Suretyship

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THE ORIGIN AND HISTORY OF THE CONCEPTION

INTRODUCTION

We are apt in our investigations into the history of human institutions to postulate that history as one continuous story of the infancy and adolescence of the race from its origin to its present intellectual maturity. Conformably with this idea, we discover in the Andaman Islander or the Australian Aboriginal a type of backward or arrested development, and from the starting point presented by their social and moral standards we speculatively reconstruct the evolutionary processes by which we ourselves progressed from the stage to the present. The complex rules however relating to intertribal marriage of the Arunta (Spencer & Gillen pp 71-75) may it is suggested be a survival from a higher civilization. An allegedly ancient skull found at Malga, Queensland is said to represent a cranial development superior to that of the Australian Aboriginal, who is probably a degenerate. This may be more generally true of the savage, or semi-savage races than is usually acknowledged. We have to revise our conceptions of the age of the world and the race, and freed from the restraints of orthodoxy and tradition, seek a clearer and wider mental vision. The chronological tables of Sargon B.C.3800 (Records of the Past II Vol -p805) includes 330—Sovereign who preceded him. Making every allowance for error and exaggeration, there remains recorded 3800 years ago the chronology of a then vast and distant past. Professor — Blinders Petrie states that he has traced eight periods of culture, in Egypt, each of an average age of 1800 years. Similar traces are found in North and South America, China, Central Asia, India, Africa, and Asia Minor. It may be that in
this apparent ebb and flow of the tide of human affairs each succeeding reflux carries the race higher and farther in attainment, so that each period is an advance on the last towards some preordained high water mark of human destiny and achievement.

Can we say of any of our legal conceptions to which we assign a comparatively modern origin that it is not a renaissance or rediscovery. The conception itself may have survived from some long lost civilization by means or through channels of which the traces are lost. Indeed it is probably true that since the first enlightenment by culture of any particular community or section of the race there has been no relapse of the whole at any time to primeval conditions.

Professor Maitland warns those too speculative investigators who are ever looking for survivals, of the danger of mistaking the new for the old; but there is equal danger in the other extreme, the danger to those who do not speculate at all, of mistaking the old for the new.

Infancy is the age of simple ideas and crude processes, so to the infancy of Jurisprudence we are apt to assign the origin of the crude and simple—as contrasted with the complex forms or expressions of the same concept or notion when we find them existing side by side in the same code or body of laws. The simple pledge is suggestive of a survival from ruder times; the hypothec appears as the cultured development. While our reasoning may not be invariably correct, it may be safely assumed that the general trend of progress is from the simple to the compound or complex, or from generalization to specialization. The process may be synthetic or analytic. The original concept may be found so related to others as to form but the part of a greater whole, or a unit in a related group of ideas, or it may itself be a compound which is resolvable by study and experience into its components. As Maine says, "We know enough of Ancient Roman Law to give some idea
of the mode of transformation followed by legal conceptions and legal phraseology in the infancy of Jurisprudence? (Ancient Law, p. 216). Jurisprudence begins with a few rudimentary general ideas. Its progress is one of growth from these rudiments as a stem throws out shoots. It may in any particular system take on alien grafts or lose superfluous limbs by decay or the knife, but the roots, stem and main limbs are the system itself. So the rudiments remain as an integral part of the developed idea. The difficulty of the investigator is frequently to determine the sequence of growth. Whatever may be its origin and the agencies which have given it shape and efficiency the modern contract of suretyship is in operation a form of security related to, if not descended from or through hostageship and the pledge or hypothec of property, the need which it was conceived to meet is common to humanity, and as old as humanity. While it is therefore significant, it is not remarkable that the concept not only holds an important place in probably every modern system of law but that in some form it has left its traces in every representative code of body of laws of which any record is extant from the age of 

Hamurabi about 2300 B.C. down to the beginning of modern legal history. It may be that if that legal history furnished the necessary guidance, these traces could be followed back to a single common source. It is perhaps more probable that this universality is the result partly of intercourse and partly of the independent evolution of ideas under the like conditions and the like stimulus at certain epochs in the history of civilization, or in communities remote from each other in point of time or space. From such records as survive we may with the aid of experience and deduction try to envisage some of the conditions under which the notion first germinated.

The effect of the evidence derived from comparative Jurisprudence is to establish that view of the primeval condition of the human race which is known as the Patriarchal Theory."

(Ancient Law, I22)
The family is a community in itself, the absolute imperium being vested in the patriarchal head. The members of the family are not legal entities but merely atoms which only have a legal existence collectively and as a whole. As individuals they possess neither property nor rights, and obedience is not an ethical duty, but rather, like gravitation, a necessary law.

Their relations interact and with the head are determined by status or condition not by choice or contract. The family might in a few generations expand to the proportions of a tribe under a single patriarchal headship, the succession to which was regulated by primogeniture. More often the pressure of circumstances or of individual ambition and qualities of leadership would lead to secessions. Separate family groups would be formed, associated together it may be by ties of kinship or common interest. An aggregate of such associations might reach the dignity of nationhood. Groups of alien stock are admitted by ex-nihilo a process of adoption or absorption under cover generally of the fiction or tradition of a common ancestry. Traditions of race and high destiny even if only mythical have always been a vitalizing and civilizing influence in national life. The descent of the Hellenes from a common ancestor Hellen was a fundamental article in the popular faith, (Smith's Greece p 12). So the Hebrew's pride of race found its fullest expression in the patronymics "Children of Israel" "Seed of Abraham".

In a patriarchal society the family group with its collective rights and responsibilities formed a corporate or quasi corporate entity. In the aggregate or association forming the gens, family was the unit. (Ancient Law I,84) There could at first be no law or rule of primogeniture governing succession to the headship. Expediency, the difference paid to seniority and experience, and possibly the expressed preference of the passing chief would determine the choice in so many cases in favor of the eldest born as to establish a usage.
which in time crystallised into custom and law. There were
however exceptions and variations: even the family itself
became in some circumstances a structure more or less arti-
ficial, as in the case of the Irish Joint family (Senchus
Mor Vol IV p p 283-5) and the Roman family which as a civil
organization included slaves. Two natural instincts common
to all forms of life would furnish to the primitive man the
impulse towards the evolution of the moral sense. The ----
instincts of self preservation and reproduction prompt him,
not only to defend his person or the possession of the game
he has captured, and the mate he has chosen against all comers,
but also, if the need arises, to take without compunction the
life or food or womankind of his fellow. When the conception
of property or even a mere right of occupancy was developed,
cattle were accumulated as a form of wealth and medium of
exchange, the old instinct survived and cattle lifting was --
among the Irish Septs and in the Border forays of the Scotch,
was the commonest form of depredation either for gain or by
way of reprisal. Probably the conscience of each particular
community concerned attached no greater degree of turpitude to
the practice than to any other form of warfare, especially in
an age when the ability to take and keep was the only title
recognised. Interchange between the primitive families or
--
groups would be confined to simple commodities by way of bar-
ter on the spot. The form of a right or duty resting on
promise as (as will be stressed later) a comparatively modern
conception. Hence not only could there be no credit or time
payment, but the transaction effecting a change of possession
and concerning the corporate interests would assume the pub-
lic character of a diplomatic act or treaty concluded with
formality and ceremonial, in the presence of the family or its
principal members, for this reason intestate succession was
the rule among the early Teutons (Uris, and p 621) and even to
day a Conveyance in Germany is of a public character. Thus it
it may be, originated also the formal conveyance of which the
Roman Macedonia is a type. It has been well observed that
the primitive mind could no more conceive of a right apart
from form than it could conceive of a religion without a cult.
Lacking ideality its only avenue to belief or conviction was
through the physical senses. Thus a transaction must not only
be capable of being seen and heard, but to become of record it
must actually have been seen and heard. Hence the witnesses
were requirement of procedure, not to complete the formalities
but to demonstrate them. The same formula in the testament per
ses ut libram among the Romans employed to transmit the
familia that is the succession to the whole body of universitas
of rights duties and privileges covered by the Patria Patentes.
In a state of society lacking both moral and legal sanctions, 
the safety of the individual or communal life, and the posses-
sions of the means and opportunities of existence depend upon
brute force. Either in aggression or defence, the savage must
slay or be slain. His only guarantee of security is to exter-
minate his enemy or rival. Held in captivity the latter would
be merely an encumbrance unless under conditions industrial or
otherwise when his services could be utilised and he acquired
an economic value as a chattel possession. That stage of
development marks the beginning of slavery as an institution.
"Servi ex eo appellati sunt, quod imperatores captivos venere
ac rer hors servare nec occidere solent." ( D I.6.4 )
It must eventually happen that in warfare against considerable
areas or by an army on campaign, in enemy country, or under a
humane leader, wholesale capture or slaughter became either --
impossible, inexpedient, or abhorrent. The elementary and funda-
mental need of securing safety by submission or of ensuring
good faith, or the performance or observance of any act, for-
terance office or undertaking might in such circumstances be
satisfied by the capture or voluntary surrender of one or more
members of the enemy group, who either by reason of personal
prowess, force of character, or exalted birth, were of sufficient importance to make their safety a first consideration. The individual thus taken was held in obsequium (obseo) or vetagium as a pledge or surety for the good behaviour of the community he represented. Such hostages pledges might be given taken or exchanged at any stage in any dispute, before or without a resort to actual hostilities. There seems no reason to doubt that hostagehood might be as well undertaken voluntarily as enforced compulsorily, whether in private interfamily differences, or in international warfare. Nor perhaps was the personal custody of the hostage always necessary to complete the security when the failure to answer his duty or undertaking resulted in outlawry. The engagement entered into by Judah son of Jacob "Send the lad with me and I will be surety for him (Genesis 43:9)" was kept when Judah offered to become bondsman or slave to Joseph on condition that Benjamin was free to return to his father. Judge Holmes in his essay on Anglo Saxon legal history p. p 716- 18 writes of "the clear descent of suretyship from the giving of hostages." As appears from the context he is alluding to the contract of suretyship which was a comparatively belated development in at least the two greatest judicial systems in history, that of Rome and our own. Surely the concept itself is latent in hostagehood which is probably the first primitive form in which it found expression. There is ample evidence in modern legal institutions to indicate that where and when the conditions have coincided, societies everywhere have followed the same general grooves of change. Within the family all executive and administrat-
ive power was comprehended in the Patria Potestas. Between the family or tribal groups there offence of the individual was the offence of his group. There was but one code and one sanction, the law of revenge: a law lacking even the comparative amenities of the lex talionis; so long as its exactions were measured only by passion. Violence resorted by violence, begets the vendetta. The voluntary surrender of forcible taking of property to compensate for the theft or destruction of property in "sugges"
alternative of property compensation for homicide or personal injury. Tacitus notes this in practice among the Germans. The transition is gradual. The faela, werigild, or price of blood is a charge on all the family or kindred of the offender for the benefit of the kindred of the deceased. The growth of population, increase of intercourse, and interchange of commodities, have in time the inevitable result of disintegrating the family and substituting individual for collective responsibility. In the long transition period from the patria potestas or its equivalent to the sovereign authority of the State, the individual is at first left to the natural remedy of self-redress; Maine writes "The functions of law begin when authority interposes in private or individual disputes." That interposition at the outset goes only to the extent of regulating or supervising the proceedings of the disputants. The processes are those of individual force at first actual and then symbolic. The archaic inscription B.C. 600 found at Gortyn in Crete indicates that in certain forms of action in Athenian procedure the plaintiff or prosecutor might lay hands on and take the defendant to a magistrate or conduct the magistrate to the defendant (Whibley 380). Similarly self-aid and authority met and co-operated in the Roman "Actio per manus Injectionem." This was based on what was probably recognized as a customary right of the injured to personally summon the defendant before the praetor and on his refusal to drag him there. In time the placing on of the hand became a mere symbol of force, non-compliance being punishable by fine. "The interposition of the praetor was symbolic of the interposition of the State authority in a private quarrel" (Ancient Institutions 270). The judicial combat as a mode of deciding private disputes is said to have been introduced by the Goths into European Countries which they over-run in their predatory raids. The practice was probably ancient in Germany when first introduced (if it was introduced) by them into adjoining communities. The influence of Teutonic and Frankish thought and institutions on the development of English Customary
Law must be noticed later. The appeal or wager of battle as a form or procedure was after efforts to suppress it by the Lombard edicts revived under the feudal laws of Otto I - 900 A.D. and crossed with William I. The legal history of medieval and modern England presents a panoramic view of the transformation. Society consists of a number of patriarchal groups either isolated in semi-savage or loosely associated into the national entity, which as the State was officially invested with exclusive administrative and judicial functions, beginning with political union the Royal power was then directed to the control and regulating of primitive procedure. "The efforts of later English kings appear to have been successful in limiting the feud to cases of personal violence. Under the name of Appeal the feud reduced to order and limited to the parties interested remained at least until Weston's day the ordinary remedy" (Jenks p 42)

The appeal, while falling into disuse, survived indeed as a remedy alternative to the procedure provided by the Assize of Clarendon and by subsequent legislation until 1819 when it was abolished by 39 Geo III c 40. The Assize of Clarendon marked distinctively the point at which civil and criminal procedure took different ways. That point is only reached in the history of jurisprudence when the sense of national life has passed into activity a national conscience which recognizes public rights and duties, and sanctions them by public law. Thus the publica judicia were a comparatively late development in Roman law.

There being only the one remedy of force available to the primitive men, every wrong and injury entailed similar consequences; hence early law recognizes only the obligation ex delicto. When the public wrong or crime has been distinguished the residuum is the subject of civil procedure, with respect to which the same process of gradual State interposition is continued.

The personal summons is replaced by the Royal writ and the personal distraint by official execution. How gradual and guarded the movement was, is indicated by the fact, that, even in --- Glanvill's time the Kings Court refused to adjudge disputed arising
out of private agreement. There were other movements accompany-
ing the transition from commercial to individual legal and political capacity in the same direction, and from the family to the State social organization in another, and not only --- accompanying, but related to them and to each other, sometimes as cause and sometimes as effect. Personal rights and duties instead of being prescribed by custom or usage according to status or condition in life, are increasingly varied or created by convention or agreement. With the growth of intercourse arises the necessity of a medium of exchange, and barter gives place to sale. The recognition of the binding force of a formal promise or of the obligation imposed by the use of possession of another's property, renders possible the executory contract. The concept of debt emerges and gradually takes on its present character as the creature of promise express or implied.

In attempting an estimate of the influence of these changes on the development of suretyship from hostage to the modern contract in its several forms, the student must rely chiefly on deduction, with the disadvantages that even the first premises of his complex syllogism rests partly on tradition. No life history of the subject is possible. The most that can be essayed in this paper is (1) To notice generally the --- evidences of the conception in different societies or systems as nearly as possible in chronological order, (2) To distinguish, compare, or contrast the forms in which it appears, and (3) To discuss the relationship between differing forms and between them and the conditions under which they appear.