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SOCIAL JUSTICE IN THE FIELD OF TORTS

By L. W. Feezer

The brief title given above is but suggestive of the purpose to discuss some of the doctrines in the law of torts which seem to be undergoing a process of evolution, produced by, and perhaps contributing to a changing social concept of justice.

It is a matter of some difficulty to delimit the term "Social Justice" and any definition which might be attempted would undoubtedly be imperfect and leave ample occasion for well deserved criticism. The use of the term by certain legal and social-worker authors seems to justify its use. There may also be room for dispute as to whether the modifications which appear to be taking place in the law with reference to certain concepts of tort liability, really may be regarded as contributing to the bringing in of a better standard of social justice even by those who might agree upon a definition of the term.

Is "Social Justice" in any way different from any other justice? When we say "Social Justice," do we mean anything more or less than when we merely say "Justice"? Does a proper standard of social justice involve any departure from principles upon which are founded a true conception of justice for the individual? Is modern society changing its acceptation of what (the word) justice really means, so that the word is coming to connote a new balance of rights, privileges and interests on the one hand, and of duties and obligations on the other? The writings of some of the leading present day authorities on problems of jurisprudence and legal philosophy would seem so to indicate. It is undoubtedly true that a growing regard for the "greatest good of the greatest number" as a policy of society is causing both lawyers

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1Reginald Heber Smith, Social Justice and the Poor.

2Fundamentally this is a question of the individual's place in society. Isn't justice after all merely the process of securing to the individual his place in society? Dean Pound in 28 Harv. L. Rev. 343, says, "Undoubtedly the progress of society and the development of government increase the demands which individuals may make so increase the number and variety of these interests." He then continues in a footnote: "A man's rights multiply as his opportunities and capacities develop . . . . The more civilized the nation, the richer he is in rights." Miraglia, Comparative Legal Philosophy 324 (Lisle's Trans.). The idea here is that interests, that is, demands of the individual,—increase with increasing civilization, and hence the pressure upon the law to meet these interests increases the scope and character of legal rights."

3See Pound, Spirit of the Common Law, pp. 6 and 7.
and laity to look upon "justice" from a new and still changing and unfixed point of view. It has been observed that this process of broadening in the scope of some of our legal concepts accounts in part for the changes which have been and of course are still taking place in the application and form of statement of a number of doctrines of tort liability. This is the undoubted product of the increasing specialization, increasing industrialization, and increasing complexity of our present day civilization. Of course the changes due to such causes are not confined to the law of torts. They may be observed in many branches of the law. They may surely be seen in such fields as administrative and constitutional law and in equity jurisdiction. Perhaps in some respects the spirit of change is more strikingly manifest in the adjective law than anywhere else.

The present writer does not presume to discuss, as they deserve, the principles of sociological jurisprudence which may lie in the background of this process of change which is going on in the law. So much has been said about these changes and about the social legislation which has been formulated and adopted in recent years, that, for the present purpose their existence may be assumed. The real purpose here is to show by a few illustrations taken from the field of torts, that as a result of the change which is going on, rights which are regarded as inherent in personality are coming to have a place in the law in greater numbers and of increasing importance. It is not to be taken that the illustrations chosen are inclusive or necessarily the most effective. They are simply a few which might very likely occur to almost any lawyer or to many law students who might give the matter thought.

4Ibid, page 13. In speaking particularly of the spirit of the common law during the last century, Dean Pound says, "it is so zealous to secure fair play for the individual that it secures very little fair play for the public."

5Our procedure in the courts of general jurisdiction has been fixed under the various state codes of procedure and is not itself changing so much at the present time. But by legislative enactment, much of what was formerly the business of the courts has been placed in the hands of administrative boards of one sort and another. Moreover courts are being specialized and by statute are handling certain types of cases in ways which are altogether new and strange to the common law. In this connection one thinks of the domestic relations courts and juvenile courts, the small debtors, or conciliation courts, the traffic courts and the special divisions of municipal courts in some of the larger cities with a staff of trained technicians such as, social workers, psychiatrists and others, upon the basis of whose investigations the court is advised in rendering its decision. For an interesting exposition of the work of a very much socialized court, see the Annual Reports of the Municipal Court of Philadelphia, or Chicago. These are notable examples.
RELATIONS BETWEEN MASTER AND SERVANT

The fellow servant rule has given place to workmen's compensation systems all of which are radical departures from the rules of law they supplanted. Here is a change in the law which has been accomplished in the name of social justice largely by legislation rather than by decision and which has in some places carried with it other innovations upon the common law theory of the master and servant relation, such for example, as compulsory workmen's compensation insurance.

The courts of common law, reasoning from broad general principles and opposed to any extension of liability without fault, had come to the conclusion that an employee assumed the risks which were reasonably incidental to his job and, as it was stated in one of the classic cases dealing with this rule of law,

"The mere relation of master and servant can never imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to take of himself."\(^6\)

The rule was first stated in America by Justice Lemuel Shaw in the supreme judicial court of Massachusetts in the case of *Farwell v. Boston & Worcester Ry.*\(^7\) as follows:

"He who engages in the employment of another for specified duties and services, for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services and in legal presumption the compensation is adjusted accordingly."

This is a properly logical inference in terms of the legal reasoning of the Victorian and pre-Victorian school of jurisprudence. And does it not well represent the individualistic reasoning of a period whose legal concepts were colored by the sacro-santness of property and contract rights, which class of rights were the especial favorites of the English landlord-made, landlord-administered and landlord-interpreted law of a century and more ago?\(^8\) It is not to be doubted that Lemuel Shaw was intellectually honest with his own New England conscience and with the social standards of his time as well as with the then prevailing theory of the end of law, when he said that the rule above stated was a general rule, "resulting from considerations as well of justice as of policy." In short this conception of justice was in undoubted harmony with the policy and with the social standards of that day; but the day of that policy and of the social standards which tolerated that policy is past.

\(^6\)Priestly v. Fowler, (1837) 3 M. & W. 1.
\(^7\)(1842) 4 Metc. (Mass.) 49.
\(^8\)See infra page 316, 317.
Now what is justice? "The constant and perpetual disposition to render every man his due." Every man's due is obviously a rapidly growing item in the progress of the development of democracy in society. In a despotism every man's due does not even include the participation in government either directly or by the exercise of a suffrage in the choice of a representative to do so in his behalf. It is perhaps significant that, with this changing conception of social justice which we are thinking about, despotisms are becoming fewer and fewer. Thus the ancient Justinian definition of justice is an elastic one, adequate for today and probably capable of expanding with the evolution of the social order.

The doctrine of assumption of risk by employees was subject to limitations and exceptions almost from the time it was first clearly announced in such cases as *Priestly v. Fowler* and *Farwell v. Boston & Worcester Ry.* and in a vast number of cases these limitations have been defined with infinite variation. However the judicial limitations were not developed rapidly enough to keep pace with the growth of our mechanical age. Every man cannot have his due, according to the conceptions of our time as long as the law continues to apply to its complex industrial organizations such a doctrine as the "fellow servant rule." Hence there came into existence the numerous modern statutes eliminating all but a few occupations from the application of the fellow servant rule and the assumption of risk doctrine. Moreover, to make a thorough job of it, these statutes have for the most part done away with contributory negligence as between master and servant.

\[\text{\textsuperscript{8}}\text{a}\text{Institutae Bk. 1, Tit. 1; 2 Just. 56.}\\ \text{\textsuperscript{9}}\text{(1837) 3 M. & W. 1.}\\ \text{\textsuperscript{10}}\text{(1842) 4 Metc. (Mass.) 49.}\\ \text{\textsuperscript{11}}\text{Indeed there are now on the books many state statutes imposing upon employers, "liability without fault" in favor of employees engaged in certain occupations designated as "hazardous." Prof. F. H. Bohlen, writing in 1912 in the Harvard Law Review says, speaking first of the earlier legislation in this field, "Whatever legislation there was looking to a fuller remedy, preserved the fundamental conception of the common law that fault... was essential to the employer's liability..." Then he continues, "There has been a complete change in the attitude of public opinion. There are now in force in no fewer than ten states, acts by which the owner of a business is made to bear a part of the loss resulting to his workmen from injuries received by them in his service, whether due to a defect in the conditions or operations of the business or not." 23 Harv. L. Rev. 328. Again at page 332 we find this statement, "There is a point beyond which the cost of production cannot be increased without destroying the profit of the producer and thus driving him out of business or raising the cost of the commodity to a point where the demand is stifled, and so indirectly reaching the same result. The ultimate success or failure of this sort of legislation one may venture to predict, will depend upon} \]
SOCIAL JUSTICE IN THE FIELD OF TORTS

The courts are not altogether to be blamed for the fact that this change has been made by the legislatures. It is for such purposes that we have legislatures. Courts are conservative partly at least because they must be consistent. While it may be permissible for a court to find exceptions to a general rule, it is nevertheless dangerous to be too quick to abandon the entire rule and the judge who does so must be certain of his conviction that the precedent he throws aside is not the law for the time and the circumstances of his decision in the particular case. As Judge Cardozo says, "Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts."1

THE CHANGING POINT OF VIEW IN THE LAW OF FRAUD AND DECEIT

The maxim "caveat emptor" has long been prominent in the law to express in relation to fraud an idea analogous in its social view-point to that referred to as being expressed in the case of Priestly v. Fowler, namely, that the law will be slow to impose upon another the duty of taking better care of one than he takes of himself. Consequently a purchaser is bound to discover at least the patent defects in whatever he buys and dare not too much rely on the statements of the vendor, except they be made by way of warranty. In other words, the purchaser cannot sue the vendor in tort unless he can prove the existence of the elements of an action of deceit. This is fair enough if judicial interpretation of the word "fraud" keeps pace with the economic and social standards of the day. Here, as in the problem last presented, viz., the relations between employee and employer, the law appears to be changing. Perhaps the process of change is not so apparent in the law of deceit, but, it is submitted, that social justice is being modified by an improving standard of commercial honesty and general morality. There are two great limitations upon modern social justice in the law of deceit as it has come to us from the last century. There is evidence that they are losing ground as time goes on and are destined further to decay. These are the doctrine of Peek v. Derry12 and that "benefit of clergy" accorded to the morally and socially culpable trader under the whether the modern humanitarian and collectivist sense of justice can be satisfied without unduly burdening business or the consumers whom it serves."

12Cardozo, Nature of the Judicial Process, pg. 34.
Reference has been made to the requirement that certain distinct "elements" must be present in order to enable a plaintiff to make out a cause of action in deceit; viz., defendant must have made a false statement as of fact, he must have intended that the plaintiff should act upon it, the plaintiff must have so acted, the plaintiff must have been damaged in consequence of so acting and finally the defendant must have had "scienter", that is, he must have known that the statement was false. The whole vast body of the law of deceit is a mass of cases dealing with situations which bring out the application and definition of these various "elements". It is of course with the last of the elements above indicated that this discussion is to be chiefly concerned. Indeed the cases dealing with this element of "scienter" have been the most troublesome in the law of deceit and it is in this department of the subject that deceit would seem to offer a fertile field for the application of modern and improving standards of social justice, which in respect to problems of this sort simply means honesty, real "Golden Rule" honesty. It is possible for the courts to interpret narrowly the element of scienter or knowledge as applied to the speaker's realization of the truth or falsity of his statements and to say, that to be liable for deceit, he must actually know that what he says is false. On the other hand it may become the established rule in a given jurisdiction that the requirement of "scienter" in an action for deceit will be satisfied with something less than actual knowledge of falseness. *Peek v. Derry* in effect takes a position that while scienter is not necessarily actual knowledge of falseness, nevertheless, there will not be sufficient scienter to charge a defendant in deceit, if he believes in the truth of the statement which is the basis of the action and provided, such belief on his part is an honest belief, and, provided also, it is a reasonable

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14See note 13 above. Defendants in this case were directors of a company which issued and sold stock on the basis of prospectus containing the alleged actionable statements. The prospectus stated that the company has the right to use steam or mechanical motive power instead of horses. It appeared that this right was conditional upon securing the consent of the board of trade and of the corporations of the municipalities through which the line was to pass. These consents were not obtained, in consequence of which the company had to be wound up and the plaintiff lost money on stock for which he has subscribed relying on the prospectus. The defendants are found to have honestly believed that the necessary consents had been obtained. The house of lords restored the opinion of the trial court, dismissing the action and thereby overruling the court of appeals. The court of appeals based its decision on the ground that, although the defendants honestly believed the statement on which the actions depends, they had no reasonable ground for so believing.
Belief. *Peek v. Derry* still represents the English view, but liability for deceit has been extended in many American jurisdictions to cover cases on all fours in the matter of scienter with *Peek v. Derry*. And in such states the defendant in an action of deceit is held to be affected with a sufficient scienter if his words reasonably permit the inference that he *knows* the truth of his material statements, when in fact he does not *actually know*. At least this is so when the statement refers to a matter which is susceptible of accurate knowledge. This border view has perhaps been adopted by statute in a number of states. Professor Williston says in the article cited in the foot note, "The statutes of California and other states cited above, excuse a defendant from liability if he had reasonable ground for believing his statement to be true." In other words we are uncertain after all whether *Peek v. Derry* would have to be followed in such jurisdictions.

Now, which is the better view for the social and economic background of our times, this broader view of some American jurisdictions, or the conservative position represented by the English rule? If we follow this broader view, we have taken a position so advanced that some might contend, that it compels us for the sake of consistency to go still farther and impose liability for negligent misrepresentation. The wall between this broad conception of deceit and a doctrine of liability for negligent misrepresent-

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16S. Dak. Code 1919, sec. 796. "One who wilfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers."

Section 797. "A deceit within the meaning of the last section is either:
1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
3. The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
4. A promise made without any intention of performing."

In the article by Prof. Williston cited above in note 15 he says in referring to the California statutory provision corresponding to subsection 2 of section 797 above, "This provision has been adopted in identical words in North Dakota, Civil Code Sec. 5388-2, Montana, Civil Code 5073-2."

The same provision has since been adopted in Oklahoma.

At page 456 Prof. Williston says, "The Statutes of California and other states cited above excuse a defendant from liability if he had reasonable ground for believing his statement to be true."

sentation is very thin, yet it may still be said to exist. Deceit is founded upon bad faith. The person who in the presence of the other elements of deceit, makes a statement not knowing whether it is true or false and in such form as to justify the opposite party's inference that he does know, should be, and in many jurisdictions is, chargeable with deceit. It must be emphasized in this connection that this test is to be applied in association with the other elements of deceit, particular attention being paid to the requirement that the speaker intends the opposite party to rely on the statements.

If liability is imposed for negligent misrepresentation, it is not to be confused with liability for deceit and must be regarded as another step in the development and extension of tort liability. Nevertheless this is but a short step from the sort of liability which is involved in those cases which have involved the principle of Peek v. Derry but have reached a contrary result. The entire problem of the nature and theory of liability for false representation, not actually fraud, has been reviewed with extensive annotations by Professor Williston and by Professor Jeremiah Smith in the Harvard Law Review in articles already referred to in the foot notes. It is the intention of this paper merely to mention this problem as illustrating the general trend of decisions to harmonize the law with the social and economic background of their own time. It should be noted that a few cases have been decided since Professor Williston wrote the paper above referred to and which show a further tendency to impose liability even for honest misrepresentation where it is negligent.

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18 As pointed out by Prof. Jeremiah Smith, 14 Harv. L. Rev. 184, Peek could not on his declaration have recovered for negligence because he alleged fraud and proof of negligence would have been a variance. So, whether or not an action might be allowed for negligent misrepresentation, it is at least settled in England that negligence is not fraud. See also Pollock, Torts, 12th ed. 292 et seq. He says at 295, "There is no general duty to use care, much or little, in making statements of fact on which other persons are likely to act."

19 See note by Zachariah Chaffee Jr., 31 Harv. L. Rev. 779 for a very interesting application of the analogy of the problem of Peek v. Derry to that of Young v. Grote, (1827) 4 Bing. 253.


21 Glanzer v. Shepard, (1922) 233 N. Y. 236, 135 N. E. 275. In this case the defendants had been engaged by a vendor of beans to weigh a quantity which they knew the plaintiff had bought and contracted to pay for according to their certificate of weight. The defendant negligently certified the weight to be more than it actually was, and the plaintiff in consequence, overpaid the vendor. He then brought an action of tort for negligence, and was allowed to recover on the ground that he had suf-
Caveat emptor, as a maxim of law, sounds to modern ears more appropriate to describing the relation between tradesman and prospective buyer at an oriental bazaar than to the present day one-price shops, nationally advertised goods sold in original packages and controversies over price restriction agreements. It is traditional that a horse-trade is conducted by parties dealing at arms’ length but the transactions of modern business are increasingly carried on between persons who deal with each other fairly and openly and the greater emphasis in present day sales competition is on service. Or, if price or quality are the issues, the sales arguments tend to present truth, leaving the purchaser to pass upon the weight of various truths as they bear upon his particular requirements.

The assumption involved in “caveat emptor,” and the cases of a few decades ago, that vendors would overstate the truth and that purchasers must not be credulous, is surely not justifiable today to the extent it appears formerly to have been. Business today demands of one who would command the respect and custom of his business associates, a very high standard of commercial morality. The law may have lagged behind the spirit of the times in this as some other respects but there are indications that it is falling in line with this better business policy. “The tendency of modern decisions is not to extend but to restrict the rule requiring diligence, and similar rules, such as, ‘caveat emptor’ and the rule granting immunity to dealers’ talk, and is to condemn the falsehoods of the tort feasor rather than the credulity of his victim.”

ferred an injury caused by the defendant’s negligence. See 30 Yale L. J. 607 for extensive note discussing the above case and principles involved. Accord: Western v. Brown (N.H. 1925) 131 Atl. 141, in which the plaintiff sued the defendant for negligent misrepresentation respecting the sale of a farm. The lower court charged the jury that, “a person who acts upon a false representation, made for the purpose of inducing him to vary his line of conduct, may recover the damages he sustains, if the representation was fraudulent, or if it was negligently made. The defendants excepted and it was held that the exception be overruled. See note 35 Yale L. J. 707.

Contra Dwyer v. Redmond, (1925) 103 Conn. 237, 130 Atl. 108 and note 12 Va. L. R. 76, in which the upper court held erroneous an instruction to which the plaintiff’s (vendor’s) criticism was that, “The jury were instructed that they could find the plaintiff guilty of fraud even if his only and sole fault was in being negligent.”

226 C. J. 1144. Among cases cited see particularly Fargo Gas and Coke Co. v. Fargo Gas and Electric Co., (1894) 4 N. D. 219, 59 N. W. 1066, wherein the court says, “The unmistakable drift is towards the doctrine that the wrongdoer cannot shield himself by asking the law to condemn the credulity of his victim,” and also Aultman Machine Co. v. Schierkolk, (1915) 95 Kan. 737, 149 Pac. 680. “The present tendency is to limit rather than extend the rule that enables the perpetrator of a fraud to take advantage of his victim’s want of prudence.
And indeed is it not better social ethics that he who buys a gold brick should be protected, than that the one who sells it should be immune from civil liability? The victim may learn his lesson from an adverse verdict but the potential supply of victims is unlimited. Barnum was right if he said, as he is reputed to have done, that a sucker is born every minute, and the United States Post Office department finds that constant vigilance is necessary to prevent the mails from being used as the medium for fraud upon thousands of victims. The law may teach one gullible purchaser a lesson by requiring him to suffer a loss which a man of better judgment would have avoided, but the supply of “easy marks” is inexhaustible and they are the ones, who on account of their inability to take care of themselves, most need the protection of the law.

The legislature is in general closer to the contemporary spirit of the public mind than the courts. We have statutes for the protection of those who might otherwise be unprotected against fraud. By the imposition of criminal liability the legislatures have therefore restricted certain practices formerly much more common and for the consequences of which a dishonest person was very unlikely to be held accountable. The courts however have not been entirely unconscious of this “zeitgeist” and in many instances we find utterances from the bench expressing a very high social ideal as for example: “The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful cunning as well as those whose vigilance and sagacity enable them to protect themselves.”

It is rather a surprise to find that Massachusetts seems to have been particularly tolerant of “dealer’s talk.” Mr. Justice Oliver Wendell Holmes, whose opinions in the Supreme Court of the United States have probably done as much as those of any single jurist for the advancement of social justice, was formerly a member of the supreme judicial court of Massachusetts and even Justice Holmes as a Massachusetts judge seems to have been rather in accord with the rule of that jurisdiction as to “dealer’s talk.” In an opinion delivered in 1889 he said:

23“No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.” Chamberlin v. Fuller, (1887) 59 Vt. 247, 9 Atl. 832

24Statutes have been passed in most of the states dealing with various commercial practices involving danger to the savings of the average man. To instance but a few of the topics with which they deal; bucketing and deals in futures, lotteries, race-track gambling, blue-sky laws, adulteration mislabelling etc.

25Ingalls v. Miller, (1889) 121 Ind. 188, 22 N. E. 995.
“Said defendant went no farther than to say that the bond was ‘A No. 1.’ which we understand to mean that it was a first rate bond or that the railway was good as security for the bond. We are constrained to hold that he was not liable under the circumstances of this case, even if he made the statement in bad faith. This rule is hardly to be regretted when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value when the expectation has been disappointed.”

**Manufacturer’s Liability to Consumers**

The abandonment of the doctrine of *Winterbottom v. Wright,*

that a vendor or manufacturer of a chattel is liable for injury to a user only where there is privity of contract between them, seems to be almost complete in some jurisdictions. This rule, never authorized by the case of *Winterbottom v. Wright,* for which it has been named, has checked the logical development of the law of negligence for almost three quarters of a century and until very recently its obvious injustice has been mitigated only by a few exceptions as arbitrary as the rule itself.

As the general doctrine becomes less and less suited to our more and more mechanical times and as the manufacturers and the users of the multitude of appliances depended upon in ordinary life are farther apart, it has really become impossible to attain justice between the parties on the basis of a few exceptions to the doctrine of *Winterbottom v. Wright.* A few cases have at last laid down the proposition that the idea of warranty and of privity of contract in such cases must be scrapped together with the exceptions and that liability should be predicated upon negligence.

Have we not here an important contribution to the development of a better concept of social justice? It will also be a pleasure to those who have faith in the vitality and adaptabil-

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29The leading case for this view is *McPherson v. Buick Motor Co.,* (1916) 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C 440. Because of the hope it affords of future development of the law of responsibility for negligence in such situations as were here involved it is worth much that the opinion is by Judge Cardozo of the New York court of appeals. Judge Cardozo said in his opinion in this case, “We have put aside the notion that the duty to safeguard life and limb, when the consequence of negligence may be foreseen, grows out of contract and nothing else; we have put the source of obligation where it ought to be. We have put its source in the law.”
ity of the common law to notice that this development has taken place solely through the adaptation of the principles of the common law as laid down in the repeated decisions of the courts and entirely without the aid or influence of legislation. The result of this modification of responsibility is to tend to shift the burden of loss (so far as it can be translated into money damages) back to the producer whenever a defective chattel injures an innocent user or consumer. Negligence and proximate cause are of course part of the plaintiff's case. This loss then becomes a part of the cost of production and is shared by the industry at large and thus ultimately by society.30

Illustrations could be multiplied, for example the tendency to allow recovery for damages in the nature of mental and nervous shock where unaccompanied by physical impact, affords material for extensive discussion as another demonstration of the rise of a new set of social values.31 Likewise the relations between the owners of real estate and persons coming thereon for one purpose or another are distinctly changing. Professor Bohlen has said in an article in the University of Pennsylvania Law Review:

"It is true that a persistent change in public opinion as to the relative value of the interests compared tends to find expression in judicial decisions. Thus the early decisions, which held that the landowner's interest in doing as he pleased upon his own land was of greater value than the life and limbs of even a morally innocent intruder, have yielded to a change in public opinion which places a higher value on life and limb than upon the traditional, dominial prerogative of the landowner."32

The topics chosen for discussion herein have been chiefly of the sort wherein we find the law going farther than formerly in

30For citation of numerous cases and further discussion see article—Tort Liability of Manufacturers etc., 10 MINNESOTA LAW REVIEW 1; also note 1 Wisc. L. Rev. 433.
31The recent English case of Hambrook v. Stokes Bros., [1925] 1 K. B. 141, in which plaintiff sued for the death of his wife whose death resulted from the nervous shock of seeing defendant's motor truck strike and injure her child. The court on appeal held that plaintiff could recover if he showed that the shock was due to what she herself saw with her own unaided senses and if it was due to reasonable fear of immediate personal injury to herself or her children. The whole English doctrine of no recovery for shock without physical impact is re-examined in the light of this case in 41 L. Q. Rev. 132. For an earlier discussion of this problem see Bohlen, 50 Am. L. Reg. 141.
32Bohlen, Mixed Questions of Law and Fact. 72 U. of Pa. L. Rev. 111 at 120.
the direction of allowing recovery based upon the recognition of new rights as inherent in personality. It is conceivable that in some directions social justice is better served by the restriction of individual rights of action in tort which may have been long recognized. There are instances in which defenses may be strengthening and extending to meet changes in public opinion. It has been the prevailing rule that newspapers in dealing with candidates for office and with office holders must confine themselves to fair comment and statements of fact which will meet the test of truth. In other words the defense of privilege in actions of libel will not be available to newspapers making false statements of alleged fact with reference to candidates and office holders. There is a minority view on this point which has something to be said for it in the name of the social interest in freedom of public discussion.\textsuperscript{33} Closely related on the other hand, to the field of libel is the right of privacy which would seem to be making some headway as a new field of liability when we consider that it was first mentioned in 1890 in an article in the Harvard Law Review by Brandeis and Warren.\textsuperscript{34}

This paper has confined the examples or illustrations of its thesis to the law of torts. The operation of the same forces and tendencies may be recognized in all branches of the law. We may discover evidences of this same conflict between the older and the newer standards of jurisprudence going on in every court in the land in which causes are being heard, all the way from the lowest, most informal tribunals to the supreme courts. Old and apparently firmly fixed principles of the law are being disturbed not only in torts but in every field; in equity, in procedure, in constitutional law. It is interesting to note the sociological developments behind many constitutional questions. The child labor statute passed by Congress was declared to be unconstitutional, not because of the principles of social justice involved but on account of the methods provided.\textsuperscript{35} Thus far the legislatures of the several states have not found themselves ready to ratify an amendment to the federal constitution which will clearly authorize such

\textsuperscript{33}Van Vechten Veede, Freedom of Public Discussion, 23 Harv. L. Rev. 413.
\textsuperscript{34}Brandeis and Warren, The Right of Privacy, 4 Harv. L. Rev. 193. See brief survey of recent cases involving Right of Privacy, 10 MINNESOTA LAW REVIEW 55 and sources there cited.
legislation. The difference between child-labor and other subjects of social legislation upon which Congress (and more often the states) has acted, is a difference not in fundamental principle, but in degree of control provided for, or, in some of the collateral circumstances in the struggle of the particular "cause" for official recognition. If time proves the justice of the demand for the control of child-labor (even federal control) can any reader of history doubt that it will be accomplished? 80 Indeed, the study of constitutional law is an outline of the social and political and economic history of the United States.

The concepts of individual rights are of course inter-related with contemporary ideas of individual liberty. Liberty, as it was understood in the legal philosophy of the 18th and part of the 19th centuries, has given place to a less individualistic and more collectivistic liberty. Judge Cardozo in the series of lectures previously referred to says: 37

"Gradually, however, though not without frequent protest and intermittent movements backward, a new conception of constitutional limitations in the domain of individual liberty emerged to recognition and dominance. Judge Hough, in an interesting address, finds the dawn of the new epoch in 1883 when Hurtado v. California 110 U. S. 516 was argued. If the new epoch had then dawned, it was still obscured by cloud and fog. Scattered rays of light may have heralded the coming day. They were not enough to blaze the path. Even as late as 1905 the decision in Lochner v. New York 198 U. S. 45, still spoke in terms untouched by the light of the new spirit. It is the dissenting opinion of Justice Holmes, which men will turn to in the future as the beginning of an era. In the instance it was the voice of a minority. In principle it has become the voice of a new dispensation which has written itself into the law. 38"

361 Odgers & Odgers, Common Law of England 2nd ed. p. 4. In the introductory chapter on the nature and sources of rights and duties under the common law says, "Yet the will of the people ultimately prevails whenever the people has a will and cares to make it felt. Hence more and more every year the tendency of our legislation is, without advancing or injuring the interests of any particular class, to assert, maintain, and promote the overriding claims of the community."

37 See note 12.

38 This "new dispensation" which, as Judge Cardozo says, "has written itself into the law," speaks to us through many tongues. At a later lecture in the same series already referred to Judge Cardozo quotes from the December 8, 1908, presidential message of Theodore Roosevelt as follows, "The chief law makers in our country may be, and often are the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty—they necessarily enact into law, parts of a system of social philosophy and as such interpretation is fundamental, they give direction to all law making. The decisions of the courts on economic and social questions
The law of torts, dealing so largely as it does with purely human relations, probably brings before the courts as many situations involving new social issues, as any field within the whole scope of the law. In dealing with these issues, the courts cannot escape committing themselves to the one economic and social philosophy which represents the present age and which has been so much advanced by the work of such judges as Holmes and Cardozo, or they must elect to adhere to the philosophy of Lemuel Shaw and his contemporaries and predecessors. This older legal philosophy is that of the old England that has gone and of the social order that has gone with it. It is the law and the social philosophy of an England whose quaintness and charm appeal to us, but we cannot overlook that along with the charm of that age there was much of injustice and of indifference to human rights and human misery.

Every lawyer is in some limited way a collector of books. If he loves books, the lawyer should know A. Edward Newton and his delightful "Books about Books." Mr. Newton in his collection of short papers published under the title, "The Greatest Book in the World," has a chapter on "Sporting Books," in which he has caught and interestingly characterized the spirit of the times when so many of our common law rules were being given the shape, in which they have come to us, by the English judges. After telling us that:

"The Englishmen are the sportsmen par excellence of the world," and that "in all that pertains to sport, to games, to life in the open, England is the land," Mr. Newton continues: "The English are very complacent about all this, indeed nothing less than a world war, can shake them out of their complacency.

Never again will England be so completely cock of the world's walk as in the fifty years after the battle of Waterloo. England was then indeed the right little, tight little island to which all the world paid and would continue to pay tribute. The rich were very rich, and the poor were very poor, but was not that as God had ordained? The Governors, teachers, spiritual pastors and masters were satisfied and that was all that was necessary. Oh what a comfortable thing it was to hear the children promise to order themselves, 'lowly and reverently' to all their 'betters' and to hear them sing:

depend upon their economic and social philosophy, and for the peaceful progress of our people during the 20th Century we shall owe most to those judges who hold to a 20th century economic and social philosophy and not to a long outgrown philosophy which was itself the product of primitive economic conditions."
"God bless the squire and his relations,
"And keep us in our proper stations."

"The poor were expected by church and state to work for pay
just sufficient to keep body and soul together, just as the squire
was expected to ride and drive and hunt and shoot from one year's
end to another, . . . and this life, so picturesque and so com-
pletely a thing of the past, is nowhere so perfectly described as
in the 'Sporting Books' which we are now to consider."

Another picture of those same days and one with which many
lawyers are familiar, is that book in which Mr. Warren has made
a novel about the ridiculous fictions of the action of Ejectment,
"Ten Thousand a Year." The fiction of the Victorians is large-
ly built about the life of the land-owning gentry of old England
and a comfortable life they must have had and there may be
occasional twinges of regret for the Golden Age of the English
landlords and for the law which came into being to "bless the
squire and his relations." However, since the land acts of 1925,
can anyone doubt that it is gone forever, or, can one doubt that
the 20th century is better off without it?

As has already been stated it has not been the purpose of this
article to generalize about the evolution of law and the processes
by which it appears to be harmonizing itself with present day
social philosophy. It has attempted to show by certain references
what is taking place and what has been accomplished in one
branch of the law. To point out other developments which ought
to be brought about and doubtless will take place through one
means or another to bring this part of the law into more complete
harmony with the standards set by the other social sciences would
be an interesting undertaking, but "that is another story" and this
is already too long.