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## Forms of Anglo Saxon Contracts and Their Sanctions

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## FORMS OF ANGLO-SAXON CONTRACTS AND THEIR SANCTIONS.<sup>a</sup>

THE several forms of contract will be taken up in the following order: 1. *the Surety Contract*, including (a) the creditor's rights against the debtor, (b) the creditor's rights to sue the surety, and (c) the surety's right of reimbursement; 2. *the Warranty Contracts*, including (a) warranty of title, and (b) warranty of quality; 3. *the Contract of Court Record*; 4. *the Contract of Plighted Faith*; 5. *the Pledge Contract*; 6. *the "Delivery-Promise"*; 7. *the Written Contract*; and 8. *the "Earnest" Contract*.

By way of introduction two other topics will be briefly summarized: 1. *Contract Transactions and Contract Actions*; and 2. *the Procedural Contract*, including (a) the appearance contract, and (b) the judgment contract.

The eight forms of the non-procedural contract will be placed in two periods. The first, A., begins with the laws of King AETHELBERT, which date from 601 to 604. It includes also the laws of Kings HLOTHAER and EADRIC, WITHERAED, and INE and runs to about 696. After that there is a gap of about 200 years during which we have no recorded laws. The second period, B., begins with the laws of King ALFRED starting about 890,<sup>1</sup> and ends with the laws of King CNUT about 1027.

The first three, (1-3), of the above contracts will be taken up in the first period, for they seem to have had their origin at that time. The last five, (4-8), are placed in the second period. The eighth, the "earnest" contract was not fully developed even in the age of GLANVIL, but it is so clearly of Anglo-Saxon origin and so closely associated with the other Anglo-Saxon contracts that it seemed best to take note of it. The contracts placed in the first subdivision will be treated as a whole under A., i. e. their history will be carried through the second period. The significance of the classification is simply to indicate about when the several contracts originated and to emphasize the conditions which gave rise to them.

### I. CONTRACT TRANSACTIONS AND CONTRACT ACTIONS.

Before taking up the several forms of contract separately, it seems desirable to note the nature of the transactions to which the formalities were applied, and the nature of the actions (if Anglo-

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<sup>a</sup> Copyright, 1917, by Robert L. Henry, Jr.

<sup>1</sup> He came to the throne in 871.

Saxon legal proceedings may be so called) by which contracts came to be protected.

The principal, if not the only, contract transactions were of three types: (1) the executed barter, or sale, involving contracts of warranty; (2) the barter or sale executed on one side only, and the loan; and (3) the bilateral bargain and sale, executory on both sides.

So far as appears the contractual needs of our Anglo-Saxon ancestors were confined to sales and loans. To be sure there were surety and pledge contracts, but they were not collateral transactions as with us, but were themselves the principal contracts. They were used for sales and loans, and will be treated not as distinct transactions, but as forms of contract.

Leaving out of consideration the bilateral bargain—which appeared as the “earnest” contract and which, as already noted, was still a fledgling at the end of the Anglo-Saxon period—all of the contracts—those of warranty, sale and loan—were unilateral. If each party in an exchange or a pledge entered into a covenant, the obligations were independent.<sup>2</sup>

If the rights involved may be judged from the actions available for their enforcement, they were all of a similar nature. In other words the remedy of a warrantee, of an unpaid vendor, of a purchaser who had paid but had not received the goods, and of a lender, was the same.

It would be going too far afield to enter into a discussion as to whether a vendee before delivery got title and a “real” right, or whether a lender transferred the title in making a loan for use, or a deposit. It will be sufficient for our purposes to show that so far as the remedy was concerned, there was no difference between the rights of the obligee in the several kinds of transactions. For instance, we may call the vendee’s right “real,” if we please, but it was not available against a third party. If the buyer A had paid B for the chattel, and B then sold and transferred it to C, A had no action against C, his action was against B on the contract.<sup>3</sup> C got an indefeasible title. Again the only action available to a vendee was purely personal. It was based upon contract.<sup>4</sup>

Nor was there any difference in the remedy of a lender who had loaned for use and one who had loaned for consumption. LAUGHLIN says,<sup>5</sup> “In the action for the return of a fixed object, which had

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<sup>2</sup> See the second instalment of this paper.

<sup>3</sup> Laughlin, *The Anglo-Saxon Legal Procedure*, Essays in Anglo-Saxon Law, 204.

<sup>4</sup> Laughlin, 196. Hereafter the essay by Laughlin cited in note above will be cited as “Laughlin.”

<sup>5</sup> Laughlin, 199.

been loaned or deposited, HAVEL's distinction between an obligatory and a real right is untenable. The plaintiff in his claim asserted neither ownership nor a real right in opening the procedure, nor named the obligation arising from the contract. It was immaterial whether the object passed out of his possession as a *commodatum*, *depositum*, pledge, for inspection with purpose of sale, or for repair. As in the case of debt, a simple claim, without any statement of the legal obligation, set the procedure in motion."

In brief, for all the contract transactions there was but one form of procedure, and one kind of claim. In each case the plaintiff claimed that the defendant was under an obligation to give him a thing, or a definite sum of money, in none of them did the plaintiff claim that the thing or money was his. In each case the obligation which the plaintiff sought to establish by court proceedings was promissory. That is plainly indicated by the formulas used.

The plaintiff opened the proceedings by the following oath: Oaths X. "In the name of the living God as I money demand, so have I lack of that which N. promised me when I mine to him sold."

The defendant's reply ran: Oaths XI. "In the name of the living God, I owe not to N "sceatt" or shilling, or penny's worth; but I have discharged to him all that I owed him, so far as our verbal contracts were at first."<sup>6</sup>

## II. THE PROCEDURAL CONTRACT.

The law began with the procedural contract, the treaty between two families, by which the defendant family agreed to pay a composition in consideration of the plaintiff family giving up the pursuit of vengeance.

An excellent picture of the negotiations leading up to such a contract is to be found in the laws of King EDMUND. A is charged with having killed B. The family of B gathers and pursues A to wreak vengeance upon him. A appeals to one of the leading men of his own family, asks protection and promises to do the right thing; that is to stand trial if necessary and to pay a composition out of his own property in so far as he is able, if he is found guilty. The family of A gather for his protection. The two families under arms are arrayed against each other. The dooms of EDMUND then proceed to describe what should take place.

"First according to folk-right the slayer shall give hand-pledge to his for-speaker and the for-speaker to the kinsmen that the slayer will make *bot* to the kin. Then after that it is requisite that hand-pledge be given to the slayer's for-speaker that the slayer may

<sup>6</sup> For a description of the procedure see Laughlin, 189-202.

come near and himself give *wed* for the *wer*. When he has done that let him find sureties."<sup>7</sup>

It is the *wed* ceremony which concludes the treaty. That was as follows. The accused handed a stick, or in all probability his spear in the case described, to the spokesman of the accusing family, and the latter then handed it to the sureties who were representative men of the defendant family.<sup>8</sup>

The meaning of the ceremony is this. A captured man is of course disarmed. In the case described the capture has been frustrated by the fleeing man's family. His weapon is handed to the pursuers and by them handed back to the family of the pursued in return for their solemn promise to see that the accused stand trial, if necessary, and that the composition, which will be due if he is found guilty, shall be paid.<sup>9</sup>

The case pictured is one of a homicide, but every suit for a composition was of essentially the same nature. Feuds were pursued for killings for centuries after it had become customary to compound for lesser injuries. They died hard, and it is due to that fact that at such a comparatively late date as the reign of King EDMUND, (940-946) we get a picture of negotiations which were likely to take place and which the king and his witan hoped would always take place after a slaying. If the injury was less serious the chances were that the family of the sufferer would not take up arms. But the pressure was of precisely the same kind. The person who had done the harm was compelled, through fear of the injured person's family, to give sureties from the members of his own family. Because of the identity in nature of all composition suits it is legitimate to use a citation which comes from the second period in picturing the initiation of the contract employed in the first period as well as later. The customary law indeed said that when one man demanded justice of another the latter was bound to give him sureties. And for failure to comply with such demand a fine was prescribed.<sup>10</sup> But there is every reason to believe from the general condition of the country, particularly its unorganized state, that during the early Anglo-Saxon period, at least, the threatened fine had little substantial effectiveness. The real force inducing the procedural contract was the potential strength of the plaintiff group.

But suits were not long confined to composition claims for assault, battery and homicide. At an early date stealing, particularly cattle-

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<sup>7</sup> Edmund I., 7.

<sup>8</sup> Wigmore, 10 Harv. L. Rev., 328n.

<sup>9</sup> Cf. Alfred 42, Edward 9.

<sup>10</sup> Hlothar & Eadric, 8.

stealing, gave trouble. The procedure in such cases was set in motion by a laying hold of the chattel claimed. The possessor then had either to give it up or give sureties, who would see to it that he was brought to trial to defend his title.<sup>11</sup>

When contracts became actionable, the procedural contract was obtained in advance, that is, at the time the contract was made. Sureties were then given by the debtor whose business it was to see that performance took place, or in case a dispute arose, to bring the debtor to court and to see that he performed the judgment rendered. The contract procedure was based on the procedural contract.<sup>12</sup> In short, all civil actions were founded on contract.<sup>13</sup>

When the procedural contract, with which every law suit began,<sup>14</sup> was once entered into, what was the sanction insuring its performance? As far as the promisee-family was concerned it was primarily the good faith and honor of the promisor-family, with whatever religious and customary sanctions the ceremony carried with it.

In addition in the composition and theft cases there was some inducement to the state to take a further interest in the matter, in the shape of the *witte*, or peace-money. As the offenses for which compositions were demanded were also breaches of the folk-peace, defendants had to pay not only *bot* or satisfaction money to the plaintiffs, but also the *witte* to the representative of the state, the king.<sup>15</sup> Theft, also having a criminal aspect, was a matter in which the state was concerned throughout the proceedings. But in contract cases there was no such public interest, and as to them the sureties were the sole sanction.

The procedural contract normally included both (a) a contract to produce the defendant in court to answer to the claim and (b) a contract to pay the judgment rendered.<sup>16</sup> They could, however, be separate. For instance, bail of a person charged with crime could discharge their liability by producing and surrendering the accused.<sup>17</sup> On the other hand, it might happen that a man could not find sureties before trial. In that case he might be imprisoned up to the time of trial. Then if condemned, an opportunity was given to relatives or friends to redeem him by becoming surety for the amount of the

<sup>11</sup> Laughlin, 202 et. seq.

<sup>12</sup> Laughlin, 196.

<sup>13</sup> Laughlin, 189, citing Sohm, *Das Recht der Eheschliessung*, 24-26, 78-87, "adding the weight of his authority to Laband" to the effect that German civil actions were founded on contracts.

<sup>14</sup> Hlothaer & Eadric, 8; Ine, 8.

<sup>15</sup> Laughlin, 273.

<sup>16</sup> "De iudicio siste" and "de iudicio solvi," Laughlin, 190.

<sup>17</sup> Edgar, II., 6.

judgment.<sup>18</sup> In the last case, or in any case in which immediate satisfaction of the judgment was not made, we see a judgment contract. It was always a contract with sureties.

What was the sanction behind it? The sureties and the solemnity of their undertaking. The state was no longer concerned. There was not even the threat of a fine, or the prospect of a share in the proceeds, as was the case before judgment.

What of execution? As far as appears there was no such thing as a suit upon a judgment. There was no assistance by the state in the matter of executing a judgment. It had to be done by the plaintiff, in so far as it was done.<sup>19</sup> It was the business of courts to declare rights, not to enforce them. As a practical question, however, the situation was not bad. For if the sureties were of the proper sort, the judgment would be executed. Also public opinion and social pressure were so strong that to declare a right, to the knowledge of the whole community, must generally have been as effective as enforcing its execution.

In the second period, which begins with the reign of King ALFRED, two important developments took place which materially affected the legal situation. In the first place society became organized on a new basis. The country was divided into hundreds and tithings. The first mention of such organization is to be found in the laws of King EDGAR, 959-975.<sup>20</sup> By the laws of King ÆTHELRED, 978-1016, it was provided that every freeman should have a true *borh*, i. e., a surety, "that the *borh* may present him to every justice, if he should be accused."<sup>21</sup> In the country every ten men were bound together in tithings. They were required to be sureties for each other. In the cities and towns men were bound by town or gild organizations.<sup>22</sup> Every lord had to be a protector and surety of his dependents.<sup>23</sup> There were then few unattached or lordless men, and if any of such got into trouble it was apt to go hard with them.

In the second place, from the reign of King ÆTHELSTAN, 925-940, the state—represented by the king, his sheriffs, and the ealdormen—began to take a more substantial part in inducing the submission of cases to adjudication. From that time on,<sup>24</sup> the law is full of references of "riding" to compel recalcitrant families to enter into the procedural treaty. In addition to that, penalties of the

<sup>18</sup> Edward, 9; Æthelstan, V. Twelfth; Æthelstan, V. 4.

<sup>19</sup> Laughlin, 193, 196.

<sup>20</sup> Edgar, I, Intro. 2.

<sup>21</sup> Æthelred, I, 1; Cnut, 20.

<sup>22</sup> Alfred, 27.

<sup>23</sup> Æthelstan, I, 2, IV, 1; Æthelred, I, 1.

<sup>24</sup> Æthelstan, V, eighth 2, 3.

severest kind, outlawry, and confiscation of goods were prescribed for contumacy, for being *tíht-bisig* or untrue to the people. Being thrice absent from the *gamot*, which in itself was a breach of duty to the state and at the same time prevented the initiation of suits and prosecutions and summons or arrest, was such an offense.<sup>25</sup>

All of this meant that the executive machinery, such as it was, was now to be seriously employed to enforce the customary law. The sanction, of course, was not as complete as it became a few centuries later, when the state took over both the summons and the execution of judgments, which throughout the whole of the Anglo-Saxon period remained with the parties. The changes nevertheless were significant.

The matter was one of emphasis. The procedural contract was still a contract, in the second period as well as in the first. The difference was merely that it was generally provided in advance, that is, before the wrong was committed; and that the state had determined to use more effective duress to induce the making of the contract.

A.—601 A. D. TO 696 A. D.

#### I. THE SURETY CONTRACT.

##### (a) *The creditor's rights against the debtor.*

Precisely the same *wed* ceremony was used for extra-judicial contracts as for the procedural.<sup>26</sup> The contract thus employed may be called the surety contract.<sup>27</sup> Its chief characteristic was that the surety was bound, the debtor was not.<sup>28</sup> Even as late as GLANVIL such was the case.<sup>29</sup> In order to sue on a surety contract the surety had to be summoned, not the debtor.<sup>30</sup>

How then can we talk about the creditor's rights against the debtor? It is believed legitimate to do so even though they had to be worked out through the surety and with his assistance. For when a surety was summoned to "acquit" the creditor, he produced the debtor to make defense, and the issue was between creditor and debtor.

The party primarily concerned was the debtor. It was his business to perform. It was his business to save the surety harmless. It was his business to defend, to take the clearing oath, if he could.

<sup>25</sup> Edgar, II, 7.

<sup>26</sup> Hlothær & Eadric, 6, Inc, 13.

<sup>27</sup> Holmes, *The Common Law*, p. 247.

<sup>28</sup> Wigmore, 10 *Harv. L. Rev.*, 328n.

<sup>29</sup> Glanvil, Book X, c. 3.

<sup>30</sup> Cf. Glanvil, Book X, c. 4.



If judgment went for the creditor, it was the debtor's property which was applied to its payment, so far as it would go. And in contract matters, unlike the case where a very large *wæp* had to be paid for a killing, the debtor was most likely to have sufficient property of his own with which to pay. If the surety paid in the first instance, he could constrain the debtor to reimburse him. So although the surety only was treaty-bound to the creditor, and the debtor in turn bound to the surety by being under his protection and power, the rights of the creditor against the debtor were real, even though indirect.

It may be asked what reason have we to suppose that contracts were actionable at all, or that there was any such thing as a binding contract as early as our first period of Anglo-Saxon law? Contracts that are non-procedural are referred to in the "laws" very early.<sup>31</sup> The mere fact that they are, is some argument for their existence, but perhaps not conclusive, for may not matters be spoken of in our Anglo-Saxon "laws" which were not legally sanctioned? It is quite possible. If we apply an Austinian definition of law we may be embarrassed to find any law in primitive times. And yet if we are less exacting than that as to what is law, may we not find a substantial difference between a man's right to a composition and his rights on a non-procedural contract? It may be suggested that the right to a composition itself—as every right of action in primitive Anglo-Saxon Law—was contractual, based on the procedural contract. But waiving that point of view, what evidence is there that the early law recognized and sanctioned non-procedural or commercial contracts?

The early law, it will be said, did not concern itself with contracts. Primitive law begins with a tariff of compositions, for assault, battery, and homicide.<sup>32</sup> Then larceny and property-recovery come into notice. Those subjects, with procedural regulations, form almost the entire content of the early "laws." Contracts are only referred to in the most incidental manner. The end of state-sanctioned law was the preservation of the peace. Breaches of contract were not deemed sufficiently menacing to the peace to engage attention.

But even assuming, for the time being, that there was no redress by action for breach of contract, it would be a mistake to suppose that contracts did not exist and were not employed. The only substantial sanction even in claims for compositions was family pressure and custom. In the composition cases, in order to insure the

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<sup>31</sup> Hloth. & Ead. 6, Ine 13.

<sup>32</sup> Laws of Aethelbert (601 A. D.—604 A. D.)

giving of sureties, the state threatened a fine for refusal. But in the case of surety contracts there was no need of a threatened fine, for sureties had been provided when the contract was made. From a purely practical point of view, if the state sanctions were of little effect, as seems to have been the case, the surety contract was better sanctioned than the right to a composition, regardless of whether there was any state sanction behind it or not.

It may, however, have been the case that suit could be brought upon a surety contract without there being any state pressure to compel submission to the court. There were the sureties who could compel the debtor to appear.

But regardless of a right to sue for breach, if we look at realities rather than definitions we must conclude that the surety contract was as real a right as one to a composition.

But was the surety contract an actionable contract in the early law? Probably. Germanic civil actions were founded on contracts.<sup>33</sup> LAUGHLIN says in speaking of debt, "It is to be seen then, in conclusion, that this procedure was founded on a unilateral obligation arising from a contract *in genere*."<sup>34</sup> To sue on a composition one must demand sureties to do justice; to sue for property one must demand its return and the defendant must comply or give sureties to prove that the thing is his own; to sue on a contract it is only necessary to apply to the sureties already given. If there is a defense, the sureties will produce the debtor in court to make such defense. By its origin and very nature the surety contract is a procedural contract, and whenever you have such a contract you have a potential law-suit.

It will not be asserted positively, in the absence of clearer evidence, that the surety contract was actionable in the first period of Anglo-Saxon law. Assuming for purposes of argument that it was not actionable that early, when did it become so? In the age of GLANVIL we find a special writ of Debt to summon sureties on surety contracts.<sup>35</sup> At an earlier date, our second period, a general debt procedure had been developed.<sup>36</sup> It had then become possible to sue debtors on unsecured debts; that is, where there were neither sureties nor pledges. It may have happened that at that time the right to sue on surety contracts also arose.

On the other hand it may conceivably have been later. Our ancestors may have reasoned this way. A creditor has his choice. He may rely on sureties, or he may take a pledge, or he may trust in a

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<sup>33</sup> Laughlin, 190.

<sup>34</sup> Laughlin, 196.

<sup>35</sup> Glanvil, Book X, c. 4.

<sup>36</sup> Laughlin, 189 et seq.

remedy given him by the law and allow another to become indebted to him without security. If he relies on sureties or pledges, and they fail him, he has only himself to blame and should not ask for legal redress. The fact that a pledgee had no right to sue the pledgor on the debt in any case<sup>37</sup> argues for such a theory. Such was the rule even in the age of GLANVIL.<sup>38</sup> But there was a special reason why the pledgee could not sue;<sup>39</sup> the fact that the creditor did have a right to sue the surety on a surety contract at that time<sup>40</sup> argues the other way, that is in favor of the prior actionability of the surety contract.

If we take into consideration that the surety contract was the basic contract; that it was not only itself used for every kind of transaction,<sup>41</sup> but was the parent of all other forms of contract, it does not seem at all likely that Debt could be brought on some contracts and not on the surety contract. That surety contracts did not become actionable until a general debt procedure had been developed seems improbable. The development was more likely the other way, from an actionable surety contract, to an action on a contract in which there was no surety.

Does the wording of the oaths in the debt procedure indicate that the promises sued on were made by debtors and not by sureties? The plaintiff's oath ran: "In the name of the living God, as I money demand; so have I lack of that which N. promised me when I mine to him sold."<sup>42</sup>

The issue appears to be between a creditor and a debtor. But that is what is to be expected, even in a surety contract. An oath asserting a promise by the debtor might be looked for in view of a development which had taken place, namely the custom of requiring the debtor, as well as the surety, to take a promissory oath at the time the contract was made. When such a stage had been reached it might be proper to say that both sureties and debtor were treaty-bound. Though the intrinsic relationships between creditor, sureties and debtor remained the same, you could not sue a debtor if there was a surety.<sup>43</sup> You sued the surety, but the debtor defended and the pleadings ran against him.

But what of the scope of actionable promises? Suppose it is shown, as seems to be clear, that only such promises were actionable

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<sup>37</sup> Wigmore, 10 Harv. L. Rev., 327.

<sup>38</sup> Glanvil, Book X, c. 8.

<sup>39</sup> See the second instalment of this paper.

<sup>40</sup> Glanvil, Book X, c. 3.

<sup>41</sup> Laughlin, 190.

<sup>42</sup> Oaths, 10.

<sup>43</sup> Cf. Glanvil, Book V, c. 3.

as assumed obligations to pay money or deliver property. Were there not other promises undertaken by debtors and sureties in surety contracts? For instance a relative of a minor might be put under sureties to safely keep the minor's property until he became of age.<sup>44</sup> Again a bridegroom bound himself to the relatives of the bride "to keep her according to God's law as a man should his wife," and sureties were given to hold him to such promise.<sup>45</sup> As to the first sort of obligation there is no difficulty. The curator of the minor's property was bound to deliver at the time specified, just as in a sale or a loan there was an obligation to deliver.

As to the betrothal, which in origin and form was a contract, it seems reasonably certain that if a husband did not treat his wife as a Christian husband should, the only penalty—other than surety pressure—was church-inflicted. The obligation was not a lay debt.

Other examples—besides the betrothal—of surety contracts which could not be resolved into promises to pay money or deliver goods seem to be lacking. There are quite a number of undertakings by the *wed* ceremony which appear in the laws and which do not fall within the above category. They seem to be contracts without sureties.<sup>46</sup> There is nothing, however, in the nature of the surety contract to confine it within such narrow limits. But if it was used for other types of promises, procedure was lacking for legal redress upon breach. There was no machinery for assessing unliquidated damages. If used for such promises, it will have to be admitted that no suit could be brought. The whole sanction must have been the constraint and social pressure involved in the ceremony and the relationships thereby created.

There would, however, seem to be no force in an argument that the surety contract was not actionable, because it was capable of being used for promises which by their nature could not be redressed by the existing legal machinery.

It is submitted then that the development was as follows. The surety contract, as a procedural contract, was actionable from the very beginning of Anglo-Saxon law. The only usual issue which such a contract would raise would be on the question of performance. The making of the contract was a public fact which could not easily be disputed. Note that the quoted formula raises only the issue of performance. At some time, probably quite early, such issues were litigated. After a time, because it was perceived that the controversy was primarily between creditor and debtor, and be-

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<sup>44</sup> Hlothar & Eadric, 6.

<sup>45</sup> Edmund "Of Betrothing," 1-9.

<sup>46</sup> See the second instalment of this paper.

cause in addition it had become customary to get the debtor to promise as well as the surety, the oath which was the plaintiff's declaration came to run in the above-quoted words.

There is no reason to believe that in our first period the state exercised any pressure to get debtors in contract controversies to court. If the surety contract was employed there was no need for any such pressure. The sureties were relied on for that.

In the later period, as will be shown, the state took more of an interest in contracts, but the indications are that even then, if there were sureties, the law worked through them and not directly with the debtor. As before, issues between creditor and debtor were raised as a part of the process by which the sureties "acquitted" themselves.

(b) *The Creditor's Right to Sue the Surety.*

But all this assumes the honor and good faith of the surety, or that social pressure will be sufficient to induce him to carry out his obligations. Such usually would be the case. But suppose the surety is recalcitrant, that he either denies the obligation or simply refuses to do his duty, or to pay: What then? There can be no question that the law said that the surety should pay if the debtor defaulted.<sup>47</sup> But how enforce such a right? Was there any provision for that? If there was the prospect of a *witte* we may surmise that there was a chance of state pressure. But if the matter was merely a breach of contract, it was not a breach of the peace, and hence would not interest the king. Possibly then the following words of King AETHELSTAN were applicable. "Now that is, because that the oaths, and the *weds* and the *borhs* are all disregarded and broken which there were given; and we know of no other things to trust in except it be this."<sup>48</sup> In other words the only reliance was the *wed* ceremony and the sureties. If the sureties proved untrustworthy then there was nothing in which trust could be put.

But there was a general provision prescribing a fine for failure to give sureties when justice was demanded. Why not put a recalcitrant surety under sureties to answer for his suretyship? If the surety has failed to produce a debtor, we may take it that he has lost his chance to defend on the ground of performance. The issue is one of denial of suretyship. The laws of King INE provided,<sup>49</sup> "A man may make denial of suretyship if he know that he does right." The surety could clear himself by an oath. As the original

<sup>47</sup> Alfred I, 1; Edgar, Intro. 6; Edgar II., 6.

<sup>48</sup> Aethelstan, IV. proem.

<sup>49</sup> Ine, 41.

transaction was entered into by public ceremony, the hesitation to take a false oath would be great. If the surety did not clear himself the sureties that he had given would constrain payment. As mentioned before, in GLANVIL's age the surety could be sued.<sup>50</sup>

It is submitted that at least in the later Anglo-Saxon law the surety could himself be sued, and that if he refused to give sureties he could be fined, or upon continued contumacy, further punished.

(c) *The Surety's Right to Reimbursement.*

The sureties were representatives of the debtor's family. But in addition to the general powers of internal discipline which the group exercised over its members, which in the loosely organized and democratic kindred may not have been of great effectiveness, the debtor had placed himself, by his *wed*, under the special protection and into the power of his sureties to answer a particular claim. They could rightfully exercise all the necessary physical compulsion over their prisoner just as bail can today. In addition to that there were strong moral and social sanctions, family feeling, gratitude for protection, the injustice of allowing the burden to fall upon the sureties, public opinion, and perhaps the physical help, if necessary, of other members of the kindred.

It was the sureties' right as well as their duty to compel the debtor to appear in court and defend. Likewise it was their business to force him to satisfy the judgment, if he had the wherewithall. If he did not and the sureties paid, the sureties' power to constrain the debtor remained and could be exercised to compel reimbursement.

Ordinarily the pressure which could be brought to bear must have been amply sufficient. But if it was not the king offered help. A recalcitrant debtor could be confined in a royal prison, and he was there required to suffer whatever the bishop might prescribe. If the debtor resisted and had to be forced, he forfeited his weapons and his property. If he escaped he was declared an outlaw, and was to be excommunicate in all Christian churches.<sup>51</sup>

The matter was thus one of internal family discipline primarily, but was sanctioned by custom and law, and by the help of the state if required. It was not unlike the right of a father to discipline or chastise a son. It would seem improbable that legal issues were at an early day framed between surety and debtor. If a dispute arose between them it would be a matter to be settled by the family council.

<sup>50</sup> Glanvil, Book X, c. 3.

<sup>51</sup> Alfred, I.

But as kindreds broke up and family ties became weaker—which was already a noticeable phenomenon in the second period here considered—what took the place of them? Society, as has been noticed, was then organized into tithings and hundreds. Every ten men were bound together, and the head man of the group with the assistance of the members was supposed to maintain discipline and to settle such disputes as he could. The members of the group were constituted sureties for each other, so if one man paid another's debt, his reimbursement was a group concern. Merchants were organized into gilds and were sureties for each other; and reimbursement would then be a gild affair.

We have then a thoroughly well recognized right. It may not have been until late that it gave rise to a right of suit in the courts, though in one sense the family council, the tithing, and the gild were themselves not unlike courts. The only substantial difference was that a dispute between surety and debtor was a matter to be settled within the group and was perhaps informally handled, while controversies between groups had to be determined in court at the meeting of the larger unit, the hundred. Where shall we say the law begins? Shall we confine it to matters external to the group? If so, it was perhaps a long time before the surety's right to reimbursement became actionable. It was actionable in GLANVIL'S day.<sup>52</sup> How long before then it seems difficult to say.

(To be Continued.)

*Chicago.*

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<sup>52</sup> Glanvil, X., c. 5.