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## AN EXTRA-LEGAL APPROACH TO LAW.*

It may be merely man's innate conceit that leads him to believe that the particular span of life in which he lives and moves is something different from any other period. Still, if we read only the newspapers, it does not take long to see that idols, kings, and so-called deep-seated convictions are, if not being actually overthrown, at least subjected to a rather severe re-examination. The day of faith and credence seems going, if in fact not already gone, and in its place we have a general spirit of skepticism followed often by a move towards the empirical and pragmatic. People are no longer satisfied with the old beliefs, merely because they are old: there is, strangely enough, a demand that they work, and above all produce results. Even religion seems not to be exempt. It is not surprising then, that law, which covers and purports to regulate the greatest part of human endeavour, should be embroiled.

Practically all legal writings of the present time are permeated with a spirit of skepticism as to all our former ideas of law. By this I do not mean to say that there is necessarily any turning away from law, or dissatisfaction with the legal order,—although the steady growth of administrative tribunals, so greatly deplored by Lord Hewart in his recent book *The New Despotism*, might at first glance seem indicative of this,—but, rather, that legal thought refuses to deal with law at rest, as though it represented the sum total of human perfection. To-day our concern is not so much with what law is, but why it is and what it is for. Speculations as to what it is for, lead to the further question of whether law is accomplishing its object. All this in turn, leads to an attempt to discover how best to attain that end towards which the law is striving. In other

* A lecture delivered to The Law Club of Toronto University.

words, law is to-day not being studied as a dissociated group of rules of absolute validity, but as one of several means of ordering social conduct. The growth of the administrative tribunals already referred to, which regulate various aspects of our industrial life, may be attributed not so much to a disbelief in law itself, as to the feeling that our object of social control and advancement may better be served by extra-legal than legal means.[1] The importance of this approach to law as a means to an end, rather than treating it as a subject to be studied and developed in and for itself, cannot be overemphasized. The end of law must always be found outside the law itself, and as our opinions of that end change, so must change the content of the law. Simple and self-evident as this proposition would appear, it was not until a comparatively recent date that it was even admitted.

To indulge in another generality, I would say that until the beginning of the present century, law was studied more or less *in vacuo*. Judicial pronouncements were *law*, to be examined critically and even microscopically, it is true, but no speculation was allowed outside this analysing and comparison of the rules of law themselves. To-day on the other hand, while this is still one of the largest functions of the legal student, another equally important branch is concerned with the end of law, or what we are actually trying to achieve by the legal system. Viewed in this way, the sacred pronouncements of courts became only some evidence, (and not always good evidence), of the prevailing views as to this end. Viewed in this way also, we see the law can and must advance. It becomes a living thing rather than the stagnant well of technicalities which it has always seemed to the man in the street.

What our aim in law is, I leave for exact definition to the experts in jurisprudence—no two of whom, I believe, have ever given a unanimous opinion on the subject. One explanation of this phenomenon—which is always a puzzling one to students—seems to me to be due to the fact that the men who endeavoured to formulate a theory of that for which we strive by law, were themselves seeking a hard and fast rule. But what is good to-day will not necessarily stand the test of changed living conditions to-morrow. Hence, while in some quarters at the present time, conscious efforts are being made to formulate an ideal end towards which law should con-

[1] See for example Lord Shaw in *Local Government Board* v. *Arlidge*, [1915] A.C. 120, where the workings of an administrative tribunal were attacked as contrary to natural right and justice because legal procedure was not followed. It was expressly pointed out that judicial or legal practice was not the *sole* means of attaining justice.

stantly tend, few, if any, definitions incline to the rigid or dogmatic.

The present stage of our legal development has sometimes been likened to that other period of expansion known as the period of equity or natural law. Both are characterized by the emphasis laid on the aims or end of law. Both are periods of re-awakened interest in law and its relations to human conduct. The difference however lies in the cautious and wary approach to the problem in the later period which was totally lacking in the earlier.

At that time (17-18th centuries) we find attempts made to state our law as but a reflection of the law of nature or moral law, which, "being dictated by God himself"[2] must have eternal and absolute validity. While the effect of this was of undoubted value in providing a stimulus to judicial activity, based as it necessarily had to be on pure reason or rationalization, it soon led to the accusation, concerning the Courts of Equity, that divine law was unfortunately not revealed in the same manner or degree to different judges. Hence the remark that the equity administered varied "like the Chancellor's foot."[3]

To meet the reaction of last century, with its rigidity of rule which followed on this exuberant process of rationalization, at the present time even those who insist on the ideal or ethical element as essential to our aim in law, take great care to make it not an absolute ideal, but one, as Stammler puts it, which is "a natural law with changing content—that is, precepts of right and law which contain a theoretically just law under conditions empirically conditioned."[4] Other writers attempt to give body to this ideal by determining from our present day civilization the "jural postulates" which society in its present state of development seems to indicate,[5] Without expressing an opinion as to the efficacy of such formulations, it is apparent that they are attempts to state an ideal from actual social data collected from without the body of existing law.

Other writers, feeling a sense of futility in all ethical ideals, are quite satisfied with a purely pragmatic or utilitarian approach. As law exists for the protection of the claims and demands arising out of a social life, such men are satisfied with attempting first to ascertain and catalogue the demands so made, and then, consciously to

[2] "This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority mediately or immediately, from this original"—I Blackstone, Commentaries, 41.

[3] Lord Eldon in *Gee* v. *Pritchard* (1818), 2 Swanst. 402.

[4] Stammler, Wirthschaft und Recht, (2nd ed.) 181.

[5] Kohler, Rechtsphilosophie und Universalrechtsgeschichte, sec. 2.

give effect to as many as possible with the least sacrifice to all. It will be noted in this connection, that whereas formerly we spoke of law protecting "rights" of individuals, groups, or society generally, to-day the proper emphasis is placed on the interests or claims of individuals or groups, and it is only after finding the claim do we ask, should this interest receive the protection of a legally enforceable right? Not only does this place in proper perspective that which the law is actually dealing with, but an appreciation of this method of approach avoids much confusion of thought. In view of the fact that English writers have made little use of the doctrine of "interests," it may be worth a few moments' digression to show how in concrete situations it may be applied.

For example, a husband has an interest in, or makes a claim to, the society of his wife. Insofar as he makes this demand against society generally, the law protects his interest by giving him a right to damages against persons depriving him of his wife's society. But, as regards the claim he makes against his wife, while the law formerly recognized and enforced such an interest by allowing a suit for restitution of conjugal rights, and by permitting the husband to restrain and forcibly chastise the wife, on a balance of the interests involved and considering particularly the interest which society as a whole has in the highest development of the individual, we have reached a result whereby the husband can no longer correct his wife and the action of restitution of conjugal rights is obsolete.[6] While the law has thus seen fit to withdraw the full protection of a legal right from the husband's interest, and thereby seemingly to confer on the wife a liberty to leave her husband, none the less the law may give imperfect recognition to this interest in other ways. For example, suppose a wife, for no legally recognized reason, is about to leave her husband. If the husband promise to pay her a sum of money if she remain with him, does the surrender by the wife of her liberty to leave, furnish consideration so as to make the husband's promise binding? It is submitted, not. That is, while the law may in one sense and for one purpose recognize a liberty (often erroneously styled a right),[7] it may so far disapprove of the tolerated act

[6] For a discussion of this method of approach to the problems here presented see Pound, Individual Interests in the Domestic Relations (1916), 14 Mich. L. Rev. 177.

[7] See Cave, J., in *Allen* v. *Flood*, [1898] A.C. 1 at 29: "Thus, it was said that a man has a perfect right to fire off a gun, when all that was meant, apparently, was that a man has a freedom or liberty to fire off a gun so long as he does not violate or infringe any one's rights in doing so, which is a very different thing from a right the violation or disturbance of which can be remedied or prevented by legal process." See also Salmond, Jurisprudence (7th ed.) 246.

in another connection as to deprive it of its normal efficacy.[8] Unless we appreciate the approach to law, not from a consideration of "legal rights" but through the recognition of "interests" such apparent anomalies may be difficult to understand.

Moreover, an appreciation of the fact that this is how a problem actually presents itself to a court, goes a long way towards the solution of many situations which have become obfuscated by the use of thought-evading or process-covering legal terms. No better illustration of this can be given than the recent analysis of Proximate Cause in the realm of tort law made by Professor Green.[9] The latter attempts to show that, whereas courts have treated a case in tort as being comparatively simple, consisting only in labelling the wrong, finding causal connection and damage, the process is much more involved. As he states it[10] the following inquiries arise:

> (1) Is the plaintiff's interest protected by law, i.e., does the plaintiff have a right? (2) Is the plaintiff's interest protected against the particular hazard encountered. (a) What rule (principle) of law protects the plaintiff's interest? (b) Does the hazard encountered fall within the limits of the protection afforded by the rule? (3) Did the defendant's conduct violate the rule which protects the plaintiff's interest? (4) Did the defendant's violation of such rule cause the plaintiff's damages? (5) What are the plaintiff's damages?

Stating the problem in this way, whether one agrees or not with the writer's conclusions, it becomes apparent that much of the talk of courts regarding causation has in reality been concerned with the questions presented in numbers (1) and (2), which of course have nothing at all to do with cause and effect. The numerous reported cases in which judges have wandered through "nets" and "webs," "conduit pipes" and "chains" of causation lend weight to a recent writer's attack on the "labyrinthine maze" of causation as a valid legal concept at all.[11] Because approaches like Professor Green's are attempts to obviate the use of such conceptions they appear to be the really significant feature of present day legal thought. Instead of words and concepts being accepted at their face value, there is an effort to find out what goes on behind the veil of legal jargon. In other words not what courts *say* they are doing, but what they actually *do* is the important inquiry to-day.

So far has this tendency gathered strength, that we find a well known law teacher in one of the foremost American law schools

[8] See this and similar problems dealt with by Prof. Goodhart in Blackmail and Consideration in Contracts (1928), 44 L.Q.R. 436.

[9] Rationale of Proximate Cause, by Leon Green.

[10] Op. cit. p. 2.

[11] Goodhart, Consequences of a Negligent Act (1930), 39 Yale L.J. 449.

asserting that the written reasons for the judgment of a court may be entirely disregarded: that the important elements of a decision are the facts and the holding only. As Professor Oliphant puts it,[12]

> We have focused our attention too largely on the *vocal behaviour* of judges in deciding cases, a study with more stress on their *nonvocal behaviour*, i.e., what the judges actually do when stimulated by the facts of the case before them, is the approach indispensable to exploiting scientifically the wealth of material in the cases.

While the underlying fallacy of this notion, as pointed out by Professor Goodhart,[13] lies in the fact that a judgment or decision is based on the facts as the judge sees them, a perspective which can be gained only from the opinion, nevertheless it is an indication of the modern attitude to law; a turning from word worship to actualities, from law in words to law in fact. Moreover it is sometimes necessary to bear in mind the idea above expressed else we shall be misled in actually knowing the law. For example, we are told from our earliest contact with law, that in England and Canada, a "third party beneficiary" to a contract may not sue on the contract or otherwise enforce it; he is a stranger to the consideration. It does not take long however to find that although courts may say that, they do not actually follow it.[14] True, they may adopt another form of words, such as "trust," but the fact remains that in instance after instance they *do* what they *say* they cannot.

What may be, and to a great extent has been accomplished by this modern method, is seen to great advantage in the strides which American courts have made in connection with the so-called "Right to Privacy." That a man has an interest in living his life in seclusion if he so desires is undoubted. That there are many who would suffer the agonies of the damned by having their photographs broadcast for the popularization of anything from a new toothpaste to a new brand of cigar seems also above question. Yet to date, the law of England and Canada refuses any protection to this interest, unless, so it is said, a man is actually libelled. That is to say, unless a writing or photograph have a tendency to injure a man by subjecting him to the hatred, ridicule or contempt of his fellowman, no action will lie. No matter how much a man's feelings may be

[12] A Return to Stare Decisis, Handbook of the Assoc. of Am. Law Schools at p. 82, commented on by Prof. Goodhart of Oxford University in (1930), 40 Yale L.J. 161 at 168.

[13] Op. cit. at 169.

[14] See the English and Canadian Cases collected and admirably discussed by Prof. Corbin in Contracts for the Benefit of Third Persons, in (1930), 46 L.Q.R. 12.

hurt, or his own mental and spiritual equilibrium disturbed, unless he can show some material damage, he has no recourse.[15]

About forty years ago, two law students set themselves the task of ascertaining whether there was not within the body of law itself, some principle that was capable of extension to protect the interest involved in these cases.[16] Confronted with the necessity of finding, according to the decisions, either an injury to some property interest, or else a libel, they showed that in protecting so-called "intellectual and artistic property," the courts were really in fact, if not in terms, protecting a man's claim "to be let alone," and live his life in seclusion. For example, it is well established that no letters a man writes, or the pictures he paints for his friends or his own amusement, may be published without his consent.[17] While the basis of the right to restrain such publication is stated to be that a man has a right of property in such work, it would appear that "where the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property at all."[18] The fact that the matter which a person is restrained from publishing may be of the most inconsequential and worthless character, in itself leads one to this conclusion. There are certainly statements in the cases[19] which go far to indicate that under the guise of a property concept, the courts do give protection to a claim to privacy. If that be so, then it would appear that the courts, having given relief in such "literary property" cases, should not be hampered by their own word barriers, in finding a "property" for example, in one's own face. That Canadian and English courts may now have cut themselves off from further judicial advance in this direction seems probable.[20] If so, a new starting point must come by way of legislation.

Turning to another side of our problem, it is I think, a simple fact often entirely ignored, (and particularly by those learned in the law), that courts in administering law, only do so after all, because we believe it a safer way of attaining justice than to leave the

[15] See *Tolley* v. *J. S. Fry & Sons, Ltd.*, [1930] 1 K.B. 467; Kenny, Cases on Torts, p. 367; *Warren* v. *Karn* (1907), 15 O.L.R. 115; *Rowe* v. *Hewitt* (1901), 12 O.L.R. 13, and cf. Goodhart, Recent Tendencies in English Jurisprudence (1929), 7 C.B. Rev. 275 at 283.

[16] See The Right to Privacy (1840), 4 Harv. L.R. 193 by Samuel Warren and Louis D. Brandeis (now Mr. Justice Brandeis of the U.S. Supreme Court).

[17] See the cases collected in the article last cited.

[18] Op. cit.

[19] See *Prince Albert* v. *Strange*, 1 McN. & G. 25; 2 DeG. & Sm. 652.

[20] See a review of Chaffee, Cases on Equitable Relief Against Defamation and Interests of Personality by S. E. Smith in 7 C.B. Rev. 551.

magistrate absolutely unfettered by rule. That there are drawbacks to such administration is clear. For example, law must always operate more or less mechanically, since law is laid down for general application, for types of cases, rather than for the individual case itself. The resultant security, however, seems well worth the sacrifice involved, in view of what might be expected from an unlimited discretion of the judge, swayed by any number of individual and unforeseeable motives.[21] None the less such mechanical operation should be reduced to a minimum, and where the aim of law is not solely or even largely directed towards obtaining security, it may be that there is a larger place for ethical or moral considerations than we are accustomed to grant.

The tendency to ignore and shun claims based on "justice" as though it were the plague, is but a natural result of the extreme to which the last century went in its search for certainty, and its consequent exclusion of all moral issues as unrelated to law. Compare, for example, the almost exultant note in the judgment of one of the Lords Justices of Appeal, to the effect that

> Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled "justice as between man and man."[22]

We are here led to believe that although in other sad and unhappy days, justice may have been of concern to a court, in the enlightened to-day it is not even recognized; or at the highest it is treated as summed up to its ultimate development in the decisions of the courts and can go no further.

It is quite true that in the solution of many problems, there is no moral issue of right or wrong. Justice in many commercial questions consists only in securing a certain and workable rule, so well known and established that the industrial or financial community may advance with security and predicability of result. This is also true of property interests generally. People are concerned not so much with the righteousness of acquiring and holding property, as with the security they expect with regard to the means of acquisition and the protection for what they have. There is no moral explanation why a contract formed by correspondence should be completed on mailing the acceptance, even though the acceptance never reach the offeror. The solution is one based purely on expediency by the open recognition of the interest of the acceptor in knowing at a given moment of time whether or not he has a contract. Bearing

[21] See the problem discussed by Dean Pound in Justice According to Law, 13 Col. L.R. 696.

[22] Hamilton, L.J., in *Baylis* v. *Bishop of London,* [1913] 1 Ch. 127 at 140.

in mind that the offeror can always guard against the application of the rule by stipulating in his offer for actual receipt, we see that there has been merely an adjustment of conflicting claims on a sure, and what has proved to be a workable, basis.

At the same time, when law enters the realms of regulating human conduct, the problem presented being not solely one of obtaining security, a large element of moral right or wrong appears. In this connection a conscious effort is to-day being made to divide roughly the various branches of law into two groups; those in which it is better that law should be certain rather than just, and those where the just solution of individual cases, rather than any legal perfection of rule is our aim. The tendency in the past has been to reduce everything to rule, and, as put by the judge quoted, to exclude consideration of so-called justice.

One result of this "legalistic" attitude may be found in the shameful neglect and stunted growth of any theory of "Quasi-Contracts" in English law. There is probably no other subject at the present time so little known and in such crying need for investigation in the whole body of the common law. An accident of legal history having forced recoveries for unjust enrichment into the uneasy bed of "implied contract" has practically eclipsed the essentially moral grounds from which it took its rise and on which it must proceed. Lord Mansfield, who, above any other single judge, probably did more in the way of developing this type of action for recovery of monies paid under mistake and kindred topics, expressed quite plainly the grounds on which he was proceeding. In 1760 in the famous (but subsequently reviled) case of *Moses* v. *Macferlan*[23] he stated:

> This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund . . . In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund* the money.

In other words we have a statement of what is essentially a moral principle, equally openly expressed in the Roman, and our French-Canadian civil law that "no man should be unjustly enriched at the expense of another." It was with reference to this principle, however that the judge previously quoted, made his haughty remark concerning justice at the present day. There have been others.[24]

[23] 2 Burr. 1005 at p. 1012.
[24] *Baylis* v. *Bishop of London* (*supra*); *Sinclair* v. *Brougham*, [1914] A.C. 398; *Holt* v. *Markham*, [1923] 1 K.B. 504.

True the principle of justice may not be a very accurate or exact working rule, but if it *is* the principle on which the cases have been dealt with, why not openly proceed upon it? Instead of the ethical principle being adopted as a starting point however, the fiction of contract, the legal concept, has been seized on, until one can almost say in English law that the fiction is fact. An accident of history and the limited number of forms of action is retarding the development of our entire law of quasi-contracts.[25]

For example, in another case of Lord Mansfield's,[26] he made the remark that the right of recovery in the situation under discussion, being based on large principles of equity and justice, "the defence is any equity that will rebut the action." With this in mind let us suppose that a bank overpays a customer through some mutual mistake of fact. And suppose further that the customer is robbed on his way from the bank. Is there any doubt as to what the judgment should be? To compel the defendant customer to repay the money under such circumstances would be to impose a serious loss on an innocent man. True, the bank is also innocent, but the merits or equities being equal, why shift the loss? Later courts, however, scorning and denouncing the dictum of Lord Mansfield's,[27] have held that mere change of position can furnish no answer. Of course if you say that a man who receives money paid under a mistake has "promised" or "contracted" (no matter whether it be impliedly or not) to repay, it makes little difference what happens to that which he has received. This seems to be the present unsatisfactory position of our law. In other words we have a further illustration of preference for a legal form, however devoid of actuality it may be, in place of a proper principle.[28]

In the same way all attempts to compel reimbursement for the man who in your absence spends time or money in saving your property have proved abortive, being met with the answer that it is impossible to spell out a contract without a request. Such a reply is no answer at all. As Professor Allen has recently pointed out, no one has ever been able to explain *why* there is no right of recovery

[25] "It is not till forms of action are things of the past, that [we will have] . . . a uniform law of quasi-contract. It is not till these procedural changes have taken place that the fiction of a promise, and with it the confusion between implied contracts and contracts implied in law, will be got rid of, and the law of quasi-contracts will be able to emerge, a distinct branch of the law." 8 Holdsworth, History of English Law, 98.

[26] *Sadler* v. *Evans*, 4 Burr. 1985.

[27] *Baylis* v. *Bishop of London* (*supra*) and cf. *Holt* v. *Markham* (*supra*).

[28] See generally Costigan, Change of Position as a Defence in Quasi-Contracts (1906), 20 Harv. L.R. 205.

in such a case.[29] A broad field of investigation is still open in this connection, and it is submitted that any advance that comes, (as in my opinion it must) must be made with the conscious acknowledgment that contract concepts based as they are on security of transactions, are out of place in an inquiry that should be directed towards the just solution of these individual controversies.[30]

The foregoing is but one of many instances that might be given of situations in which a frank recognition of the moral issues involved seems necessary. The attention which has been given of late to what appears to be an increasing attitude of the courts to recognize "altruistic duties" in the field of tort law is also indicative of the modern attempt to deal with moral right and wrong where a fair solution is to be preferred to a sure and certain result. As Professor C. K. Allen has pointed out[31] the law slowly but surely is groping its way towards a fuller recognition of the duty of assisting our neighbours in peril or distress than would have been dreamed of a hundred years ago. Once realize that the only difficulties in the way of holding liable the man who, having it in his power to save a drowning swimmer, sits by and watches him drown, are practical ones of proof, half the battle is won; and, instead of dogmatically denying relief on "legal principle," courts will gradually arrive at a position recognizing the duty to assist, even though it may be limited by the exigencies of the case.[32]

A point that needs continually to be borne in mind in any approach to law and law reform, is that the development of our law is but one phase of the development of civilization. The demands which people make on law to work marvels cannot be countenanced. The layman too readily assumes that law can make men moral, sober, upright and efficient. When anything goes wrong there is an immediate cry, "There ought to be a law against that." It is necessary to emphasize the limits of effective legal action. For example, it has been said, "to penalize lying in a community of confirmed liars would scarcely be productive of anything but disrespect for law."[33] Some unkind people thus point out that to attempt to eliminate drinking in a country of drinkers is meeting with the same

[29] Allen, Legal Duties (1931), 40 Yale Law J. at 373 *et seq.*

[30] See 8 Holdsworth, History of English Law p. 98. Much work has already been done in this field in the United States, e.g., see Hope on Officiousness, 15 Cornell L.Q. 25, but Prof. Allen (*supra*) is one of the first of the English writers to revive interest in this subject. It is noteworthy that he approaches the subject from the broad standpoint of general altruistic duties.

[31] Article on Legal Duties (*supra*).

[32] Ames, Law and Morals (1908), 22 Harv. L. Rev. 97; Allen, Legal Duties (1931), 40 Yale L.J.

[33] Isaacs, Business Postulates and the Law (1928), 41 Harv. L. Rev. 1014.

fate. But if law is limited by the dictates of civilization, it surely should, as a bare minimum at least, give expression and sanction to the dictates of that civilization. This is sometimes forgotten.

Compare, for example, Lord Holt's struggle to limit the negotiability of promissory notes, as manifested in *Buller* v. *Cripps*.[34] Expanding commerce in the seventeenth century had forced the courts to recognize certain principles of commercial expediency that business men had been acting on, namely, that in many cases, in order to obtain some degree of security in business relations, a person might pass on a better title than he had, if the thing in question were a bill of exchange intended for public circulation. Nevertheless in the case referred to, Lord Holt, in a memorable passage, refused to extend the doctrine to promissory notes, saying that

> actions upon such notes were innovations upon the rule of the common law, and invented in Lombard Street, which attempted in these matters of bills of exchange to give laws to Westminster Hall. That the continuing to declare upon the custom of merchants proceeded from obstinacy and opinionativeness, since he had always expressed his opinion against them.

The grounds on which Lord Holt proceeded may have been technically sound on the basis of arguing purely from the legal definition of a bill of exchange. Hence he believed that "ignorant laymen, without any real justification were attempting to upset the true legal principle which he had discovered."[35] As Professor Holdsworth points out, while there may have been technical force in the argument of Lord Holt,

> its fallacy lay in the assumption that even the most correct technical reasoning could stop the development of the new machinery, rendered necessary by the new needs of an expanding trade. On the contrary, it was clear from the history of the bill of exchange, that the law must adapt its technical rules to that machinery.[36]

In this instance the wall of judicial legalism was only broken down by subsequent legislation.[37] A proper appreciation of the functions of law might have obviated the outcry of the mercantile world which Lord Holt himself foresaw.[38] In the last century, similar opposition of legal concept and business practice became apparent over the question of the negotiability of debenture bearer bonds. In this case, business practice was eventually recognized and given effect to, although over the protest of several judges, who,

[34] (1704), 6 Mod. 29 and see 8 Holdsworth, History of English Law, pp. 172 *et seq.*
[35] 8 Holdsworth, History of English Law, p. 175.
[36] Op. cit. p. 175.
[37] 4 Anne. c. 9.
[38] *Buller* v. *Cripps* (*supra*).

like Lord Holt, refused to open the gates of rigid rule to the demands of business convenience.[39]

So long as there is friction between law and business methods which do not infringe other interests, but on the contrary are essential to the successful conduct of economic enterprise, law is not fulfilling its function. It must be admitted that in the past the demands of business have for the most part been met either by judicial or direct legislation. All that is demanded to-day is a conscious appreciation of the problem so that any friction may be reduced to a minimum. No longer do we decry the "merchants giving law to Westminster." On the contrary, law is being approached in commercial matters, from the standpoint of what business requires from law, rather than from that of what the law demands from business. In other words, the tendency to-day is to bring law closer to business, rather than business closer to law.

What then does business seek from law? Putting it another way, what should be the object of law with regard to business? A broad attempt to state the problem in this way is to be found in an article styled "Business Postulates and the Law" by Nathan Isaacs, Professor of Law in the Harvard School of Business Administration.[40] He states the major demands to be four in number: "(1) Peace and effective enforcement; (2) Security of acquisitions; (3) Fair conditions in the market; (4) Facilitation of transaction."

The first of these does not require much comment. It is but part of one of the major demands of society generally. As the writer puts it, "if we had to look behind every tree for a lurking Indian, we could hardly do the work of the modern world."

In connection with "the security of transactions" and "fair market conditions" we find a fertile field for the working of changed business demands. Beginning with the old leisurely system of barter and sale it is not surprising to find the maxim *caveat emptor* so firmly rooted in the bed rock of the common law; likewise the maxim *nemo dat quod non habet,* represents a time when purchasers had time and opportunity for careful scrutiny and investigation. With the system of modern high pressure marketing and the practical impossibility of investigation, buyers demand more and more protection: hence negotiability, blue sky laws, implied warranties and the like, all of which are answers to modern business conditions and shift the entire emphasis to the protection of the seller. It is strange indeed that we still treat *caveat emptor* and *nemo dat quod*

[39] *Crouch* v. *Credit Foncier of England* (1873), L.R. 8 Q.B. 374; *Goodwin* v. *Robarts* (1875), L.R. 10 Ex. 337; *Edelstein* v. *Schuler,* [1902] 2 K.B. 144.

[40] (1928), 41 Harv. L.R. 1014.

*non habet* as fundamental and all else exceptions. To understand the direction our law will take in future, it is apparent that the dangers and difficulties of the present commercial system be known and appreciated not only by students of business, but by students of law.

More than that, it is sometimes necessary to understand the business viewpoint before it is possible to understand the existing law. Thus we are told by most of the "orthodox" writers, that agency, to bind a principal, may only arise either by the will or consent of the principal that the agent bind him, or, when the principal has represented to a third party that a certain person has his authority. Until quite recently this was treated as gospel. The fact remains that there are decisions which cannot be supported on either of these theories.[41] Are these decisions erroneous, or is there some other explanation? It is submitted that the explanation lies in the law's response to the commercial need for facilitating transactions and protecting persons acting in the normal course of business. Agency is essentially commercial.[42] As one writer states, "Agency is a commercial device, not a metaphysical toy,"[43] and the reason why a principal may in some cases be bound in the absence of real authority or estoppel, is probably because some courts have realized that "business goes on much better if the law in effect guarantees the usual."[44]

Evidence of this new approach to law is not lacking. Law schools are abandoning the purely legal method of attack on business problems. It has become apparent that lawyers working on legal abstractions may produce principles of logical consistency and undoubted historical accuracy from within the body of existing law, only to find, that when exposed to the light of the extra-legal world, they either languish or die, or else, what is perhaps more common, impede the solution of the problem for which they were designed. So we have the so-called "functional" approach to law which, as I see it, is merely to state that you must first know business before you know law, or at least have a working knowledge of each. This is a proposition with which I think every successful business counsel would agree. Professor Isaacs presents it as the business postulate of *facilitating transactions*. That is to say, business needs more

[41] See for example, *Smith* v. *McGuire* (1858), 3 H. & N. 554; *Edmunds* v. *Bushell* (1865), L.R. 1 Q.B. 97; *Watteau* v. *Fenwick*, [1893] 1 Q.B. 346.

[42] Seavey, Rationale of Agency (1920), 29 Yale L.J. 859; Isaacs, Business Postulates (*supra*).

[43] 44 Harv. L.R. 265 at 267.

[44] Wright, Opposition of Law to Business Usages (1926), 26 Col. L.R. at 921.

than arid definitions of the law of agency and its resulting relationships. It needs more than a separate study of the law of mortgages or leases. As he puts it, "business presents numerous novel problems of organization calling for the most ingenious massing of traditional devices." In other words, one of the grave problems of the lawyer to-day is to lump his various concepts into new arrangements that will serve rather than hinder commercial development. Corporate financing is as yet an almost unexplored field. In the past we have studied the law of corporations as one branch of law, the law of mortgages as another. What is required to-day, is a knowledge of the business man's problem as he faces it, and an ability to adapt the formulas of a pre-commercialized age to the new situations. It is a matter of grave doubt whether our law schools are filling this need, or whether they are not teaching a curriculum that is outworn and outdated in a modern industrial era.

As yet we still study law, as we have always done, as ready made for the commercial world. And yet, what has our law to say about false or misleading advertising? Who can state with certainty the law with respect to misbranding of merchandise? The national and international advertising campaign carried on through such agencies for example as the *Saturday Evening Post,* are bringing into mutual contact the consumer and manufacturer. And yet the law tells us that the consumer dealing only with the retailer can have no rights of any kind against the manufacturer. It is only with the retailer that there is any "privity" and only against him therefore he can claim, say, for example, damages caused by the defective nature or manufacture of the article purchased. Until the magic is taken from this term "privity," many problems of merchandising will never be solved.

In the United States, where the situation has presented itself most acutely, claims are being put forward by the consumer against the manufacturer and in many instances allowed.[45] It is true that courts may not make law out of thin air. It is also true that they are limited by the existing legal material before them. But they can shape and reshape that material by choosing different starting points which seem indicated by present commercial necessity. For instance, if our concept of contract will not allow so-called "privity" between consumer and manufacturer, what is to prevent a court from holding that in view of the fact that the latter has made direct representations to the public he has brought himself into a position with relation to the public whereby members of that body will be

[45] *McPherson* v. *Buick Motor Co.* (1916), 217 N.Y. 382.

injured unless he uses due care for their safety in the manufacture of his products. In other words does not the changed character of merchandising call for an extension of general principles of tortious liability.

In the leading American case of *McPherson* v. *Buick Motors,*[46] the plaintiff who had purchased a car manufactured by the defendant company from a retailer, was injured by a defect in the construction of the car. On a legal interpretation of the "privity" shibboleth, there certainly was no nexus between the plaintiff and defendants. Hence on the doctrine of the English courts[47] the manufacturer only owed a duty to the person who was the immediate purchaser from him, namely, the retailer. True, the English courts have been adding exceptions by talk of "dangerous things,"[48] but there has been no accurate or inclusive description of the principle on which this exception proceeds, and the general rule remains unshaken. Compare the attack taken by Cardozo, J., in the *McPherson* case:

> It [the defendant] knew that the car would be used by persons other than the buyer. This was apparent from its size; there were seats for three persons. It was apparent also from the fact that the buyer was a dealer in cars who bought to resell . . . The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel today. The principle that the danger must be imminent does not change but the things subject to the principle do change. They are whatever the needs of life in a developing civilization requires them to be.

This decision may teach us much. First, that a frank recognition of present day problems, calls for a reconsideration of older precedents in the light of present day conditions, and secondly, that having taken a peep over the legal horizon and discovered another world, new content may be instilled in old concepts. Here, by expanding the motion of dangerous things in accordance with general principles of negligence, a result in accord with modern merchandising is obtained.[49]

It has been said that many of the developments in our law have

[46] *Supra.*

[47] *Winterbottom* v. *Wright* (1842), 10 M. & W. 109.

[48] Salmond, Torts (7th ed.) pp. 482 *et seq.*; Bohlen, Liability of Manufacturers to Persons Other than their Immediate Vendees (1929), 45 L.Q.R. 343.

[49] See Sir F. Pollock's remarks on this case in 45 L.Q.R. 421.

been due to the work of weak judges who understood neither the existing state of the law, nor its historic background.[50]

On the other hand is it not at least arguable, in view of our present views of the function of law, that these so-called weak judges were perhaps the stronger, who, with a view to existing demands felt able, by using the old bottles of well known legal phraseology, to infuse entirely new content into the law. Strong judges to the man learned in law are too often like those referred to by Erle, C.J.,[51] as men

> who delighted in nothing so much as a strong decision. Now a strong decision is a decision opposed to common sense and common convenience . . . A great part of the law made by judges consists of strong decisions, and as one strong decision is a precedent for another a little stronger, the law at last, on some matters becomes such a nuisance that equity intervenes or an Act of Parliament must be passed to sweep the whole away.

Until we realize that law does not exist solely for the intellectual satisfaction of judges in making out the logical or historically accurate content of legal doctrine, such "strong" decisions must be periodically expected.

It has been said that "Taught law is tough law." Law however cannot, like mathematics or the sciences be taught dogmatically. There are no essential verities. Law can never stand still long enough to allow them to be extracted. What is law to-day is not necessarily law to-morrow. Hence law, like the movements of the earth itself can only be observed in operation. Let us then at the same time observe and consider the changing conditions of society which furnish the path that law must follow and to which it must adjust itself. Only by so doing will we in any degree be able to prophesy where law is tending.

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[50] "Paradoxical as it may sound, the law has frequently owed more to its weak judges than it has to its strong ones. A bad reason may often make good law. Street has put this clearly in his Foundations of Legal Liability: 'The dissenting opinion of Coleridge, J., in *Lumley* v. *Gye* (1853) like the dissenting opinions of Cockburn, C.J., in *Collen* v. *Wright* (1857) and of Grose, J., in *Pasley* v. *Freeman* (1789), is exceedingly instructive, for it brings into clear relief the fact that the decision of the majority embodied a judicial extension of legal doctrine, not to say an actual departure from former precedents. Nothing better illustrates the process by which the law grows. That situation which to one judge seems to be only a new instance falling under a principle previously recognised, will to another seem to be so entirely new as not to fall under such principle. It will not infrequently be found that the judge of greatest legal acumen, the greatest analyzer, is the very one who resists innovation and extension. This, indeed, is one of the pitfalls of much learning." [Street, Foundations of Legal Liability (1906), 343] quoted by Prof. Goodhart in (1930), 40 Yale L.J. at 163.

[51] Senior, Conversations with Distinguished Persons, p. 314, (1880).