The Death of Contract

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Edited and with a Foreword by
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The Ohio State University Press
Columbus

IV

Conclusions and Speculations

SPEAKING DESCRIPTIVELY, we might say that what is happening is that "contract" is being reabsorbed into the mainstream of "tort." Until the general theory of contract was hurriedly run up late in the nineteenth century, tort had always been our residual category of civil liability.[228] As the contract rules dissolve, it is becoming so again. It should be pointed out that the theory of tort into which contract is being reabsorbed is itself a much more expansive theory of liability than the theory of tort from which contract was artificially separated a hundred years ago.[229]

We have had more than one occasion to notice the insistence of the classical theorists on the sharp differentiation between contract and tort—the refusal to admit any liability in "contract" until the formal requisites of offer, acceptance and consideration had been satisfied, the dogma that only "bargained-for" detriment or benefit could count as

consideration, and notably, the limitations on damage recovery.[230] Classical contract theory might well be described as an attempt to stake out an enclave within the general domain of tort. The dykes which were set up to protect the enclave have, it is clear enough, been crumbling at a progressively rapid rate. With the growth of the ideas of quasi-contract and unjust enrichment, classical consideration theory was breached on the benefit side. With the growth of the promissory estoppel idea, it was breached on the detriment side. We are fast approaching the point where, to prevent unjust enrichment, any benefit received by a defendant must be paid for unless it was clearly meant as a gift; where any detriment reasonably incurred by a plaintiff in reliance on a defendant's assurances must be recompensed.[231] When that point is reached, there is really no longer any viable distinction between liability in contract and liability in tort. We may take the fact that damages in contract have become indistinguishable from damages in tort as obscurely reflecting an instinctive, almost unconscious realization that the two fields, which had been artificially set apart, are gradually merging and becoming one.

A number of the developments which we noted in the preceding Lecture in tracing the twentieth century decline and fall from nineteenth century theory illustrate this basic coming together of contract and tort, as well as the "instinctive, almost unconscious" level on which the process has been working itself out.

The idea which we have come to know as "quasi-contract" was not part of the nineteenth century theory.[232] We think of quasi-contract as a sort of no-man's-land lying

between contract and tort. In the early part of the century the concept served to blur the sharp edges both of contract theory and tort theory. It was, as the courts readily admitted, a legal fiction: the "quasi-contract" was no contract at all but the admitted legal fiction served, or so it was thought, the ends of justice.[233]

The "promissory estoppel" cases, like the quasi-contract cases, began to appear in the reports shortly after the turn of the century. The two concepts were, indeed, twins. As a matter of usage it came to be felt that quasi-contract was a better way of talking about the situation where plaintiff was seeking reimbursement for some benefit he had conferred on the defendant, while promissory estoppel was better for the situation where plaintiff was seeking recovery for loss or damage suffered as the result of reliance on the defendant's promises or representations. It would seem, as a matter of jurisprudential economy, that both situations could have been dealt with under either slogan but the legal mind has always preferred multiplication to division. And it may be that we still feel that the "benefit conferred" idea is a little closer to contract than it is to tort, so that contract (or quasi-contract) language is appropriate, while the "detrimental reliance" idea is a little closer to tort than it is to contract, so that tort (or quasi-tort) language is appropriate.

In this connection the introductory Comment to revised § 90 in *Restatement (Second)* is instructive:

> Obligations and remedies based on reliance are not peculiar to the law of contracts. This Section is often referred to in terms of "promissory estoppel," a phrase suggesting an

> extension of the doctrine of estoppel. Estoppel prevents a person from showing the truth contrary to a representation of fact made by him after another has relied on the representation. . . . Reliance is also a significant feature of numerous rules in the law of negligence, deceit and restitution. . . . In some cases those rules and this Section overlap; in others they provide analogies useful in determining the extent to which enforcement is necessary to prevent injustice.[234]

We seem to be in the presence of the phenomenon which, in the history of comparative religion, is called syncretism—that is, according to Webster, "the reconciliation or union of conflicting beliefs." I have occasionally suggested to my students that a desirable reform in legal education would be to merge the first-year courses in Contracts and Torts into a single course which we could call Contorts. Perhaps the same suggestion would be a good one when the time comes for the third round of Restatements.

The most recent, and quite possibly the most important, development in the promissory estoppel or § 90 cases has been the suggestion that such contract-based defenses as the Statute of Frauds are not applicable when the estoppel (or reliance) doctrine is invoked as the ground for decision.[235] This line, if it continues to be followed, may ultimately provide the doctrinal justification for the fusing of contract and tort in a unified theory of civil obligation. A remarkable passage in the *Restatement (Second)* § 90 Commentary explains how most "contract" cases, if not all of them, can be brought under § 90 so that resort to § 75 [§ 71] and consideration theory will rarely, if ever, be necessary.[236] By passing through

the magic gate of § 90, it seems, we can rid ourselves of all the technical limitations of contract theory. And if we choose to follow the alternative route of recovery under theories of quasi-contract or unjust enrichment—§ 89A [§ 86] in *Restatement (Second)*—the argument that the contract limitations no longer apply seems to be quite as strong as it is in the § 90 cases.[237] If we manage to get that far, the absurdity of attempting to preserve the nineteenth century contract-tort dichotomy will have become apparent even to the law professors who write law review articles and books—the academic mind is usually a generation or so behind the judicial mind in catching on to such things.

Until now the process of fusion has been going on mostly underground. I would like, however, to draw your attention to a sequence of recent California cases—during the past quarter of a century the California Supreme Court has unquestionably been the most innovative court in the country—which comes as close to an overt recognition of the process as anything I have yet seen in the judicial literature.

In *Lucas v. Hamm*[238] it appeared that an attorney had been directed by a testator to draft a will under which bequests were to go to certain beneficiaries. The attorney drafted the will in such a way that the bequests failed because of provisions which were invalid under the California rule against perpetuities. The Court declared, in an opinion which must have sent a thrill of horror through the California bar, that the attorney, if he had been negligent in drafting the will, would be liable to the beneficiaries in the amount of their loss. (Ultimately, the Court concluded that

the attorney was not liable on the odd ground that the California rules on perpetuities were so confused that not even a competent attorney could be expected to understand them —hence there had been no negligence.) In its discussion of the attorney's theoretical liability the Court treated the case as a contract case involving the third party beneficiary doctrine. In *Connor v. Great Western Savings and Loan Association*,[239] the Savings and Loan Association had financed the builder of a residential development. The Association had, the Court found, "cooperated" closely with the builder and, indeed, "shared in the control" of the project. Under those circumstances, the Court held, in an opinion which must have horrified the banking community quite as much as *Lucas v. Hamm* had horrified the bar, that the Association was liable to the buyers of improperly built houses. The Court elected to treat the *Connor* case as an action in tort. *Heyer v. Flaig*[240] was, like *Lucas v. Hamm*, an action against an attorney by disappointed beneficiaries under a will. Strongly reaffirming the doctrine of *Lucas v. Hamm*, Tobriner, J., commented, in the course of his opinion in *Heyer v. Flaig*, that the discussion of contract theory in the *Lucas* case had been "conceptually superfluous since the crux of the action must lie in tort in any case; there can be no recovery without negligence." "It has been well established in this state," he continued, "that if the cause of action arises from a breach of a promise set forth in the contract, the action is ex contractu, but if it arises from a breach of duty growing out of the contract it is ex delicto." At least in the golden state of California, ex delicto seems to be well on the way toward swallowing up ex contractu.

One of the most interesting case law developments of recent years—one in which the California Court, once again, assumed a pioneering role[241]—has been the expansion of a manufacturer's liability to remote users of his defective products—the so-called "products liability" cases.[242] The law of seller's warranty, it is true, has always had one foot in contract and one foot in tort. Gradually, it seemed, the contract side of warranty had prevailed; the successive codifications in the Uniform Sales Act and the Sales Article of the Uniform Commercial Code had dealt with warranties entirely in contract terms. Beginning in the mid-1950s the courts, unexpectedly reversing the long established and apparently settled allocation of warranty liability to contract, set out to fashion a new and much more expensive law of warranty based entirely in tort. Here again, I suggest, we see an almost instinctive choice of tort over contract as the principle of liability in a rapidly developing field.

Restatement of Torts (Second) deals with products liability in § 402A, which has quickly become as celebrated as § 90 of the contracts Restatements:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such product, and
>
> (b) it is expected to and does reach the user or

consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[243]

The term "strict liability" has often been used to describe what has been going on in the cases as well as in § 402A. That is, no doubt, an exaggeration since liability is imposed on a "seller" only where his product is "defective" when sold and the defect makes it "unreasonably dangerous" to use. It has indeed been argued that the courts, by manipulating "defective" and "unreasonably dangerous," could quite as effectively restrict liability as ever they did in the hey-day of *caveat emptor*.[244] So they could, but it is entirely clear that, for the past ten or fifteen years, they have been manipulating the new catchwords in such a way as considerably to increase the liability of manufacturers and other commercial sellers to the users of their products. It should be noted that § 402A, by cutting the liability loose from its previously secure base in contract, at one stroke abolishes the "no privity of contract" defense, makes disclaimers of warranty ineffective and gets rid of the previously universal requirement of timely notice to the seller of the claimed "breach of warranty."

The products liability cases and the § 402A formulation impose liability even though the defendant has acted with "all possible care"—that is, even though he is in no way chargeable with negligence. It is not only on the products liability front that the erosion of the negligence idea has been proceeding.[245] Indeed the decline and fall of the nineteenth century idea that tort liability is, or should be, based on negligence or other fault matches the decline and fall of nineteenth century consideration and contract theory which we have been tracing in these Lectures. The two stories are, of course, halves of the same whole and the same "explosion of liability" has manifested itself, perhaps even more dramatically, on the tort side than on the contract side.

Let us assume, arguendo, that it is the fate of contract to be swallowed up by tort (or for both of them to be swallowed up in a generalized theory of civil obligation). We must still provide ourselves with an explanation of what contract—the classical or general theory of contract, as we have called it—was about in the first place and, if it is now dead or dying, what caused the fatal disease.

We started with Professor Friedman's suggestion that the "model" of classical contract theory bore a close resemblance to the "model" of what he calls "liberal"—or, I suppose, laissez-faire—economic theory.[246] In both models, as he put it, "parties could be treated as individual economic units which, in theory, enjoyed complete mobility and freedom of decision." I suppose that laissez-faire economic theory comes down to something like this: If we all do exactly as we please, no doubt everything will work out for the best. Which does seem to be about the same thing that

the contract theory comes down to, with liability reduced to a minimum and sanctions for breach cut back to the vanishing point. I do not mean to suggest—nor, I am sure, did Professor Friedman—that the lawyers and economists who constructed the two "models" were influenced by, or were even conversant with, each other's work. Holmes, for one, remained blissfully ignorant of economic theory throughout his life. It is rather that the lawyers and the economists, both responding to the same stimuli, produced theoretical systems which were harmonious with each other and which, in both cases, evidently responded to the felt needs of the time.

It seems apparent to the twentieth century mind, as perhaps it did not to the nineteenth century mind, that a system in which everybody is invited to do his own thing, at whatever cost to his neighbor, must work ultimately to the benefit of the rich and powerful, who are in a position to look after themselves and to act, so to say, as their own self-insurers. As we look back on the nineteenth century theories, we are struck most of all, I think, by the narrow scope of social duty which they implicitly assumed. No man is his brother's keeper; the race is to the swift; let the devil take the hindmost. For good or ill, we have changed all that. We are now all cogs in a machine, each dependent on the other. The decline and fall of the general theory of contract and, in most quarters, of laissez-faire economics may be taken as remote reflections of the transition from nineteenth century individualism to the welfare state and beyond.[247]

There are, I think, some other more specifically legal, factors which enter into the equation and which may help to explain why contract theory took on the particular shape it

did as well as why it gradually lost its hold on the legal imagination.

Throughout the history of the Republic the achievement of at least a tolerable degree of national uniformity in the substantive law has been a pressing goal of law reform. Once the obvious solution of a federalization of the substantive law had been rejected on the constitutional level, the ominous prospect of a state-by-state fragmentation of the law became, as early as the 1820s, a matter of concern to thoughtful observers.[248] The prospect seemed particularly disturbing in the commercial law area where, as communications improved, transactions increasingly tended to spill over state lines. Codification, either partial or comprehensive, was early proposed as a solution[249] but the codification movement, after having enjoyed bright prospects for a generation or more, ran out of steam by the time of the Civil War if not before. Eventually the codification idea gained renewed strength and, after 1900, we witnessed a fairly comprehensive codification of commercial law in the series of Uniform Acts devoted to negotiable instruments, sales, documents of title and so on.[250] But from the 1860s until the 1900s the goal of national uniformity had to be pursued, as best it could, on the chancy level of case law.

A degee of federalization was, so to say, sneaked in the back door through the doctrine of the general federal commercial law announced by the Supreme Court of the United States, speaking through Justice Story, in *Swift v. Tyson*.[251] Over a considerable period of time this odd device worked extremely well: when the Supreme Court proposed a synthesis of conflicting views, the lower courts, state as well as

federal, were, more often than not, delighted to go along.[252] The device, perhaps predictably, began to work less well as the political, economic and technological complexities and tensions of our society mounted and as the Supreme Court was forced to turn its energies in other directions. After 1900 the Supreme Court began to withdraw from the business of proposing new private law syntheses; with that balance-wheel no longer functioning, the whole *Swift v. Tyson* machine could no longer work and, as we know, eventually had to be scrapped.[253]

National uniformity on a case law level, in the federal republic we had evolved by mid nineteenth century, required what we might call an intensive purification of doctrine.[254] Almost instinctively, the so-called national law schools, led by the Harvard Law School under Langdell, seem to have set themselves to this task with, for fifty years or so, spectacular results. We should not underestimate the influence on the legal profession throughout the country of the handful of great law schools which, during this period, trained an inordinate number of the lawyers who became the leaders of bench and bar in every state. And, in addition to the immediate impact of teacher upon student in the classroom, there was the extraordinary series of monumental treatises which rolled forth in a steady flood. By the time of World War I the legal literature, which had previously consisted mostly of manuals written by practitioners for practitioners, had been revolutionized.

The basic idea of the Langdellian revolution seems to have been that there really is such a thing as the one true rule of law, universal and unchanging, always and everywhere the

same—a sort of mystical absolute.[255] To all of us, I dare say, the idea seems absurd. We are steeped in the idea that law is process, flux, change; our relativism admits no absolutes. Had we lived a hundred years ago, I dare say that we too would have felt the compelling attraction of Langdell's simplistic jurisprudence. And, of course, so far as national uniformity in the law was concerned, Langdell's thesis ought to have been true even if it wasn't and perhaps, with a sufficient effort of will, beneficent error could be made to prevail over unpalatable truth.

For a riot of pure doctrine, nothing could have been better than Contract. Since there never had been a general theory of Contract before, there was nothing to inhibit the free play of the creative imagination—no historical underbush to be cleared away, no tangled skein of old doctrine to be set straight. Perhaps we must, after all, credit Langdell with a degree of genius for his perhaps instinctive choice of a non-existent field as the vehicle for the initial demonstration of the great theory that law is doctrine and nothing but doctrine—pure, absolute, abstract, scientific—a logician's dream of heaven. And once the genius of Holmes had been enlisted in carrying the project out, the resulting theory could be guaranteed to be what the new age required.[256]

We have had occasion to note that one aspect of classical contract theory involved the avoidance of fact questions wherever possible as well as the restatement of questions of fact as questions of law through such devices as the reformulated doctrine of consideration and the newly minted objective theory of contract.[257] This insistence was of course consistent with the primarily doctrinal emphasis of the

theory. I will also suggest that this aspect of the theory may be taken as reflecting an uneasy, inarticulate distrust of the role and function of the civil jury. To the extent that issues arising in contract litigation—in commercial litigation generally—can be phrased as questions of law for the court, the vagaries of juries can be effectively controlled. It is also true that appellate courts can exercise a much more thorough control over the vagaries of trial courts than would otherwise be the case—with a clear gain for the cause of pure doctrine. At the height of the classical period, it seemed that it was hardly possible to phrase any contract issue other than as a question of law. Everything came down to, or could be made to come down to, a question of consideration or of conditions or of the proper construction of a writing or of the applicable rule of damages—all these matters being for the court and not for the jury as well as coming within the proper scope of appellate review.

As an historian, I find the idea that distrust of the civil jury obscurely played some role in the causation of these events both intriguing and helpful. For one thing, on a broader level of historical reconstruction than the one I have attempted in these Lectures, we would be faced with the problem that the whole nineteenth century consideration episode was an Anglo-American exclusive which had no counterpart in the comparable industrial societies and legal systems of Western Europe. The peculiar Anglo-American institution of the civil jury, in the form which it assumed in the nineteenth century, might at least hint at an explanation of why what happened here did not happen in France and Germany and Scandinavia. For another thing, it seems to be

true that the doctrinal statement of contract theory was carried to much greater extremes in this country than it ever was in England. For example, the English—compare any edition of Pollock on Contracts with Williston on Contracts—never went as far as we did with the bargain theory of consideration, wherefore it was unnecessary for English courts to experiment, as our courts did, with the promissory estoppel idea as an escape from bargain theory.[258] We may also observe that the English civil jury began its decline a good deal earlier than did the American version of the institution, which was riveted into the framework of the federal constitution. With us, too, the civil jury is on its way out; judges who propose that it be abolished need no longer fear impeachment proceedings. The disappearance of the civil jury may provide us with still another explanation for the collapse of classical contract theory. Since we no longer have to worry much about juries, we need no longer be as reluctant as once we were to allow trial courts—as triers of the facts—to inquire into such essentially factual questions as good faith, reasonableness, observance of commercial standards, change of circumstance, or, for that matter, fraud, duress and coercion.

It may be that, in totally unexpected ways, things work out for the best. In the First Restatement the debate between Williston and Corbin (or their principals, Holmes and Cardozo) resulted in an uneasy and, it might be argued, intellectually indefensible stand-off. We can see by hindsight that Corbin and Cardozo had a better understanding than did their opponents of the course on which the law was set. If truth means the ability to predict what is going to happen

next, they were closer to the truth. And yet, if their approach had prevailed—if consideration had been defined as the equivalent of causa[259]—it is entirely possible that the collapse of the classical theory might have been delayed for another generation or so and might have come about in an altogether different fashion. The Cardozo-Corbin construct did retain a central feature of the old theory—that conclusions are to be expressed as deductions from rules of law, not as deductions from observed facts. Their approach would have introduced a good deal more play into the joints of contract theory and, thereby, perhaps, have allowed it to survive, in recognizable form, for a considerable time. One way of staving off a revolution is to make concessions to the revolutionary demands even before the demands have been precisely formulated. The Restatement compromise was to maintain the structure of classical theory in all its formal rigidity, while ambiguously hinting—as in § 90—that there might be possible routes of escape. Had the structure itself been, so to say, modernized or made more habitable, the courts, in making good their escape, might not have been compelled to tear the whole thing down. The unresolved tensions of the First Restatement, which admirably reflected the intellectual cross-currents of the post–World War I period, may thus have largely contributed, in ways that the draftsmen never intended and could not possibly have foreseen, to the emergence of what we begin to perceive as a radically new way of analyzing the problem of civil obligation.

This has been a study in what might be called the process of doctrinal disintegration. The process is one with which we have been, until now, relatively unfamiliar. The reduction of

the basic fields of law to self-contained and logically consistent systems of rule and doctrine was, I suggest, the principal feature, as it was the greatest achievement, of our late nineteenth century and early twentieth century jurisprudence. What went on in Contract is merely a special instance of what went on everywhere. The instinctive hope of the great system-builders was, no doubt, that the future development of the law could be, if not controlled, at least channeled in an orderly and rational fashion. That hope has proved, in our century of war and revolution, delusive. The systems have come unstuck and we see, presently, no way of glueing them back together again. But it is possible to learn as much from a failed experiment as from a successful one. Our observation of how the general theory of contract was put together and how it fell apart may stand us in good stead when next we feel ourselves in a mood to build something.

I have one final thought. We have become used to the idea that, in literature and the arts, there are alternating rhythms of classicism and romanticism. During classical periods, which are, typically, of brief duration, everything is neat, tidy and logical; theorists and critics reign supreme; formal rules of structure and composition are stated to the general acclaim. During classical periods, which are, among other things, extremely dull, it seems that nothing interesting is ever going to happen again. But the classical aesthetic, once it has been formulated, regularly breaks down in a protracted romantic agony. The romantics spurn the exquisitely stated rules of the preceding period; they experiment, they improvise; they deny the existence of any rules; they churn

around in an ecstasy of self-expression. At the height of a romantic period, everything is confused, sprawling, formless and chaotic—as well as, frequently, extremely interesting. Then, the romantic energy having spent itself, there is a new classical reformulation—and so the rhythms continue.

Perhaps we should admit the possibility of such alternating rhythms in the process of the law. We have witnessed the dismantling of the formal system of the classical theorists. We have gone through our romantic agony—an experience peculiarly unsettling to people intellectually trained and conditioned as lawyers are. It may be that, in this centennial year, some new Langdell is already waiting in the wings to summon us back to the paths of righteousness, discipline, order, and well-articulated theory. Contract is dead—but who knows what unlikely resurrection the Easter-tide may bring?