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ESSAY

THE REALITY OF CONTRACT IN ENGLISH LAW

Geoffrey Samuel*†

One of the great similarities between English and Roman law is said to lie in the fact that both systems concerned themselves with remedies rather than rights. In Roman law this emphasis is perhaps reflected in the lack of concern for a general law of contract; for the common lawyer, the emphasis is reflected in the lack of a general theory of tort. This is not to say that each system did not develop any general principles: the Roman concept of bona fides is perhaps one of the great legacies of their law of obligations, and Donoghue v. Stevenson undoubtedly represents a rallying point for the common law in respect of personal injuries. However, both systems being keen to develop their law through the decision or discussion of concrete factual situations, there is in both a concern with the nature of the plaintiff's claim, rather than—as with many modern civil law systems—a preoccupation with notions of rights and duties. Thus to emphasize English law's general theory of contract is perhaps to conceal the varying nature of possible claims in a contract action.

Accordingly, it will be the aim of this essay to examine some leading contract cases from the angle of the nature of the plaintiff's claim,
as opposed to the traditional standpoint of contract as a promissory obligation. In this way certain historical—but, hopefully, still more than relevant—preoccupations of the common law may become evident. Also by highlighting focal points that form the substance of what we would today call contractual actions, it may be possible to identify certain dialectical tensions between form and facts long thought to have been confined to the grave with the demise of the forms of action. Furthermore, by investigating the substance of a plaintiff’s complaint it may be possible to expose the foundations of contract (and tort) liability which, unlike those of Mr. Ann’s house, may prove to have more depth and cohesion than many post-laissez-faire judicial architects give credit.

I. ROGUE MALE

Having advertised their Renault Dauphine for sale, the Ingram sisters were visited one Saturday in August, 1957 by a talkative gentleman caller who claimed to live in Surrey but have family connections in Cornwall. He expressed great interest in the car and gave his name as Mr. Hutchinson. After a vociferous test drive, the sisters agreed to sell the vehicle for £717; however they became distinctly icy when the visitor produced his cheque-book. In order to placate them, the man announced that he was in fact the Mr. P.G.W. Hutchinson of Stanstead House, Caterham—a gentleman with important business interests in Guildford. Discovering from a telephone directory that such a character existed, the sisters accepted his cheque and handed over the Renault; unfortunately the visitor was not the gentleman of substance he claimed to be and by the time the sisters discovered this fact, ‘Hutchinson’—or ‘Hardy’ as he subsequently called himself—had disposed of the car to a bona fide purchaser, Mr. Little.

The sisters traced the Renault to Mr. Little’s possession and sued him in detinue and conversion for its return or value. The trial judge and majority of the court of appeal allowed the sisters to proceed, expressing due sympathy to the unfortunate Mr. Little by way of compensation. The reasoning of the majority was centered on the contract between the Ingram sisters and ‘Hutchinson’; if a valid agreement had been concluded then title would pass to the rogue and in turn he could give title to Little. If, however, because of a fundamental mistake of identity, a contract had not been concluded, then no title could pass.

and the swindler would not be able to furnish Little with good title under the principle of *nemo dat quod non habet*. Accordingly the judges, no doubt on counsels' advice, preoccupied themselves with the conceptual wrangles about mistake of identity in the law of contract.

It is not surprising, therefore, to find that English lawyers usually treat *Ingram v. Little* as a contract case. It appears in the law reports and textbooks under the heading of mistake or offer and acceptance; and the Law Reform Committee seemed little interested in questioning this analysis other than to recommend that the contract between the Ingram sisters and the rogue should have been voidable rather than void. A point now accepted—if it had not already been so—by the common law.7

However such an analysis would surprise a Roman lawyer. His attention would be focused not on the relationship between the Ingram and the rogue, but on the connection between the sisters and the car. To the Roman lawyer the case would be one of property rather than contract. Unfortunately when the common lawyer thinks of property it conjures up a feudal image of land—and all its legal entails—with little thought given to chattels, which tend to be relegated to other divisions of our legal system such as tort, sale of goods and hire-purchase. The key to the Roman lawyer's understanding of *Ingram v. Little* would be the plaintiff's actual claim, which was of course tort, namely conversion and detinue. And these actions are not really obligation remedies at all—a point emphasized by the fact that damages are measured by the value of the chattels, behaviour being irrelevant—they are much closer to the old Roman proprietary action of *vindicatio*.9

The failure to appreciate *Ingram v. Little* as a property case can have practical, as well as academic, repercussions. Very little, if any, attention was paid by the judges to the law regarding the passing of property in chattels; it was assumed that the conveyance stood or fell with the contract. But if contract is vital to the property position, how can title to goods pass under any defective contract? Yet the Privy

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8. T. WEIR, A CASEBOOK ON TORT 393-98 (3d ed. 1974) [hereinafter cited as WEIR].
Council in *Singh v. Ali* had little doubt that it could. Perhaps a contract that has never been made is different from one that is defective only through illegality; a pity, though, that *Singh v. Ali*—with its suggestion that property can pass by delivery and intention—was not cited in *Ingram v. Little*. Much trouble and distress might have been spared to Mr. Averay if it had been.11

It should be evident now that the Ingram sisters' claim against Mr. Little was not itself a contractual claim; they were seeking, not damages for breach of promise, but the return of what they considered to be their property. Looked at from the plaintiff's point of view these identity cases themselves take on a new identity—from contract to realty.12

II. ESCAPE IN VAIN

Chattels are not the only items of property to which a plaintiff may lay claim; common lawyers have long recognized that a debt can give rise to a similar cause of action.13 Thus the old writ of debt was not at all unlike detinue; indeed, the two were originally the same.14

An advertisement in the *Pall Mall Gazette* on November 13, 1891, stipulated that the Carbolic Smoke Ball Company would pay £100 by way of reward to any person who contracted influenza after having used the company's inhalent three times daily for two weeks as per directions supplied. To indicate that this was no mere advertisement, the advertisement went on to state "£1000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter." Mrs. Carlill, believing both the health and the sincerity assurances, purchased one of the inhalents and used it as directed for the two weeks; the product proved ineffective and the company insincere. Hawkins, J. allowed Mrs. Carlill to recover the £100; an appeal by the company proved as ill-fated as their Smoke Ball.

It might be useful at this point to compare the plaintiff's claim in

12. The use of "realty" here is in the Roman sense, meaning property in general, including chattels.
**Carlill v. Carbolic Smoke Ball Co.** with that of Mr. Hobbs in *Hobbs v. London and South Western Railway Co.* The plaintiff, together with his wife and two young children, purchased tickets for the midnight train to Hampton Court; unfortunately the train wrongfully went to Esher instead. Because of the traditional British dearth of transport facilities after the midnight hour, the family was forced to walk the five miles home in the drizzling rain; the experience was so miserable that Mrs. Hobbs was laid up for much time with an illness not dissimilar to that experienced by Mrs. Carlill. Mr. Hobbs sued the railway company for breach of contract and succeeded, being awarded £8 for the inconvenience and £20 for his wife's illness and its consequences. On appeal to the Queen's Bench, the court held that the £8 was properly awarded, but the £20 was not—that damage was not to be contemplated by the railway company and, as such, they could not be said, in law, to be the cause of it.

Both *Carlill* and *Hobbs* are traditionally analyzed as contract cases; the plaintiffs were entitled to damages for breach of the defendants' promise. However it soon becomes obvious that the nature of the claims in the two cases are very different. The remedy sought by the plaintiff in *Carlill* was not unlike that of the Ingram sisters; both could be said to be claiming specific items of property. In *Ingram v. Little* it was the car or its value; in *Carlill* it was £100, no more no less. These claims are very different from the action for compensation in *Hobbs*, here the plaintiff was seeking damages for a loss arising out of the defendants' wrongdoing. In this kind of claim, as has been seen, the court will pay particular attention to the actual losses and their causes. The difference between the 'proprietary' actions and a damages claim can be found in history where, as Milsom points out, two simple ideas were at work—"the demand for a right and the complaint of a wrong." Debt and detinue—along with trespass—were old writs whose primary function was to protect property and personal rights; the preoccupation with compensation came with the rise of actions on the case in the fourteenth and fifteenth centuries. Broadly, then, the difference between a writ action and action on the case was that in "the latter damage was the gist of the action, in the former it was not." Thus it could be said

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16. *Id.*

17. [1875] *L.R.* 10 Q.B. 111.


19. For an excellent discussion, see *id.*, ch. 11.

that the difference between the claims of Mrs. Carlill and Mr. Hobbs is that the former was founded in the writ of debt and thus the actual loss suffered by her was irrelevant—while the latter was founded in case.

The modern analysis of Carlill and Hobbs still admits of some difference between them. The former case is termed a unilateral contract, while the latter is referred to as bilateral; the practical difference between the two is that “a unilateral contract of itself never gives rise to any obligation on the promise to do or to refrain from doing anything.” However, despite this contemporary example of analytical distinction, both cases are still seen today as compensation actions for breach of promise; the problem of relating Mrs. Carlill’s £100 to her actual loss is overcome by applying a rule of damages that a plaintiff in a contractual action is entitled to an expectation interest. In the words of Baron Parke: “The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.” Of course, the promise that is of importance in Carlill is the one for the £100 reward; the court of appeal was not awarding damages for breach of the undertaking that users of the smoke ball would not catch the flu (the defendants never promised that anyway). If the case had been based on breach of a promise of that nature (assuming of course that the advertisement was differently worded), then Mrs. Carlill would only have been entitled to her actual loss arising from being ill. In fact, such a claim might prove very beneficial to a consumer who has relied to his detriment upon specific advertising statements made by a commercial enterprise.

Promises, therefore, can relate either to specific items of property or money or to warranties as to goods or services. And it is the fact that many transactions can be loosely analysed into promises that allowed King’s Bench to subsume the old writ of debt within the rubric of trespass on the case at the beginning of the seventeenth century. In a

21. Levontin, supra note 13, at 86.
sense Slade's Case26—with its common denominator of promise—could be said to be the ‘Donoghue v. Stevenson’ of contract; and at this level of abstraction it is easy to make the transition from reality to obligation, as Carlill in fact shows.

The historical difference between unilateral and bilateral contracts is a difference between formality and consensuality. In understanding the concept of contract (in both English and Roman law) it is very necessary to see the part played by each. In English law, debt was a recuperatory action whose binding nature lay in its form; consent and agreement were of little relevance.27 And quid pro quo was not so much evidence of agreement as evidence of a proprietary transaction.28 With the rise of case, however, there was a shift in emphasis from formality to substance: questions of culpa, consensuality and so on, became of essence—and these were related directly to the plaintiff's actual damage. Thus, with the formal writs, the questions asked tended to be very mechanistic: Has the defendant directly invaded the plaintiff’s person or property? Is the defendant detaining the plaintiff’s money or property? On the other hand, with case, the question was more often whether the plaintiff should have a remedy for this particular damage?29 And this latter question would involve a consideration of several focal points: for example, the behavior of the parties, their relationship, causation, the type of damage, and so on and so forth. It was in case that the real law of obligations was forged; property and debt belong more properly to the formal writ system—although, of course, this is a much simplified picture. Broadly then, it might be true to say that as many of the classical unilateral contracts are debt cases, unilateral contracts reflect the old formalised writ system; while bilateral contracts are a result of case. A similar pattern can be found in Roman law, although Buckland and McNair point out: “As no general doctrine of consideration ever appeared it is not surprising that the formal unilateral...

26. Slade's Case [1602] 2 Rep. 91; 76 E.R. 1072. Of course, Slade's Case must be treated with a certain caution. See Baker, New Light on Slade's Case, CAMBRIDGE L.J. 51, 213 (1971). However, it is submitted that the decision nevertheless represents a useful local point for the judicial thinking of the time, even if the Chief Justice “Coked the books, so to speak. . . .” See A. Simpson, A History of the Common Law of Contract (1975) (reviewed by Duncanson in 39 MOD. L. REV. 741, 742 (1976)).


28. For a discussion of the relationship between the old notion of quid pro quo and the more modern idea of consideration, see Simpson, supra note 14, at 424. See also Milsom, supra note 18, at 293.

eral contract is more prominent [in Roman law] than it is with us."\(^{30}\)

It would be tempting to think that the problems of form and substance would—indeed, should—have disappeared with the demise of the forms of action. Unfortunately it is not so easy to bury five hundred years of legal introspection; at least, not without considerable murmurings from beyond the grave. In fact, it is this century that is bearing the brunt of judicial chain-rattling; and, while it is tort\(^{31}\) that seems, ostensibly, to be the grand Haunted Palace, contract can still find itself faced with historical spectres. *White and Carter (Councils) Ltd v. McGregor*\(^{32}\) is a case in point.

In *McGregor*, the plaintiffs were a firm of advertisers who received a telephone order from the defendants' manager to place advertisements of the defendants' business on local authority litter bins for a period of three years. The manager, it seems, had exceeded his mandate and the defendants subsequently wrote to the plaintiffs purporting to cancel the agreement. The plaintiffs, however, refused to accept the cancellation, went ahead with the advertising, and then sued for the contract price. A majority of the House of Lords allowed the plaintiffs to recover the debt, despite the defendants' argument that the plaintiffs ought to have mitigated their loss. “If one party to a contract repudiates it,” said Lord Reid, “the other party . . . has an option. He may accept that repudiation and sue for damages for breach of contract . . . or he may if he chooses disregard or refuse to accept it and then the contract remains in full effect.”\(^{33}\)

The House of Lords, by allowing the plaintiffs to recover the full contract price, were in effect paying no attention to the actual damage suffered by them; the issue was whether or not they should have ‘their’ money. Once again, the case was not really a damage action in the true sense, but an action for debt; and it was this difference of remedy that formulated the whole basis of the dispute before their lordships. From an historical point of view, the plaintiff was claiming in debt while the defendant was arguing that the action should be in case; only in the latter claim would mitigation—being a rule of damages—be relevant. *McGregor* comes very close to the kind of procedural dispute that would “gratify the ghosts of generations of special pleaders.”\(^{34}\)

\(^{30}\) *Buckland & McNair*, *supra* note 27, at 275.


\(^{32}\) [1962] A.C. 413.

\(^{33}\) *Id.* at 427.

\(^{34}\) To use the words of Diplock in Fowler v. Lanning, [1959] 1 Q.B. 426, 431.
III. Havoc by Accident

The original writ of trespass was an action protecting a person from direct physical invasion of his person or property. In the technologically unsophisticated society of medieval Britain, a good many invasions were of a direct physical nature and so the action worked tolerably well for a while. Nevertheless, the original writ had serious defects that were soon to become apparent as society developed—the injury had to be direct and little attention was paid to the plaintiff's actual damage. Rights, it seems, were more important than remedies. However, once trespass was freed from the limitations of directness, by the action on the case, the idea soon developed that one could not only invade by physical means, but also by words; the tongue being as mighty as the sword. It is not surprising to find, therefore, that traders who lied about their goods were as much wrongdoers as militant sword-rattlers. As Milsom points out, "Consumer protection is neither a modern invention nor an exclusively modern need." Law and economics were good partners.

Speech, however, is civilization itself. And so the problem arose as to which statements ought to attract the attention of the law. If the words complained of had been accompanied by an act whereby the plaintiff suffered his loss, then there was less of a problem. Thus, case remedies were soon available, for example, against the surgeon who said he would cure the plaintiff's horse, but who went about it so carelessly as to achieve the opposite result. The real difficulty was with the defendant who said he would do something but did nothing; his statement was accompanied by a nonfeasance rather than with a misfeasance, and here the law was faced with the old maxim 'Not doing is no trespass'. Nevertheless, the judiciary was able to overcome its fears of the metaphorical floodgates by accepting the theory that if the defendant did not do what he said he would do, this was tantamount to deceit. Thus trespass on the case was gradually extended to where it

35. Weir, supra note 8, at 253.
38. Milsom, supra note 18, at 276.
40. See Milsom, Not Doing is No Trespass, 1954 Cambridge L.J. 105.
41. See Kessler & Gilmore, supra note 1, at 27.
could be shown that the defendant had undertaken to do something for a plaintiff who in turn had reasonably relied upon this statement of intention, and had suffered damage when the defendant failed to keep his word. This particular action became known as assumpsit: and—as is well known—it is this remedy that paved the way for a general law of contract, as well as giving rise to the modern idea of a bilateral obligation.

Nevertheless, assumpsit's close association with what today we should call tort ought not to pass unnoticed. The main difference between trespass as a tort and trespass as assumpsit was in the focal point of liability: with the former it was the invasion that was of importance, with the latter it was the failure to act in breach of an undertaking. In assumpsit, the real complaint was that the plaintiff relied to his detriment upon the defendant's word; the wrong was not so much the actual invasion but the false statement by the promisor. It should come as no surprise, therefore, to find that assumpsit was originally closely associated with what is now the tort of deceit; and this association can still find itself reflected in contemporary cases, often causing difficulties.

It was not a great step to move from the notion of undertaking and reliance to the concept of promissory obligation. And such a conceptual analysis was convenient for the laissez-faire-ists who wanted a stable nucleus for commercial law as society had moved from static feudalism to mobile capitalism. The bilateral obligation, in effect, became the means of private legislation that the industrialists needed as an anchor. Law and economics were still good partners.

Nevertheless, the difference in emphasis, between the old idea of invasions on the one hand and promissory undertakings or obligations, on the other, can still cause difficulties. In Harbutt's 'Plasticine' Ltd. v. Wayne Tank & Pump Co. the plaintiff's complaint was that the defendants had wrongfully caused the destruction of their factory. The defendants had undertaken to install on the plaintiff's premises specialized equipment for storing molten stearine; the contract specified that plastic 'Durapipe' was to be used. The work was duly completed and

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42. See generally SIMPSON, supra note 14, at 250; KESSLER & GILMORE, supra note 1, at 28.
43. See MILSON, supra note 18, at 282.
44. See e.g. Hedley Byrne & Co. v. Heller & Partners Ltd. [1964] A.C. 465. (Is this a contract, deceit or negligence case?)
45. See generally F. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 100 (1950); KESSLER & GILMORE, supra note 1, at 1-15.
switched on for overnight testing; unfortunately, because the pipes were of durapipe—which was in fact unsuitable—the thermostat did not work and all of the plaintiffs' industrial premises were consumed in the ensuing fire. The plaintiffs, or at least their insurers, claimed from the defendants the cost of a new factory, together with consequential loss of profits, on the ground that the defendants were the cause of their loss in that they had impliedly promised that care would be taken in respect of the materials specified in the contract and used in the construction of the installation. This claim was successful despite a clause in the contract which purported to limit the defendants' liability to the amount of the contract price. 47

Difficulties arise if this case is approached from the classical contract point of view, for this view emphasises the promise(s) rather than the invasion. Thus the defendants never undertook to make good all loss arising as a result of their negligence; they only agreed (via the limitation clause) to compensate up to a certain figure. In effect, the defendants were putting up an argument that given the damage in issue, which fell within the limitation clause, they should only be liable for the contract price, for that is all they promised; their argument was, in one sense, Carlill in reverse.

If, however, Wayne Tank is approached from the old trespass (or invasion) point of view, the court of appeal's analysis makes more sense: the defendants' wrong had invaded the plaintiffs' property and so the former, it could be said, ought to pay for all the damage arising as a result of this negligence incurred by the latter. 48 From the historical angle, the plaintiffs were claiming damages for 'trespass', while the defendants were arguing that they had only agreed to pay a 'debt' not measured by the actual damage sustained, but by the contract price. Thus, to see Wayne Tank as a contract case in many ways confuses the issue; the judges were not interested in viewing the problem as one of contractual interpretation, they preferred to see it as the "invasion of a legal right". And it did not much matter if this "invasion of a legal right" was "by breach of contract or by the commission of a tort." 49 Of course, whether the court of appeal was right in adopting this approach

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47. Id. at 448 (Clause 15 of the contract which limited liability to £2,330).
48. One is reminded of Lord Salmon's recent statement: "It seems to me to be manifestly fair that any damage caused by negligence should be borne by those responsible for the negligence rather than by the innocent who suffer from it." Anns v. London Borough of Merton [1977] 2 All E.R. 492, 511.
in 1970 is another matter.50

IV. CAUSE FOR ALARM

In cases like *Hobbs* and *Wayne Tank*, the defendants did not expressly promise that they would not do what they did; such promises were implied by the law itself. In this way the common law is able to dress up rules of law to look as if they have been determined by the parties themselves, thus perpetrating the notion that contract is an obligation founded in the will of the contractors.51 If the courts are prepared to fill in the substance of an obligation once it has been created in abstract by the parties, it is not a great step for the courts to imply the actual obligation itself when they feel the need arises or when they want to give the plaintiff a remedy. This is what happened in *Upton-on-Servern Rural District Council v. Powell*.52

Mr. Powell awoke one night to discover that his Dutch barn was alight. Unable to directly summon what he believed to be the local fire brigade because they were not on the telephone, Mr. Powell rang the Upton police who in turn telephoned a garage that was close to the Upton fire brigade and asked for a message to be conveyed. The brigade arrived and spent much time and energy dampening the blaze. Some six hours later, a fire officer from the Pershore fire brigade appeared on the scene and informed the fire officer from Upton that it was in fact a Pershore fire they were tackling; nevertheless the Upton brigade battled on until daybreak, when Pershore took over. Mr. Powell's problems, however, were not extinguished with the fire, as Lord Greene M.R. pointed out:

> It so happens that, although [Mr. Powell's] farm is in the Upton police district it is not in the Upton fire district. It is in the Pershore fire district, and [Mr. Powell] was entitled to have the services of the Pershore fire brigade without payment. The Upton fire brigade, on the other hand, was entitled to go to a fire outside the area, and, if it did so, quite apart


52. [1942] 1 All E.R. 220; see Kessler & Gilmore, *supra* note 1, at 140.
from its statutory rights, it could make a contract that it would
be entitled to repayment of its expenses.3

Accordingly, the Upton fire brigade sent Mr. Powell a bill and, when
he refused to pay it, had recourse to the courts.

"The sole question here," said Lord Greene when the case went to
appeal, "is whether or not any contract was made by which the Upton
fire brigade rendered services on an impromise to pay for them made
by or on behalf of [Mr. Powell]."4 The court of appeal unanimously
held that there was an implied contract and that the county court judge
had been right in holding Mr. Powell liable for the cost of services ren-
dered to his barn by the Upton fire brigade.

From whatever angle one approaches Powell, it is a difficult case.
Looking at it via contract, it is unsatisfactory because there was plainly
no agreement between the plaintiff and the defendant; even the Ro-
mans—who were less individualistic about their contracts—were not
prepared to see this kind of claim as being founded on agreement.
From the traditional debt angle, the case is unsatisfactory because at no
time did the defendant promise, either expressly or impliedly, that he
would pay for the fire brigade's services; Mr. Powell, no doubt being a
good tax and rates payer, expected to receive these services free. Thus,
even from the quasi-contractual approach, it is difficult to see how he
was unjustly enriched.5

Part of the problem with the Powell decision arises from the belief
that debt actions are founded only upon contractual promise. Both in
Roman and pre-nineteenth century common law it was a perfectly ac-
ceptable principle that debt actions could also arise from unjust enrich-
ment; this was recognized by Lord Mansfield in 17606 and, more
recently, by Lord Atkin in United Australia Bank v. Barclays Bank
Ltd.7 The narrow view taken of debt in the classical contract era has
led lawyers to fail to take a global view of the problem in cases such as
Powell. As previously mentioned, even if Mr. Powell's liability is seen
as being based in indebitatus assumpsit, or quasi-contract, it is still un-
satisfactory because in no way was he unjustly enriched. In fact, the
party that benefited was, of course, the Pershore fire brigade and thus it
is they who should have been liable for the debt. However, because of

53. [1942] 1 All E.R. at 220.
54. Id. at 220.
55. KESSLER & GILMORE, supra note 1, at 142.
   CASES AND MATERIALS 5 (2d ed. 1966) [hereinafter cited as WADE].
the subjection of quasi-contract and the unjust enrichment principle during the laissez-faire period in favor of the implied contract theory, the debt action, especially outside the formal promise situation, became distorted. The plain truth of the matter then in Powell is that the wrong person got sued—the old common law would probably have had much less difficulty in allowing a debt action between the two fire brigades and, hopefully, so now would the common law.

Once again it is important to distinguish Powell from the compensation cases such as Hobbs and Wayne Tank. While the amount claimed by the plaintiff in an unjust enrichment action may not be quantifiable in quite the same way as was Mrs. Carlill's £100, the claim is, nevertheless, better seen as a debt action than as a damages one for "the defendant is withholding something from the plaintiff, of which he ought to make restitution." Thus debt should be seen as arising not only from a promise or transaction, but also from the principle of unjust enrichment. And here, of course, the remedies formulated by the Court of Chancery becomes central.

The relationship between contract and equity is not altogether a happy one. The bargain theory of consideration does not seem to warrant the expansion of promissory estoppel, and the development of recission as an equitable alternative in mistake cases could be seen by some as an undermining of the stricti juris approach to the making of these bargains. The main problem, again, seems to the attitudes fostered by the laissez-faire era of classical contract: broad equitable principles were too uncertain to be of use to the industrialists interested in using contract as a means of justified enrichment. Nevertheless, if contract is to be used as a legal method of enriching oneself, any hint of bad faith, mistake or undue influence is, as far as the equity lawyer is concerned, going to amount to profiting at the expense of another's ignorance or error. Although, of course, much depends on the status of the parties, landlords and multi-nationals could be seen as being

60. Lawson, supra note 20, at 76.

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able to take care of themselves. Thus the increasing influence of equity within the domain of contract is in many ways just a reflection of the revived influence of the old Roman principle that a person ought not to be unjustly enriched at another’s expense.

V. FINAL CURTAIN

The purpose of this analysis of some contract cases has been to try to show that such categories as ‘contract’ and ‘tort’ are of little help in understanding the way the common law tackles factual situations. The common law is not really a system that functions in global terms, thus to talk, as one Lord of Appeal has recently done, about contract being “part of the law of obligations” based upon the enforcement of promises, is elegant, but not illuminating. If any principle can be discerned, it is that the common law has tended to look at things through the eyes of the plaintiff: invasions of interests seems more accurate a description of the principle than obligations and duties. And this idea of interest is closely bound up with the concept and definition of ‘property’; debt, detinue, trespass, nuisance, and so on, are as much property writs as ‘obligation’ ones. Thus, much of what we might be tempted to call obligations could equally be classified under property rights. For the Roman lawyers, on the other hand, the obtaining of another’s property was to be distinguished from protecting one’s own, so their division of private law into obligations and property made more sense. Obligations signified a relationship between person and person, property—between person and thing. The English legal system, as Ingram v. Little shows, is not concerned with such abstract distinctions; rights and wrongs tend to be a result of the dialectical process between proprietary formalism and judicial activism—a process that operates at such a low level of abstraction that interpreters must have more sympathy for ‘impressionism’ than ‘classicism’. Thus, the transgression of one’s privacy is unlikely to be seen as a wrong until we see privacy as property (a right), then it becomes a ‘thing’ to be invaded. Translate an Englishman’s interest into a ‘house’ and the judges may treat it as a ‘castle’.

Accordingly, it might be more helpful if the common lawyer classified civil remedies with reference not only to the nature of the wrong (negligence, breach of promise etc.) but also to the type of claim (debt,

67. This seems to be an approach recognized by many American textbook writers on the law of tort, although some English authors are thinking this way now. See, e.g., H. STREET, STREET ON TORTS (6th ed. 1972).
damages, property) in issue. In this way the dialectical process between property and obligations becomes more obvious, and thus the aim and functions of particular areas of the law become more exposed. *Ingram v. Little* is in one sense not 'about' mistakes in contract; it is about who should have a particular car. The question that really needs to be considered is the function of the law of property in a consumer society, rather than the determination of when there is a contractual obligation. Failure to expose such issues precisely can cause trouble.68

But this essay is not meant as a plea for abolishing the distinction between contract and tort. Indeed, there is much sense in distinguishing the two; tort is about civil responsibility, while contract is about transactions. However, the contract and tort dichotomy should be seen as a signpost rather than a shackle; there are other remedies, as the Roman jurists noticed, that cannot be adequately accommodated within the two-fold classification. Thus when the Romans came to classify their laws, they not only categorized the causes of action, but also the nature of the claim; besides Property, Obligation, Persons, and Succession there was also Actions. By emphasizing both the form of the action and the substance of the claim, the Romans were able to coherently develop defences such as the *exceptio*69 (not that dissimilar from our modern estoppel) and claims neither tortious nor contractual, such as unjust enrichment. In America, of course, the concept of remedies is well known70 and perhaps this is one reason why unjust enrichment has gained acceptance.71 In England, despite the efforts of Robert Goff and Gareth Jones,72 the subject has still not been recognized by the House of Lords.73

Of course, a reclassification of the common law will not in itself solve the problems of legal categorization. It often only redefines the issues. What a remedies approach could achieve, however, is an alternative viewpoint to the normal causes of action classification which at the moment seems to dominate aspects of our jurisprudence. By emphasizing the form of the remedy as well as the cause of action, a legal system is in a better position to adapt and develop: thus Lord Mansfield

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69. See *F. Schulz, Classical Roman Law* (1951).


72. *Goff & Jones, supra* note 58, at 1-11.

in *Moses v. Macferlan*\(^\text{74}\) was not inventing a new remedy as such, he was just pointing out that a debt-action might well be available outside the promise situation. And Judge Denning in *Central London Property Trust Ltd. v. High Trees House Ltd.*\(^\text{75}\) was not making an inroad into the theory of consideration: he was just applying a different remedy—that of equitable estoppel—to contractual circumstances. Furthermore, if this double perspective of law is always kept in mind, it might be less difficult not only to distinguish restitution from tort,\(^\text{76}\) and equity from contract, but also to appreciate the boundaries between various torts. So, for example, the major difference now between negligence and nuisance in English tort law “lies in the nature of the remedy sought.”\(^\text{77}\)

Now that contract, it seems, is being rapidly destructured,\(^\text{78}\) it is necessary to pay more regard to the ‘deep structure’ of the common law. Hence an analysis that takes full account of legal history and the nature of actions should help in highlighting perennial principles. So, even if common lawyers do not know “what unlikely resurrection the Eastertide may bring”\(^\text{79}\) with regard to contract as a cause of action, we ought at least to be aware of how the common law operates at a more formal level. In this way we might have some kind of map to guide us through the contractscape in which we are now travelling.


\(^{75}\) [1947] 1 K.B. 130. See also Kessler & Gilmore, *supra* note 1, at 498.


\(^{77}\) Per Lord Denning M.R. in Miller v. Jackson [1977] 3 All E.R. 338, 343. His Lordship continued: “If the plaintiff seeks a remedy in damages for injury done to him or his property, he can lay his claim either in negligence or in nuisance. But, if he seeks an injunction . . . I think he must make claim in nuisance.”


\(^{79}\) Gilmore, *supra* note 78, at 103.