

LAW, LOGIC AND EXPERIENCE*

GRANT GILMORE†

ONE reason for the popular dislike of lawyers is that they do not think like human beings. No doubt there is such a thing as a natural aptitude for the study and practice of law: a remote detachment of mind allied with a passionate cantankerousness and a child's love for words. If you were not like that, you would not be here. And, assuming the natural bent of the twig, the lawyer's training progressively dehumanizes him until his remaining contact with the human race is tenuous indeed. The truth of the matter is that lawyers are, *ex officio*, the relativists of societies in quest of absolutes, and it is no wonder that they are disliked.

Law students soon learn that the legal constant is not permanence, but change. And we cannot too often repeat that the life of the law has not been logic but experience. But there was more than cleverness in Holmes' famous antithesis. If experience and change are the terms on one side of the equation, so logic and changelessness, or the quest for them, are the balancing terms on the other. We begin to be lawyers when we perceive that rules and doctrines are not, and are not meant to be, universals. Law is not something waiting to be discovered, to be brought down by a skillful aim or a lucky shot. But we do not become lawyers until we have also perceived that there is more involved than whim, caprice and random behavior; that there are patterns which make sense if we have the wit to see them; that, if we dig deep enough, we will find something better than chaos.

Earlier lecturers in this series have said substantially the same thing. To Professor Corbin, legal doctrines are "tentative working rules", tools for the solution of dispute and controversy, necessarily to be changed as the kinds of dispute and controversy which require solution themselves change. To Professor Northrop the positive law—the body of statutes and judicial decisions—is merely an expression of the "living law"—the culture in which we live—by which the positive law is determined and toward which the positive law strives. Thus each generation must refine the working rules which it has inherited and in each generation there must be achieved a new approximation of the living law.

I should like to suggest to you this afternoon some illustrations

* "The life of the law has not been logic: it has been experience." Holmes, *The Common Law* 1 (1881). This paper was one of a series of orientation lectures given to the entering class at the Yale Law School in October, 1956.

† Professor of Law, Yale Law School.

of the ways in which this process works itself out, the ways in which, with the aid of formulae which a logician would despise, we answer the problems posed by an experience imperfectly perceived. In most cases the process is a subterranean one, and those who are its architects and artisans are unconscious of what they are doing. We can look back and, with the vision of hindsight, determine that what was once demonstrably black has curiously become white. But even so we may be hard put to explain Why and our guesses may satisfy no one.

We can all agree that in the past hundred and fifty years there have been significant changes in the organization of the economy. I have in mind particularly changes in the kind of goods we use, changes in the methods of their manufacture, and changes in the methods of distribution. The simple artifact has given way to the mysterious—and expensive—gadget. The individual artisan has been replaced by the assembly line—which means not only mass production but standardization of product. The local market has become a national, continental market. Goods are no longer sold on a basis of individual dicker, for cash, by producer to user, but on established price schedules, often for credit, after having passed through the hands of a chain of independent distributors. These considerable changes, one would assume, must have occasioned equally considerable changes in legal doctrine. And the assumption would be correct. I shall describe the stages of such a change in the obligation imposed on a seller of goods for their quality—the law of warranty.

On hearing the ancient maxim *caveat emptor*, we all no doubt feel a pleasurable glow of recognition, as well as the comforting certainty that we have come upon a fixed point in the law. In truth, the proposition that the buyer should beware, for all its Latin dress, is of no great antiquity;¹ under the mediaeval guild system the rule was quite otherwise, and over the past five or six hundred years there have been not one but two distinct revolutions in the law of seller's responsibility for his wares. With *caveat emptor* we are already in modern times.

Specifically, in 1625 when the Exchequer Chamber heard argument in the case of *Chandelor v. Lopus*.² The case was that Chandelor, "being a goldsmith and having skill in jewels and precious stones, had a stone which he affirmed to Lopus to be a bezar-stone, and sold it to him for one hundred pounds." But, concededly, it was not a bezar-stone. On those facts Lopus had judgment in the

¹ See Hamilton, *The Ancient Maxim Caveat Emptor*, 40 *Yale L.J.* 1133 (1931).

² *Cro. Jac.* 4 (1625).

court of King's Bench. On appeal, however, "all the justices and barons (except Anderson)" held that there had been error:

"For the bare affirmation that it was a bezar-stone, without warranting it to be so, is no cause of action. And although he knew it to be no bezar-stone, it is not material. For everyone, in selling his wares, will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action."

We may pause for an instant to speculate on the solitary figure of Baron Anderson—a man so far in advance of, or, it may be, so far behind, his time. But there is a mystery in the case: in 1625 a hundred pounds was a considerable price to pay for a stone, however precious. A "bezar-stone" or bezoar-stone, the new Oxford Dictionary informs us, was "a calculus or concretion found in the stomach or intestines of some animals, chiefly ruminants, formed of concentric layers of animal matter deposited round some foreign substance, which serves as a nucleus". But the true value of a bezoar-stone lay in its magic, or, to use an equivalent term, its medicinal, properties: Application of the stone to the afflicted part would cure whatever maladies the flesh was heir to. "Everything that frees the body of any ailment," one commentator remarked, "is called the Bezoar of that ailment." And in 1618 the East India Company had reported exuberantly that "On the island of Borneo, diamonds, bezoar-stones, and gold might be obtained".

Now it is not clear from the report of *Chandelor v. Lopus* whether Lopus' complaint was that the stone he had paid a hundred pounds for was not "a calculus or concretion found in the stomach of an animal" or whether it was that the stone had not protected him against the plague. Presumably the latter, and, if so, the case should perhaps be restricted to its own peculiar facts. Even today the members of the medical fraternity are slow to warrant cures in advance and the courts reluctant to hold them liable in damages when they have failed to provide the proper Bezoar for the patient's ailment.

More than 200 years after *Chandelor v. Lopus*, Chief Justice Gibson of Pennsylvania—one of the great judges of the mid-nineteenth century—restated the law of warranty for his generation. Newman bought a horse from M'Farland, who allegedly warranted it as sound in all respects except the colt distemper.

"It was proved [according to the report of the case] that the horse had a defluxion from the nose at the time of the bargain; that M'Farland assured Newman it was no more than the ordinary distemper to which colts are subject; and that it had been of only a few days' continuance: whereas it was testified that the horse had exhibited

the same symptoms all the time M'Farland had him, (a period of ten or eleven months) and the evidence was very strong that he had an incurable disease called glanders. It was testified also, that the person of whom M'Farland had him, had passed him away as a glandered horse, or at least had refused to say to M'Farland that he was otherwise; that M'Farland had been told of the true nature of the disease by another person; and that he himself had said he feared it was, or would become something worse than the distemper."³

At trial, Newman had a verdict for \$75 damages—a result which was, in the opinion of the Chief Justice, speaking for a unanimous court, outrageous.

"[T]he common law courts [he said] started with the doctrine that though the sale of a chattel is followed by an implied warranty of title, and a right of action *ex delicto* for wilful misrepresentation of the quality; yet that the maxim *caveat emptor*, disposes of all beside. Thus was the common law originally settled; and the current of decision ran smooth and clear in the channel thus marked out for it, from the days of the year books, till within a few years past, when it suddenly became turbid and agitated; and . . . finally ran wild. The judges, in pursuit of a phantom in the guise of a principle of impracticable policy and questionable morality, broke away from the common law, . . . by laying hold on the vendor's commendation of his commodity, and not at first as absolutely constituting an express warranty, but as evidence of it. I say the policy of this principle is impracticable, because the operations of commerce are such as to require that the rules for its regulation admit of as few occasions for reclamation as possible; and I say its morality is questionable, because I am unable to discern anything immoral in the *bona fide* sale of an article represented to be exactly that as which the vendor had purchased it.

. . .

"The relation of buyer and seller . . . is not a confidential one; and if the buyer, instead of exacting an explicit warranty, chooses to rely on the bare opinion of one who knows no more about the matter than he does himself, he has himself to blame about it. If he will buy on the seller's responsibility, let him evince it by demanding the proper security; else let him be taken to have bought on his own. He who is so simple as to contract without a specification of the terms, is not a fit subject of judicial guardianship. Reposing no confidence in each other, and dealing at arms length, no more should be required of parties to a sale, than to use no falsehood; and to require more of them, would put a stop to commerce itself in driving every one out of it by the terror of endless litigation."⁴

Two comments. In the first place, Chief Justice Gibson was not, as you may have assumed, a conservative. He was, in his own day and age, a wild-eyed radical, a Jacksonian Democrat who had grown

³ M'Farland v. Newman, 9 Watts 55 (Sup. Ct. Pa. 1839).

⁴ *Id.* at 56, 57.

up on the western frontier.⁵ Secondly, it was clear to him that the law was already on the move, that the smooth and clear current of decision had become turbid and agitated and had finally run wild. The very violence of his language suggests that he knew he was, like many another radical grown old, speaking for a lost cause.

The heyday of *caveat emptor* covers a period of two hundred or two hundred and fifty years; few legal doctrines have lasted so long or, presumably, served so well. The basic idea seems to have been that in the typical case—and the typical case is all the law ever seeks to provide for—buyer was as well-equipped as seller to pass on the quality of what he bought. He had the opportunity to inspect and, having the opportunity, should be required to use it. Therefore, there was no occasion to throw the risk of the transaction on a seller who was not guilty of active dishonesty, fraud or deceit. Furthermore, to deny the buyer remedy for after-discovered defects was in line with the wise idea that it is in the general interest for the law to provide as few occasions for litigation as possible.

Today, as we all know, almost never do we have the opportunity to inspect the cellophane-wrapped, hermetically-sealed objects we live by. There are, in any case, precious few things which it would do us any good to inspect if we could. It may also be suggested that the seller—or at least the manufacturer—of mass-produced, standard-run goods is in a far better position than the individual artisan of a few centuries back both to insure a uniform quality for his product and to assume the risk of non-conformity. For these and, no doubt, other reasons, *caveat emptor* has withered on the vine and been replaced by something very like *caveat venditor*.

The process of breakdown and reformulation deserves our attention. This polar shift in liability was not accomplished all at once, as by a tidal wave breaking across a beach to shatter against a retaining wall; it took place rather in the slow, irregular, almost imperceptible way in which the incoming tide finds its way to high-water mark. The old doctrine was slowly eroded away and finally buried under the cumulative flood of thousands of judicial opinions.

The first and most obvious line of attack was to expand the scope of the express warranty. It had been clear in 1625 to all the judges (except Anderson) that "everyone . . . will affirm that . . . the horse which he sells is sound; yet if he does not warrant [it] to be so, it is no cause of action" and the proposition was equally clear to Chief Justice Gibson in 1839. How far we have come in the last hundred years is suggested by a presently proposed recodification of this

⁵ See Llewellyn, *On Warranty of Quality, and Society*, 36 Col. L. Rev. 699, 733 (1936).

branch of the law of warranty, which accurately reflects its present state:

“Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes a basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise. . . . If the agreement creates an express warranty, words disclaiming it are inoperative.”⁶

But it was not enough to convert the huckster's commendation of his wares into a binding obligation. Controlling his natural instinct, the seller might remain silent. Wherefore the courts constructed a series of implied warranties, to bind the seller whether he spoke or not. To start with, there were several types of implied warranties, distinct and separate from each other. One was that when goods are bought by description from a dealer or manufacturer, there is an implied warranty that the goods shall be of merchantable quality:⁷ evidently the warranty of merchantability was in its origins an obligation running between merchants, on the professional rather than the consumer level. Another of the implied warranties was quite as clearly for the use of consumers: when the buyer makes known to the seller the particular purpose for which he intends to use the goods, and it appears that the buyer has relied on the seller's skill and judgment in selecting them, then there is a warranty that the goods shall be reasonably fit for such purpose.⁸ It will be noted that the warranty of fitness was subject to important limitations: there had to be a communication before the sale of the purpose for which the goods were to be used, as well as evidence that buyer relied on seller's skill and judgment.⁹ As more and more goods came to be

⁶ Uniform Commercial Code/Official Draft/Text and Comments Ed./1952/ with changes and modifications [through] Dec. 11, 1953, §§ 2-313, 2-316.

⁷ Uniform Sales Act, § 15(2). The statutory formulation of the implied warrantier in the Uniform Sales Act reflected, on the whole, the earlier common law developments.

⁸ Uniform Sales Act § 15(1).

⁹ *Turner v. Central Hardware Co.*, 353 Mo. 1182, 186 S.W.2d 603, 158 A.L.R. 1402 (1945) contains a classical passage in which plaintiff, who had been injured in a fall from a defective stepladder, explained the circumstances under which he bought the ladder:

“. . . I went up to the counter and asked the clerk if he had the particular kind of ladder illustrated right here; I pointed it out on the ad. . . . He came out from behind the counter, walked over with me to examine this particular ladder I had specified. . . . I asked him if he thought it would be good for the purpose I wanted it, and he asked me what it was. I said I was cleaning wallpaper, I wanted to use it as a stepladder and extension ladder; and he said, 'I think that would be exactly what you want.' . . . I asked him about the strength of the ladder and he said 'As far as strength, they were tested to two hundred pounds or better.' . . . I asked him about the wood. I said, 'I don't know anything about wood; I will rely on your judgment,' and his answer was it was very good wood.”

Not all cases, it may be assumed, fitted the pattern so neatly. Missouri has not adopted the Uniform Sales Act, so the case may also serve as an illustration of the

sold under brand names (in which case there was no implied warranty of fitness)¹⁰ or in sealed containers (in which case the buyer could hardly be thought to have relied on the dealer-seller's skill and judgment), it became apparent that the original formulation of the consumer warranty was becoming obsolete by reason of new methods of merchandising. Acute thinkers observed, however, that no corresponding limitations attached to the mercantile warranty of merchantability. The consumer who bought a wrapped, sealed and brand-named loaf of bread which turned out to have a pin or some broken glass baked into it could not recover for breach of the warranty of fitness. But could it not be said that such a loaf of bread was unmerchantable and that the warranty of merchantability ran to consumers as well as between merchants? It could be said and it was said, by no less a court than the New York Court of Appeals, speaking through no less eminent a jurist than Judge Cardozo: the date was 1931, which suggests how long this sort of thing takes.¹¹

It is a frequent experience that when one difficulty is cleared away, another, hitherto unsuspected, takes its place. When we are cured of sinus and no longer suffer from the upper respiratory infections, we develop ulcers. And so it was in the secular growth of the law of warranty. With the construction of the implied warranties and their eventual coalescence, the consumer seemed to have been armed with weapons which should have reversed the eighteenth century balance of power. But the sellers, naturally resistant, found more than one prepared position to retire to.

For example, it has never been clear to the legal mind whether an action to recover for breach of warranty is essentially an action to recover for breach of contract or one to recover for a wrongful act—thus in tort. There was, at least, a strong flavor of tort. It could be argued that the dealer who sold goods which he could not inspect because they were sealed or because they were technologically beyond his competence was quite as guiltless of wrongdoing, quite as innocent, as the consumer-buyer himself: therefore he should not be liable. That left the manufacturer as a possible defendant. However, as to the manufacturer's liability, it could be argued in his behalf that the action for breach of warranty is essentially contractual, and between the manufacturer and the consumer who had bought from a dealer there could be no contractual obligation, because there was no contractual link: no privity of contract. The arguments for in-

fact that there was little, if any, difference between the common law and statutory formulations of the implied warranties.

¹⁰ Uniform Sales Act § 15(4).

¹¹ *Ryan v. Progressive Grocery Stores, Inc.*, 255 N.Y. 388, 175 N.E. 105 (1931).

sulating the dealer and for insulating the manufacturer were mutually inconsistent, but each, on its own premise, was cogent and it was never necessary to use them both in the same case.

I do not mean to suggest that the arguments just outlined were lightly cast aside by courts intent on rewriting the positive law in the light of the living law. Indeed they have proved, and still prove, successful before many judges and in many jurisdictions. But by no means always, even fifty years ago; by no means often, today. Many courts have met the inconsistent arguments of counsel with a reverse inconsistency of their own. When the innocent dealer is defendant, it can be insisted that the action is contractual and the dealer's liability promissory, without regard to his wrongdoing. Contrariwise, with a manufacturer as defendant, the action can be found to lie in tort so that a lack of privity of contract can be overlooked.¹²

On the whole the tort analogy has been a more flexible instrument than the contract analogy. Plaintiff's lot in a tort action is much easier than it was a generation or two ago: the shift in the standard of tort liability from liability based on negligence toward liability without fault, from the ethical principle that the wrongdoer should be punished toward the ethical principle that the victim should be made whole, could furnish an instructive parallel to the warranty story and could well be related to the same industrial developments.

Action breeds reaction. In the days of *caveat emptor* the astute buyer could have protected himself by insisting on an express warranty for his bezoar-stone; the law merely refused to spread its mantle of protection over the improvident and foolish. In these days of *caveat venditor*, the same sort of thing is true in reverse. The astute seller can protect himself by disclaiming all warranties or by proffering a carefully limited warranty in lieu of all other warranties express and implied. Some products lend themselves more easily to this treatment than others. The seed manufacturers can stay in business although they attach to the seed package a legend which reads (if the purchaser were to read it): "We give no warranty, express or implied, as to description, quality, productiveness, or any other matter of any seeds sent out, and will in no way be responsible for the crop, and the purchaser hereby waives the right of refusal and return

¹² Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828, 142 A.L.R. 1479 (1942) is a leading case which illustrates the trend toward imposing liability on manufacturers, without privity of contract and, for that matter, without negligence. The case involved food products and the opinion, fairly read, suggests that the court may have intended to limit its discussion to poisonous or adulterated food. A standard development in the warranty field is that a doctrine of increased liability for product, first announced in cases involving food, is in time generalized to apply to all manufactured goods.

of goods. . . ."¹³ Sellers of manufactured goods can limit their risks by attaching to their product a statement that their liability is limited to replacement of any part found in the manufacturer's judgment to be defective, provided the defective part is returned to the factory with all expenses of freight or postage paid by the buyer. In the case of bulky objects such a limitation of warranty can be as effective as an outright disclaimer. And, if the furnace blows up, killing everyone in the house, there will be no liability. Sellers of food products, on the other hand, are less favorably situated: as a matter of public relations, to say nothing of the Federal Food, Drug and Cosmetic Act, they are in no position to announce that what they sell is not guaranteed fit to eat.

The courts have not gone so far as to deny the effectiveness of disclaimers and limitations of warranty. Freedom of contract is still a powerful slogan. But they have developed techniques for dealing with disclaimers. Let plaintiff testify, for example, that the seller assured him that the stone was indeed a bezoar-stone, or that the manufacturer's advertisement proclaimed that the shatterproof windshield was indeed shatterproof.¹⁴ Defense counsel, pointing to the written contract of sale which clearly says No Warranty, objects that the evidence is inadmissible: a writing may not, according to a fundamental rule, be varied or contradicted by parol evidence of what was said or done prior to the execution of the writing. But in most cases, today, the judge will listen to the evidence and, what is more, will let the jury listen to it. Or, for another example of judicial technique, it is possible to say, reverting to the nature of the warranty action, that the disclaimer is effective as to liability in contract but not as to liability in tort¹⁵—which neatly sets in opposition to the principle of freedom of contract the equally important principle that a man may not contract out of liability for his own wrongdoing.

We have keyed our discussion thus far to judicial, as distinguished from legislative, change. You will often hear it said, or you may instinctively believe, that there is a great difference between

¹³ *Lumbrazo v. Woodruff*, 256 N.Y. 92, 175 N.E. 525, 75 A.L.R. 1017 (1931).

¹⁴ *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, 15 P.2d 1118, 88 A.L.R. 521 (1932).

¹⁵ See, for example, *Bowersock v. Barker*, 186 Okla. 48, 96 P.2d 18, 127 A.L.R. 130 (1939) (fraudulent misrepresentation). Many courts have developed the tort-contract distinction in dealing with election of remedies cases under § 69 of the Uniform Sales Act (which provides, inter alia, that when buyer has rescinded the contract—e.g., by returning the goods—he cannot also claim damages); one way of allowing the damage action, despite the rescission, is to say that the damage action is in tort and the rescission bars only a subsequent action in contract. See *Friedman v. Swift & Co.*, 18 F. Supp. 596 (S.D.N.Y. 1937). The election of remedy cases can easily be moved over for use in the disclaimer of warranty cases.

statute and case law, between a codified system and a system of customary or common law. The glory of the common law, we are told, lies in its flexibility, its ability to respond sensitively to social and economic pressures; statutes and codes, say the apologists of the common law, freeze the law as of the time of drafting and inhibit subsequent growth. There are persuasive arguments the other way. One of the great weaknesses of any system of decisional law is that the court can decide only the case that is before it; it is blinkered to one state of facts, perhaps an atypical one; it is not allowed to look beyond the record and what goes into the record is restricted by artificial rules of evidence. The function of a court is not to decide what rule may best serve the general welfare; it is to do justice—or at any rate to deliver a judgment—between A and B. By contrast, a statute designed to be of general application and framed with reference to many states of fact, not just one, can be, and by its nature is apt to be, not only more precise and certain but more just and equitable. By paying heed to a wider range of experience, the legislature can achieve a more rational solution than can the courts. Furthermore, the codifiers will argue, social change does not proceed at so breakneck a pace that the statutes cannot be kept up to date by periodic amendment—and all the arguments which make a statutory statement preferable to a judicial formulation in the first instance apply as well to the process of change by amendment instead of by refinement, reformulation, distinguishing among precedents, and so on.

Despite the heat that such arguments can generate, I am inclined to believe, at least with respect to the rate and manner of change, that it makes little, if any, difference whether you are working under a statute—a code, if you prefer the term—or under the purest possible system of decisional law. The life history of most statutes resembles that of a Christmas toy: for a day or two it catches the eye, engages the attention, satisfies the felt need; by New Year's Day, battered and twisted, it has been put aside and forgotten.

The warranty story offers an excellent illustration of the point. Warranty law was codified, as part of the Uniform Sales Act, which was drafted shortly after 1900 and thereafter enacted in a substantial majority of the states. As if to furnish a laboratory control, however, a sizable bloc of states—principally in the South and Southwest—did not pass the Act but stayed with the common law. A few years ago a group of my students, who had become interested in the problem of codification, made a study of warranty law developments between 1910 and 1950, both in the Sales Act states and in the common law states. The result of their research, which disturbed a number of my own preconceptions, was to show that the two groups of

states had followed substantially identical courses. Courts in the common-law states had had a little easier going and showed a tendency to make a somewhat earlier and somewhat more extensive use of the free-wheeling tort rationale—but by 1950 the common-law case law of Texas and the statutory case law of, say, New York, had become indistinguishable.¹⁶

We have traced in the roughest of outlines and on a merely descriptive level the evolution of a basic shift in liability, determined by fairly obvious social pressures relating from easily identifiable changes in methods of manufacture, distribution and merchandising. If time permitted we could trace comparable shifts in other areas. There is, for example, the rise of the idea of good faith purchase: as property has acquired velocity, as wealth has become movable, as the frequency of transactions has increased, we have moved, in little more than a hundred years, from the proposition that the owner ought to be protected in his ownership to the quite different proposition that the purchaser ought to be protected in his purchase, even though that means depriving the original owner of his property.¹⁷ And there is the fascinating and complex story of the ebb and flow of the rules for measuring damages for breach of contract as, in the same period of time, we have moved from fluctuating markets to stabilized markets, from price based on bargain and dicker to a rigid price structure, from an economy of abundance to an economy of scarcity and short supply.

In each instance we should observe the same pattern of change: not neat, tidy, orderly and predetermined, but large, sprawling and messy, with plenty of false starts, hesitations and reversals of course. But we are committed to the proposition that we are dealing with both logic and experience—or that experience hath its logic, which logic knoweth not. Let us look at the canvas again to see what patterns we can spot, what conclusions we can draw, beyond the simple one that things do change.

To start with, I suggest that the warranty story illustrates a principle of legal growth—which is always away from formalism, simplicity and certainty toward complexity, uncertainty and, if you will, confusion. When we were children, we were all magicians, which means that we believed not merely that the impossible can be achieved—we believe that at any age—but that it can be achieved simply, with a minimum of thought and effort. To fly, I need only flap my arms. But, as we grow up, we lose our magic powers, to a degree. A simi-

¹⁶ The study, unfortunately, was not published.

¹⁷ Some aspects of this development are traced in Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 *Yale L.J.* 1057 (1954).

lar phenomenon can be observed in the growth of legal doctrine. We—that is, lawyers, yesterday, today and tomorrow—set to work solving the problems of our time in the sure belief that words have magic powers, and the touching conviction that there can be easy answers to hard questions. The first rule, the original rule, the primitive rule, is not only a sweeping generalization; it is designed to work automatically, like an I. B. M. machine, and its criterion is the taking of, or the failure to take, some action in a prescribed and formal way. Thus a seller was not held to liability for the quality or genuineness of his bezoar-stone unless he pronounced, in the presence of his buyer, the magic formula: I warrant. Such a rule has much to recommend it: it is simple, certain, automatic. It leads to predictable results. It thereby discourages litigation and, when litigation does arise, it immensely simplifies the course of proceedings and proof by narrowing the issues to one central point.

Nevertheless, the simple, certain, automatic and workable rule always breaks down, and becomes fragmented into the wilderness of single instances which annoyed Tennyson.¹⁸ It solves problems, but it does not solve them well; its mechanical operation disturbs the sense of justice. We learn that the easy answers are bad answers and that certainty and predictability can be bought at too high a price. The sweeping generalization becomes qualified, limitations arise and exceptions flourish. While this is going on, social and economic conditions are also changing, so that the primitive rule in time comes to seem not merely oversimplified but out of date. The courts begin to say that they will look through form to substance, and in time the crucial formalism—on which the operation of the primitive rule depended—loses its vigor, its force, and finally its meaning. By the time the process is well-advanced we have lost, along with our primitive rigidity, much of our primitive virtue as well. At the cost of certainty we have gained in flexibility and, it may well be, in justice—but the price of justice seems to be that no man can be told in advance what his rights are.

Another principle of legal growth is the maintenance of a continuity of tradition through the pretense that change is not change. We do this through our use of words and through the resort to fictions. The legal vocabulary almost never changes—we pour new meanings into the same old words. And instead of announcing a new principle we discover an old one that can be pressed into use to serve a novel purpose—which is how what are commonly called legal fic-

¹⁸ . . . the lawless science of our law,
That codeless myriad of precedents,
That wilderness of single instances . . .

Aylmer's Field (lines 435-437).

tions are born. A fiction—that is, the explanation of a result by patently absurd reasoning based on analogy borrowed from the more or less distant past—on the face of it seems to be a sort of antiquarianism, an archaizing return to the womb; in fact it is almost always a sign of disturbance and growth. The law, persistently revolutionary in substance, is stubbornly conservative in form—and, at depths which I am not properly equipped to explore, I have no doubt that this is a good and useful and necessary thing. It is also one of the things about the law which most irritates all laymen, most law students and some lawyers.

We like to divide the law into two great halves: substance and procedure—the rights and duties which we have or which are imposed on us, as against the way in which we go about asserting our rights or denying our duties in court. Procedure, we might say, is like the bare bones which lie beneath and support the soft and transient flesh. And, like the bones, the rules of procedure are much more resistant to change than are the rules of substantive law. The forms of action, in Maitland's celebrated epigram, although abolished, still rule us from their graves.¹⁹ And in their superintendence over the great shifts in doctrine courts find their most bothersome stumbling blocks—and the defenders of the old position their most useful weapons—on the procedural side. For examples drawn from the warranty story, we may note the difficulty the courts have had in dealing with the parole evidence rule and with the technical doctrine—which is not, of course, narrowly procedural—of privity of contract.

We have mentioned the transition from simplicity and certainty, under an automatic rule, toward complexity, unpredictability and confusion as the price that must be paid for moving toward flexibility and justice. But confusion is more than an undesirable concomitant of desirable progress; it has its own real use and merit. In trying to understand the process of legal change, it is essential to keep in mind that, although we may recognize that we are moving and can see where we have come from, we can never know how far along the road our destination lies. Today's business practices, today's social customs are manifestly different from yesterday's; what tomorrow's will be like we do not know. It is the part of wisdom to keep our generalizations incomplete and open-ended, our definitions a little unclear, our categories blurred and fuzzy at the edges.

We have referred to the curious patch of fog which envelops the legal mind when called upon to decide whether the warranty action lies in contract or in tort—and it may have seemed absurd

¹⁹ Maitland, *The Forms of Action at Common Law* 2 (ed. by Chaytor and Whittaker 1948).

to you that in three hundred years the massed intelligence of our learned profession has not been able to settle so simple a point. I suggest that the maintenance—the almost deliberate maintenance—of this entirely unnecessary bit of confusion has been a most useful device in promoting the free growth of ideas, and their adaptation to changing circumstance.

The existence of an unresolved ambiguity at the very heart of a doctrine serves another minor but useful purpose—it greatly simplifies the difficult problem of dealing with fraud. No rule of law can be invented that cannot be circumvented by the fraudulently inclined. Indeed the attempt to state rules of law in such precision and detail that they cannot be turned or evaded is self-defeating: the connoisseur of fraud quickly finds ways to convert the protective device into an engine of iniquity while at the same time the cumbersomeness of the rule operates as a clog and burden on all legitimate activity. It has usually proved wiser in the end to state rules loosely enough to allow honest men—whom we must assume to be in the majority—to go their ways without judicial let or hindrance even though we seem thereby to be playing into the hands of the crooks. And at this point a little play in the joints of doctrine can be a useful thing. Fraud, collusion and dishonesty are often difficult to prove conclusively; on the other hand, the intuition, the hunch, the feel of an experienced trial judge are not to be disregarded. A touch of doctrinal ambiguity makes it possible for the judge—by allowing him, in the warranty context, to wear now his tort hat and now his contract hat—to rule in favor of the honest man and against the crook without going to the unpleasant extreme of calling the crook a crook. Obviously, this sort of judicial discretion can be abused—but so can most good things.

Law and ethics can be separated, but never divorced. We have traced the way in which a particular change in legal doctrine has taken place and I have sought to point out some of the elements in our illustration which are common to the phenomenon of legal change in general. We should not conclude, however, without asking Why—even though no answer lies ready to hand.

We started with the idea that significant changes in technology would be reflected in significant changes in legal doctrine. In connection with our principal illustration the observation was made that the assumption behind the rule of *caveat emptor* seemed to be that the buyer had the opportunity to inspect the goods and determine their quality—and that since he could, he ought to. The breakdown of the old rule, or its replacement with its opposite, could, it was suggested, be tied to the fact that the factual basis for that assumption

gradually disappeared. All that is, I think, sound as far as it goes. But the fact that most goods were once of a type which could be intelligently inspected by ordinary people does nothing to explain the ethical judgment which dictated the conclusion that buyers ought therefore to bear the risk of defects—any more than the fact that most goods today cannot be inspected explains the conclusion that sellers ought to bear the risk.

Ultimately, we can never explain anything. The best we can do is to set particular events in a broader context—which gives them perspective, even if it does nothing to clarify their meaning.

In most social or economic relationships there is an active party and a passive party, an enterprising party and a party who merely receives—which is, we are told on authority, less blessed. Over the past hundred years—to go no further back—we have experienced a curious shift of attitude toward the relative merits of action and passivity. Our forefathers were, on the whole, tender toward the party who acted: it was better to do than to do nothing; action should be encouraged; and, since action is dangerous, the actor should be protected from the incidentally harmful consequences of his socially useful activity. The risks, therefore, should fall on the passive party. We have, even in our own generation, made great strides toward reversing that position. Ethically, we feel, the weak should be protected against the strong, and the full consequences of his actions should be visited on the head of whoever dares to act.

In politics and government—if a private law man may poach for a moment on the public law domain—we may see an illustration of what we are saying in the downfall of *laissez-faire* and the rise of the welfare state, not to mention our current passion for security—political, economic and social. We seek protection and stability and status—which means, in an overliteral sense to be sure, the right to stand still wherever we are. The fifth freedom, when we get to it, will probably be the freedom from change.

It has been a commonplace of legal scholarship that one of the great ground-swells of movement in the nineteenth century was from status to contract—from the protection of rights of property and ownership to the protection of rights of contract. It is easy to see how this should have happened as wealth multiplied and an aristocratic society gave way to its pushing, aggressive, dynamic successor. I suggest that the ground-swell carried an undercurrent with it and that, as the great wave recedes, we are being caught in the undertow. The next half-century may well record a reverse movement.

In the crucial business of allocating commercial and social risks we have already gone a long way toward reversing the nineteenth

century. In tort we follow a banner which bears the strange device: liability without fault—although we soften the impact on the innocent tortfeasor by various schemes of insurance and compensation. In contract we have broken decisively with the nineteenth century theory that breach of contract was not very serious and not very reprehensible—as Justice Holmes once put it: every man is “free to break his contract if he chooses”²⁰—from which it followed that damages for breach should be held to a minimum. Today we look on breach of contract as a very serious and immoral thing indeed: never, I dare say, in our history have the remedies for breach been so easily available to the victim, or the sanctions for breach so heavy against the violator—who will be, in most cases, the active or enterprising party. The continuing increase in seller’s warranty liability is merely one illustration of what has been going on all along the contract front.

I assume—although I will not attempt to prove, if indeed I could—that what has been going on, alike in our public law theories of the state and in the obscure and dusty corner of the private law attic which we have visited this afternoon, reflects a great swing in our fundamental ethical concepts—a swing which, at a still further remove, reflects, if it did not inspire, the later stages of the industrial, economic and technological revolution of the past two hundred years. As I suggested, nothing can ever be explained—but the perspective is a spacious one.

Justice Holmes, whose views on contract and many other things seem to us to have been deplorably light-minded, was right when he said: Not logic—but experience. The law, whatever it may be, is not the frozen embodiment of reason miraculously transmitted from a remote past. We all know that much. The temptation today is to insist too much on the temporal, the transitory nature of law; to assume that all arguments, if they are not circular to start with, can at least be made to run both ways; to conclude that doctrine, because it is not immutable, is therefore meaningless. Such an attitude is quite as false as the naive belief that law is all logic and reason. If we would be worthy of our profession, we must recognize that we build, not for all time, but for a generation at most. But, recognizing that, we must also dedicate ourselves to this: in the diversity, which is only too apparent, there is unity; in the formlessness there is form; in the process of change there is order; in the organization of experience there is logic.

²⁰ Holmes, *The Common Law* 301 (1881).