

# Anomalous Growth of the Common Law— the Anglo-American Quest for Justice.

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*Law is the sense of justice taking form in peoples and races.*

—*Sir Frederick Pollock.*

AS SOON as social relations begin, there arises the question of what right each member of society has in the conduct of the other members. Because of such relations each member must yield or forego some of the things which otherwise he might like to do and could do. If the sense of social justice, or righteousness, were at this time developed all men would thus forego without outside influence. But, since this has never been true anywhere as yet, it has been necessary universally to have "law". The purpose of law has been to recognize some of the things which men must give up to their fellow-men—things which from the standpoint of one are called legal rights and from the standpoint of the other are called legal duties and legal obligations—and to compel the men under duty and obligation either not wrongfully to violate such rights, or if they wrongfully do violate them to restore or redress the same. This is true of all systems of law—Babylonian, Egyptian, Hebrew, Roman and English.

An ideal system of law would recognize only such rights as ought to be recognized, and such wrongs as should be regarded as wrongful violations thereof, and would provide as adequate remedies as possible for protecting those rights either before or after violation, and as simple means as possible for enforcing the same. So long as any one of these ends is lacking, justice has not been found and people will continue on their quest. Even if one age should realize an ideal system of law for itself, such system might not be an ideal one for a succeeding more civilized age, and thus again the quest for justice would have to go on.

The history of the American and English people, from the time of William the Conqueror, 1066 to date, affords no more fascinating topic than the quest of these people for justice. The quest has

often been hap-hazard. It has almost always been unconscious. Yet through the ages an increasing juristic purpose has run. Men of this age and of that have hunted for justice as other men have hunted for the elixir of life or the phantom Eldorado. The goal of justice has not as yet been reached, but the history of the quest for it is not a history of failure but a history of progress.

#### CONTRACTS

Our law of contracts has passed through remarkable changes since the time of William the Conqueror, and I think it will be admitted that the general tendency of all the changes has been toward the goal of justice, though the causes which have produced the changes often had no such ultimate goal in view.

The most important topics in contracts are agreement, consideration, conditions, assignment, legality and discharge.

The modern consensual contract dates from the sixteenth century. Prior to the sixteenth century contract law did not rest upon consent. No action for breach of promise, though given for consideration, would lie prior to Henry VII. Whatever contract law then existed rested upon the foundation of the actions of debt and covenant. These actions came into use in the twelfth century. In debt a promise was not enforced, but proprietary rights were re-adjusted. In covenant a promise was enforced, but because of formality not because of agreement. There was no obligation in the absence of the formal word, however repugnant to justice the result might be. If the formal word was given, the giver was bound, however unrighteous it might be to enforce the promise. In the sixteenth century the action of *assumpsit* made its appearance. This was an action on the case in the nature of deceit. It was at first a tort action, but became a contract action as the remedy was gradually extended to cases of non-feasance. Yet as late as 1606<sup>1</sup> a goldsmith who sold a stone affirming it to be a bezoar stone escaped liability though it was not such stone, because he had not used the magic words "I warrant" or "I undertake". And as late as the reign of Elizabeth the court held that an inn-keeper could obtain no relief at law from a gentleman of quality, who put up at his inn with his servants and horses because no price was agreed upon.<sup>2</sup> Even today in the cases of conveyances

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<sup>1</sup> *Chandelor v. Lopus* (1603), Dyer 75a, n., 73 Eng. Repr. 160, Cro. Jac. 4, 79 Eng. Repr. 3.

<sup>2</sup> *Young v. Ashburnsham* (1587), 3 Leon. 161, 74 Eng. Repr. 606.

of land the grantee must have his covenant in the deed if he would be protected, although in the sale of chattels implied warranties arise without the use of magic words. The bilateral contract made its emergence in the seventeenth century, though it was not so named until Judge Dillon and Dean Langdell christened it. As a result of this development contract law today rests upon the foundation of agreement. One man is under obligation to another because he has promised. Modern contract law bears little resemblance to ancient, but there can be no doubt that because of the growth of the law of agreement, contract law is on a higher plane today than ever before.

Not every promise is yet legally enforceable. The common law still requires more than a mere promise to give or to do something. Of these requirements consideration is the most important. In the old action of debt the consideration required was benefit to the promisor (*quid pro quo*), if we may call this consideration. In covenant there was no consideration required, except as a result of the development of assumpsit. In assumpsit the consideration was detriment to the promisee (or the promise thereof). Debt and covenant have become almost obsolete as a result of the development of assumpsit. There are many circumstances under which a person ought to pay for a benefit conferred, as under the old action of debt, and if these obligations had gone with debt, the law might not have progressed; but the old obligations have been preserved in the modern law of quasi contracts, which grew out of equitable constructive trusts by the extension of the action of general assumpsit. The reason why debt had to go was not because it enforced unjust claims, but because of the mode of proof (wager of law) connected with it. The true principles of consideration and quasi contracts were unearthed by Langdell, Ames and Keener when they made their historical survey of the common law. It may be wondered whether or no the common law has made progress in its almost inexplicable changes in the matter of consideration, but I think the importance of liability where a promise has been given in exchange for some legal detriment alone will convince anyone that such is the case. The time may come when other promises should be enforced, but no fewer promises should be enforced than are now enforced by the common law. The study of the historical development of consideration shows progress in the quest for justice.

In the early common law there were no conditions except

express conditions, but the courts began to scrutinize covenants for conditions. After the simple bilateral contract came into existence the old analogies at first prevailed, and only express conditions were recognized. Lord Holt came close to the implication of conditions in 1701,<sup>3</sup> but the honor remained for the great Lord Mansfield, who, in 1773, clearly established the doctrine of implied dependency as to conditions precedent.<sup>4</sup> In 1792 it was held that concurrent as well as precedent conditions would be implied.<sup>5</sup> Mansfield developed implied conditions by the road of the construction of the intention of the parties. In modern law conditions are implied from the idea of the court as to what is just, because it assumes that performance is presumed to be given for performance. Today there are many contrary holdings and perhaps undue technicality in regard to the performance of express conditions, installment contracts and breach of conditions; but no one will dispute that the law of conditions as a whole is in the line of progress, and that the modern theory of implied conditions is close to the goal of justice.

The common law allowed no assignment of the rights of contract. Equity permitted the assignee to sue wherever specific performance would lie. Then the common law permitted the assignee to sue in the name of the assignor. Later the codes authorized the assignee to sue in his own name, adopting the principle of equity. Each one of these changes marks a step in advance.

As to what will amount to illegality, the decisions of the courts also show a growing moral sense. Wagers, which were first held illegal in England, and then legal if not against public policy, have in the United States been held illegal because against public policy. In some matters, such as champerty and maintenance, the decisions of the courts are not so rigid now as they formerly were, and some think that thereby the courts have taken steps backward, but not many instances of this sort are named.

At one time an accord and satisfaction, but not an accord alone, would discharge a contract, because the doctrine arose before the modern consensual contract, and the rule persisted after the reason for it disappeared; but an accord was allowed to

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<sup>3</sup> *Thorp v. Thorp* (1701), 12 Mod. 455, 88 Eng. Repr. 1448.

<sup>4</sup> *Kingston v. Preston* (1773), cited in *Jones v. Barkley*, 2 Douglas 689, 99 Eng. Repr. 437.

<sup>5</sup> *Goodisson v. Nunn* (1792), 4 T. R. 761, 100 Eng. Repr. 1288.

discharge a contract in case of a composition in 1831,<sup>6</sup> and today an accord generally is enough if it is the intention of the parties to take the accord in satisfaction. There may be a question whether the law of discharge is not still overburdened by technicalities, as for example in the requirement of a consideration and the refusal by the United States courts to allow the rescission, by an oral bilateral, of a unilateral contract before breach. There can be no question but that the law has been in a constant state of improvement.

Thus it clearly appears that the Anglo-American law of contracts has been, not only constantly changing—instead of remaining fixed, as some maintain is the characteristic of the common law of the past, and should be the characteristic of the common law of the present—but it has been constantly approaching more nearly to the ideal of justice.

#### AGENCY

When our substantive law shall have reached perfection, how far will the legal consequences of one person's acts be visited on another? Apparently our common law has not been able as yet to answer this question. The common law of agency began with the vicarious responsibility of a man for the acts of the members of his own household. Civilization could not long tolerate such a rule. Consequently we find that criminal responsibility passed away by 1200 and civil responsibility by 1300. From 1300 to 1689 one person was responsible for the acts of another only in cases of command.<sup>7</sup> One who had suffered from the unauthorized misconduct of a servant, acting within the scope of his employment, could obtain no compensation. As a result largely of the revolution of 1688 the English courts held that there was a presumption that all acts done in furtherance of the master's affairs were done by his authority.<sup>8</sup> This was in the time of Blackstone and Lord Holt. In the nineteenth century this presumption ripened into a positive rule. In torts a master is liable now for any act of his servant in the course of his employment and in furtherance of it. In contracts a principal is bound by any contract which the agent makes while acting within the scope of his actual or apparent authority. To these rules the fellow servant doctrine is the great exception. Here the common law apparently

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<sup>6</sup> *Good v. Cheesman* (1831), 2 Barn. & Ad. 328, 109 Eng. Repr. 1165.

<sup>7</sup> 7 Harv. Law Rev. 330, 332, 335, 384.

<sup>8</sup> *Tuberville v Stampe* (1698), Comb. 459, 90 Eng. Repr. 590.

has lagged behind the times, for the modern legislatures are passing workmen's compensation acts for the ostensible purpose of relieving the workmen from an unjust rule. An undisclosed principal was allowed to sue in 1712 and to be sued in 1812.<sup>9</sup> Justice probably always will demand some measure of liability by a master and principal for the acts of servants and agents, yet it would seem that progress would come by reducing this liability to the minimum and by holding all men liable only for their own wrong doing. It is unjust to hold a master liable for damage done by his servants when acting within the course of their employment although they carelessly or even wilfully disregard his instructions, and although he has used all possible care in their selection; yet expediency will require this rule for some time to come. However, it would seem that, as to their rights, servants should be put upon the same footing as strangers, whatever rule is adopted as righteous and just.

Enough has been said to show that, though there may be difficulty in deciding how much progress there has been made in the development of the substantive law of agency, there have been as great changes here as in the law of contracts.

#### BAILMENTS, CARRIERS AND PUBLIC CALLINGS

The early law of bailments, carriers and public callings cannot be understood apart from the action of detinue, which was the one action (aside from account) available to bailors and which gave character to the substantive law of bailments and public callings. Bailees were regarded as owing to the bailors the chattels placed in the formers' possession. Bailees in public calling were liable for particular losses as insurers. In 1703 Lord Holt,<sup>10</sup> borrowing doctrines largely from the Roman law, decreased the liability of all bailees except common carriers, though he did not put the liability of mandataries and ordinary hiring bailees as low as it would be placed today. In 1785<sup>11</sup> common carriers became absolute insurers except for the act of God and the act of the public enemy. Today, in bailments for the sole benefit of the bailor the bailees are bound to exercise only slight diligence; in bailments for the sole benefit of the bailee, the bailees are bound to exercise high diligence; in bailments for mutual benefit, the bailees are

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<sup>9</sup> Paterson v. Gandasequi (1812), 15 East 62, 104 Eng. Repr. 768.

<sup>10</sup> Coggs v. Bernard (1704), 2 Ld. Raymond 909, 92 Eng. Repr. 107.

<sup>11</sup> Forward v. Pittard (1785). 1 T. R. 27, 99 Eng. Repr. 953.

bound to exercise ordinary diligence; though it seems permissible to vary these obligations to some extent by special contract.

Public callings, once many, grew less with the theories of individualism and competition in vogue in Adam Smith's time; but more recently have been growing again in numbers, until now in the United States they include public warehousemen, innkeepers, all common carriers of goods and of passengers, public utilities, and possibly insurance companies, the associated press and even the so-called trusts. At first to be an innkeeper one had to furnish food, lodging and stabling, but the law has undergone change gradually until today lodging (for transients) alone may be enough.<sup>12</sup> All public callings always have been required by the common law to serve with adequate facilities, for reasonable compensation and (more recently) without discrimination. In respect to the above obligations the law has undergone little change, either because true and universal principles were discovered early, or because courts and law makers have been too busy applying the obligations to change them. Methods of regulation of public callings have had remarkable growth. As to diligence and liability for loss the law has not been so stationary. Innkeepers at first were not liable for injury to guests<sup>13</sup> but were liable almost as insurers for their goods, while today they are liable to the guests for negligence and are under only a prima facie liability for their goods, which last liability may be escaped by showing absence of negligence.<sup>14</sup> The common carrier's early common law liability has been modified in modern times by adding to the exceptions to his absolute liability. Now the common carrier is excused from liability, not only when the loss is due to act of God or act of public enemy, but also, to inherent nature of goods, act of the shipper and act of public authority. Common carriers of passengers remain bound, in absence of special contract, to exercise the highest diligence.

The courts have permitted all persons engaged in public callings to narrow their common law liability for loss of goods so long as they do not exempt themselves from liability for negligence,<sup>15</sup> and the majority of the courts now allow common carriers

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<sup>12</sup> *Nelson v. Johnson* (1908), 104 Minn. 440, 116 N. W. 828.

<sup>13</sup> *Cayle's Case* (1584), 8 Co. 32 a.

<sup>14</sup> *Johnson v. Chadbourn Finance Co.* (1903), 89 Minn. 310, 94 N. W. 874.

<sup>15</sup> Some courts, as for example the English and New York courts, have allowed even greater freedom of contract.

of passengers to exempt themselves from all liability, except for wanton acts, to persons riding on free passes.<sup>16</sup> As a consequence common carriers of goods have had two rates, one for shipment under contract liability and another for shipment under common law liability. How far the freedom of contract is going to be allowed to grow is problematical, but there are indications of governmental limitation on such growth and of a return to one liability, more liberal than the so-called modern common law and less liberal than the modern contract.

No more interesting example of the anomalous growth of the common law can be found than in the law of bailments, and public callings. Here we see how the over-exacting requirements of the early law have been modified, and how the law has changed from century to century to meet changing conditions. This branch of the law may not be perfect yet, but a historical review shows a constant approach to perfection. No one would care to go back to the law of the twelfth century. Why, on the one hand, should a system so progressive be criticised, or, on the other hand, should any objection be made to future changes in such a system?

#### PERSONS

The growth of the law of persons has been kaleidoscopic, but it must be admitted that most of the changes, which advancing civilization has demanded, have been accomplished by legislation rather than by the evolution of the common law through the instrumentality of the judges. Thus have come about the great reforms in the law of married women, infants, the insane and corporations. The common law is not to be commended for its position herein but rather is the subject of criticism, so that the opponents of change in the common law will find little comfort in the history of the law of persons. Today in spite of the great legislative reforms of the past, the law of persons still needs other minor reforms, and its growth should continue. The law as to the rights and obligations of married women needs important modifications in many jurisdictions. Has not the time come when the defense of infancy should to a large extent be abolished? Should not a lunatic be compelled to make reparation to one injured by his act—at least if the lunatic is rich and the injured person is poor?

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<sup>16</sup> Northern Pac. Ry. Co. v. Adams (1904), 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. Rep. 408.



## PROPERTY

The law of property affords a rich field to the student of the Anglo-American quest for justice.

In the development of the law of liens we see a rather strange instance of injustice, where apparently judges were trying hard to work out principles of justice. In the beginning, common law liens were given when there was no promise, and therefore the party would have been remediless had not a lien been given him. The next step in the development was where the lien was given also when there was an inferred promise, but the lien was not given in such case to the agister because it had been decided in the first stage of development of the law of liens that an agister, who in that case happened to have an express promise, had no lien. Finally the lien was given also when there was an express promise. Of course now there was not the shadow of an excuse for not giving the lien to the agister, but the mistake continued, so that it had to be corrected by statute. Most states have now made this correction.<sup>17</sup>

In perhaps no branch of the law do we find more changes than in that of real property, and in perhaps none is it more difficult to decide whether or not the changes have been toward the goal of justice. Many changes have been brought about by such outside influences as legislatures and chancery. Yet the common law courts are not without some credit in the matter. One of the most unfortunate results of this sort of development is the great amount of legal debris that still clutters up the territory of the modern rules, which have finally been evolved.

The incubus of the feudal system with its estates and tenures has been gotten out of the way, but what a trail it has left upon of the law of real property! Military, socage, frankalmoign and villenage tenures, because of legislative reforms, no longer exist, but their mark can still be seen. The Statute of Quia Emptores (1290) hit the first blow at the system by abolishing subinfeudations, and the Statute of Charles II (1660) abolished all tenures except common socage (Grand Serjeanty, etc.) But today land is still held of the state as is shown by the doctrines of escheat, taxation and eminent domain.

What a history the fee tail has had! It was a fee conditional before 1285. It was a fee tail between 1285 and 1473. Beginning

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<sup>17</sup> See Ames in 2 Harv. Law Rev. 61, 62.

with 1473 it was defeated and made a fee by the devices of common recoveries and fines, and in 1579 the rule announced in Shelley's Case completed the work of destruction so far as the courts could destroy it. In 1833 the power of alienation was granted in England, and in the United States the fee tail has been abolished generally by statute.

The common law judges refused to enforce a use or trust, and refused to allow gaps or laps in estates. Equity (1422) began to enforce uses out of analogy to the enforcement of devises.<sup>18</sup> In 1536 the Statute of Uses was enacted in the interest of the land owners for the purpose of destroying uses, but by a strange legal chance had the opposite effect. However, the Statute of Uses was not broad enough to include all uses, and equity continued its jurisdiction in the case of a use on a use, active trusts, use grounded on an estate less than freehold, estates tail and copyholds. As a further result of its work in this connection equity, overriding gaps and laps, gave us the new estates of resulting, springing and shifting uses, and the new conveyances of bargain and sale and covenant to stand seised.

Before 1278 guardians in chivalry, and tenants by curtesy and dower alone were liable for waste. All of these were liable for voluntary waste, but probably none of them for permissive waste. After 1278 tenants for life and for years, by virtue of the Statute of Gloucester, and tenants at will, by virtue of judicial construction, have been liable for voluntary waste in both England and the United States until today, for permissive waste in England until 1899<sup>19</sup> and in the United States still, and for ameliorating waste in England (though not in the United States) until 1891.<sup>20</sup> These slow but desirable changes have corrected most of the defects of the law of waste. But one further defect had to be corrected by equity. This was the liability of tenants for life without impeachment for waste, tenants in tail after possibility and owners in fee upon limitations, for using the property otherwise than a prudent man would. Equity held all of these parties liable (1599) and the name of equitable waste has accordingly been given to the conduct.

The test of a fixture was at first physical annexation, but this test has gradually become less important, except in machinery cases, until today in the United States the test is intention, either

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<sup>18</sup> 2 Select Anglo-American Essays 715.

<sup>19</sup> *In re Cartwright* (1889), L. R., 41 Ch. Div. 532.

<sup>20</sup> *Meux v. Copley*, [1892] 2 Ch. Div. 253.

expressed, or if not expressed, as inferred from (a) the relation to the freehold of the annexer, (b) the mode and degree of annexation, and (c) adaptability to the use of the freehold.<sup>21</sup> The result is that a great and just distinction is made between annexation by the owner or one standing in an analogous position, and annexation by a tenant.

The early common law as to waters has been modified so as to bring it into harmony with modern conditions. Riparian ownership of watercourses, surface and subterranean, has been modified in the western United States by the doctrine of appropriation—absolute and modified. The common law doctrine that surface waters were a common enemy has been modified in some jurisdictions by the principle *sic utere tuo ut alienum non laedas*. The common law doctrine which permitted the drainage away of percolating waters, while at the same time giving absolute ownership, has been modified so as not to permit the taking away of water from another's land by means of pumps, etc.

#### BILLS AND NOTES

Bills (or letters) of exchange were legally recognized in the beginning of the fifteenth century, and the evolution of five centuries has produced but slight changes in the most marked features of the early law. One great change which has made headway, in spite of the formal character of bills and notes, is that of alienability by indorsement, through the growth of the law of representation and the improvement of title by transfer. But in the main they were formal contracts, remain formal contracts and ought to remain such, because of the exigencies of the business world. The Uniform Negotiable Instruments Act is an effort to so fix the law.<sup>22</sup>

#### INSURANCE

The law of insurance is another part of the common law whose roots run back into the law merchant. The law merchant was introduced into London by the Italian merchants on Lombard Street, and was at first enforced by merchants' courts. The history of the law of insurance is largely a history of how the common law got jurisdiction away from the merchants' courts. In 1570 the Privy Council appointed arbitrators, but this scheme failed. The admiralty courts were not satisfactory. The Court of Insurance

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<sup>21</sup> *Teaff v. Hewitt* (1853), 1 Oh. St. 511.

<sup>22</sup> 3 *Select Anglo-American Essays* 51.

Commissioners created by act of Parliament (1601) was unsuccessful and died. The regular common law courts were at first unfit (1588), but Lord Mansfield (1756-1788) accomplished what others had failed to accomplish. By summoning juries of merchants to establish the customs, usages and maritime laws of the continent he succeeded in giving the King's Bench jurisdiction over insurance cases. Insurable interest was required by statute in 1746. The concealment doctrine arose in 1743.<sup>23</sup> The warranty doctrine arose in 1691.<sup>24</sup> The technicalities of the law merchant features of insurance law are in modern times becoming of less and less importance owing to the adoption of standard policies. The future of insurance law seems destined to be involved in the increasing power of the state over the conduct of the business. This may take either the direction of state insurance, as in the state of Wisconsin, or, more probably, the direction of state control, on the theory that insurance companies are public callings, as in the states of Iowa<sup>25</sup> and Kansas. The law of public callings would seem to afford a complete solution to any problems of injustice that remain in connection with the law of insurance.

#### SALES

In the law of sales we discover many problems which have long bothered the courts, while they have been on their quest for justice.

Should the ascertainment of price be a condition precedent to the passing of title? At first it was held in England that title could be transferred only by delivery or payment. Then the reciprocal grant doctrine was adopted, whereby it was held that title might pass without delivery and payment if credit was given. Finally the English courts held that title would pass according to the intention of the parties whether or not credit was given. Then arose the question: If something remains to be done to ascertain the price does that indicate an intention not to have title pass? This was at first answered in the affirmative as an absolute rule.<sup>26</sup> Later this was qualified by confining the rule to an unascertained price to be fixed by the seller.<sup>27</sup> The English Sale of Goods Act has so fixed the law. In the United States some courts follow

<sup>23</sup> *Seaman v. Fonereau* (1743), 2 Str. 1183, 93 Eng. Repr. 1115.

<sup>24</sup> *Jeffry v. Legender* (1692), 3 Lev. 320, 83 Eng. Repr. 710.

<sup>25</sup> *Duffy v. Bankers etc. Assn.* (Iowa, 1913), 139 N. W. 1087.

<sup>26</sup> *Hanson v. Meyer* (1805), 6 East 614, 102 Eng. Repr. 1425.

<sup>27</sup> *Turley v. Bates* (1863), 2 H. & C. 200.

Hanson v. Meyers, some Turley v. Bates, and a few have done away with the presumption of retention of property because something remains to be done to ascertain price.

Should the title pass at once in the sale of a specific quantity from a larger uniform mass? The English courts at first answered yes;<sup>28</sup> but this case was overruled by later cases, in spite of the fact that the same courts recognized tenancy in common in the case of confusion of goods. In the United States the prevailing doctrine has been that title will pass if the parties so intend.<sup>29</sup> At first it was doubted if the parties would be tenants in common, but now it is held that they are tenants in common with right of severance in the case of fungible goods.

Should title pass in a cash sale? The early law was that title would not pass. Payment or credit was required. In modern law there is a presumption that there is an absolute sale, but that the seller has a lien in lieu of title.

In the sale of goods having a so-called potential existence, should the title pass when the goods come into existence freed from any defects of title due to rights which have accrued since the time of the original bargain? An early English case,<sup>30</sup> decided after the doctrine was already two hundred years old, held that a seller might so transfer title. This, since, was limited to crops and the young of animals, and at last was abolished in England by the Sale of Goods Act. The doctrine has been narrowed in the United States, so as not to apply to crops to be grown beyond the next season. The American Sales Act follows the English in this respect. But it is held that, though the doctrine of potential existence is abolished and turned into a contract to sell, such contract to sell may have equitable effect in the nature of a lien upon the goods as acquired, except against bona fide third persons, where specific performance would lie, or a mortgage has been given and damages would not be an adequate remedy for a promise to give security.

#### CRIMES AND TORTS

Prior to 1200 the law of torts and crimes was not separated, and the rule was to visit liability on the visible offending thing.<sup>31</sup>

All early English law was unmoral even after 1200, but this

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<sup>28</sup> Whitehouse v. Frost (1810), 12 East 614, 104 Eng. Repr. 239.

<sup>29</sup> Kimberly v. Patchin (1859), 19 N. Y. 330.

<sup>30</sup> Grantham v. Hawley (1616), Hob. 132, 80 Eng. Repr. 281.

<sup>31</sup> Wigmore in 3 Select Anglo-American Essays 474.

was especially true of early criminal law. It was written in blood. It made no distinction between crimes and criminals. Though a party assailed had killed his assailant in self-defense, using no unnecessary force, such killing was not justifiable homicide. He had to go to prison, and trust to the king's mercy for pardon, and although he obtained his pardon he had to forfeit his goods for his crime. Yet our English ancestors desired justice, and when their moral sense rebelled against the unmoral character of their early law, changes in their criminal law began to appear. Criminal liability in case of killing in self-defense disappeared comparatively early. First, pardon became a matter of course, and then the jury was allowed to give a verdict of not guilty. Many other reforms in the substantive side of our criminal law have followed. But, when many of our states still have from a thousand to fifteen hundred acts catalogued as crimes and misdemeanors, it is at least an open question as to whether or no the work of reform is completed. Yet, astounding as is the fact of the number of things still made crimes or misdemeanors, it is also an open question as to whether or no we should not have more acts made crimes. Suppose a man, who accidentally shoots another by a glancing shot, should, after seeing his victim, go off and allow him to die. Ought this man to be held criminally liable or not? Again, ought not an innocent man to be compensated by the state for an unmerited punishment?

The early English tort law, after 1200, was characterized by the same absolute liability. A defendant sued in trespass for battery was liable, though he showed that he was acting in self-defense. He had committed the battery and must make reparation. But of course he had an independent action against the plaintiff. Early English tort law was also mostly confined to trespass. Prior to 1500 the common law gave no redress against the slanderer. For centuries no action was maintained for deceit in the sale of a chattel. An action for malicious prosecution—though a criminal prosecution instigated malevolently with knowledge of the plaintiff's innocence—would not lie until the middle of the seventeenth century.<sup>32</sup> No relief against the unauthorized printing by a stranger of an unpublished work of an author was given until the second quarter of the eighteenth century. The action of the husband for the alienation of the affections of his wife dates from

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<sup>32</sup> *Savile v. Roberts* (1699), 1 Ld. Raymond 374, 91 Eng. Repr. 1147.

1745.<sup>33</sup> The tort of procuring breach of contract is still more recent.<sup>34</sup>

The unmoral character of early tort law had to give way as the English people continued on their quest for justice. However, the doctrine of civil liability for damage caused by a morally innocent actor was very persistent. Thus a sleep walker would be held liable for everything he broke in his sleep. But little by little there grew up the doctrine that an unintentional injury to another would not render the actor liable, and finally, in 1891, the court of Queen's Bench<sup>35</sup> held not liable a man who shot out the eye of another by a glancing shot fired at a pheasant. The late Dean Ames remarks: "The early law asked simply—'Did the defendant do the physical act which damaged the plaintiff?' The law of today, except in cases based on public policy, asks the further question—'Was the act blameworthy?'"

Yet, great as have been the changes in the law of torts, we cannot yet say that the transformations are complete. Should a lunatic be held liable for damage inflicted by him? Should one be required to keep at his peril fierce wild animals and domestic animals after knowledge that they are dangerous? Should a bank be liable on a bank note printed but never issued, if it is stolen? Should not a judge be held liable for slanderous words spoken on the bench? Should not one be liable for using without consent for advertising purposes another's likeness? Should not a man be liable in all jurisdictions for damage done by a spite fence? Should not a man be civilly liable when he sees another in great danger, as drowning, or on a railroad track, if he makes no effort to rescue?

#### REMEDIES

Aside from certain possessory actions, the only remedy which the ancient common law gave for civil wrongs was damages, and even that remedy in the beginning was not the developed remedy of today. The remedy of damages was available at common law only where common law actions were available. Until the sixteenth century none of the actions on the case—including trover, trespass on the case, case, special assumpsit and general assumpsit—were available, and trespass and account were not available until the thirteenth century. The various actions on the case were the crea-

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<sup>33</sup> *Winsmore v. Greenbank* (1745), *Willes*, 577, 125 Eng. Repr. 1330.

<sup>34</sup> *Lumley v. Gye* (1853), 2 E. & B. 216, 118 Eng. Repr. 749.

<sup>35</sup> *Stanley v. Powell*, [1891] 1 Q. B. 86.

tions of the clerks in chancery acting under Statute of Parliament enacted in 1289. Upon the actions on the case is based our whole law of defamation, malicious prosecution, deceit, nuisance, negligence, express contracts, inferred contracts, and quasi contracts. Even our law of damages is of modern origin. There could be no law of damages so long as the jury—which came in with the action of trespass—exercised its early function of deciding facts as of its own knowledge, or even so long as the damages were “at large” as in torts generally. The growth of the law of damages has come through the courts obtaining control over the machinery of proof, making the verdict conform to a standard of damages derived from legal principles, and holding these legal principles binding upon itself.

But even our perfected modern remedy of damages would have been wholly inadequate for many injuries which were constantly being inflicted by men upon their fellowmen. The promise under seal was regarded at common law, not as evidence of the contract, but as the contract itself. Accordingly, if the promisee lost the instrument or if it was destroyed, he had no action, for a year book judge said, “if the specialty is lost the whole action is lost.”<sup>36</sup> Ethically the promisee was still entitled to the amount named in the instrument as much as though it had not been lost or destroyed, but the early law was not concerned with ethics. Likewise an obligor who had formally executed an instrument, was helpless though it was obtained by fraud or was given for immoral purposes, or upon an assumption in the offer that was not true, or even if he had once already paid the same in full, if he had neglected to take a release or to secure the destruction of the instrument.<sup>37</sup> Often, injuries threatened were so serious that they ought to be prevented, or injuries committed were so irreparable that they ought to be specifically repaired; damages would be an inadequate remedy in either case. These defects in the common law remedies have been remedied by equity.

Equity has been the greatest single factor in the development of the English law. Its influence has not been confined to the law of remedies, in spite of the fact that it has given us some twenty-five equitable remedies. It has also contributed to the perfection of the common law, by supplying some omissions in procedure, and

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<sup>36</sup> Y. B. 24 Edw. III, 24, pl. 1.

<sup>37</sup> 9 Harv. Law Rev. 52-54.



in the substantive law of antecedent legal rights, and it has also contributed much to all branches of law by giving them a more ethical aspect.

Equity acts *in personam* rather than *in rem* and it has therefore regarded the duty of the defendant more than the right of the plaintiff, and because of this emphasis has been more ethical than law. The injustice of allowing an obligor to profit at the expense of an obligee because of the mere loss of an obligation prevailed in chancery in the seventeenth century, and in the following century in the common law courts, where recovery was allowed on secondary evidence. Equity also gave relief to an obligor when it would be unconscionable to permit the obligee to enforce his obligation, by commanding him under pain of imprisonment to abstain from the exercise of his right. Now, by statute, defendants are allowed at common law to plead equitable defenses. Equity has granted specific performance of certain obligations (fifteenth century),<sup>38</sup> enjoined the performance of other acts (sixteenth century), granted rescission and cancellation of contracts for fraud, mistake and other inequitable conduct, restrained the enforcement of common law judgments obtained by fraud, compelled mortgagees to surrender mortgaged property, compelled the holders of penal bonds to surrender them up without exacting the penalty, and established constructive trusts—acting upon the highly moral principle that no one should, by the wrongful acquisition or retention of property, unjustly enrich himself at the expense of another.

Should a third person for whose sole benefit a contract is made be allowed to sue thereon? England permitted such suit in a case decided in 1677,<sup>39</sup> but repudiated this position in 1861.<sup>40</sup> In the United States, Massachusetts and New York do not allow such suits, except in insurance cases; but most of the other states do allow them, although the reasons therefor have not as yet been fully worked out. On strict common law principles (in *assumpsit*) perhaps the action ought not to lie. Early equity gave no such relief. Yet here is a case where some remedy is needed. Most courts have arisen to the situation and have invented a remedy in the nature of equitable relief. This is a good illustration of the latent power of

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<sup>38</sup> Ames, *Cases on Equity*, 37.

<sup>39</sup> *Dutton v. Poole* (1677), 2 Lev. 210, 83 Eng. Repr. 523.

<sup>40</sup> *Tweddle v. Atkinson* (1861), 1 Best & S. 393, 121 Eng. Repr. 762.

the courts still to extend the law of remedies where justice requires it.<sup>41</sup>

#### PROCEDURE

Nothing in connection with the Anglo-American system of law is more remarkable than the history of the law of procedure. Constant changes have been the order. The earliest forms of administering justice which existed in self-help gave way to the ordeal and wager of law peculiar to Anglo-Saxon procedure. The Anglo-Saxon ordeal and wager of law were in turn replaced by the Norman jury (and to some extent by the Norman wager of battle). The jury system itself underwent constant change. The jury little by little changed from witness-judges to judges of the facts, and less and less power in this last respect has been given them because of the growth of the law of damages. Attorneys took the place of champions, and an intellectual tournament thus was substituted for the old physical tournament. The technical rules of pleading, evidence and practice grew up. Common law procedure was under continual change. Equity procedure has modified common law procedure, and in turn has been modified by it. Legislation, as in the English Judiciary Act of 1873, the Field Code and the New York Code of Civil Procedure abolished the distinctions between the various forms of actions, simplified the rules of pleading to some extent by requiring the allegation of the facts, modified the rules of evidence slightly—as by allowing parties to civil actions to testify—and attempted to reform the rules of practice by requiring the determination of law suits upon their merits. In common law procedure justice was sacrificed on the altar of form. Technicality was more important than justice. The rules of procedure had to be obeyed, no matter whether legal wrongs were prevented or redressed. The means was allowed to become the end. Much was expected of the code reforms. More might have been accomplished thereby, had the attorneys of the day taken more kindly to them. As a matter of fact our code procedure is practically as bad as common law procedure ever was. A class of attorneys—shrewd, tricky and ingenious—has been developed. Delays, reversals, technicalities and expense are weapons in constant use. Administration of justice is a game

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<sup>41</sup> Williston's *Wald's Pollock on Contracts*, 237-278; 3 *Select Anglo-American Essays* 339.

played by practitioners at the expense of their clients and society. Procedure has again become the end instead of the means.

What should be the future of our legal procedure? Shall we allow our procedure, our machinery for the administration of justice, to continue to be a game so expensive that only the rich can afford it? Or shall it become a system for the administration of justice on earth? The answer cannot be too emphatic, that procedure must soon retire to its proper place. If the legal profession does not take on itself the task of seeing that this is done, society will do it without the aid of the legal profession.

Progress in the past has been slow—too slow—but we have had progress; we are going to continue to have progress. Our laws will fit future generations no more than the laws of the eleventh and twelfth centuries fit us. We must press forward, not backward, and you and I and all others engaged in work in the legal field should help in the Quest for Justice.

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