THE ADAPTATION OF LEGAL INSTITUTIONS TO NEW USES *

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The history of English law has until a few generations ago been the history of judge-made law. The law, and the judges, have been accused of undue conservatism and unwillingness to change. It is recognized that some freedom of movement has existed at the outer fringes of legal development, but the hard core of the law has been conceived of as fixed and unyielding. It is my present object to point out that this analysis is superficial. It is not that the judges have been less willing to see the law progress than other members of society; it is rather that the very limited and, strictly speaking, unauthorized character of judicial legislation has imposed strict limitations on their activities. The one-way character of precedent has also been an obstacle to sudden reversals of legal development. In spite of these formidable bars the judges have succeeded in many cases in achieving legal reform by altering the character of well-established legal institutions from within, leaving them outwardly unchanged, so that their activities have escaped causing conspicuous scandal. This is simply one aspect of English life; where other societies undergo constant revolutionary change the English revolutionise the content while maintaining strict respect for the form, thus harmonising the tenacious conservatism and vocal radicalism which mark the national character. The present address is an attempt to show how this paradox has been realized in the field of legal change, and it will be clear to even the casual observer that the changes thus achieved have been deliberately worked out by the courts, though a typical reticence, perhaps a conspiracy of silence, has veiled its workings.

I should like to begin with a fairly familiar theme, the change in the character of the English Court of Chancery. In mediaeval times we find the Court of Common Pleas entrenched in the field of real property law. The Court of Chancery exercises

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a special jurisdiction over various royal claims connected with revenue and with the grant and revocation of charters. This Chancery Court begins in the fourteenth century to extend its activity to interfere with abuses of common law procedure, but solely in order to make the common law itself more effective, e.g. dealing with municipal officials who, for personal interest, were failing to execute procedural steps in civil litigation.[1] In the next century the Chancery begins to develop equitable institutions, but always against a background of common law. Since real property law dominated common law and formed the most lucrative legal practice it was natural that equitable interference became most marked in this area, and resulted, in a sense, in equity becoming the prisoner of the law of real property. For several centuries the Chancellors still consulted the common law judges where difficult points of real property law arose in the cases brought before them.[2] However, as a result of the acknowledged primacy of equity over conflicting rules of law, and owing to the general use of conveyancing based on the device of trusts, the Court of Chancery came to take over most of the work of the old Common Pleas. The Chancery Bar also came to specialise in the field of real property. The final result has been that questions of real property law in England now fall almost exclusively to the Chancery Division of the High Court, sometimes because of its competence in construing written documents, sometimes because of direct statutory authority, sometimes as a result of administrative allocation of work. The English "common lawyer" now professes ignorance of real property law and most practitioners at the Bar avoid it. This is not true of the less specialised solicitor in England, who devotes much of his time to property matters. It is also untrue where the legal profession is undivided, as in Ontario, where there is also no longer a separate Chancery jurisdiction, and fusion of law and equity is much more advanced.

It is, of course, no accident that equity became caught in the trammels of the old land law. England was a feudal society and its law a feudal law. I feel that insufficient attention has been paid by legal and economic historians to the role which equity played as a solvent of feudalism, in addition to the well-known functions of the inflation of currency, reducing the value of feudal dues, and the Peasants' Revolt. The old common law was agrarian, with concrete concepts like seisin and feoffment and specific remedies for the recovery of land. It was the law of a society of agricultural aristocracy which treasured the soil which

1 See Potter, *Historical Introduction to English Law*, 4th ed., p. 154.
2 *Ibid.*, p. 156.

sustained it. Equity began its career as this society was in decline, and as commerce, industry, money, initiative and invention replaced land ownership as the leading principle of the economy. It can be no accident that equity deals with figures and balances, with notional conversion, with intent and not form, with conscience rather than possession, with tracing of wealth in and out of various forms, and with such intangible ideas as trust funds and choses in action, creatures of the balance sheet and not the soil.[3]

The great equitable remedy of specific performance has undergone important changes without losing its identity. In mediaeval times petitions were made to the Chancellor to enforce agreements because they were unenforceable at law. The Chancellor had no organized machinery for the enforcement of judgments, e.g. sheriffs and bailiffs, but he could summon the defendant or judgment debtor and ultimately imprison him. Hence, obviously following Continental models and canon law, he ordered defendants to perform their obligations specifically, on pain of committal for contempt. As time went on, suitors began to petition in Chancery where they had a remedy in damages at common law but for some reason this remedy was inadequate. As these suits came to be accepted a new theory evolved, that the grant of specific performance was a privilege designed from the start to improve on the common law remedies, and all sorts of restrictions began to be imposed on its issue. The fact that it had once been the only remedy was lost to sight.[4]

The mortgage is an institution which has changed its character without losing its identity. It began as an emergency loan to meet a case of sudden illness or to ransom a capture from the Saracens or pirates, and was frowned on as an un-Christian exploitation of the needs of a neighbour. For centuries equity was vigilant to protect the borrower and allow him opportunities to recover his land. The profligacy of the upper classes in the seventeenth and eighteenth centuries led to widespread use of such securities to raise spending money, and resulted in the ruination of once great families. In modern times, however, the mortgage has become a common and almost universal means of financing purchases. Many buyers would never own their own homes if they could not obtain the purchase price in advance from a mortgagee. Business men whose finances are quite healthy often prefer to pay low interest on mortgages and put their money to more profit-

3 See, for example, *Re Hallett* (1880), 13 Ch. D. 696; *Lingen v. Sowray* (1711), 1 P. Wms. 172; 24 E.R. 343.

4 Potter, *Historical Introduction to English Law*, 4th ed., pp. 625 *et seq.*

able purposes, while mortgage interest is also a useful tax deduction. The courts have been compelled to recognise this, and are far less prone to relieve the borrower from the consequences of his bargain.[5]

The trust has proved one of the most adaptable institutions of all time. At first, like the mortgage, it was an emergency device to provide safety for the legal title while the landowner was away during a war or other emergency, and in particular where the heir apparent was too young to manage the estates. Then it was much used for frauds on creditors or for evasion of the law prohibiting the acquisition of lands by the Church without royal licence.[6] Gradually it assumed its modern form, a deliberate transfer of property to third-party management, fulfilling many of the purposes of institutions, curacies and tutorships under the Roman systems. The charitable trust has followed the familiar pattern of adaptation. It originated with a stress on public works, such as harbours and bridges, then turned into a noble work for education and religion, and, now in England, as the welfare state takes over most philanthropic functions, the charity has revived in the form of trusts for special "amenities" beyond actual welfare needs.[7]

Turning now to the common law, it will surprise no one that the most remarkable adaptations have occurred in the supposedly hidebound field of real property law. Though this area is one of natural conservatism over existing title, it is also one where the possibility of slow and careful planning has allowed experienced lawyers to turn their imagination to good account.

The change in the character of the settlement for successive interests, a typical common law institution, is notable. It was at first the feudal superior who, fearing that he might be burdened with an uncongenial or even disloyal vassal, limited the grant of land to the life of the immediate grantee, whom he knew and trusted. But as the grant of fee simple interests became general, with the slackening of the personal aspects of feudalism, landowners themselves seized on this idea of limited ownerships as a means of carving estates out of their own titles, in order to curb the supposed extravagance of their descendants and place the dead hand on the destinies of the living.[8]

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5 Ontario statute law still restricts postponement of redemption to five years, but mortgages by corporate bodies are exceptions: R.S.O., 1960, c. 245, s. 16.

6 Potter, *Historical Introduction to English Law*, 4th ed., pp. 606, 609.

7 Report of the Nathan Committee (U.K. Cmd. Paper 8710), c. 2.

8 Potter, *Historical Introduction to English Law*, 4th ed., p. 529.

The lease, so different, in theory at least, from the Continental contract of hire of land, has proved the most adaptable institution of all. The original conception of tenure was characteristic of the relation of feudal lord and freehold vassal, and had no application to mere contractual relationships.[9] Yet, as the new contractual lease began to replace the older feudal freehold relation in the economic pattern of land use, the supposedly staid courts experienced no difficulty in applying it to such ideas as specific recovery of the land by the tenant, the remedy of distress, the rule of forfeiture for denying the landlord's title, and the whole doctrine of real covenants—so different from the "classic" common law ideas of contract.[10] Would a modern judge feel free to adapt the rules of law in such a cavalierly fashion? We know, too, that the lease began as an emergency device to raise money, as a type of mortgage without any entry on land, that it soon turned into the modern lease and that actual entry and possession became requirements.[11] The despised lessee soon became envied because his remedies were more recent and therefore more liberal, and proud freeholders abandoned their own cumbrous and antiquated remedies in order to usurp the lessee's actions, by using legal fictions of leases to fictitious lessees.[12]

In recent times the concept of "mutuality" has been employed by courts in order to provide some exceptions to hard rules. Thus the rule that an easement must be expressly reserved by the vendor has been relieved, in the case of drainage easements and easements of support to buildings, by holding that an implied reservation is the fair reverse of the coin to an implied grant.[13] The rule that the burden of positive covenants to repair will not run with land has also been undermined, in the case of sale of apartments in buildings, by holding that the tenant of the flat may only use the common spaces, such as stairways and drives, so long as he contributes to the repair funds as he contracted.[14]

Conveyancing exhibits many important, if gradual, changes. Thus the fine and recovery began as genuine litigation and were then adapted to collusive actions resulting in a kind of guaranteed title by judicial record.[15] The lease of land was adapted to the functions of a sale by means of the two-stage procedure of lease

9 *Ibid.*, p. 487.
10 *Ibid.*, pp. 498-500.
11 *Ibid.*, p. 499.
12 *Ibid.*, p. 511.
13 Gale on Easements, 13th ed., pp. 87, 88.
14 *Halsall v. Brizell*, [1957] Ch. 169.
15 Potter, *Historical Introduction to English Law*, 4th ed., p. 533.

and release, in order to escape the embarrassing publicity which the Statute of Enrolments of 1536 attached to sales of land; the simple private lease for a year was followed by an equally private deed of release, the legislature in its wisdom having failed to take into account the rule that reversions might be so disposed of.[16] The deed, so typical of land transfer in modern times, was originally a mere testimonial of an oral ritual of "feoffment with livery of seisin". As feoffments with complicated conditions came to be used, the "charter of feoffment" or deed became a necessity to preserve the actual terms. Gradually it became the usual proof of title and feoffments were first made alternative and then abolished altogether.[17]

In recent years there has been much controversy about the jury system. Thus England abolished the system of presentment by grand juries in 1933 but some Canadian provinces, including Ontario, still preserve it, though subject to the criticism that its role is rather mechanical. In early days in England the grand jury was a body of denunciants and very much an instrument of the Crown, but, owing to the rather peculiar political and religious conditions of the 17th and 18th centuries, at that time acquired the very different character of a buffer between Crown and subject, less liable to press for political prosecution than the Crown counsel and less dependant on the royal favour than the judges. With the growth of responsible Parliamentary government the need for a buffer between the free citizen and the laws enacted by his freely chosen representatives disappeared, especially with the extension of the right to vote to all classes irrespective of wealth.

The system of preliminary enquiry which paralleled the grand jury in England and still does so in Ontario is another example of adaptation. At first its function was to deal with the award of bail and curb the avarice of extortionate sheriffs, but the magistrates so extended their activities that they conduct a preliminary trial of the strength of the prosecution case and consequently led to recent suggestions that they merely duplicate the trial on the merits.

The trial jury originated simply as a group of impartial witnesses in civil cases, who at first did not require to be unanimous, but turned into judges of fact and later were also used by a desperate court as a form of criminal trial since the trial by ordeal became unworkable as a result of the withdrawal of the Church's cooperation in 1215. The fiction that the jury were a

16 *Ibid.*, p. 521.
17 *Ibid.*, pp. 520, 522.

form of proof and not a judicial body led to many inconsistencies in the law, e.g. the rules of venue which require jurors to come from the place of the wrong or crime, in order to be knowledgeable about it. Today we rationalize the rule and attribute it to the laudable aim of spreading the workload fairly among potential jurors, in particular to prevent the London jurymen doing all the work because lawyers may find it more convenient to have a case tried in London rather than in the English provinces, and correspondingly with Toronto in Ontario.[18] The idea that the jury were themselves the form of proof led to the omission on the records of trials of any account of the offering of evidence to the jury as judges of fact or of the addresses of counsel. It is correspondingly difficult to study the history of the law of evidence. When it is added that law reporters seldom troubled themselves with criminal cases and that trials of facts in civil cases seldom attracted them once the pleadings had been settled by the court, we can see how great a blow has been struck by this fiction at the orderly study of legal history. The idea that civil juries knew the facts in advance led to the peculiar procedure of attaint by which an unpopular verdict could be treated as some kind of perjury.[19] The criminal juror escaped this treatment, but not on the rational ground that he was trying to decide on the evidence but on the equally grotesque fiction that he had been voluntarily chosen by the prisoner as a form of proof—that the prisoner had "put himself on his country"—and that (though the logic of this now escapes us) he could not then object to the results of the proof selected. We may compare this with the similar rule in wager of law in civil cases, that if any of the oath-helpers stumbled over the ritual the person "helped" stood "confessed" as in the wrong.

The important change from oral to written pleadings in superior courts was another development with devious origins. Holdsworth shows us how it was first used by men unable to afford counsel or where counsel refused to accept their statements as fact and would not "aver" them to the court.

The substantive criminal law has manifested several examples of changes in law by peculiar means. Thus we are having difficulty today in drafting a generally acceptable law of homicide, but this is the more understandable if we recollect that our common law did not start with a positive hierarchy of offences but with a general strict rule that killings were felony. If a killing were purely accidental it was necessary to sue for a free pardon; if

18 *Ibid.*, p. 342.
19 *Ibid.*, p. 248.

it involved some measure of guilt such pardon would involve a fine or a period of waiting in prison. At one time the Crown was prone to excuse even what we should now call murder, if the subject was willing to serve in the royal forces or had done some service in the past. Parliament found it necessary, in order to protect the public, to curb the royal generosity and deny the right to pardon the most serious types of homicide. Hence our law was built up haphazardly from conditions of pardoning and not pardoning, and we have not been left by our forebears any really logical constructive principle.[20]

A crime which has wholly changed its content is blasphemy, which began as a weapon of the Church against dissent and has with time been changed into a form of prevention of public disorder, protecting all beliefs, even those inimical to the Established Church, from provocative, intemperate attack.[21]

Benefit of clergy was widely used to protect first offenders in former times. It began as a true means of protecting priests from the lay power but subjecting them to expulsion from the Church for the future. By allowing any man to "claim his clergy" by reciting a set passage of Scripture this institution became a general means of law reform. As a reaction, Parliament enacted that certain heinous offences should be "without benefit of clergy".[22] Although the benefit has long since been abolished the "allocutus" after conviction, where the accused is asked if he can state any cause why he should not be sentenced, still lingers on to embarrass prisoners and judges.[23]

There are few subjects today on which lawyers are so divided as the subject of punishment—whether it is useful, and, if so, what forms it should take. Here again we suffer from the absence of any consistently developed legal historical background. At common law crimes were generally capital, except for petty offences punishable locally or by magistrates. Imprisonment was conceived of purely as a system of safe custody on remand before trial. It is said that the idea of imprisonment as a form of sentence was borrowed from the law of the Church, which confined offenders in some place of retreat in order that they might quietly consider their sins and have time to repent. As capital punishment declined, its place was for a long time taken by transportation

20 *Ibid.*, p. 367.
21 *Ibid.*, p. 371.
22 *Ibid.*, p. 361.
23 Omission of the "allocutus" is no serious error in procedure: The Canadian Criminal Code (1953-4), 2 & 3 Eliz. II, c. 51, s. 575 is similar.

of convicts to the colonies. When this practice was discontinued the law was left, at a relatively late date, to find another substitute, and the rather unimaginative and ineffective prison sentence was the result. When we add to this the mechanical, mathematical approach to sentences, measuring out punishments in doses of more or less years, we cannot fail to see how badly this part of the law compares with many of its happier and more convincing sections.

Passing to the field of tort, an interesting and often neglected phenomenon is the transformation of items of damage in one action into independent forms of action, e.g., the tort of intimidation out of special damages in trespass to land for intimidation of the occupier's servants or tenants.[24] And an element of a tort might become a tort, e.g., the hostile attitude or "insult" which made a battery tortious was turned into an independent tort of assault.[25] We know today how the element of "negligence" in various torts has become a tort of negligence in itself, and how the submission of conduct to the test of the view of the "reasonable man", probably originally due to the incompetence of the defendant to testify as to his real state of mind, has become an avenue of broad judicial legislation.[26]

The law of defamation has undergone curious changes in content, which may account for its somewhat unsatisfactory nature. An old writ lay at common law where several persons conspired to indict a third person for a crime of which they knew he was innocent.[27] Out of this writ two variant writs developed, one against a single person for procuring an indictment (the tort of malicious prosecution)[28], and the other for false accusation of an indictable crime, whether or not prosecution followed.[29] In the background lay a statute which prohibited the ecclesiastical courts from punishing persons who promoted the prosecution of criminals, even if the accusations were unjust.[30] Early defamation cases concerned oral slander which imputed a crime, generally theft. Yet modern defamation is generally in writing and covers an immense range of imputations, that of direct theft being today fairly uncommon. Because imputations of crime required no proof of special damage and this rule was extended to all cases of written

24 Potter, *Historical Introduction to English Law*, 4th ed., p. 444.
25 *Ibid.*, p. 381.
26 *Ibid.*, pp. 390, 440.
27 Kiralfy, *Action on the Case*, pp. 117, 122.
28 Holdsworth, *History of English Law*, vol. 3, p. 406.
29 Potter, *Historical Introduction to English Law*, 4th ed., p. 434.
30 (1326-7), 1 Edw. III, st. 2, c. 11.

defamation, English law never developed any consistent theory of damages in libel, and awards differ extraordinarily and disturbingly.[31]

In the field of commercial law a notable development has occurred with respect to bills of exchange and bills of lading. Originating as evidences of transactions these took on proprietary characteristics. Bills of exchange first became popular to avoid the risk of loss or theft of money, but they came to be a common method of extending commercial credit, relapsing into relative unimportance in recent years as other financing methods developed, and completing a full circle in the popularity of the cheque, itself desirable because it avoids the need to carry large sums of money.[32]

The law of contract is marked by several cases of adaptation. It appears clear to me that Lord Mansfield had considerable insight into the real springs of our law of contract, when he considered that seals and consideration were matters of evidence. Research tends to show that this was originally true. Early records of the sealing of contracts refer to this procedure as providing testimony and not as a formal ceremonial.[33] The growth of literacy passed unnoticed by the law, and seals continued to be demanded long after they had become antiquated in every-day life. Though the legal requirements could be satisfied by the mere letters "L.S." or by indentations or creases.[34] In favour of the view that consideration was also evidentiary is the fact that it first appeared in connection with certain tortious claims for negligence and that consideration has quite disappeared in this field in modern times.[35] That the lawyers of the great creative age of simple contract were confused as to the principle, if any, underlying consideration, appears from their readiness to follow any false god, be he cause, benefit or damage, according to the vogue of the moment, or to combine all these ideas in their pleadings.[36] Even *Pinnel's* case, the great authority on consideration, was a debt action and not an assumpsit action, and can be explained in terms of the peculiar

31 A good solution is The Libel Act and Slander Act of Ontario (1958), 6 & 7 Eliz. II, c. 51, s. 5(2) which limits claims against newspapers or broadcasters to actual damage.

32 Holden, *History of Negotiable Instruments.*

33 Pollock & Maitland, *History of English Law,* vol. 2, p. 220, n. 1; Kiralfy, *Source Book,* p. 180; Potter, *Historical Introduction to English Law,* 4th ed., pp. 457, 478.

34 *Cf.,* Cheshire & Fifoot, *The Law of Contract,* 5th ed., p. 19.

35 Potter, *Historical Introduction to English Law,* 4th ed., pp. 473, 476, 478.

36 *Ibid.,* pp. 474, 475.

common law conception of the solidarity of a debt, without resorting to the doctrine of consideration at all, e.g., if a debt of £50 was claimed and £49 was proved to be owing the plaintiff-creditor at one time lost his claim![37]

Deceit is an idea which has been put to varying uses. We first find it used for certain abuses of litigation, like impersonation in legal proceedings. It is then used as a "bridge" by which to make mere failure to perform a contract actionable, treating it as a positive wrong and providing an alternative explanation to "breach of an informal covenant". Having provided a pretext for the enforcement of simple contracts, it is dropped from contractual pleadings and emerges as a modern tort based on representations of fact and not intention! I say nothing of the ramifications of the further refinement, equitable (or inequitable?) fraud![38]

The law of persons bristles with examples of changes in the function of institutions. One example is the extension of the age of 21, the age at which a man could attain knighthood, to majority in all sorts of situations, whereas originally full age was attained at various ages for various purposes.[39] The fatal attraction of aristocratic privilege accounts for another very typical feature of the old common law, the principle of primogeniture, which gave all lands on intestacy to the eldest son of the last owner.[40] There may have been an economic justification for this rule in early feudal times for the aristocracy, but its extension to all forms of land tenure is less convincing, granted that the fragmentation of farms is undesirable.

Marriage in more pious times than our own could be constituted by mere cohabitation with marital intent, and the religious ceremony was merely proof. Yet, in the teeth of scholarly opposition, modern courts have held a religious ceremony or a statutory substitute, essential and the "common law marriage" has practically disappeared everywhere.[41]

The wide powers of a husband over his wife's property were typical of the classic common law approach until the 19th century reforms, yet legal history shows that he gained his powers over

37 *Ibid.*, p. 480.
38 *Ibid.*, pp. 428, 463, 465.
39 *Ibid.*, p. 639.
40 *Ibid.*, p. 557.
41 *Ibid.*, p. 219; the law is now statutory: In England see The Marriage Act, 1949, 12, 13 & 14 Geo. VI, c. 76; in Ontario, see R.S.O., 1960, c. 228.

her land as an extension of purely administrative powers, and over her goods as a result of a confusion as to the relative spheres of royal and church courts.[42] The important law of guardianship began as a protection for the guardian and gradually changed into a protection for a ward.[43]

The legal profession itself has changed its functions considerably. The "attorney" was at first a local agent who could save his client trips to the courthouse, and whose main feature was an ability to make binding admissions or stipulations or approve final pleas in his name. The barrister was an eloquent and amateur friend who undertook to plead for a less articulate litigant. Yet as early as the end of the 13th century the two branches of the legal profession had assumed a professional character, with specialized training, and with strict admission controlled by the judicial bench. The Englishman may well regard these two professions as inherently distinct, but in North America they have tended to fuse, so that the same man may belong to both, without, however, quite destroying the division into advocates and office lawyers, as a matter of pure practice.

In conclusion we might mention the Parliamentary bill. This was first formulated by a subject with a grievance, and pressed upon the attention of the Crown. Then formal bills were drawn up in the same way. Today almost all legislation proceeds from the Crown and is drafted by permanent staffs employed for the purpose.

It is difficult to draw any universal conclusions from a study which has ranged over so many areas over so many centuries. The explanation for the evergreen character of various legal institutions may lie in the caution of the judges, the desire to appear to be dealing with the familiar and commonplace, and also, in part, in a genuine gradual change in the understanding of some institution. My own predilection is for the first of these two alternatives. I feel that lawyers and judges have been at all times acutely aware of the needs of the moment and of the serious limitations on what was possible under the law. They have been quick to grasp the opportunity to remould existing institutions to achieve new purposes. Indeed they may well have felt that these institutions, e.g., deceit, wardship, breach of the peace, venue, were in some Platonic sense inevitable, as the Roman lawyer struggles to fit new types of business arrangements into the

42 Holdsworth, *History of English Law*, vol. 3, p. 526.
43 Potter, *Historical Introduction to English Law*, 4th ed., p. 640.

"numerus clausus" of the classical Roman contracts. At the same time they have never felt their incidents to be sacrosanct, and have taken the most remarkable liberties with their substance.

Be this as it may, I hope that I have established that, alongside the avowed work of legislative law reform, a great body of reform has been achieved by the courts, often with laudable conscientiousness and always with becoming modesty.