

DEPARTMENT OF LAW

UNIVERSITY OF PENNSYLVANIA
LAW REVIEW

AND AMERICAN LAW REGISTER

FOUNDED 1852

VOL. { 58 O. S. }
 { 49 N. S. }

APRIL, 1910

NUMBER 7

THE CONTINUITY OF CASE LAW.

In the last days of February, 1909, the Supreme Court of the United States was delivering an opinion in the case of the "Folmina," new steel steamship of the latest type, whose cargo of tea had been damaged by salt water. The august Court was sitting in that city which one hundred years ago had been but little more than a wilderness, half morass, half scrubby woodland, with the crude buildings of the new nation rising here and there, separated from each other by long stretches of the desolate waste. Servants of a new nation, members of a court which counted not much more than a hundred years of active life, they sat there representing the latest phase of the judicial development of the world, to expound the law as they found it to be in the latest year of the republic.

The case which they were considering was not in any way remarkable; it was in fact a very ordinary case with no especial elements of interest. A very practical case, however, a matter of damages and dollars—words potent for the exorcism of the unpractical and the ideal—a case, therefore, quite to our purpose. But even in the year 1909, in the city of Washington, it is the habit of the court in formulating its opinion, to rest its reasoning upon the principles propounded in previously decided cases. Mr. Justice

White delivered the opinion in the case, deciding in regard to the chief point that, "When goods are received in good order on board of a vessel, under a bill of lading agreeing to deliver them, at the termination of the voyage, in like good order and condition, and the goods are damaged on the voyage * * * the burden lies upon the carrier to show that it was occasioned by one of the perils for which he was not responsible." A modern enough matter, any day might—most days do—bring such cases up to the bar of some one of our numerous courts for decision. We have here, in fact, an everyday case, on an everyday business matter, not calling for the enunciation of any new theory, for any unusual analytical examination, or for any exceptional depth of reasoning; a case treated as hundreds of such cases have been treated before.

As has been said, the decision followed the reasoning of previously decided cases. Among the cases followed was that of the *Niagara*, 21 How. (U. S.) 347 (1858). This case in turn relied on *Rich v. Lambert*, 12 How. (U. S.) 347, (1851) which leads us for authority to the case of *Forward v. Pittard*, I. T. R. 27 (1785). Through the medium of this very well known case we reach, in the arguments of counsel and in the decision itself, citations to a great number of the old law reports, and it also takes us to the famous case of *Coggs v. Bernard*, 2 Ld. Raymond, 909 (1704), in which Lord Holt set forth with all the learning at his command, not only the precepts of the Common Law, but those of the Civil Law as well. Lord Holt, in his opinion, after giving to the consideration of the case much of his wisdom and learning, said: "I have said thus much in this case, because it is of great consequence, that the law should be settled in this point, but I don't know whether I may have settled it, or may not, rather, have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle." No wiser head seems as yet to have stirred the point to any successful issue with his decision, and the case of the "Folmena," steel steam-

ship of the modern type, was decided in agreement with the cases from the Year Books upon which Lord Holt founded his opinion in *Coggs v. Bernard*. Thus, in this case which we have just followed from 212 U. S. to the seventh year of Henry the Sixth, we find ourselves consulting the pages of the Year Books to find a foundation stone of one branch of the law upon which its legal structure rests today. Take away that foundation stone, and we have the case poised in mid-air, resting upon opinions which in turn rest upon nothing. Not that there is any magic virtue in the name of "Year Book;" not that all legal principles had their beginning in those volumes; not that there is no new law; that there are no modern theories of a vigorous and healthful type; nothing so foolish. But the virtue of the Common Law lies in its oneness with the common life. Beyond all other systems of law it has the virtue of being bone of the people's bone, flesh of their flesh. As the civilization of today has grown out of the civilization of those centuries in which the cases reported in the Year Books were decided, so the law of today has grown out of the law of that day. There has been no break in the steady line from one to the other. In those centuries covered by the decisions of the Year Books, the English were building up a people; a people which should become a dominant people; who should greatly change the face of the earth. Gradually they were producing yet another race, who would not be content with the limitations, physical or mental, of the British Isles, and out of whose dissatisfaction with those limitations should come new peoples, who would inaugurate a new civilization, and administer under new conditions that old law in which they had been trained, and which they were to develop. But, as there was no break in the continuity of the civilization, so there was no break in the continuity of the law. Today the voices of those old judges speak to us from the most modern of tribunals, and the principles which they then enunciated are the principles upon which we base the reasoning of our courts. They are immutable principles in many cases certainly, always new, yet always old; but

somewhere there must originate a certain accepted statement of such opinions; somewhere there must be shaped the first formula which is to guide the future action; and in our law these statements were first made, and these formulas first set forth in those books which we call the Year Books.

We have traced a case back from the new to the old; let us reverse the process, taking a case from the Year Book of 19 Hen. VI. 49, pl. 5 (1441). It is a case often quoted, and for many points, but it is not in any way a unique case. It is nearly five hundred years in point of time from our American case, and fairly illustrative of the old law.

In the nineteenth year of the reign of Henry the Sixth, of England, over fifty years before the discovery of America, the Court was sitting at Westminster. It was an interesting court. There was Paston, of the family made so well known to us by the letters, who had been made a judge in early life, and who was nearing the end of a judicial career which, although apparently not without fault, yet had brought to him the name of the "good judge." Sir Richard Newton was the Chief Justice, a Welshman by birth, a man whose predilections toward privilege weakened the weight of his judgments. But, no questions as to the rights of the Crown arising, and all the debate being as to the rights of persons of low degree, he may be pictured as bored, perhaps, but willing to lend a condescending ear to the plea of either plaintiff or defendant as the case might be. Counsel were of an even more interesting character. There was Fortescue, only a serjeant at law now, but in the next year to be raised at once, without preliminary steps to the Chief Justiceship of the King's Bench. We may well listen to our serjeant with attention. He will not only be a Chief Justice very soon, but he will write that great book of his, and come down all the centuries and sit in spirit on the bench with the great chief justices of this latter day, as counsel cite the arguments he once used so skilfully. Markham, who was opposed to Fortescue, was

still a serjeant, but he too was soon to be raised to a seat on the King's Bench, where he was to "suffer for conscience sake" and to earn the name of the "upright judge." Interesting men, all of them, and men of a mentality sufficient to make either argument or decision of theirs of value.

The case before them came up on a writ of trespass, and it was "well debated" for they were all keen-witted men, not over willing to yield a point. Paston and Fortescue had the best of the argument, however, as well they might. Paston warning Markham that he had not made his farrier a "common farrier" and that unless he did this his plea would be of no avail, and Fortescue arguing that the assumption of the risk (most modern sounding of phrases) was the cause of the action. Markham at last was driven to "impari," so they probably agreed, when safely beyond the sacred bounds of the court, on the precise points on which to come to issue. Or else Markham's farrier, not being a common farrier, did not care to face Paston's decision, after his remarks from the Bench, and so Markham and his client vanish from the records of the court. Not so the principles for which Fortescue contended and Paston decided. Today in nearly every well known case of carriers the case of *Coggs v. Bernard* will be cited either by counsel or by the court, and in citing that case this Year Book case of ours is referred to, as it was cited by counsel and referred to by Lord Holt in that case. Lord Holt might have been inspired to "stir these points," but it is very doubtful if he could have convinced his contemporaries by the mere force of his inspiration without the use of that authority which he collected from the Year Books. From those books we step to the case of *Coggs v. Bernard*; from that case into every ramification of the law of bailments and of carriers. To be specific we can trace our case of 19 Hen. VI, to *Coggs v. Bernard*; from that case to that of *Clark v. Barnwell*, 12 How. (U. S.) 272, (1851), through this case to many later cases in the United States Supreme Court, and, by use of the same process, through all the courts of all the States.

Neither the modern cases which we trace back, or the ancient case which we follow into the modern world, are examples taken because of their adaptability for the purposes of the argument. They must serve because some example must be taken, but almost any case, taken at random from the reports, will be found to lead to the same result. It is not only easy to do it, it is impossible not to do it, if a brief is to be made with any sort of accuracy or depth of reasoning. The brief that cites so well known a case as that of *Forward v. Pittard*, may be written by a man who has no knowledge of the Year Books. But he has then put himself in the hands of an unknown power; he shows himself as dependent upon that case, and we have shown that that case is dependent upon the cases in the Year Books. If he knows only *Forward v. Pittard*, and must argue the case upon arguments deduced from it, he may find himself arguing against a man who not only knows that case but is familiar with the various arguments in the Year Books which led to the making of that decision. Should the point to be argued be a delicate one, can there be any doubt that the man who is familiar with the subtleties of those old debaters; who knows how the points were argued then; how they were settled and unsettled, and finally got shaped into that which is now the accepted law, will best be able to overrule the arguments, to distinguish the differences, to challenge the statements, which may be made in the course of the litigation. Which will win? The man with only a superficial knowledge, going only half way back, or the man with a knowledge that is thoroughly grounded in the sources of the law? But it will be said that the chances are that neither will ever have gone so far back, and thus one will be as well-weaponed as the other. The man who fights chance fights odds few lawyers have a right to take; and men have taken such chances and failed. Have we not the well known Girard will case to prove that the man who takes it for granted that he will not have an opponent learned in the older law, has thrown away the chances of his client in a blind reliance upon the

ignorance of that opponent? At any time, in any case, the same thing may happen, and it is increasingly more probable with every advance of knowledge, with every passing year that brings new students into the field. Take the case in *Henry Sixth* that we have been talking about. The case that led back to it was a case in which the responsibility of a common carrier was in question. The case in 9 Hen. VI was a case of trespass, and had nothing apparently to do with carriers, but had to do with the doctrine of the assumption of risk and with the holding forth as a common carrier. The principles there stated were carried over into the law of carriers, or rather, the principles in the case of a public farrier and a public carrier were recognized to be the same. A man unfamiliar with the Year Book cases, and not having the line of cases in his mind might say, but this is not a case of a carrier, and even if it were he was a simple carter, and here in this case of the "Folmena" we not only have a modern carrier, but we have the case of a great ship, and there is no connection between the two cases; the principles in the one cannot govern the other. But one who has studied the line of cases knows how and when the case of the land carrier came to be assimilated with that of the shipmaster. Sir Mathew Hale in *Coggs v. Bernard* says, "this is the case of a common carrier, common hoyman, master of a ship, etc. Which case of a master of a ship was first adjudged 26 Car. 2, in the case of *Mors v. Slew*." In that case of *Mors v. Slew*, as Hale spells it, it was strongly argued that the case of a shipmaster was not that of a common carrier, and "the Court inclined strongly for the defendant, there being not the least negligence in him," and Ventris in his first report. (Ventris, 190) would not have it that a verdict was given for the plaintiff, saving, "But since I've heard that it was compounded." But his later report of the case (p. 238) corrects that error, and it is correctly reported by Raymond (Sir T. Raymond, 220). While the law had undoubtedly been drawing toward that point ever since the first cases in which the carrier had been held liable under the theory of his common employment,

and his assumption of the duty to carry safely, yet in the argument it was possible to say, apparently without fear of contradiction, "there is no case of this nature in experience." But Hale, who finally delivered the judgment, decided it upon the assumption that the case of a master of a ship is the same as that of a hoyman, and the hoyman had already come into the class of common carriers, under the common law (Hob. 17). The hoyman being supposed to receive his payment directly from the patron, as the original carter or carrier did, that step was easy; it was only when it came to the master of a ship that it was argued by many, even by Maynard himself, that the case was different, for the carrier was paid by the owner of the goods, "but here the master is servant to the owner of the ship." But Ventris in his second report of the case when it came up before Hale, makes Hale answer this objection by saying, "The law takes notice of him as more than a servant * * * he is rather the officer than a servant." Thus Sir Mathew Hale answered the argument of Mr. Hole, counsel in that case, and so the law was established which today holds good in the court of last resort in the United States.

Another case in the law of carriers is that of *Inman v. Seaboard Air Line Co.*, (59 Fed. 960) decided in 1908. The case rests for authority, among other cases, on *Clark v. Barnwell*, 12 How. (U. S.) 272 (1850), which case cites *Forward v. Pittard*, 1 T. R. 27 (1785), which leads us to 3 Hen. VI, 36, and to many other citations from the Year Books.

If it is desired to trace a principle through the later cases to the older ones in other sub-divisions of the law, we may take a case in torts which supports the proposition that "an action lies against a person who wilfully and with intent to do harm, hinders another in the exercise of his lawful right." We will take a case in Nebraska, *Lowe v. Prospect Hill Cemetery Association* (58 Neb. 94, 1899), a recent case in a sufficiently modern community. Counsel cite one hundred and twenty-five cases, thus showing their belief that the law is founded on precedent. Among the authorities thus

cited is the *Earl of Ripon v. Hobart*, 3 Mylne & Keen, 169, in which the judge (p. 181) cites for authority Hale, in a note to Fitzherbert's *Natura Brevium* (181, n. B.) which note is founded on 13 Ed. III, a Year Book case.

In contract we may take the case of *Rann v. Hughes*, supporting the proposition that "a promise not under seal does not form a ground for action unless supported by a consideration." The case is given as a leading case in Volume Six of the *English Ruling Cases*, and the first words of a note to the case are "This rule has been established by numerous cases from the Year Books downward." The citations lead from the modern cases to *Levinz* (3 Lev. 403) to the Year Book of the first year of Hen. VII.

It may be said that these cases are cited to support fundamental, or elementary, principles of the law, and therefore they necessarily lead back to the foundation or fundamental cases. But to have taken cases upon some fine point, or insignificant branch of the law would have been to give point to the objection that only in such cases would one ever be under the necessity of reverting to such archaic instances. It would have been quite as easy and perhaps even more interesting to follow the finer point, the more slender thread, but it would not have shown that the high road and the beaten track still lead to the fountain head. But if there has been given no case of a telegram or a flying machine—things it is granted were unknown to the leaders of the bar in the days of Henry VI, yet the law of the telegraph is founded upon the law of contract, and in regard to the flying machine it may well be that we shall soon be appealing to the principles of the ancient law of real property and its doctrine of ownership in land giving rights to the uppermost heights of the unfathomed spaces above us. Shall a man who abhors racing be obliged to witness monoplanes racing through his ether, while from pursuing biplanes drop the phrases of the rack track and the betting pool? Can the owner of lands, or can he not, enjoin the offending aviator from keeping the sunshine from his melon patch, and the balloonist from sanding his strawberries? In a case of

first impression we do not go to the recent law reports. Why should we seek what we already know to be a barren field? We must first know what the Common Law said long since, if not on the new subject, at least on subjects in which a similar principle may be expected to have ruled. And where do we go for that law? We go to the commentaries, the treatises, the digests and the abridgments. And do not their references lead us most surely to the Year Books?

The modern lawyer may not know a word of old French; he may never have opened a Year Book; he may not be able to trace a citation through the mazes of an old abridgment; he may not care for the old law, but may care only for "the practical side" of the law, as he calls it, and the latest decision fresh from the judicial pen. Not the less is he dependent upon the older law. He can no more get away from it than he can get away from past history, past development in all the other surroundings and conditions of his life. When he goes into court and talks about an assumpsit he speaks as the men of old spoke. What is an action but the thing they shaped? Where are the roots of those doctrines he—glibly or painfully as it may be—recites before the court? Why does the court support or refuse his presentation of them? The court has to know if he does not, or if—supposing the impossible—the court does not know, it must borrow the knowledge somewhere. How could Justice White decide as he did in the case of the "Folmena" without Molloy and Bacon, and the case of the "Niagara"? And whence did they get the wisdom to help him? How could Hale make his decision in *Morse v. Slue* without his Year Books, and how could we get on without that case, and the case of *Coggs v. Bernard* and *Pittard v. Forward*? The weathercock on the vane may feel vastly superior to the ancient stones beneath him, but there would be small glory for him should the stones be moved from their foundations.

But we must not only go to the foundation, we must be sure that our foundation is as broad as it should be, and

that the stones are all in place. In the older abridgments, in Statham and Fitzherbert, we find many citations to Year Books which have never as yet been printed, which still remain buried awaiting their resurrection through the printer's art. The cases in them are of the same authority as those upon which we have for so long been founding our law, and the older writers had access to them in their manuscript form. It seems a disgrace that there can still remain unprinted, practically inaccessible, sources of the law so valuable, so apparently priceless that it would seem that they would have found their place in the world of learning many and many a year ago. And more than this, the edition of the Year Books from which most of us have to obtain what knowledge we have of them, is an edition which has never been collated and corrected by comparison with the manuscripts which are so abundant, and which would afford a means by which we could complete, correct, and clarify these old editions of ours; these most important, most fundamental portions of our case law.

The thoughtful lawyer, the skilful practitioner, the student of the law, all need, and should demand, that in this latter day, this day of discovery and enterprise and initiative in all other things, they should have set before them not only a new edition of the already printed Year Books, but that all the unprinted Year Books should be given to them, in some such form as that in which Mr. Maitland gave to the world his translation of that portion of the Maynard, or oldest of the Year Books, which he was able to complete before his death. Or if not in so ideal a manner, yet in some correct and complete form, they should be given to the world; the world which never at any time has too much knowledge, and which cannot afford to forego the benefit which would come to it from such a source.

It is not because the letter of the law stands written out in these old books that they alone are valuable. Not too much stress must be placed on authority. The dead hand of the past must not be laid too heavily upon the quick brain of the living present to chill it into inactivity. But the vivid

life of today must send its roots down into the depths of the past to draw thence the strength and the vigor which shall give it, not the frail and freakish beauty of the air plant, but the splendid strength of the oak and the magnificent virility of the poplar, which towers above its fellows of the forest, stronger, straighter than them all, yet bearing upon its branches the most delicate, the most exquisite of flowers. So should the modern tree of legal learning be. A giant with roots grasping firmly the good earth from which it grows, with branches gaining from every source of sun and air a liberal life, and in their midst the flowering of that pleasant wisdom which while it is the chief adornment of the tree, is also the seed vessel from which shall spring the yet grander tree of future times.

M. C. Klingelsmith.