of insurance or compensation for injuries sustained in accidents. Workers' compensation itself has merged in England into a wider scheme of National Insurance.

I have suggested in the course of this paper that much of the modern legislation that goes with the Welfare State presents no real challenge to basic individual human rights.

But some inroads there are; and the most dangerous threat to individual liberty in the modern Welfare State is the tendency in modern legislation to entrust to executive officers of government departments and public authorities the power to make decisions affecting individual personal and proprietary rights in such a way that those decisions are not effectively examinable in a court of law. This, of course, is a vast subject and I can only touch on the fringe of it. The common law still speaks with a strong voice in relation to official action by means of the great prerogative writs of certiorari, prohibition, mandamus and by means of the declaration of right. The courts may see to it that officialdom is kept within the powers conferred by statute. But the Welfare State demands that there must be left to officialdom some area of discretion into which the courts may not trespass. The problem is, what is the area of unexaminable discretion to be?

It is, of course, inefficient to protect individual rights. It is much less time-wasting to give authority to an official to make a quick decision in secret rather than to have the matter debated in a public court and submitted to an independent judiciary. But let us remember that it is also more efficient to put people in gaol without trial. It is much more efficient to reverse the onus of proof. In fact, it may be summed up by saying that dictatorship without the obstruction of the rule of law is much more efficient than any democracy could ever be.

We must therefore be eternally vigilant in this modern Welfare State to preserve these basic individual rights against insidious destruction in the name of efficiency and we must ceaselessly and fearlessly proclaim them.

Dean Griswold, the Dean of the Harvard Law School, in opening the Conference held at the School on the occasion of the Bicentennial of Chief Justice Marshall on September 22, 1955, reminded the Conference of Bracton's words: *Non sub homine sed sub Deo et lege*, which Dean Griswold said were 'words repeated by Coke on a day in the law's history which the American and English peoples think cardinal in their shared tradition'.[13]

The rule of law and not of man remains therefore the supreme guarantee of freedom in the modern Welfare State.

May I conclude with another reference from Blackstone:[14]

> At some times we have seen (the absolute rights of every Englishman) depressed by overbearing and tyrannical princes. . . . But the vigour of our free constitution has always delivered the nation from these embarrassments: and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.

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13 Government Under Law (1956) p. 3.
14 Commentaries, Vol. 1, p. 127.