Book Reviews

A Pageant in Modern Dress


Reviewed by S.F.C. Milsom†

The reviewer determined to complain about something had better pick on the title. The death in question, like Mark Twain's, may turn out to have been exaggerated. Mr. Gilmore's book is as much about the birth of contract as its death. And in a deeper sense it is not about the death of anything, but about the way in which the common law lives, perhaps the way in which any system of law lives.

To this improbable reviewer, a legal historian practicing mostly in the Middle Ages, it has given that rare and unnerving pleasure experienced by lecturers who suddenly, in full cry, understand what they are saying. From time to time, pretending that he belongs in a law school, the medievalist puts on a course with some such title as "mechanics of legal development." Part of it goes like this. The law is a reiterated failure to classify life. There have always been categories like tort and contract (the medieval words were trespass and covenant); each cycle begins with fact situations being pinned up under the one or the other without much need for thought. Under each heading, the preoccupations of the formative period dictate more or less clear rules; and the system as a whole acquires mathematical force. But as soon as the force is compelling, the system is out of date. Both the classification itself and the rules within each category formed around yesterday's situations; when today's are pinned up on the same principles, they are subjected to rules and yield results no longer appropriate. The individual lawyer cannot hope to get the rules changed for his client, but he can often try to have his case reclassified. No doubt a promise is a promise: but it may also be or imply a statement, and if the rules of contract do not effectively enforce the promise, the statement may still trigger essentially tortious rules about reliance. This is how as-

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sumpsit began, not, of course, as the conscious device of a profession suddenly aware that its rules of contract were out of date, but as a back door to justice in a few hard cases. For the front door, the law of contract governing at the time, you needed a document under seal; this once sensible requirement of proof for large transactions was being forced upon small ones by economic and jurisdictional changes, hitting first and worst those who themselves acted on their agreements but had no document with which to attack the other side. It was for such victims that lawyers first sought out a backdoor "tort theory." But the inappropriateness of sealing wax for daily business turned it into the main entrance: most agreements were made on the footing that any litigation would be in *assumpsit*, and the document under seal came to be used only for special transactions. And so our first law of contract died its death, and there was conceived that which was to flourish in the late 19th and early 20th centuries and to die so opportunely under the eyes of Mr. Gilmore.

The medievalist's offering is of course a little fraudulent: already uncomfortable as the 17th century looms up, he never reaches the 19th, let alone today; names like 'promissory estoppel' and 'products liability' have hitherto been dropped to suggest that it all belongs together and that the past can illuminate the present.¹ Now it turns out that it all does indeed belong together, and that the present can also illuminate the past. One might say that Mr. Gilmore has almost produced this play again in modern dress, but with the richness of ascertainable detail, the immediacy of Corbin's recollections, and the solidity of Mr. Fuller's reliance cases² instead of those shadowy early *assumpsits*. But one difference deserves discussion. The mechanism depends upon there being clearly separate categories within which rules are insulated, and the early *assumpsit* cases seem to have been truly seen or at least truly presented as trespass rather than covenant, in our language tort rather than contract. It was this that warded off the requirement of a seal, and development would have been crippled by a suggestion which left some traces in the year books: that even in the tort action a plaintiff relied upon the contract as a factual ingredient, must prove it appropriately.³ The modern analogue, presumably, would be a holding that reliance entitled you to reliance damages, but did not absolve you from the need to prove consideration.

1. On all the foregoing, see the present reviewer's *Historical Foundations of the Common Law* (1969) and *Reason in the Development of the Common Law*, 81 LAW Q. REV. 496 (1965).
3. Y.B. Mich. 2 Hen. 4, f. 3d, pl. 9; Y.B. Mich. 11 Hen. 4, f. 33, pl. 60.
But the development described by Mr. Gilmore began entirely in contract, the separate categories being epitomized by two sections of the first Restatement of Contracts, § 75 (consideration) and § 90 (reliance). His account of their genesis is perhaps the most absorbing passage in this absorbing book. He also gives as good an explanation as we can hope for of the paradoxical fact of the two sections in the same document: the text and illustrations of § 90 suggest "that no one had any idea what the damn thing meant"; it was compelled by a line of cases won by plaintiffs who could plainly show no consideration within the meaning of § 75, in many of which the courts had resorted to talk of estoppel, "which is simply a way of saying that, for reasons which the court does not care to discuss, there must be judgment for plaintiff." Section 90, in short, represents a sensible, practical view taken in hard cases. "A sensible, practical view it may be," wrote the greatest of legal historians about a very different development, "but legal principle avenges itself." Mr. Gilmore mentions recent suggestions that a recovery based on the principle behind § 90 is not a contract recovery at all. As a practical matter, of course, such recovery accommodates plaintiffs who lack some component in the contract package other than consideration; it would also lead to greater flexibility over damages (a need, incidentally, which seems to have helped the beginning of assumpsit). But the compulsion to intellectualize is surely playing its part. Of §§ 75 and 90 Mr. Gilmore says that "these two contradictory propositions cannot live comfortably together: in the end one must swallow the other up." Or push it out into a different compartment of the law? The animals can live at the same time provided they are in separate cages.

And it remains astonishing that they have for quite a long period lived together as incompatible principles in the same compartment; and here a geographical rather than a historical comparison may be helpful. This vigorous coexistence has not happened in England, and could not have happened. The English promissory estoppel is an anemic creature able only to release obligations; it cannot replace consideration in creating liability. Mr. Gilmore charitably attributes this difference to a more relaxed English view of consideration, but the
offended reaction when the pale English estoppel was introduced, less than 30 years ago,\(^{10}\) suggests that here he is overgenerous. The likely explanation, and one which gives the story a new juridical twist, is that the English have been hidebound enough never to do anything about sealing wax. It remained possible to embody an agreement in a document under seal, and so long as the forms of action mattered the chief result was that litigation would be in one of the old actions rather than in *assumpsit*. The chief result today is that one can make a promise binding without any consideration. The kind of case in which American courts first resorted to promissory estoppel, for example, the promised benefaction, would therefore look less hard in England: the benefactor could have made a binding promise under seal, and the beneficiary relied on anything less at his own risk.

But what actually happened or not is less important than what could have happened, and however pressing the need, things could not have happened in England quite as they did in the United States. There could not have been a *Restatement* enunciating contradictory principles because there could not have been a *Restatement* at all. It is a larger proposition than it sounds. There is no room for a *Restatement* in a single jurisdiction with a clear hierarchy of courts and the rigid adherence to a monolithic precedent that is its product. There is no room either for that vitalizing competition between ideas and approaches so strikingly exemplified by the American story. Multiplicity of jurisdictions does not alter the basic mechanism of change, but it enables it to respond much faster.

The English experience may be relevant to another aspect of Mr. Gilmore's story, namely the 19th-century appearance of contract as a system, a subject in itself. He attributes to Langdell's casebook, first published in 1871, and in particular to a summary appended to the second edition in 1880, "the idea that there was—or should be—such a thing as a general theory of contract,"\(^{11}\) and to Holmes and then Williston the enunciation and elaboration of that theory; Holmes's formulation in particular is beautifully expounded. But these system-builders may have found more spadework done than is here suggested, and more by way of foundations already laid. Mr. Gilmore\(^{12}\) remarks that many of Langdell's cases were English, and that the jurisdictional unity in England makes for doctrinal coherence. "English case law is manage-


\(^{11}\) Pp. 13-14.

\(^{12}\) P. 13.
able in a way that American case law has never been.” Another adjective would be “stifling.” But it is certainly manageable for the writers of textbooks, and a cursory glance suggests that they may by the date of Langdell’s book and summary have come closer than their American counterparts to formulating a theory of contract, or at any rate to assuming that there was such a thing. Where did the idea come from? It may not be irrelevant that among the earliest treatises on contract to be published in English were translations of Pothier. But we would be as wrong to think of a civilian idea being casually taken up, as Mr. Gilmore may be wrong in seeing a like idea as coming out of the blue to Langdell. History had left a vacuum to be filled and lawyers’ thinking necessarily requires the kind of classification with which this review began.

The Middle Ages had a concept like our contract, or rather had two concepts. Their “covenant” was about the enforcement of agreements as such. And their “contract,” confusingly different from ours, was something like the Roman contract re: it was about the duties arising when certain transactions were executed on one side, most obviously loans. But these concepts were submerged by assumpsit, which expressed the matter in tort: even in the early 19th century, for example, the contractual defendant would be charged with deceit, though so formally that he did not even take offense. This made the old concepts unusable. Trespass and covenant became the names of actions and for a century or so legal thought proceeded in terms not of separate abstract categories but of separate “forms of action.” The assumption that such thought is as old as the common law writs has done much to make our legal history seem unsatisfying; indeed the thought itself must have been unsatisfying too. The rise of our own ideas can be traced in the titles of books. ‘Tort’ was a newcomer in such a role, and at first needed a subtitle explaining torts as wrongs. But ‘contract’ had only to be expanded from its old sense. Powell in 1790 on the Law of Contracts and Agreements was followed in 1807 by Comyn

13. P. 55.
14. The earliest translation of R.J. Pothier’s Treatise on Obligations was American, but was presumably done not just to satisfy juridical curiosity: It was published in 1802 by F.X. Martin, who also wrote on the laws of North Carolina and of Louisiana. Another translation was published in London in 1806 by W.D. Evans, who admired the cosmopolitan learning of Lord Mansfield and saw the value of comparative study; this edition was reproduced 20 years later in Philadelphia.
15. The lateness of books on torts is interesting. The earliest was American. F. Hilliard, Law of Torts or Private Wrongs (1859). In England, instructive titles are C.G. Addison, Wrongs and Their Remedies, Being the Law of Torts (1860) (15 years after his contract book); A. Underhill, Law of Torts, or Wrongs Independent of Contract (1873). Even F. Pollock, Law of Torts (1887) has a subtitle referring to ‘Civil Wrongs.’
on *Law of Contracts and Agreements not under Seal*, and the additions were evidently needed to bring in the original idea of ‘covenant.’ But for Chitty in 1826, Addison in 1845, Smith in 1847 and Leake in 1867, *Law of Contracts* by itself was enough to mark out the field. Pollock in 1876 and Anson in 1879 both expressly endowed it with “principles.” Pollock, in fact, took a further step relevant to Mr. Gilmore’s theme: he went into the singular with *Principles of Contract*.\(^1\)

Pollock must bring us back to his great friend Holmes, and to another dimension of a book which could take on a team of reviewers and entice each into a different sort of irrelevance. This notice has sought to place Mr. Gilmore’s insights about contract in the context of centuries. To others, the main interest will not be in contract at all, but in his picture of the American legal scene in the last hundred years. It comes almost in thrownaway sketches: Williston and Corbin; the making of the *Restatements*; Holmes’s dramatic lectures on the common law. A line here and a line there, and that is what people were like and how things happened. The life of the law may be all sorts of solemn things, but in court and classroom it can also be seen as something which hardly ever comes through in print: sheer pleasure in predicaments and solutions, in the economy of ideas. It is this which makes Mr. Gilmore’s so perceptive as well as so enjoyable a book.

\(^{16}\) A subtitle notes that references are made to American law, as well as to Roman and European law and to the Indian Contract Act of 1872.