

Introduction to Havighurst's Limitations Upon Freedom of Contract

Grant Gilmore*

If I follow Dean Havighurst's argument correctly, the idea—or slogan—of freedom of contract is one that emerges in the course of the nineteenth century after centuries or millennia during which the range of choice available to most people had been confined within what we, in this century, would perceive as intolerably narrow limits. It seems to be implicit in his discussion that this new idea, freedom of contract, derived from the eighteenth century industrial revolution and the economic system which, following Karl Marx, we call capitalism that followed in its wake.

Dean Havighurst further assumes that the freedom of contract idea was, during the nineteenth century, carried to excess. It became a sort of license under which the rich and powerful were entitled to prey on the poor and weak which they did with great enthusiasm. In our own century, on the other hand, the countervailing principle that the poor and weak must be protected against their natural predators has exercised a powerful influence. Courts, legislatures and the administrative agencies which were born with the century have all made their contributions to the necessary limitations which had to be imposed, and were imposed, on the "wild anarchic idea of contract." The conclusion is reassuringly upbeat. The contract institution, after a hundred years of trial and error, "leans toward liberty."

What most struck me in reading the essay was that, as recently as twenty years ago, men of good will and wide learning—Dean Havighurst emphatically qualifies on both counts—could reasonably conclude that, at least in the restricted domain of the law of contract, things had on the whole worked out well. We had not achieved Utopia but we had succeeded in working out an equitable balance of conflicting interests. A civilized rule of law had, at long last, replaced the law of the jungle. How many of us today can still share, or even understand, the tranquil optimism of the 1950's? Twenty years of anarchy and violence have done strange things to us.

Let us accept the idea that freedom of contract was a nineteenth century invention which made its way in England and Western Europe, as well as on this side of the Atlantic, during the long period of peace and prosperity which succeeded the chaos of the Napoleon wars in Europe and the revolu-

* Professor of Law, Vermont Law School. A.B. 1931; Ph.D. 1936; LL.B. 1942, Yale University.

tionary turmoil in our own country. I dare say that no society had ever felt more confident. The present represented an immeasurable improvement in the quality of life over even the recent past; there was no reason to doubt that the future held in store a series of triumphs as industrialized man moved from strength to strength. For the first time in the history of human society it was possible to believe in a world in which there would be enough to go around; enough food, enough clothing, enough shelter, even enough happiness, not only for the rich but for the poor.

It is fairly arguable that our nineteenth century law of contract instinctively and in many subtle ways reflected the idea or hope or belief that there was—or soon would be—enough to go around. In an economy of abundance, contract, it is reasonable to assume, plays a minor role—not much more than a walk-on part. In the tropical island of dream and fantasy where nature generously provides whatever is needed at a transaction cost of zero, we would not expect to find a highly developed institution of contract. The inscription which Rabelais placed over the entrance of the Abbey of Thélème would do the job nicely: *Fais ce que Voudras*. It is only when things get tough that we take contract seriously.

As late as the 1950's it was still possible to believe in much or most or all of the nineteenth century dream. In this country the excesses of free enterprise capitalism had indeed, or so it seemed, been effectively curbed by the political and social reforms of the New Deal. The two great wars of the twentieth century had ended, or so it seemed, in the victory of good over evil, in the ultimate triumph of freedom and democracy. Undreamed of technological advances made possible, or so it seemed, the actual realization of the economy of abundance—for all—of which our fathers had dreamed. It was entirely reasonable for a man of vision to conclude, as Dean Havighurst did, that our institutions, including contract, leaned toward liberty.

In the 1970's we have entered the era of Tragic Choices—which is the title Guido Calabresi and Philip Bobbitt chose for a book, published in 1978, which they subtitled: *The conflicts society confronts in the allocation of tragically scarce resources*. There is not, there will not be—ever—enough to go around. The dream—it was a noble dream—that the day will come when everyone can do exactly as he pleases without inflicting harm on his neighbour has proved to be a dream. We shall be presently rethinking our ideas about everything—including contract. Our range of choice will be progressively narrowed. It is unlikely that the nineteenth century idea of freedom of contract will have any role to play in the twenty-first century.