

→ LECTURE SEVEN ←

CONTRACT—I. HISTORY

THE DOCTRINE OF CONTRACT HAS BEEN SO THOROUGHLY REMODELED to meet the needs of modern times, that there is less necessity here than elsewhere for historical research. It has been so ably discussed that there is less room here than elsewhere for essentially new analysis. But a short account of the growth of modern doctrines, whether necessary or not, will at least be interesting, while an analysis of their main characteristics cannot be omitted, and may present some new features.

It is popularly supposed that the oldest forms of contract known to our law are covenant and debt, and they are of early date, no doubt. But there are other contracts still in use which, although they have in some degree put on modern forms, at least suggest the question whether they were not of equally early appearance.

One of these, the promissory oath, is no longer the foundation of any rights in private law. It is used, but mainly as a solemnity connected with entering upon a public office. The judge swears that he will execute justice according to law, the juryman that he will find his verdict according to law and the evidence, the newly adopted citizen that he will bear true faith and allegiance to the government of his choice.

But there is another contract which plays a more important part. It may, perhaps, sound paradoxical to mention the contract of suretyship. Suretyship, nowadays, is only an accessory obligation, which presupposes a principal undertaking, and which, so far as the nature of the contract goes, is just like any other. But, as has been pointed out by Laferrière,¹ and very likely by earlier writers, the surety of ancient law was the hostage, and the giving of hostages was by no means confined to international dealings.

In the old metrical romance of Huon of Bordeaux, Huon, having killed the son of Charlemagne, is required by the Emperor to perform various seeming impossibilities as the price of forgiveness. Huon starts upon the task, leaving twelve of his knights as hostages.² He returns successful, but at first the Emperor is made to believe that his orders have been disobeyed. Thereupon Charlemagne cries out, "I summon hither the pledges for Huon. I will hang them, and they shall have no ransom."³ So, when Huon is to fight a duel, by way of establishing the truth or falsehood of a charge against him, each party begins by producing some of his friends as hostages.

When hostages are given for a duel which is to determine the truth or falsehood of an accusation, the transaction is very near to the giving of similar security in the trial of a cause in court. This was in fact the usual course of the Germanic procedure. It will be remembered that the earliest appearance of law was as a substitute for the private feuds between families or clans. But while a defendant who did not peaceably submit to the jurisdiction of the court might be put outside the protection of the law, so that any man might kill him at sight, there was at first no way of securing the indemnity to which the plaintiff was entitled unless the defendant chose to give such security.⁴

The English customs which have been preserved to us are somewhat more advanced, but one of the noticeable features in their procedure is the giving of security at every step. All lawyers will remember a trace of this in the fiction of John Doe and Richard Roe, the plaintiff's pledges to prosecute his action. But a more significant example is found in the rule repeated in many of the early laws, that a defendant accused of a wrong must either find security or go to prison.⁵ This security was the hostage of earlier days, and later, when the actions for punishment and for redress were separated from each other, became the bail of the criminal law. The liability was still conceived in the same way as when the bail actually put his own body into the power of the party secured.

One of Charlemagne's additions to the *Lex Salica* speaks of a free-man who has committed himself to the power of another by way of surety.⁶ The very phrase is copied in the English laws of Henry I.⁷ We have seen what this meant in the story of Huon of Bordeaux. The *Mirror of Justices*⁸ says that King Canute used to judge the mainprisors according as the principals when their principals appeared not in judgment, but that King Henry I confined Canute's rule to mainprisors who were consenting to the fact.

As late as the reign of Edward III, Shard, an English judge, after stating the law as it still is, that bail are a prisoner's keepers, and shall be charged if he escapes, observes, that some say that the bail shall be hanged in his place.⁹ This was the law in the analogous case of a jailer.¹⁰ The old notion is to be traced in the form still given by modern writers for the undertaking of bail for felony. They are bound "body for body,"¹¹ and modern law-books find it necessary to state that this does not make them liable to the punishment of the principal offender if he does not appear, but only to a fine.¹² The contract also differed from our modern ideas in the mode of execution. It was simply a solemn admission of liability in the presence of the officer authorized to take it. The signature of the bail was not necessary,¹³ and it was not requisite that the person bailed should bind himself as a party.¹⁴

But these peculiarities have been modified or done away with by statute, and I have dwelt upon the case, not so much as a special form of contract differing from all others as because the history of its origin shows one of the first appearances of contract in our law. It is to be traced to the gradual increase of faith in the honor of a hostage if the case calling for his surrender should arrive, and to the consequent relaxation of actual imprisonment. An illustration may be found in the parallel mode of dealing with the prisoner himself. His bail, to whom his body is supposed to be delivered, have a right to seize him at any time and anywhere, but he is allowed to go at large until surrendered. It will be noticed that this form of contract, like debt as dealt with by the Roman law of the Twelve Tables, and for the same motive, although by a different process, looked to the body of the contracting party as the ultimate satisfaction.

Debt is another and more popular candidate for the honors of priority. Since the time of Savigny, the first appearance of contract both in Roman and German law has often been attributed to the case of a sale by some accident remaining incomplete. The question does not seem to be of great philosophical significance. For to explain how mankind first learned to promise, we must go to metaphysics, and find out how it ever came to frame a future tense. The nature of the particular promise which was first enforced in a given system can hardly lead to any truth of general importance. But the history of the action of debt is instructive, although in a humbler way. It is necessary to know something about it in order to understand the enlightened rules which make up the law of contract at the present time.

The same reasoning applies to civil liability. A carpenter need not go to work upon another man's house at all, but if he accepts the other's confidence and intermeddles, he cannot stop at will and leave the roof open to the weather. So in the case of the farrier, when he had taken charge of the horse, he could not stop at the critical moment and leave the consequences to fortune. So, still more clearly, when the ferryman undertook to carry a horse across the Humber, although the water drowned the horse, his remote acts of overloading his boat and pushing it into the stream in that condition occasioned the loss, and he was answerable for it.

In the foregoing cases the duty was independent of contract, or at least was so regarded by the judges who decided them, and stood on the general rules applied to human conduct even by the criminal law. The immediate occasion of the damage complained of may have been a mere omission letting in the operation of natural forces. But if you connect it, as it was connected in fact, with the previous dealings, you have a course of action and conduct which, taken as a whole, has caused or occasioned the harm.

The objection may be urged, to be sure, that there is a considerable step from holding a man liable for the consequences of his acts which he might have prevented, to making him answerable for not having interfered with the course of nature when he neither set it in motion nor opened the door for it to do harm, and that there is just that difference between making a hole in a roof and leaving it open, or cutting the cord and letting it bleed, on the one side, and the case of a farrier who receives a sick horse and omits proper precautions, on the other.¹⁷

There seem to be two answers to this. First, it is not clear that such a distinction was adverted to by the court which decided the case which I have mentioned. It was alleged that the defendant performed his cure so negligently that the horse died. It might not have occurred to the judges that the defendant's conduct possibly went no further than the omission of a series of beneficial measures. It was probably assumed to have consisted of a combination of acts and neglects, which taken as a whole amounted to an improper dealing with the thing.

In the next place, it is doubtful whether the distinction is a sound one on practical grounds. It may well be that, so long as one allows a trust to be reposed in him, he is bound to use such precautions as are known to him, although he has made no contract, and is at liberty to renounce the trust in any reasonable manner. This view derives some support from the issue on which the parties went to trial, which was that the defendant

performed the cure as well as he knew how, without this, that the horse died for default of his care (cure?).⁸⁸

But it cannot be denied that the allegation of an undertaking conveyed the idea of a promise, as well as that of an entering upon the business in hand. Indeed, the latter element is sufficiently conveyed, perhaps, without it. It may be asked, therefore, whether the promise did not count for something in raising a duty to act. So far as this involves the consequence that the action was in fact for the breach of a contract, the answer has been given already, and is sustained by too great a weight of authority to be doubted.⁸⁹ To bind the defendant by a contract, an instrument under seal was essential. As has been shown, already, even the ancient sphere of debt had been limited by this requirement, and in the time of Edward III a deed was necessary even to bind a surety. It was so a fortiori to introduce a liability upon promises not enforced by the ancient law. Nevertheless, the suggestion was made at an early date, that an action on the case for damage by negligence, that is, by an omission of proper precautions, alleging an undertaking by way of inducement, was in fact an action of contract.

Five years after the action for negligence in curing a horse, which has been stated, an action was brought⁹⁰ in similar form against a surgeon, alleging that he undertook to cure the plaintiff's hand, and that by his negligence the plaintiff's hand was maimed. There was, however, this difference, that it was set forth that the plaintiff's hand had been wounded by one T. B. And hence it appeared that, however much the bad treatment may have aggravated matters, the maiming was properly attributable to T. B., and that the plaintiff had an action against him. This may have led the defendant to adopt the course he did, because he felt uncertain whether any action of tort would lie. He took issue on the undertaking, assuming that to be essential to the plaintiff's case, and then objected that the writ did not show the place of the undertaking, and hence was bad, because it did not show whence the inquest should be summoned to speak to that point. The writ was adjudged bad on that ground, which seems as if the court sanctioned the defendant's view. Indeed, one of the judges called it an action of covenant, and said that "of necessity it was maintainable without specialty, because for so small a matter a man cannot always have a clerk at hand to write a deed" (*pur faire especialty*). At the same time the earlier cases which have been mentioned were cited and relied on, and it is evident that the court was not prepared to go beyond them, or to hold that the action could be maintained on its merits apart

from the technical objection. In another connection it seems to have considered the action from the point of view of trespass.⁹¹

Whatever questions this case may suggest, the class of actions which alleged an undertaking on the part of the defendant continued to be dealt with as actions of tort for a long time after Edward III. The liability was limited to damage to person or property arising after the defendant had entered upon the employment. And it was mainly through reasoning drawn from the law of tort that it was afterwards extended, as will be seen.

At the beginning of the reign of Henry VI it was probably still the law that the action would not lie for a simple failure to keep a promise.⁹² But it had been several times suggested, as has been shown, that it would be otherwise if the omission or neglect occurred in the course of performance, and the defendant's conduct had been followed by physical damage.⁹³ This suggestion took its most striking form in the early years of Henry VI, when the case of the carpenter leaving a hole in the roof was put.⁹⁴ When the courts had got as far as this, it was easy to go one step farther, and to allow the same effect to an omission at any stage, followed by similar damage.

What is the difference in principle, it was asked, a few years later,⁹⁵ between the cases where it is admitted that the action will lie, and that of a smith who undertakes to shoe a horse and does not, by reason of which the horse goes lame, or that of a lawyer, who undertakes to argue your case, and, after thus inducing you to rely upon him, neglects to be present, so that you lose it? It was said that in the earlier instances the duty was dependent on or accessory to the covenant, and that, if the action would lie on the accessory matter, it would lie on the principal.⁹⁶ It was held on demurrer that an action would lie for not procuring certain releases which the defendant had undertaken to get.

Five years later another case⁹⁷ came up, which was very like that of the farrier in the reign of Edward III. It was alleged that the defendant undertook to cure the plaintiff's horse, and applied medicine so negligently that the horse died. In this, as in the earlier case, the issue was taken on the assumpsit. And now the difference between an omission and an act was clearly stated, the declaration was held not to mean necessarily anything more than an omission, and it was said that but for the undertaking the defendant would have owed no duty to act. Hence the allegation of the defendant's promise was material, and an issue could properly be taken on it.

This decision distinctly separated from the mass of actions on the case a special class arising out of a promise as the source of the defendant's obligation, and it was only a matter of time for that class to become a new and distinct action of contract. Had this change taken place at once, the doctrine of consideration, which was first definitely enunciated about the same time, would no doubt have been applied, and a *quid pro quo* would have been required for the undertaking.⁹⁸ But the notion of tort was not at once abandoned. The law was laid down at the beginning of the reign of Henry VII, in accordance with the earlier decisions, and it was said that the action would not lie for a failure to keep a promise, but only for negligence after the defendant had entered upon his undertaking.⁹⁹

So far as the action did not exceed the true limits of tort, it was immaterial whether there was a consideration for the undertaking or not. But when the mistake was made of supposing that all cases, whether proper torts or not, in which an assumpsit was alleged, were equally founded on the promise, one of two erroneous conclusions was naturally thought to follow. Either no assumpsit needed any *quid pro quo*,¹⁰⁰ as there was clearly none in the older precedents, (they being cases of pure tort,) or else those precedents were wrong, and a *quid pro quo* should be alleged in every case. It was long recognized with more or less understanding of the true limit, that, in cases where the gist of the action was negligent damage to property, a consideration was not necessary.¹⁰¹ And there are some traces of the notion that it was always superfluous, as late as Charles I.

In a case of that reign, the defendant retained an attorney to act in a suit for a third person, and promised to pay him all his fees and expenses. The attorney rendered the service, and then brought debt. It was objected that debt did not lie, because there was no contract between the parties, and the defendant had not any *quid pro quo*. The court adopted the argument, and said that there was no contract or consideration to ground this action, but that the plaintiff might have sued in assumpsit.¹⁰²

It was, perhaps, the lingering of this idea, and the often repeated notion that an assumpsit was not a contract,¹⁰³ to which was attributable a more enlarged theory of consideration than prevailed in debt. It was settled that assumpsit would lie for a mere omission or nonfeasance. The cases which have been mentioned of the reign of Henry VI were followed by others in the latter years of Henry VII,¹⁰⁴ and it was never again doubted. An action for such a cause was clearly for a breach of promise,

as had been recognized from the time of Edward III. If so, a consideration was necessary.¹⁰⁵ Notwithstanding occasional vagaries, that also had been settled or taken for granted in many cases of Queen Elizabeth's time. But the bastard origin of the action which gave rise to the doubt how far any consideration at all was necessary, made it possible to hold considerations sufficient which had been rejected in debt.

Another circumstance may not have been without its influence. It would seem that, in the period when assumpsit was just growing into its full proportions, there was some little inclination to identify consideration with the Roman *causa*, taken in its broadest sense. The word "cause" was used for consideration in the early years of Elizabeth, with reference to a covenant to stand seized to uses.¹⁰⁶ It was used in the same sense in the action of assumpsit.¹⁰⁷ In the last cited report, although the principal case only laid down a doctrine that would be followed today, there was also stated an anonymous case which was interpreted to mean that an executed consideration furnished upon request, but without any promise of any kind, would support a subsequent promise to pay for it.¹⁰⁸ Starting from this authority and the word "cause," the conclusion was soon reached that there was a great difference between a contract and an assumpsit; and that, whereas in contracts "everything which is requisite ought to concur and meet together, viz. the consideration of the one side, and the sale or the promise on the other side . . . to maintain an action upon an assumpsit, the same is not requisite, for it is sufficient if there be a moving cause or consideration precedent; for which cause or consideration the promise was made."¹⁰⁹

Thus, where the defendant retained the plaintiff to be miller to his aunt at ten shillings a week, it was held that assumpsit would lie, because the service, though not beneficial to the defendant, was a charge or detriment to the plaintiff.¹¹⁰ The old questions were reargued, and views which were very near prevailing in debt under Henry VI, prevailed in assumpsit under Elizabeth and James.

A surety could be sued in assumpsit, although he had ceased to be liable in debt.¹¹¹ There was the same remedy on a promise in consideration that the plaintiff would marry the defendant's daughter.¹¹² The illusion that assumpsit thus extended did not mean contract, could not be kept up. In view of this admission and of the ancient precedents, the law oscillated for a time in the direction of reward as the true essence of consideration.¹¹³ But the other view prevailed, and thus, in fact, made a change in the substantive law. A simple contract, to be recognized as

binding by the courts of Henry VI, must have been based upon a benefit to the debtor; now a promise might be enforced in consideration of a detriment to the promise. But in the true archaic spirit the doctrine was not separated or distinguished from the remedy which introduced it, and thus debt in modern times has presented the altered appearance of a duty limited to cases where the consideration was of a special sort.

The later fortunes of *assumpsit* can be briefly told. It introduced bilateral contracts, because a promise was a detriment, and therefore a sufficient consideration for another promise. It supplanted debt, because the existence of the duty to pay was sufficient consideration for a promise to pay, or rather because, before a consideration was required, and as soon as *assumpsit* would lie for a non-feasance, this action was used to avoid the defendant's wager of law. It vastly extended the number of actionable contracts, which had formerly been confined to debts and covenants, whereas nearly any promise could be sued in *assumpsit*; and it introduced a theory which has had great influence on modern law, that all the liabilities of a bailee are founded on contract.¹¹⁴ Whether the prominence which was thus given to contract as the foundation of legal rights and duties had anything to do with the similar prominence which it soon acquired in political speculation, it is beyond my province to inquire.

CONTRACT—II. ELEMENTS

THE GENERAL METHOD TO BE PURSUED IN THE ANALYSIS OF CONTRACT is the same as that already explained with regard to possession. Whenever the law gives special rights to one, or imposes special burdens on another, it does so on the ground that certain special facts are true of those individuals. In all such cases, therefore, there is a twofold task. First, to determine what are the facts to which the special consequences are attached; second, to ascertain the consequences. The first is the main field of legal argument. With regard to contracts the facts are not always the same. They may be that a certain person has signed, sealed, and delivered a writing of a certain purport. They may be that he has made an oral promise, and that the promise has furnished him a consideration.

The common element of all contracts might be said to be a promise, although even a promise was not necessary to a liability in debt as formerly understood. But as it will not be possible to discuss covenants further, and as consideration formed the main topic of the last lecture, I will take up that first. Furthermore, as there is an historical difference between consideration in debt and in *assumpsit*, I shall confine myself to the latter, which is the later and more philosophical form.

It is said that any benefit conferred by the promise on the promisor, or any detriment incurred by the promise, may be a consideration. It is also thought that every consideration may be reduced to a case of the latter sort, using the word "detriment" in a somewhat broad sense.

To illustrate the general doctrine, suppose that a man is desirous of having a cask of brandy carried from Boston to Cambridge, and that a truckman, either out of kindness or from some other motive, says that he