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## FIFTY YEARS' GROWTH OF AMERICAN LAW\*

### CONTRACTS

WHAT we see in the law today is partly a development of the materials of nineteenth-century law, partly a revival of methods and ideas of the older law, which the nineteenth century discarded, and partly a reshaping of both by new modes of thought, juristic, philosophical, political, ethical, and economic, not as yet clearly worked out or organized, which, indeed, have not obtained long enough to enable the orbit of their operation to be plotted with any assurance. The seventeenth and eighteenth centuries were centuries of philosophy. Everything was referred to philosophically derived principles of reason. The nineteenth century was the century of history. Everything was approached by way of its historical development. That development was taken to show the course of unfolding or realizing of the idea which was reality. The nineteenth-century jurists were in revolt from the philosophical jurisprudence of the eighteenth century as the jurists of today are in revolt from the analytical and historical jurisprudence of the last century. It has proved

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impossible for jurisprudence to get along without philosophy, and there is much to indicate that it is proving equally impossible for it to get on without history.

Comte defined society as an accumulating activity. A recent writer applies to the accumulative aspects of human society the term "time binding." Groups and associations and societies, Gierke tells us, not only enhance the power of those who live contemporaneously, but above all, through their permanence, surviving the personality of the individual, bind the past of the race to those to come and give man the possibility of development. Sir Frederick Pollock reminds us that "the young adventurers of the twentieth century, who profess to owe nothing" to the Victorians, "are really standing on their shoulders." It is not merely that there is continuity of development in the common law. There is a certain likeness of the environment of Anglo-American law today to that of English law in Tudor and Stuart times. There is a clear parallel in the problems of the formative era of American law, when we had to make an American common law from the English land law and legal procedure of the seventeenth and eighteenth centuries, and those of today when we have to shape a body of law for the twentieth century from the American common law worked out for the nineteenth century. Looked at critically, such things show us that, if history does not repeat itself, at least like conditions will recur and will bring about like (even if not the same) institutions, will give like forms to precepts and doctrines, and above all will lead to like (if not the same) modes of juristic thought. If the jurists of the last century carried their faith in history too far, the jurists of today carry their rejection of history too far.

I began the study of jurisprudence when an undergraduate in college in 1886 with that characteristically nineteenth-century text, Holland's *Elements of Jurisprudence*. I had a college course in Constitutional Law taught by a professor of history from Judge Cooley's text. A historian, who had

studied in Germany and turned to institutional history, introduced me to Savigny. My law school study was in the ninth decade of the last century and I was admitted to the bar in 1890. Thus I studied and practiced law in the nineteenth century and began to teach law in 1899 thoroughly imbued with the juristic thought of that time. A few years later, I made the acquaintance of a sociologist who introduced me to Ward. In the meantime in practice, on the bench, and in teaching I made it a rule to read the current decisions of common-law courts week by week. Thus I have followed the changes which have gone on both in juristic thought and in legislation and judicial decision for more than fifty years. Looking back over them, it stands out that something more than the changes which experience of application brings about continually in all systems of law has been going on and is still going on; something which calls for examination by the thoughtful jurist as to what it means and whither it leads. Such an examination calls for analysis, history, and philosophy. But first it calls for some detail of exposition as to the changes themselves. A significant aspect of these changes is brought out in the law of contracts.

Two conflicting tendencies may be seen in the development of our law of contracts in the past fifty years. On one side, there has been a tendency to extend the sphere of enforceable promises and agreements. Such a tendency had been marked also in the seventeenth and eighteenth centuries. But in the nineteenth century the movement to bring the law into accord with morals in this respect slowed down and almost stopped. Analytical jurists rejected all identification of the legal with the moral. Historical jurists saw that from the beginning the law had only enforced certain types or categories of promises, and so held that there was reality in the idea of the legally enforced as distinguished from the only morally sanctioned promise or agreement. Today, in contrast, extension of the sphere of legal recognition and enforcement of promises and agreements goes on rapidly. The

historical categories bid fair to disappear. On the other side, there is a movement, no less marked and developing quite as rapidly, to restrict freedom of entering into contracts and limit the enforcement of recognized and generally enforceable agreements in particular cases and as to particular classes of persons. In part, this is connected with a general tendency to concrete individualization in all types of activity today. Promises even if fair in their inception which involve supervening great hardship upon the promisor were not enforced specifically in equity. But this did not leave the promisee wholly without remedy. As will be seen presently, the tendency today goes much further. The category of promises and agreements which as a type are enforceable but which are not to be enforced either at law or in equity as to certain types of person or in certain connections, grows continually. The two tendencies, while in opposite directions, are not incompatible. The one goes more to the form, the other more to the substance. The one goes more to the economic aspect and is based on the social interest in the security of transactions. The other goes more on the personality aspect and is based on the social interest in the individual life. Thus they can go on contemporaneously in a system of law, for a time at least, without any fundamental disturbance of the general security. But the second tendency goes along with one to turn the whole field over to the domain of administration and is perhaps in part connected with Marx's theory of the disappearance of law in a society which has done away with trade and commerce. At any rate, we must contrast Bentham's theory of allowing the utmost freedom of making agreements and strictly enforcing them when made, and the doctrine as to liberty of contract which developed in American constitutional law in the last quarter of the nineteenth century, with the attitude toward free contract and enforcement of contracts which obtains in legislation and administration and less noticeably in judicial decision today.

In the first of the two tendencies we see the culmination for the time being of one that may be traced almost from the beginnings of law. Indeed, it is part of a general tendency to extend the sphere of legally recognized interests which marks the whole history of law. Putting the matter in another way, there is increasing recognition of and giving effect to a jural postulate that in civilized society men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith and hence will make good reasonable expectations which their promises and other conduct reasonably create, and will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto. For the moment, I shall assume that this jural postulate is at the basis of the law of contracts. But we are becoming conscious of another postulate, not yet so clearly apprehended, that every individual in civilized society is to be assured of a full social life therein, which comes into competition with the former, is the basis of the second of the two tendencies, and must somehow be reconciled and kept in balance with the first.

One of the most useful conceptions developed by juristic analysis in the last century is that of what the Germans call *Rechtsgeschäft* and the French *acte juridique*. I have been in the habit of calling it legal transaction, using a term familiar to lawyers from the New York Code of Civil Procedure. One person has willed, or a number of persons have willed, a possible and legally permissible result, and the law, giving effect to his will or their common will, confers rights and imposes duties accordingly. This conception was worked out under the influence of the will jurisprudence of the nineteenth century and will need to be restated to accord with the ideas of today. We need such a conception in our law with a term which will include not only contract but gift, conveyance, declaration of trust, devise and legacy, release, assignment, waiver, appointment of an agent — in short, all

the cases in which the law, recognizing the will of one or more persons to bring about a legally permissible result, gives to their declared will the result intended. The writers on natural law in the eighteenth century had such an idea, not however clearly developed as it was by the jurists of the last century, to which they gave the name of contract. This use of the term is preserved for us in the federal constitution in the phrase "obligation of contracts." Obligation of contracts is not a term known to the common law. In that phrase "obligation" is used in the civil-law sense, meaning the relation between the parties to a legal transaction. The writers on natural law considered that there was a rationally demonstrable moral and therefore natural legal duty not to derogate from one's grant, and so there was the relation they called obligation of contract between grantor and grantee in an executed legal transaction. This is the explanation of the well known case of *Fletcher v. Peck* in 1811, in which, in an opinion by Chief Justice Marshall, the Supreme Court of the United States held a statute of Georgia repealing a grant of lands by a preceding legislature void as impairing the obligation of contract. As early as 1799 the Supreme Judicial Court of Massachusetts had decided the same question in the same way on the same ground. As Chief Justice Marshall pointed out in *Ogden v. Saunders*, the framers of our constitutions were deeply read in the seventeenth and eighteenth-century treatises on the law of nature and nations in which the term obligation of contracts was used in that sense and the sanctity of that obligation was argued.

Two points must be borne in mind today when we look at the early nineteenth-century decisions holding derogation from grants and franchises to be forbidden impairment of the obligation of contracts. One is what impelled the founders of our polity to seek for and lay hold of a doctrine forbidding such impairment, the other is where they found the authoritative doctrine which they sought. Seventeenth-century England had seen recurrent confiscations and forced

transfers of property during the long struggle with the Stuarts. Each political overturn was followed by forfeitures and grants to the prevailing party, to be undone at the next turn of political fortune. Resumption of royal grants took place under the Commonwealth, and again at the Restoration, and again in Ireland under the rule of James II, and after the Boyne under that of William III. There were bills to resume the grants of Charles II and of William III. Moreover, there were confiscations and forfeitures during and after the Revolution, which were fresh in men's minds. Experience of repeated forfeitures, resumptions, and threatened resumptions and of high-handed legislative attempts to force a debased paper currency upon communities both before and after the Revolution, explain what the framers were looking for. The books they read explain where they found it. Continental treatises in which inviolability of grants and executed transactions and the binding force of promises and agreements were laid down as immutable natural law and were discussed under the term obligation of contracts, were the basis of American legal education both before and after the Revolution. John Adams read Vinnius, Van Muyden, Grotius, and Pufendorf. Isaac Parker prescribed Burlamaqui and Pufendorf to a student. Chancellor Kent as a student read Grotius and Pufendorf. Daniel Webster as a student began with Vattel and Burlamaqui. The ideas derived from this preliminary reading, done by all lawyers down to the time of the Civil War and by many even later, for almost all law students down to 1900 read Blackstone, and the introductory part of Blackstone follows Grotius, explain many things which the student and even the law teacher of today finds it hard to understand. I well remember the shock which was perceptible at a round table discussion at a meeting of the Association of American Law Schools, when a teacher brought up in the older text book type of school said *arguendo* "a conveyance is a contract." It is a legal transaction, as is a contract. Marshall and Story would have called



it a contract, even if we do not today. It is a gain that we distinguish the type of legal transaction which is made up of enforceable promises. It is a loss that we have no term in our law today for the whole category of what the civilians recognize as *negotium*, or *Rechtsgeschäft*, or *acte juridique*, and so fail to see the whole scope of the postulate which underlies all the many forms of transaction which it includes.

Definite narrowing of the meaning of the term contract is a matter of the last third of the nineteenth century. In the law school of the present century it is complete. Two reasons are behind it. One is historical, arising from the gradual assimilation of all executory legal transactions to the simple contract and the building of our analytical system upon the condition of the law when this process was substantially complete. The other reason is academic, arising from our American practice of teaching law in "courses" upon particular subjects instead of teaching the whole private law as one subject, as on the Continent of Europe.

Looking first at the historical reason, originally the action of debt, to recover a liquidated sum due, was thought of in terms of an action to recover property wrongfully detained by another. If the debt was proved by a solemn acknowledgment of indebtedness under the seal of the debtor he was estopped by his seal to deny what the instrument recited and the instrument itself was the basis of recovery. The writ was of the same type as a writ for recovery of land of which one had been disseized. It began, as did the latter, with the words "Command *A* that justly and without delay has render to *B*," etc. Also if the action was brought on a recognition, a solemn acknowledgment of indebtedness in open court, entered on the record, as the record imported absolute verity and could not be contradicted, there was simply trial by producing the record. But if the debt was not established in this way by something which did not admit of contradiction, originally the debtor could "wage his law." That is, he could take an oath that he did not owe the debt and if a

certain number of his neighbors as compurgators were willing to risk their souls by swearing that his oath was "clean and unperjured," he was discharged. Thus there were two difficulties in the proceeding to recover a debt. One was that contracts were commonly made in the form of bonds under seal acknowledging indebtedness in a certain sum unless what was the real promise was duly performed. So if one acknowledged himself indebted in the sum of \$5000 unless by February 1 he did something worth perhaps \$2500 to the creditor, the latter on default of performance could absolutely recover \$5000. Equity remedied this by not allowing the creditor to recover more than the actual damage he had suffered. In time, the law took this over and debt for a liquidated sum became an action to recover damages for not paying that sum. The other difficulty, namely, that if the debt was not established by a sealed instrument there could be wager of law, was avoided by bringing an action for the wrong of not performing a promise for which something had been exchanged so that there was something in the nature of a fraud. If there was a promise to do something other than pay a liquidated sum, the promise could be sued on, as for a wrong, directly. If a liquidated sum, as in case of a bill of exchange or promissory note, was to be recovered or a debt not established by a bond, a fictitious new promise to pay what was due was assumed and the wrong of not keeping that promise was sued upon. In this way, all actions upon contract came to be actions for damages for nonperformance and any distinction between what the Romans called a real contract, where the obligation arose from delivery of something, and what the Romans called a pact, where obligation resulted only from promise or agreement, came to be lost.

In America, all this had a result in the decadence of the sealed instrument and consequent at least partial, and in many states complete, assimilation of the formal promise to the simple contract. Originally, the seal had the function which signature has now. It identified the instrument as the

act and deed of the obligor. In time, when substantially everyone could write (not only the clergy, as in the Middle Ages) this function became obsolete and all that could be said for the seal was that it showed deliberation. In America, different states came to hold a wafer or a scroll containing the word seal or the letters L.S. (*loco sigilli* — in place of a seal), or the mere scroll or the mere abbreviation, sufficient instead of the impressed wax which was the seal at common law. Finally, many states abolished private seals. As a result, it came to be held that a seal had only the effect of importing consideration. Notwithstanding the seal it could be shown that there was nothing given in exchange for the promise and so it was not enforceable. This extended the simple contract idea to sealed instruments, and where private seals were abolished the assimilation to simple contracts was complete.

Such was the situation when at the beginning of the present century the training of lawyers in this country passed definitely from the offices of the practising lawyers and law schools of the apprentice type, in origin and largely in method large scale law offices, to academic law schools with methods of instruction characteristic of universities. The office instruction and instruction in the apprentice type of law school was based on the reading of text books on the different subjects which grew out of the common law actions and have not yet been thoroughly unified in our system. Instruction in the academic law schools took the form of teaching courses on these subjects. Thus the scope of a course on contracts came to be the making and enforcement of simple contracts — of promises made in exchange for other promises or in exchange for acts, the mercantile specialties, as Ames happily called them, that is, bills, notes, and checks, being reserved for a separate course. Where Parsons in 1853 defined a contract much as Marshall would have done, the American Law Institute defines it as a promise or set of promises which is enforced by the law.

Ideas of binding obligation as to executed transactions are not eliminated. As to private law what can be done for them is relegated either to the law of torts or to the law of property. As to public law, there is good reason to suspect that they will soon be relegated to the general guarantee of due process of law, or, if as is not impossible that phrase loses its historical meaning and comes to be confined to procedure, executed transactions will cease to have constitutional protection. The idea of the writers on natural law that the King was bound to good faith and was forbidden by natural law to derogate from his grants, may give way to an idea that a sovereign people, or those who rule in its name, is exempt from duties of good faith and can freely take back what it has freely given away.

With executed transactions out of the way, we are brought now to theories of the binding force of a promise. The Romans considered that a mere pact, a mere promise or agreement, of itself was not enforceable legally. *Ex nudo pacto*, the maxim ran, *non oritur actio*. A morally binding promise or agreement, to be legally enforceable, had to come within the bounds of some legally defined contract — *sponsio* or *stipulatio*, where originally there had been a religious sanction; entry in the household books or the literal contract; the real contract, where something had been delivered, as in deposit, loan for use, loan for consumption, and pledge; certain consensual contracts, mandate, sale, letting and hiring, and partnership; and certain actionable pacts added in the classical era or in the maturity of the law. Where a case came within one of these categories, there was a legal reason for enforcing the pact, or as it is said, there was *causa civilis*. By Justinian's time there had come to be a great extension of the actionable pacts, but the whole area of morally binding promises and agreements was far from covered.

In the meantime, the church took the matter up. If we are to credit the title *de pactis* in the Corpus Juris Canonici, a Council of Carthage, or as I am told I must say now, a

Synod of Africa, as far back as the year 343 laid down that pacts were to be observed. The Christian would keep his word and if he did not the bishop, or later the bishop's court, would see to it that he did. At any rate, the writers of the school of natural law from the seventeenth century on made the intrinsic binding force of a promise a fundamental tenet. The civilians, who down to the Reformation taught the civil law in the universities along with the canon law, united the Christian doctrine with the natural-law teaching, and it became the law of continental Europe that promises and agreements as such, made as legal transactions, were binding in law as they were in morals. As Strykius put it, we have assurance of the binding force of a pact from the very word of God, and so God is bound by a promise and the Devil and the temporal ruler, *et ideo Deus pacto obligetur et diabolus et princeps*.

On the breakdown of the eighteenth-century law of nature school, the metaphysical jurists sought to construct theories of the binding force of promises on a new foundation. Kant said it was impossible to prove that one ought to keep his promise considered only as a promise. He deduced contract from property, as a form of conveyance or alienation of one's substance involved in the very idea of individual rights. So far as no social interest is contravened one may alienate one's services or his property. The performance or the corporeal property are then another's and the other may vindicate them. Hegel carried out this idea. He said contract was a disposition of property. Hence in his view what the civilians call an abstract promise, that is, one for which no equivalent has been given, is a mere subjective qualification of one's will which he is rightfully at liberty to change. But why can't one make a gift of his promise as he may of any corporeal item of his substance? If Hegel's view is sound, the enforcement of abstract promises at common law when under seal, in Roman law when in the form of a *stipulatio*, and in the law of continental Europe and of Scotland, is unsound.

Fichte said that the moral duty of performing an agreement arises when one party begins to act under it. Probably his view was influenced by the category of actionable pacts in Roman law called innominate contracts. In our law where there is an exchange of promises each is said to be the consideration for the other, and there is a contract at once. But we say that performance of one side is a condition of exacting performance of the other. Where the promises did not come in any category of contract, the Romans held there was only a pact. But when there was performance on one side it became an actionable pact which the civilians call an innominate contract. The theory seems to be partly what is called the equivalent theory (that the moral duty to perform arises from having received an equivalent for the promise) and partly what is called the injurious reliance theory of some common-law writers — a theory that unless the promisee has begun to act in reliance upon the promise or agreement, he has no moral and so should have no legal claim to exact fulfillment. If this is well taken both the great legal systems of the world have been wrong from the beginning. The Roman law enforced formal contracts without more, and the common law enforced covenants under seal. The modern Roman law on the Continent and the law of Scotland enforce abstract promises. Also men have always felt that there was a moral duty to keep abstract promises. As it is put, a man's word should be as good as his bond. Furthermore, where an equivalent is required by law it is often merely formal. As Lord Holt put it, a little mustard plaster will satisfy the requirement of consideration.

With the rise of the will jurisprudence in the nineteenth century, and the working out of the idea of legal transaction, it came to be said that the law as to enforcing performance of contracts gives effect to the will of the parties. Their wills having been at one, it was said that morals require and the law provides that effect be given to this joint will as a sort of vindication of the free wills of the parties.

This is connected with the nineteenth-century doctrine that the end of law is to promote and maintain the maximum of free individual self assertion. Men are to be free to make such promises and agreements as they will, and when they have done so the law is to hold them to perform as demonstrating their freedom to bind themselves. This mode of thinking broke down in the present century with the recognition of the so-called contract by estoppel (not promissory estoppel, which is another thing). Thus, an offer is made which a reasonable man would understand in a given way and is accepted by the offeree in that understanding. But the offerer actually meant something else. Or an offer is wrongly transmitted, say by telegraph, and is accepted in good faith and reasonably by the offeree as it is received. Here an older English case held there was no community of will and so no contract. But the case is squarely within our jural postulate and the recent American cases hold there is a contract.

Looking back over these theories it will be seen that the nineteenth-century jurists gave up something of what the canon law and the writers of the law of nature school had done toward bringing the law up to the postulate, but although the law in the English-speaking world lagged throughout the century in this respect, American law in the past fifty years has been moving toward it once more.

Most of the progress in the last fifty years has been made in connection with the requirement of consideration. Even now just what consideration is has not been wholly settled as a matter of theory. The orthodox doctrine may be called the bargain theory. It holds that a promise is legally enforceable if it is made in exchange for something then and there done which the promisee is not legally bound to do. There may be an exchange of a promise for a promise or of a promise for an act. Another theory, formerly urged, is the equivalent theory, that the law requires an equivalent in order to make the promise legally effective. But this theory does not meet the law as it actually exists, and seems to be an at-

tempt at philosophical explanation of the *causa debendi* of Germanic law, a symbolic delivery of something at the time the promise was made which we now know was not at all meant to symbolize an exchange. As to the law today, there are three conclusive objections to the equivalent theory. One is that an equivalent given in the past, a past consideration as it is called, will not sustain a contract. The consideration must be a contemporaneous promise or act then made or done in exchange. The second is that an equivalent which is something one was legally bound to do (even for another) is not consideration. A third is that there is no requirement of substantial or adequate equivalent. As Mr. Justice Holmes put it, consideration is as much a form as a seal. Another theory which has been newly urged may be called the injurious reliance theory. It teaches that when the promisee acts to his injury in reliance upon a promise this injurious reliance constitutes consideration for the promise and it becomes enforceable. This theory has been the basis of a number of what must be called exceptions to the orthodox doctrine as to consideration which have sprung up in the law mostly in the present century. It proceeds on the basis of what is called promissory estoppel, which is not estoppel at all since nothing is better established in general than that estoppel arises from representations not from promises. But the phrase has helped the law move toward the postulate in an important group of cases.

Fifty years ago it seemed well settled that the common law had adopted the detriment idea for consideration. Consideration was a detriment to the promisee in exchange for the promise — a doing of something by the promisee which he was not bound to do and a doing of it in exchange for the promise. This was the historical idea of the action of special *assumpsit* by which simple promises (i.e. those not under seal) were made effectively enforceable. The older books had spoken also of benefit to the promisee as a consideration. But fifty years ago this seemed to have been given up, although it could be said to have been the idea of *indebitatus assump-*



*sit*, the action which gave an effective remedy for debts not established by an instrument under seal. It is significant that this idea has been revived in America and is recognized by our leading authority on the law of contracts and by the American Law Institute as the basis of allowing recovery upon a contract where the consideration moves not from the promisee but from a third person — something which the conservative English courts will not admit.

In the United States today the courts are straining to get away from the bargain theory and from the whole requirement of consideration. There has been in the last fifty years a steady movement to bring the law of contracts in this respect up to the postulate. At least fifteen exceptions have become established. They may be grouped under four main heads. First may be put promissory estoppel, already spoken of. As said above, this is not estoppel at all. The instances are cases of action afterwards on a gratuitous promise which is not part of a bargain when made. There is no making good of a representation. They proceed on the injurious reliance theory. Here belong subscription contracts. In these cases it used to be said that the promise of each was consideration for the promise of the others. But obviously there is no exchange of promises among the subscribers. More recently, subscriptions have been held enforceable after the promisee has begun to act on them. The Supreme Court of Pennsylvania says that acceptance of the subscription by a church or a charitable institution is consideration. In other words, such subscriptions require no consideration. Under the first head we may put also cases of gratuitous promises acted on, as for example, where a rich grandfather found his granddaughter working in a department store. He said that his granddaughter did not have to work. Thereafter, but not upon any promise to do so, she gave up her job. It was held there was a contract.

A second main head, what is called moral consideration, that is, moral reason for making the promise, began to ap-

pear a good while ago, but has had a marked development in the past fifty years. Here may be put cases where moral obligation has arisen from past receipt of a material benefit or infliction of a material loss. Some courts hold there is a contract in such cases where a tangible moral duty is recognized by an express promise. In Roman law a promise to discharge a natural (i.e. moral) obligation was an actionable pact. The most common type of so-called moral consideration is a new promise where a debt has been barred by limitation or bankruptcy or there has been a new promise to perform a promise obtained by fraud. Here it is said there is a waiver — an intentional relinquishment of a known defense. But the waiver is a promise to relinquish the defense. Why, then, does it not have to be part of a bargain, like promises generally? Equity has gone a long way in this connection. In cases of defective execution of an intention to secure a creditor, or settle property on a wife, or provide for a child, equity will reform the instrument in a way that amounts to specific performance. There is even some authority for treating promises of this sort as directly enforceable in equity. At any rate, gifts on moral consideration are held enforceable through reformation against the heir of the donor. The latest addition to this category is enforcement of a gratuitous promise by a parent that a child shall have his earnings free of the parent's claims. It is said to be "in effect a promise to give up a right, which is binding if acted on." Neither seal nor consideration is required. Here the courts go partly on an idea of moral obligation and partly on the injurious reliance theory of consideration.

A third main head, promises of gift, might be given the name which Justinian gave to such promises — *pacta donationis*. Justinian's legislation made them legally enforceable. In the common-law system they were supposed to be unenforceable. They were not given effect in actions at law because there was no consideration, and were not enforced in equity because, it was said, equity would not aid a volun-

teer. One who sought to get something for nothing did not appeal to the chancellor's conscience. But a well known group of cases has grown up in which courts of equity torture gifts into contracts so as to enforce *pacta donationis*. Options without consideration are another example of enforcement of what is in substance a gift of a valuable right. But the most significant case is that of gratuitous declarations of trusts. A gift requires delivery. A contract requires consideration. If I say "I give you my watch" but do not deliver it, there is nothing achieved. If I say "I will give you this watch," the mere gratuitous promise has no legal effect. But if I say "I hold this watch in trust for you," a court of equity will compel me to hold it for your benefit. When so much is allowed to turn upon a form of words, it is manifest that the courts are quite willing to see the requirement of consideration evaded.

But the most significant main head of these numerous exceptions turns on intention to be bound in a business transaction. Here may be placed a number of cases of waiver, intentional giving up of a known right, where there is no moral consideration other than keeping one's word, such as waiver by a surety of defense of extension of time or release of securities, or consent by a beneficiary to a breach of trust after the breach. A recent case in New Jersey recognizes a waiver as a legal transaction requiring no consideration although in effect it amounts to a promise to give up a valuable right, and applies it to a broker's claim to commissions. Forty years ago the courts were arguing whether waiver did not require either consideration or the elements of estoppel. Another exception under this head is release by mere acknowledgment of performance, without seal, consideration, or actual performance. This has become established in some states. Another is stipulations of parties and their attorneys as to conduct of and proceedings in litigation. Still another is mandate where there is no *res*. In Roman law, mandate, a gratuitous commission to do something for another, is a

consensual contract, requiring nothing more than consent of the mandatary to undertake the commission. In the common law we speak of a bailment of mandate. For example, if I deliver a parcel to you which you gratuitously promise to take to town and deposit in the post office the delivery of the parcel makes it a binding promise. If a gratuitous undertaking to do something for another is entered upon then the law has long held that the undertaking entered on must be carried on with due care like any other course of action. Recently, however, there has come to be a lengthening line of cases holding men to gratuitous undertakings where there is no delivery of anything and the undertaking was not entered upon. Thus where a friend who is going to town promises gratuitously to look in at an insurance agency and notify the agent that his neighbor wants the insurance on his barn renewed, and the friend forgets innocently to carry out his promise, a number of courts have held him liable. In this category, also, we may put letters of credit not under seal and not upon consideration, which are given effect when acted on. Sometimes this has been done on a theory of estoppel. American cases now put it on a theory of consideration moving from a third person, a theory which is not admissible according to the English authorities. Lord Mansfield in 1765, under the influence of natural-law ideas, sought to establish as law that no promise made as a business transaction with intention to be bound by it should be *nudum pactum*. He did not succeed in this endeavor. But the law today is moving fast toward what he proposed. So completely is the requirement of consideration breaking down that common-law lawyers who adhered to it obstinately in the last century are now prepared to give it up. Wigmore, a generation ago, denounced a doctrine the effect of which was that where a son agreed to contribute to the support of his father, then eighty-five years old, in feeble health and without property, but did not undertake this under seal nor as part of a bargain, he was not compellable to perform. Later

when Professor Westengard, as general adviser to the King of Siam, was called on to draft a code for that country, while following the common law generally, he deliberately left out the doctrine of consideration. Within a decade Lord Wright, Lord of Appeal in Ordinary and head of the English Law Revision Committee, has written advocating elimination of the requirement from our law and the Committee has adopted his recommendation.

This subject has been much influenced, particularly in equity by civilian discussion as to *causa*. In Roman law *causa civilis* was a legal reason for enforcing a pact. The writers on natural law held that reason for making a promise was a reason for enforcing it, and *causa* in the sense of reason for making was to no small extent accepted in English equity before the common-law theory had crystallized at the end of the eighteenth century. The civilians saw that intention of conferring a gratuitous benefit was a good reason for making a promise and so held it to be *causa*. Such is the law in Scotland. But in the seventeenth century Bacon delivered a reading or lecture on uses in which he discussed *causa* and consideration and was much influenced by the equivalent theory of the basis of obligation. That and the historical origin of the action of *assumpsit* which came to be the ordinary remedy upon almost every sort of contract, stood in the way of English acceptance of the step finally taken by the teachers of the modern Roman law who translated *causa* by presupposition. The *causa* of a legal transaction is the presupposition on which it proceeds. Gratuitous benefit may be the presupposition.

Another movement to bring the law of contracts abreast of the postulate of making good reasonable expectations created by promises may be seen in the increased recognition and enforcement of contracts for the benefit of third persons not parties to the agreement. The Roman law would not recognize these promises. The usual form of a binding promise was *stipulatio*, a formal contract by question and answer

using the sacramental word *spondeo*, which implied a libation and calling on the gods to witness the promise. One who was not a party to the formal ceremony could not take anything under it. The French Civil Code of 1804 expressly adopted the Roman-law idea. But the doctrinal writers later laid down that a promise for the benefit of a third person, although not a contract, since the code forbade this, was a legal transaction to which the code did not refer, and French law came to uphold such promises. The recent codes generally provide for them. In 1859, the Court of Appeals of New York took the logical bull by the horns and held such promises legally enforceable. This was followed by a great majority of our state courts, but some of the strongest American courts refused to fall in line and the House of Lords in 1915 rejected the idea and in effect overruled some decisions of the lower courts which had been reaching in the direction of adopting it. Text writers, impressed with logical difficulties, grudgingly yielded part of the way and our leading American authority ingeniously revived benefit as consideration and, treating consideration moving from a third person on that basis, was able to argue for a greater part. The simpler explanation that we are now recognizing a legal transaction conforming to a jural postulate of civilization will not be available to the common-law text writer till we go the whole way and cast out consideration.

Historical reasons are chiefly at the bottom of the slowness of the law in enforcing promises. The beginnings of law look only to keeping of the peace. Other social interests are left to what were then stronger agencies of social control. In the fifth century B. C. a Greek philosopher, Hippodamus of Miletus, asserted that there were but three subjects of lawsuits — insult, larceny, and homicide. These gave rise to desire for vengeance and led to private war between groups of kindred. Religion and good morals, or the public opinion enforced by priests or kin groups or associations on the model of kin groups took care of promises. Thus, for a

long time while law was developing, enforcement of promises was outside of its field. One might say that the law of contracts started with the proposition that legal enforcement of promises was something exceptional, and it has not been easy to get away from this original attitude. This is particularly true of our common-law system. On the Continent, the civil law or modern Roman law and the canon law grew up together in the universities, and the attitude of the church toward pacts influenced the lawyers and made acceptance of the religious and philosophical view of the binding force of a promise and building on it a doctrine of a consequent legal force an easy matter. But Germanic law had a rudimentary law of contracts. Anglo-Saxon law can hardly be said to have had any. In the earlier Middle Ages, the church was the real upholder of contracts and the promissory oath was the alternative of taking a hostage for performance. With the rise of the common-law courts and development of the law therein, English law was taught in the Inns of Court, and there was not the close contact with the canon law which obtained on the Continent. Nor was the purely professional development of the law in the courts and by practising lawyers in the Inns of Court conducive to the sort of influence of theological-philosophical natural law upon the law of the courts which was marked where the law was taught in the universities. The history of the law of contracts in England down to the eighteenth century was such as to make enforcement of promises depend upon procedural ideas rather than upon substantive principles. Thus a feeling that all promises meant by the parties to create obligation were not to be enforced but only certain types which could be brought within the bounds of particular actions became established as one of the traditional beliefs of the common-law lawyer. It is not easy to disabuse American lawyers of that idea.

When, in the stage of the strict law the law began to enforce certain promises as legal transactions, obligation was taken to arise from the formal act. One could not dispute

the recitals under his seal. Fraud, force, or mistake made no difference. That the amount recited was a penalty and the real promise was something else, only expressed in the form of a penalty upon condition, made no difference. When one makes *nexum* or *mancipium* (the formal transactions of the early Roman law) the Twelve Tables say: "As he declared with his tongue, so be the law." A rigid, literal compliance with the formal pronouncement was exacted by the strict law both in the Roman system and in our own. It was not a question of intention but solely one of formal declaration. In time, equity distinguished form from substance and prevented exaction of performance where promises had been procured by force or fraud or made under mistake. This development, which for a time went on parallel with extension of the field of enforceable promises, conformed to the postulate, since it calls only for the making good of reasonable expectations.

But interference of equity with the enforcement of promises did not stop here. Security of transactions is not the only social interest to be taken into account in this connection. There is also the social interest in the individual life, which calls for some limitation upon what is to be exacted from another, even if he has promised. Thus equity would not specifically enforce hard bargains or grossly improvident contracts, although it would not prevent recovery at law of damages for breach of the contracts. In certain cases the Roman law allowed the *beneficium competentiae* or exemption of what the promisor required in order to live. Later, Roman legislation forbade the *lex commissoria* or strict foreclosure clause in pledges. In the maturity of law, however, it had come to be felt that except for what equity had settled as not within the reasonable expectation created by a promise, the economic order required that the law should exact entire fulfillment of agreements. As Sir George Jessel put it in 1875, "if there is one thing more than another public policy requires it is that men of full age and competent understand-



ing shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice."

In the past fifty years a tendency to make inroads upon the binding force of promises has grown up and has gained no little momentum in the last three decades. English cases have begun to talk about a doctrine of undue influence in connection with contracts. They have settled that a covenant not to exercise a calling for which one has specially trained himself is unenforceable. A recent American case tells us that a contract in contemplation of marriage, fairly entered into, by which the wife is not to make certain claims against the estate of the husband will not be allowed as a defense against those claims because in the event it leaves her where she was before the marriage. A doctrine of *rebus sic stantibus*, originally devised in international law with respect to treaties, now begins to appear in commentaries on the civil codes. The Supreme Court of the United States now reads an implied term into contracts so that the state can make what the legislature considers reasonable changes in the terms of the agreement against the interest of the promisee without impairing the obligation. Cancelling of orders accepted and acted upon is now tolerated by commercial morality and there are signs that some courts are ready to permit it within limits yet to be ascertained. Also there is a tendency to prescribe standard contracts by legislation, leaving the parties little or no choice of details. Partly this is needed to insure fair service to those who are not in an economic position to obtain by bargaining the contracts they desire. As to public service companies, prescribing such standard contracts is clearly called for. But there is a tendency in legislation and administration to go much further and one is impelled to wonder whether those who have power to interfere are not tending to exercise it for the sake of the exercise.

Today we have continually increasing statutory limitations both on the making and on the enforcing of contracts. Labor legislation, legislation as to public utilities and legislation treating all manner of enterprises as public utilities, limit the making of contracts. Forbidding or limiting deficiency judgments, statutes allowing judgments to be paid in installments, legislation suspending enforcement of covenants by lessees to surrender premises at the expiration of the term, limit enforcement of contracts. It is no wonder that a teacher of the law of contracts now tells us that a promise is only a prediction. This has come a long way from the dictum of Strykius as to the universal and fundamental binding force of an agreement.

We have here an incident of the movement throughout the law the world over which I have called the socialization of law. In the beginnings of any new movement in the law there are certain gropings, and some reversion to the seventeenth and eighteenth-century arbitrary making over of contracts and other legal transactions is natural while we are finding ourselves. Whether we put it as quest of a balance between the economic order and the individual life or as interpretation of the term "reasonable" in our postulate, some relaxation of the strictness of the maturity of law must be achieved. While in the past fifty years we have progressed toward legal recognition of all promises made with intention to produce a binding relation, we have been progressing also toward attaining reasonableness in that relation. Just as in the strict law, when formal transactions were recognized and were to be enforced, there were extravagances which equity had to correct, so in the stage of socialization of law, when we begin to adjust the demands of the economic order to those of the individual life we must expect some extravagances to develop at first which it may take some reversion to methods of the maturity of law to correct. A general tendency at the present time toward government interference with every form and feature of individual activity, a world-wide ten-

dency to supersede private law by public law may turn out to be analogous to like tendencies in the era of absolute governments which followed the breakdown of the medieval polity and to be the result of like causes. It may well turn out in the long run that Marx's belief that we are moving toward a disappearance of law will prove unfounded. Certainly law seemed to be disappearing in Tudor and Stuart England quite as much as it does now.

Enforcement of promises is a postulate of the economic order. Hence, some argue that relaxing of ideas as to the paramount importance of contract indicates decadence, incipient or imminent, of that order. But good faith is more than a postulate of the economic order. It is a postulate of civilized society itself. As Parsons put it, too sweepingly perhaps, but, if by contract is meant the fulfillment of reasonable expectations from conduct or involved in relations, fundamentally true, "almost the whole procedure of human life implies, or rather is, the continual fulfillment of contracts." Sociologists tell us that law is the inner order of the groups and associations and relations of which society is made up. Good faith is presupposed by this order. It is the basis upon which men may go about their chosen or allotted work in each group or association or relation with assurance that their fellow men are doing what falls to them in the cooperation which any group or association or relation demands.

If we are coming, as some think, to an ideal of cooperation as the end of the legal order, cooperation presupposes good faith on the part of each of those who are cooperating. Force can be put behind good faith. It cannot be a substitute for good faith.

## TORTS

In the law of torts we are dealing with infringement of interests recognized and delimited by law and secured by attributing legal rights to those whose interests are so recog-

nized and imposing duties and liabilities on others in particular relations or situations or upon all others with respect to them. By interest, for the present purpose, I mean a demand or desire which human beings either individually or in groups or associations or relations seek to satisfy, of which, therefore, the adjustment of human relations and ordering of conduct in a politically organized society must take account. By individual interests I mean claims or demands or desires of individual human beings when regarded immediately as such — when asserted in title of the individual life. They are interests of personality, i.e. those involved in the individual physical and spiritual existence; domestic interests, i.e. those involved in what Paulsen calls the expanded individual life — the individual life in the family — and interests of substance, i.e. those involved in the individual economic life. But in recognizing, delimiting, and endeavoring to secure these interests we have to weigh them in connection with certain social interests, i.e. claims or demands or desires which individuals generally assert in title of social life in civilized society. Two of these, the social interest in the general security and the social interest in the individual life have to be taken into account continually in the law of torts in determining what individual claims or demands or desires to recognize, how to delimit them in view of other interests also recognized, and how to secure them. Interests continually conflict and overlap. We have to find out by experience developed by reason and reason tested by experience how to adjust and harmonize and reconcile them so as to secure the most that we can of the whole scheme of interests with the least sacrifice — with a minimum of friction and waste.

Most of our difficulties in the law of torts have arisen from the need of keeping in balance, in the process of recognizing, delimiting, and securing individual interests, the general security and the individual life. To maintain the former we have to impose many liabilities without regard to fault in

order to hold each man to diligence and vigilance not to injure others or subject them to unreasonable risks in the course of his activities. But the social interest in the individual life calls for free individual self-assertion, physical, mental, and economic. Hence the imposition of liability in order to maintain the general security must not be carried so far as seriously to impair individual freedom of action, and this requires, so far as reasonably possible, that those who are injured by his activities should be enabled to exact reparation only when his action is culpable, i.e. intentionally an aggression or carried on without reasonable consideration for the risks to which he subjects others. The law of torts has to achieve a workable balance between the two.

In the beginning, the law looked to security. In the maturity of law, when philosophy and economics put the emphasis upon liberty and the maximum of free individual self-assertion was held the end of law, there was, naturally enough, an attempt to make culpability the sole test of liability. The nineteenth-century jurists sought to make the free will the central idea in jurisprudence. Hence they considered that tort liability was to be made to depend upon culpable exercise of the will. Today we have learned to take both the general security and the individual life into consideration.

On the whole, it is safe to say that more progress was made in the law of torts in the last fifty years than in any other field of private law. Property and contracts attracted most attention in the eighteenth and nineteenth centuries. In the last generation, the enormous development of mechanical agencies, the threat to the general security in the operation of those agencies, the development of industry and consequent increase of risk of injuries in mills and plants, the growth of great metropolitan areas and consequent multiplication of points of contact of man with man, and especially in recent years the development of motor transport and possibilities of injury and of conflict of interest which

it involves, have compelled restudy of what had seemed relatively simple problems in the formative era of our law.

In this progress there was much which had been outgrown that has had to be discarded. The law of wrongs is the first subject in the law to develop. When contract was a matter for religion and good morals, wrongs were a matter for politically organized society. In a primitive legal order the wronged individual sought revenge with the aid of his kinsmen. The first task of the legal order was to keep the peace by putting down private war. It achieved this chiefly by requiring the wrongdoer to pay and the injured party to accept a composition to buy off the latter's desire for vengeance. Primitive codes are largely tariffs of compositions. The Roman law allowed recovery of composition as a debt by the proceeding appropriate to recovery of a debt. The wrong created a debtor-creditor relation whereby the injured party could exact and the wrongdoer was bound to pay the appointed sum, which was called a penalty. Thus there was an obligation *ex delicto* just as a debt resulting from a contract involved an obligation *ex contractu*. In the progress of the law a statute, called the *lex Aquilia*, formerly attributed to the third century B. C., but now recognized as of uncertain date, was so construed as to provide a general principle for injuries to property, as distinguished from the older specific money penalty for each detailed wrong. In certain cases, there was to be recovery of four times the damage suffered; in others, of twice the damage. This was developed into a doctrine of a penalty of reparation. Where one by his fault had caused injury to another, he owed a penalty of repairing the injury by paying the amount of the loss he had brought about. The French Civil Code of 1804 laid it down as a general principle that one who had culpably caused damage to another was liable for the damage. Thus there were three elements in tort liability: fault, causation, and harm.

In the common law, too, we start with the system of composition for wrongs. The Anglo-Saxon laws contain elaborate

detailed tariffs. As the law developed in the king's court, from the end of the twelfth century we find writs requiring the wrongdoer to appear and show cause why he did an injury to another in breach of the king's peace. Out of this grew the action of trespass, in which there was recovery of the damage caused. Thus, as in the Roman law, the idea of reparation superseded the idea of composition. But at common law for a long time the element of fault does not come in. The action of trespass lay for a direct physical injury to person or property. Where there was indirect or consequential injury or later injury to economically advantageous relations, the action was on the case. Originally, in the action of trespass the law looked only to causation. Under the composition system, if one caused injury to another he must buy off the resulting desire for vengeance. Under the action of trespass, if one caused a direct physical injury to another's person or property he must answer in damages. Trespass was not a matter of fault. Intention is not required today where one goes upon another's land or intermeddles with another's chattel. In such case, an innocent mistake does not excuse. This much is left of the doctrine that culpability is not an element in liability. But that proposition was laid down, as to unintentional, non-negligent direct injury to the person, in a leading case in the Court of King's Bench in 1616, and the law was still embarrassed by that case in the nineteenth century. Indeed, the matter was still arguable in England, to some extent at least, as late as 1890. As to trespass upon land, where cloud upon the title might result, since acts adverse to ownership may in time give rise to rights, the old rule remains. Except for this, the idea of liability for blameworthy causation — the idea of morals, of the writers on natural law, and of the developed Roman law — came to prevail. Blackstone, under the influence of natural-law ideas, sought to find a theoretical culpability even where the common law imposed liability without fault, as in the case of damage by trespassing animals. He considered

that as, ideally, liability must be conditioned on culpability, if the law imposed liability, as it did in the cases in question, it must be because the law saw culpability in the state of facts. As the law held the owner liable, he must have been culpable.

Nineteenth-century writers, hunting for a systematic idea on which to develop the principles of the law of torts, since no systematic idea was to be found in the common-law law books but only a series of rules as to when the action of trespass lay and when the action of trespass on the case, and as to what could be recovered in those actions, developed the idea of Aquilian *culpa* as they found it in the books of the civilians.

This idea of liability as a result of culpable exercise of the will fitted in with the theory of justice which was adhered to by philosophical jurists in the last century. Justice was a reconciling of the free will of each with the free will of all, according to a universal rule. The liberty of each was to be restrained only to the extent of allowing like liberty to all others. Hence, if one was held bound or liable to another, it must be either because he willed some undertaking or relation to which liability was attached or because he willed some act of aggression or some culpable want of care. The law was not to go beyond this since if it did there would be an unwarrantable interference with liberty. It was on this ground that the highest court of New York, as late as 1911, held a workmen's compensation act unconstitutional. The court said: "When our constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another." Hence, it was considered that the statute was arbitrarily and unreasonably imposing a liability on employers contrary to common justice. But it was not true that the common law at the end of the eighteenth century did not hold persons liable where they had not been at fault. The most that could be said was that philosophical jurists



held it ought not to do so, and text writers were seeking increasingly to limit or eliminate the cases where it did.

What, then, are the jural postulates, the presuppositions of life in civilized society, upon which we ought to proceed in the law of torts? I submit that there are three. The first and most universal and fundamental, may be put thus: In civilized society men must be able to assume that others will commit no intentional aggressions upon them. The cooperation and division of labor which make it possible to develop and maintain civilization require that men be secure from attack in going about their tasks in the social order and thus be free to conduct the investigation and experiment and research which have enabled mankind to harness physical nature to human purposes. In civilized society today, men do not have to go about armed or keep below the sky line or be careful to step warily so as not to be discovered, lest some one attack them unprovoked. Our everyday life presupposes freedom from intentional attack. A second is that in civilized society men must be able to assume that those who are engaged in some course of conduct will act with due care not to cast an unreasonable risk of injury upon others. We cross the street in a reasonable expectation that no one will be carelessly driving on the wrong side of the road or against the lights or with his brakes not in order and will run into us. In the crowded urban society of today, with so many mechanical appliances of potential danger in daily use, this postulate has come to be as fundamental as the first. In connection with it we must take account also of the jural postulate of the law of contracts, which I considered in my first lecture. Certain relations involve a duty of protection, and those who are in such relations assume and are entitled to assume that those who owe them protection will be reasonably diligent and will carry out their duty carefully. In part, this is involved in the second postulate. In part, it is a matter of the good faith demanded by the postulate which underlies the law of contracts. The third postulate

underlying the law of torts is that in civilized society men must be able to assume that others who maintain things or employ agencies, harmless in the sphere of their use but harmful in their normal action elsewhere and having a natural tendency to cross the boundaries of their proper use, will restrain them or keep them within their proper bounds. In addition, I submit a corollary of the first jural postulate, which may be phrased thus: One who intentionally does anything which on its face is injurious to another must repair the resulting damage unless he can justify his act under some social or public interest or assert a privilege because of a countervailing individual interest of his own which there is a social or a public interest in securing.

If these are the presuppositions of life in civilized society in this time and place, one should be liable in tort in three classes of cases. First, he should be liable for intentional aggression upon the personality or substance of another unless he can establish justification or privilege according to the corollary of the first postulate. Second, he should be liable for negligent interference with or injury to person or property, i.e. for failure to come up to the legal standard of due care under the circumstances, while carrying on some course of conduct, whereby injury is caused to the person or property of another. Third, he should be liable for unintended, non-negligent interference with the person or property of another through failure to restrain or prevent the escape of something or getting out of bounds of some agency which he maintains or employs, such things or agency having a tendency to get out of bounds and do harm. Progress in the law of torts has consisted in bringing its precepts into accord with these postulates.

There is an important difference between the law of contracts and the law of property, on the one hand, where we are dealing with interests of substance and so maintaining the security of acquisitions and security of transactions to the immediate end of maintaining the economic order, and,

on the other hand, the law of torts where we are dealing with questions of conduct, and at least where the first and the second of the jural postulates are involved must consider the moral aspects of acts. I have long thought that an idea of Bergson's was useful in this connection. He holds that things in space repeat themselves while things in time are unique. Property is in space in his sense. In property and in contract things repeat themselves. As I have been in the habit of putting it, there can be blank conveyances and blank promissory notes and bills of exchange, and standard insurance policies, and administrative agencies today prescribe standard legal transactions of all kinds in all manner of connections. But in Bergson's sense conduct is in time and is unique. One item of behavior is not exactly like another, as one deed or mortgage or promissory note or policy of insurance is like another. There is no such thing as a blank automobile accident. When the question is one of whether one has subjected another to an unreasonable risk of injury, times and places and circumstances must be taken into account and they vary infinitely. What was reasonable on a country road fifty years ago and what is reasonable on a paved highway running across the continent today are very different things, and there may be every gradation between the two. Hence where property and contract admit of rules, i.e. of legal precepts attaching definite detailed legal consequences to definite detailed states and situations of fact, the law of torts requires resort to standards. It calls for legal precepts imposing liability in case of departure from or failure to come up to a standard of conduct to be applied according to the circumstances of the particular case. Standards are measures of conduct prescribing limits within which there is a margin of application, whereas rules are applied without any such margin, the question being only whether the state of facts exists to which the law has attached an appointed result. Examples are: The standard of fair conduct of a fiduciary, the standard of due care in relations and situations calling

for care, the standard of reasonable service, reasonable facilities, and reasonable rates imposed upon a public utility, the standard of reasonableness in the law as to restraint of trade, the standard of fair competition. Standards are late developments in the law, whereas rules are the staple of the beginnings of law. In the law of torts we must make use in many connections of standards which would be incompatible with the economic order in the law of property or the law of contracts.

But, it will be said, in criminal law we are dealing with conduct and criminal law is made up of rules. In criminal law, however, the general security is involved in two ways. On the one hand, we seek to maintain the general security through prosecuting agencies. On the other hand, experience has shown that those agencies threaten the general security unless restrained by rules prescribing what may be prosecuted and how prosecution may be carried on. Yet experience has shown us that when we are dealing with conduct we must, perforce, provide for a large measure of individualization such as in private law we achieve through standards. In criminal law we meet this need by a series of mitigating agencies involving discretion in their exercise and by provisions for probation, parole, and pardon.

It cannot be pretended that conduct is not involved to a greater or less extent everywhere in the law. But in property and contract conduct is not the significant feature. In parts of the law of torts it is of primary significance. It is enough to suggest that inheritance and succession, conveyance of property, matters of commercial law, and the creation, incidents and transfer of obligations, with respect to which the social interest in the security of transactions is especially strong, have proved at all times a fruitful field for effective legislation. But where the questions are not of substance but of weighing of human conduct and in effect passing upon its moral aspects, legislation has accomplished little. No codification of the law of torts has achieved any measure of

success. Modern codes are content with significantly broad generalizations in this field. In the United States, succession to property is everywhere a matter of statute and no one doubts that the statutes work well. Our commercial law has in large part been codified. The law of property, with respect to which in a modern community certainty is an imperative requirement, has been codified as to estates in land in England and will no doubt afford an opportunity for uniform legislation in this country. On the other hand, in those parts of the law where we have to do more than delimit interests of substance and devise means of securing them, not only do we meet with little legislation but we find a great deal left to application of standards by juries or by administrative agencies or by judicial discretion.

Not only does the law of torts require standards, it calls for principles, authoritative starting points for legal reasoning, since new questions, not covered by established precepts, arise with special frequency in this field and require choice of starting points for analogical reasoning and a certain creative law-finding function. Like all departments of the law, however, the law of torts began with rules in the strict sense of that term, i.e. legal precepts attaching definite, detailed legal consequences to definite detailed states of fact. As has been said, we begin with a definite composition for each detailed wrong. In the nineteenth century, jurists were in reaction from the eighteenth-century natural law and the older English equity, which had not yet developed principles of the exercise of discretion. Hence, they took rule to be the normal form of legal precepts and sought to reduce all others to that form. When the law of torts began to develop as a subject of study, there were rules which had arisen and were appropriate to each of the named torts, i.e. the torts of intentional aggression, such as assault and battery, false imprisonment, malicious prosecution. The law as to these wrongs had grown up in connection with procedure. While the logical course of development would be to recognize in-

terests, delimit them in the form of rights, impose duties correlative to the rights, devise remedies to give effect to the duties, and work out actions to lead to the remedies, the historical order of development is the reverse. An injured party got a writ from the King commanding something to be done to right the wrong he had suffered. As the forms of writs became stereotyped, they brought about a series of actions. The actions gave certain remedies, and the law stopped there for a long time. It was not till the rise of equity that we began to think about duty, and not until the maturity of law that jurists began to put right behind duty. The eighteenth-century bills of rights are bills of liberties if we use legal terminology strictly. Only in the present century have we seen the importance of the interest behind the right. Hence procedure was the significant thing before men were conscious of the interests to be secured and the rights by which they are secured. But procedure is a matter of rules. Blackstone takes up torts under the actions of trespass and case, showing for what they would lie, the definite detailed states of fact upon which each form of action could be brought and what would have to be pleaded and proved in each. When the law of torts had got no further than this, there was no need for much legal reasoning and so no need for principles. But as the common-law actions have become obsolete and done away with and the question has become not what can be brought within the scope of trespass or case but how to provide for newly recognized and delimited interests and how to adjust them to other recognized interests, principles are called for. In the past fifty years we have been more and more developing and relying upon principles — authoritative starting points for legal reasoning worked out inductively from the reported decisions.

As late as 1888, when Brett, M. R. tried to put upon a general principle the cases as to liability of a manufacturer or vendor or furnisher of articles to be used by others, where those who bought or used them were injured while innocent-

ly using them. but were not in any relation of contract with the manufacturer or vendor or furnisher, instead of leaving them to a rule established in a case no longer followed and originally governed by a matter of procedure, this was regarded as academic. Well into the present century it was argued that such a question could not be disposed of in that way. Today we realize that principles indicate general tendencies in the law. The principles which have developed in the law of torts in the past fifty years indicate, what is indicated generally by movements in the law during that time, an endeavor to secure the interests of concrete human beings as widely as possible, as contrasted with the concern for promoting abstract free self-assertion which governed in the last century.

What was the condition of our law of torts in the last decade of the nineteenth century? It was at most only just emancipated from procedure. It was taught for a greater part of the century as it stood in Blackstone. The first common-law treatise on the subject was an American text published in 1859. In 1860, there was the first English text, Addison on Wrongs and their Remedies, with a sub-title "A Treatise on the Law of Torts." The first ten chapters dealt with matters which later were usually taken up under the law of property and with liability of bailees, carriers and innkeepers. "Trespasses and injuries from the negligent use and management of chattels and the negligent performance of work" is put along with negligence of bailees and carriers, because at common law one could sue either *ex delicto* or *ex contractu* where another was negligent in carrying out an undertaking. Then follow chapters on the named torts, on injuries from the exercise of statutory powers, and three chapters on procedure. This book was widely used. By the last quarter of the century it was in its fourth English edition and there was an American edition. It began to be used as the basis of instruction and had something to do with arousing consciousness that here was a great and developing field of the law.

But it was still closely tied to procedure. Not unnaturally Mr. Justice Holmes (as he afterwards became) reviewing an abridged edition for law school purposes, expressed the opinion that "torts is not a proper subject for a law book." The first edition of Ames's *Cases on Torts* (1874) did not go much beyond the named torts. It was not till 1893, when Judge Smith added a second volume, dealing with negligence and with injuries to economically advantageous relations, that general principles began to be brought out. Emancipation from the distinction between trespass and case was still not complete.

Not only was the law of torts of fifty years ago still embarrassed by procedural ideas, it had not yet worked out or at any rate lawyers and law teachers had not accepted the principle of liability for wrongs other than direct injuries to the person and to corporeal property. As late as 1916, the legal periodicals were still discussing whether there was a general principle that harm intentionally caused would create liability unless justified or whether some such principle applied only to the old and long recognized torts of aggression upon the person or corporeal property. Whether there was a general principle of the sort applying to cutting off another's reasonable expectations through contracts or relations with third persons, was being argued in many different cases in the courts and cautiously argued in the law reviews. The corollary of the first postulate was not yet generally received. In the present century, a whole chapter of the law has been written around it.

Again, in the last decade of the nineteenth century our law of torts had not yet apprehended the difference between rule and standard, and courts and text writers and even law teachers were vainly endeavoring to reduce negligence and contributory negligence to a body of rules. A great body of decision grew up as to "negligence *per se*." It was negligence as a matter of law to get on or get off a moving car, to stand on the platform of a car in a moving train, to put one's arm



or part of his body out of the window of a car, and much more of the sort. It was held to be an absolute rule of law that before crossing a railway track one must "stop, look, and listen." Mr. Justice Holmes believed in this rule to the end. It had some relation to the crossing of a single track railway with a team and lumber wagon when trains ran thirty miles an hour. What put an end to the rule in the Supreme Court of the United States were cases of heavy motor trucks crossing four-line tracks on which streamlined trains were as like as not going one hundred miles an hour. By the time the driver in such a case has stopped, got off the truck, looked up and down the tracks, got back on his truck, started it up, and moved on to the tracks, the streamlined train may have come four miles. Such cases bring home to us that for negligence cases we must use a standard. The attempt to make the subject into a body of rules had failed by the fore part of the present century.

Why was it ever supposed that negligence was a subject for rules in the strict sense? In large part it was due to the ideas of the nature of law which prevailed under the leadership of the analytical jurists. Bentham laid down that law was an aggregate of laws. Austin taught that a law was the command of the sovereign. It was not easy to fit legal standards into such a theory. Then, too, the maturity of law essays to attain a maximum of certainty, uniformity, and objectivity in the judicial process, and rules logically applied seemed the way to achieve these things. Moreover, the law of real property was taken for the model by the leaders of the analytical school, and that part of the law is the field in which rules in the strict sense are at their best.

Again, fifty years ago the law as to contributory negligence was not satisfactory to the public, although lawyers and law teachers generally approved it. The general doctrine was that if one injured through the negligence of another was himself negligent and contributed to the injury by that negligence of his own, he was absolutely barred. Half a cen-

ture before the English courts had modified this doctrine by the adoption of the idea of "last clear chance" so that one who acted negligently on a negligently set stage was liable for injury to the one who so set it if he was not present and acting at the crisis of the accident. But whether that modification was received in the United States was under discussion in the courts as late as the second decade of the present century. Indeed, it has not proved wholly satisfactory and raises many difficulties a hundred years after it was originally announced. Different solutions were tried in this country for a time by judicial experimentation with comparative negligence in a few states. These achieved no results commending them to lawyers or courts generally and it has been left to legislation, now become very general, to put this subject on a basis which is at least more satisfying to the public by making contributory negligence a ground of diminishing the amount which the injured party may recover.

Fifty years ago our law of torts was embarrassed by a number of what must be called arbitrary rules as to "imputed negligence," that is, rules imputing to a person who was not himself negligent, the negligence of some third person so as to bar recovery on the ground of contributory negligence. A child whose parents allowed him to play in the snow in the road, could not recover if seriously injured by the negligence of the driver of a sleigh. A passenger in a vehicle carrying passengers for hire could not recover if injured by some one's running into the vehicle negligently if the driver of the vehicle in which he was riding was also negligent. Where one of a party which hired a vehicle as a "joint enterprise" was injured by the negligence of another who ran into the vehicle, if one of those who jointly hired the vehicle was driving and he, too, was negligent, his negligence was imputed to all the rest, and the one injured could not recover. These artificial rules originated in a case which was decided on old rules of special pleading. In other words, they were procedural in origin. For fifty years the law has been

getting rid of them. But some remnants still remain even now, and legislation is having to be enacted to do away with them.

One of the most embarrassing features of the law of torts in the latter part of the nineteenth century and until very recent years was the vain attempt to establish rules of proximate causation. A person who culpably caused injury to another was liable to the latter if his culpable action was the "proximate" cause of the harm. But if his culpable action was "too remote" then he was not liable. Partly the courts unconsciously covered up in this way a perfectly legitimate weighing of the interests involved which the received method did not recognize. Partly the courts were reaching for a clearer idea of negligence, a better formulation of the postulate on which the law of negligence proceeds, and a theory of the risk to which the negligent action may have exposed others. Attempts were made to attain a satisfactory solution by theories of the duty of care and the persons to whom it was owing as well as by theories of causation and of remoteness. Law teachers worked out ingenious logical schemes of causation and of what would cut off the effect from the negligent cause, or, as it was said, insulate the negligence of the person sought to be held. Only in the past few years has a simple way out been found by inquiring as to the ambit of the risk which the party charged with negligence created and to which the injured party was subjected. We have here to balance the social interest in the general security, invoked by the injured person, and the social interest in the individual life as an interest in free exercise of his faculties, which is invoked by the person charged with negligence. That balance is hard to make and hard to maintain everywhere in the law of torts. But it is a great gain that we now see what it is that we have to do.

As has been said, fifty years ago text writers and many courts following them were trying to force the whole law of torts into the confines of a doctrine that tort liability

could only flow from culpable action. If one who had exercised every care in the choice and supervision of his employees was nevertheless held liable for wrongs done by the employee in the course of his employment contrary to his instructions and without fault of the employer, it was because, so we were told, the employee represents the employer; what the one does is done by the other, as in contractual agency. But if those who so argued had followed out their will theory logically, they would have seen that in the case of an agent the principal has willed that the agent represent him — has willed to confer a power upon the agent to bind him. In the case of the employee, in order to maintain the general security by making it necessary for the employer to exercise the very highest degree of care that others are not injured, the law still acts on the older idea of liability based on causation only. There were other cases, notably liability for injuries by trespassing animals or by wild animals kept, in which the older liability without regard to fault had not been given up. But the text writers of the last quarter of the nineteenth century, not being able to use Blackstone's method of proving fault from liability, pronounced these cases historical anomalies which were to disappear with the growth of the law. Meanwhile, the cases of maintaining things on land not dangerous in themselves except as they got out of bounds, but liable in their very nature to get out of bounds and do damage, led to a new category of liability where there was no fault. This was objected to by text writers as extension of the historical anomalies, and it was predicted that the leading case for this new category would be smothered with exceptions and gradually would disappear from the law. A number of American courts, mostly, however, in cases in which the matter was not squarely raised, refused to follow the leading English case, and as late as the second decade of the present century, some of our strongest law teachers were insisting that it could not be maintained. Nevertheless, despite the predictions of English text writers and the pro-

nouncements of some of our strongest American courts, the English courts, so far from limiting the leading case, began to extend it and one by one American courts began to accept it. Today the current of authority and the Restatement of the Law of Torts by the American Law Institute are in conformity with the third of the postulates above suggested. It should be added that although the French Civil Code sought to modify the cases of absolute liability which had come down from the Roman law by changing the liability into a burden of showing absence of fault, and the nineteenth century civilians sought to make culpability the sole criterion, in the present century civilians have generally been giving up what they call the "culpa principle." Liability does flow from fault. But there may be other sources.

Procedural ideas as to suing upon contract where one had bought something, dogmatic limitations involved in theories of proximate causation, and logical difficulties as to the scope of duties, greatly embarrassed the law fifty years ago in cases where a manufactured article passed through many hands before coming to the ultimate purchaser who used it and was injured by a hidden defect which the manufacturer could have obviated with due care. We now see that the manufacturer cast an unreasonable risk of injury on people generally, since it was intended some one should buy and use the article. But for a long time it was laid down that there was not tort liability in such cases, subject to an exception where there was an article inherently dangerous. Certain other exceptions were gradually added. At length, the rule deservedly broke down, some twenty-five years ago, and the subject is now governed by the ordinary principle of negligence.

For a long time, also, the law was embarrassed by notions as to misfeasance and nonfeasance. Here the trouble was due to logical development of procedural ideas. How could one who had merely done nothing be held to have trespassed? When the law of torts was thought of as part of the law of procedure such a question was a natural one. Even where

the appropriate action was case, it seemed that there should be something analogous to a trespass. But with the emancipation of torts from procedure it has come to be well understood that there can be wrongful inaction causing damage quite as much as wrongful action. Failure to perform a duty involved in a relation, such as parent and child, husband and wife, master and servant, is an old category of liability. Failure to perform a duty imposed by statute is another. But these for a long time were dealt with by the criminal law. The case which gave the most trouble, negligence in carrying out an undertaking entered upon, is now seen to involve the ordinary principle of liability for negligence. The distinction between misfeasance and nonfeasance has ceased to trouble us.

Injury due to failure to perform a statutory duty gave trouble fifty years ago for another reason. Due to modes of juristic thought of the time, a curious doctrine grew up in the United States as to harm done by one who at the time was acting contrary to a statute or a municipal ordinance. A question of causation enters into these cases. Although one was at the time acting as the statute or the municipal ordinance said he should not act, it may be that the same injury would have occurred even if he had been adhering to the prescribed rule. But it may be also that the rule was prescribed to prevent just such things as happened. Must the injured party show negligence apart from the breach of the statute or ordinance, or will the breach plus the injury establish liability? An idea that men ought to be free, so far as possible, to judge what they should do at the crisis of action, and that a reasonable man might reasonably disobey the rule prescribed by statute or ordinance, subject to the appointed penalty and to liability for damages if, but only if, his judgment was otherwise culpable, led in the last century to a doctrine that breach of the statute or ordinance was at most only evidence of negligence. It could be left to a jury to decide what a reasonable prudent man would have done under

the circumstances. Here, also, the matter has generally come to be put on a basis of principle.

There was still controversy fifty years ago as to whether contributory negligence was to be negatived by the plaintiff or was an affirmative defense to be set up by the defendant. Some of the strongest courts in the land held it part of the plaintiff's case to show he was in the exercise of due care at the time of the accident in which he was injured. It has taken legislation, in some important states as late as the second decade of the present century, to do away with what was in effect the anomaly of requiring a plaintiff to prove a negative.

In respect of injuries to personality and to interests in the domestic relations, the law was backward till well into the present century. The interest of the individual in privacy did not attract notice till 1890. In 1902, the highest court of New York denied recovery for a gross invasion of privacy on the ground that nothing about a right of privacy could be found in Blackstone or Kent and that inconvenience or discomfort not connected with the possession or enjoyment of property had never been held actionable in the common law. In that state the matter was soon put on a better basis by legislation. Elsewhere the current of authority, without waiting for legislation, has moved toward recognizing the interest and securing it by a legal right. Also the law was long backward in allowing recovery for nervous illness due to fright or nervous shock caused negligently by a wrongdoer. Courts were long troubled here by the practical problems of proof and the danger of imposition, and so required some voucher for the reality of the claimed injury where not objectivity manifest. Accordingly, they put nervous injuries which left no physical record and purely mental injuries in the same category, requiring either some bodily impact or some wrong infringing some other interest which was objectively manifest. The Judicial Committee of the Privy Council in 1888 and the Supreme Court of Massachusetts in 1897 required physical

impact, and until the first decade of the present century such was the general rule. Forty years ago the English courts had begun to move away from that rule, and they have now gone a long way in cases where in ordinary experience fright will cause nervous shock and nervous illness. The margin for impostors and the scope of pure expert conjecture have made American courts hesitate. But the current of decision has set in toward a reasonable recognition and securing of ordinary nerves and normal sensibilities against negligent injury.

For historical reasons, the law of torts fifty years ago was backward as to certain interests of the wife in the domestic relations. Her claim for support against the husband was abundantly secured. But while the right of the husband to the society and affection of the wife as against all the world was legally secured, the claim of the wife against all the world to the society and affection of the husband had no legal security. Within relatively few years, judicial decision began to allow a wife to bring an action for alienation of a husband's affection, or for criminal conversation with the husband. However, just as the law on this subject was coming to be put on a logically satisfactory basis, the abuse of such actions had come to be such that legislation in a growing number of states has been doing away with them entirely.

Another respect in which the law half a century ago was backward, as we see things today, was in denying liability for malicious exercise of liberties to the injury of another. Not only has the strict doctrine of the last century given way as to such things as spite fences, spite wells, and malicious interference with surface water, but in the present century the law has begun to deal with malicious exercise of economic power. All of this is but a recognition of and giving effect to the corollary of the first postulate. Legislation and administrative regulation under statutes have been carrying that development further in the past decade. But it had been well begun in judicial decision.



Some further improvements in the law of torts in the past fifty years may be noticed briefly. The archaic rule as to defaming a woman by imputation of unchastity has been abrogated by judicial decision or by legislation. Slander at common law requires imputation of a crime, or of a contagious disease cutting one off from society, or affecting one's business, trade, or profession, or else special damage, such as causing one to lose his job. As to anything short of this, the law was not inclined to consider mere verbal abuse. But under modern conditions, this had a hard operation as to slander of women. Another significant improvement is extension of equitable relief against injuries to personality. Another is modification of the rule as to liability for condition of premises as to those who enter under license by operation of law. A fireman who enters on premises to put out a fire is coming to be held entitled to reasonable notice under the circumstances as to the conditions he will have to encounter. There has also been a liberalizing of the attitude of the law toward trespassers injured in the course of trespassing. Here the significant point is in referring cases of operations going on upon the premises to the general principle of negligence. For the rest, the matter must be postponed till we come to take up the law of property. Likewise, there has been of late a tendency to change the rule as to non-liability of charitable corporations for the torts of their agents and servants.

To come to more general propositions, the subject of justification for acts on their face injurious to others has had a considerable development, giving increased recognition to the claims to be weighed against those of the complaining party. This has been true especially in labor legislation but has gone on also in judicial decision.

I wish I could add that we had arrived at a satisfactory state of the law as to contributory negligence. But it would be too much to expect that. The subject is intrinsically one of the most difficult of those confronting the law. At least seven solutions have been tried at one time or in one legal

system or another and none has proved wholly satisfying. It cannot be said that as yet we have achieved a solution. But there has been great advance. What we may say with assurance is that, taking the law of torts as a whole, there has been a continual extension of the area of recognized and secured interests and a continually greater efficacy of the means of securing them.

### PROPERTY

In our bills of rights from the beginning, property is joined with life and liberty. These three things are claimed and guaranteed to Americans by our fundamental law, national and state. As men came to the new world to make homes and secure a livelihood for themselves and pushed further into the wilderness, each generation with the same ambition, guarantee of the property they laboriously acquired and improved seemed fundamental. Moreover, seventeenth-century England had seen repeated confiscations, restorations, and reconfiscations, as now one side and now the other prevailed for the time being in the long struggle with the Stuart Kings. Likewise in this country the Revolution had been followed by legislative confiscations and bills of pains and penalties to an extent which led to more than one check on or prohibition of legislative action in the constitutions of the states and in our federal constitution. How thoroughly security of property had become identified with the very purpose of law and government in America is well brought out in the argument of Mr. Choate in the *Income Tax Cases* in 1895. He said: "I have thought that one of the fundamental objects of all civilized government was the preservation of the rights of private property. I have thought that it was the very keystone of the arch upon which all civilized government rests, and that this once abandoned, everything was at stake and in danger. That is what Mr. Webster said in 1820 at Plymouth, and I supposed that all educated, civilized men believed in that."

A marked change has taken place in the present century. With the passing of pioneer conditions and pioneer modes of thought, the general security is no longer identified with security of acquisitions. Nor is the change confined to America. In 1892, Jhering remarked it as a universal phenomenon. He saw then in the beginnings of the movement which we now call the socialization of law "formerly higher valuing of property, lower valuing of the person; now lower valuing of property, higher valuing of the person." He added that the line of growth in the future was weakening of the sense of property, strengthening of the feeling of the moral worth of the individual. The law of property is now less than half of what it was in the law school curriculum of a century ago. The law which we inherited from England was chiefly a law of property and a law of procedure. The rest of the law had for the most part to be developed from these by analogy. In Blackstone's Commentaries, one half is taken up by property and procedure, and if we look only at private law, leaving out criminal law, public law, and the general philosophical introduction to law, property and procedure take up two thirds of the book. The law of torts, which is the outstanding subject in private law today was part of the law of procedure in Blackstone's scheme and was not known to the law school curriculum as a separate subject until 1870. It is only in the present century that the doctrine that equity would only protect property rights has broken down. The steady growth of equitable protection of interests of personality is a matter of the present generation.

We must start, then, by recognizing that the law of property easily held the first place in the law of our formative era — the time when our legal and political institutions were given shape — and that it has been steadily losing that position. There were, perhaps, four reasons for this preponderance of the law of property in the law of our formative era. In the first place, as has been said, it had this place in the law which we inherited from England. Secondly, the law of prop-

erty is better adapted to rules than any other subject in the law. Indeed, it calls for rules, i.e. for légal precepts attaching definite detailed legal consequences to definite detailed states of fact. The economic order requires stability of the law as to property and commercial transactions and objectivity in the judicial process. In the nineteenth century lawyers were in reaction from the instability of the law and subjectivity of the judicial process involved in the rise of the Court of Chancery and the overwide personal discretion of the administrative regime of the Stuarts and later of colonial America. Hence, for a time the rule was taken to be the type of legal precept, and the law of property furnished the type of legal rule. Jurisprudence still suffers from the condition to which it came when the leading analytical jurists in the English-speaking world in the last century took their ideas from the law of real property. Thirdly, interests of substance are better suited to securing by the machinery of the legal order than interests of personality. The staple remedy of the legal order is a judgment for a sum of money — substitutional redress, as we call it. The other important remedy is specific redress — restoring one to that of which he has been wrongfully deprived, or requiring performance in specie of something rightfully due him. But money damages, which will enable an injured person to repair injury to property or to buy the equivalent of an economic advantage of which he has been deprived or to which he is entitled, will not enable him to repair a damaged reputation or impaired sensibilities, nor to buy an equivalent when his most intimate domestic relations are impaired. One who has been dispossessed of his land or of his chattel may have possession restored to him by the sheriff under a writ from a court. But no writ which a court can issue can restore one to the position he was in before a serious infringement of personality. Moreover, fourthly, in a pioneer community wealth is chiefly in the form of land. In nineteenth-century America we were still very close to the pioneer. A little more than a century ago the

author of the *Leatherstocking Tales* could write of central New York as newly redeemed from the wilderness. The grandfathers of men now living were pioneers in the states formed from the Northwest Territory. The fathers of the present population of the states west of the Mississippi were pioneers there, and many who live there today were brought up under pioneer conditions. Men are still living who were pioneers on the Pacific coast and the beginnings of California are but little further back than the span of one life. A great and populous state of the southwest was opened to settlement by the white man in the last decade of the nineteenth century and has been developed in the present century. The moment one passes beyond the narrow fringe of original settlements along the Atlantic coast, he has but to scratch the surface in order to find the frontier. The spirit of American law of the nineteenth century was sensibly affected by the spirit of the pioneer.

It is not necessary to consider the reasons for the profound change which has relegated the law of property to a secondary position in the law of today. The passing from a rural, agricultural to an urban, industrial society speaks for itself. Also there are causes at work the world over which, as Jhering showed us, have been having a like effect in other lands. It is enough to recognize the fact and to suggest it as explaining the lack of interest in the law of property today which is behind its relative backwardness in comparison with the progress which has been making in the law of contracts and in the law of torts.

What shall we say is the postulate of the law of property which should show us the direction which development of the subject should take? I have been in the habit of putting it thus: In civilized society men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labor and what they have acquired under the existing social and economic order.

Theories by which men have sought to give a rational account of private property as a social and legal institution may be put as of five types, each including a number of forms. These types may be called (1) natural-law theories, (2) metaphysical theories, (3) historical theories, (4) psychological theories, and (5) sociological theories. Of the natural-law theories, some go on a conception of natural reason derived from the nature, that is, the ideal, of things; some on conceptions of human nature. The former continue the ideas of the Roman lawyers, who considered that it was the purpose or destiny or natural reason of things to be owned by men and so started from the occupation of ownerless things or from the idea of creation through labor. Theories purporting to be based on human nature have proceeded sometimes on a conception of natural rights, taken to be qualities of human nature reached by reasoning as to the ideal of man in the abstract. At other times they have proceeded upon the basis of a postulated social contract, expressing or guaranteeing the rights derived by reason from the nature or ideal of man. In recent thinking a third form has arisen which may be called an economic natural law. In this form of theory, a general foundation for the institution of property is derived from the economic nature of man or from the nature of man as an economic entity. These are modern theories of natural law on an economic rather than on an ethical basis. Whereas antiquity held it the nature of things that men should own them, these theories hold it the nature of men that they should own things.

Metaphysical theories of private property begin with Kant. He puts in another way the position of the Roman jurists, holding if we do not assume a logically original community of the soil and things upon it, so that every one could use them, mere objects of the exercise of the will, exempted therefrom by operation of law, would be raised to the dignity of free-willing subjects although they have no subjective claim to be respected. But today we feel it is not

a matter between the owner and the thing owned, but rather one between the owner and non-owning others. Hegel treated property as a realization of the idea of liberty. He said that in order to reach the complete freedom involved in the idea of liberty one must give his liberty an external sphere. Hence, a person has a right to direct his will upon external objects and an object on which it is so directed becomes his. A material thing is not an end in itself. It gets its whole rational significance from his will. Thus, says Hegel, when one appropriates a thing he manifests the majesty of his will by demonstrating that external objects which have no wills are not self-sufficient. But this, too, assumes that the whole question is between the owner and the thing owned instead of between the owner and non-owners.

Historical jurists start with the proposition that significance is in the idea and that history is the record of the unfolding of the idea in human experience. The political idealistic interpretation, to which historical jurists adhered in the last century, took liberty to be the idea and undertook to find it unfolding in legal history. Their theory, then, proceeded on two subordinate propositions: (1) The conception of private property has had a continuous development from the beginnings of law; (2) individual ownership has grown out of group rights just as individual interests of personality have gradually been disentangled from group interests. This was taken to show that we have in each case parts or phases of the unfolding of the idea of liberty.

Natural-law theories and metaphysical theories have pretty much ceased to be urged under the pressure of the claims of non-owners and the tendency to think of satisfying material wants instead of in terms of liberty and securing free exertion of the will. Of recent theories, psychological theories were urged at one time on the basis of what was called an instinctive human claim to control natural objects. Sociological theories have been some psychological, some positivist, and some social utilitarian. The psychological form

treats property as a social development or social institution on the basis of the tendency of individuals, as a fundamental behavior tendency, to seek to control the objects they find about them. The positivist theories seek to deduce property from an observed and verified social law. The social utilitarian theories seek to justify property as an institution which secures a maximum of interests; as a wise bit of social engineering when viewed with reference to its results, an institution which conduces to the maintaining and furthering of civilization, that is, to the highest development of human powers.

It is not within the scope of this lecture to discuss these theories. What I cite them for is to show how in comparison with the past, when property was taken for granted and there was a property theory of contract and a man's reputation was looked upon legally as an asset and his capacity to work at his chosen employment as a property right, and freedom of contract as involving a secured property right quite as much as liberty, men are ceasing to look upon property as fundamental and the whole attitude of jurists toward the law of property is affected. Going back to the postulate of the law on this subject, there is today little or no scope for acquisition of property by discovery and appropriation such as there was in the era of exploration and opening up of new regions and exploitation of natural resources. Also the days when the pioneer made by his own labor the things needed for his household are long in the past. What one makes today is made usually with another's materials and with labor which one has contracted to another and for which another is paying him. Hence the only part of the postulate that is of much immediate significance is that relating to what one has acquired under the existing social and economic order. But this has been regarded as giving a civil rather than a natural title to property — one resting on the law of the time and place rather than on the ideal.



“Every practicing American lawyer knows,” so writes a former President of the American Bar Association, “that no estate of any size can be wound up, no will involving future limitations can be construed, no charitable trust can be administered in most of the United States without great uncertainty as to what the courts will make of it, and without anxiety on the part of the lawyer, at least, lest his advice to his clients is erroneous as to the exact state of the law.” The law of real property demands certainty and objectivity in application beyond any other part of the law. Indeed, it is certain and objective in its application in all ordinary matters. But as to the matters of which Mr. Sims was writing, namely, future interests in land and setting up of and gifts to charitable trusts, it is otherwise, and the reasons why it is otherwise go to the bottom of our whole law of property. In the law of property there is an imperative demand that titles be certain and stable. We must be able to know with assurance who owns a given bit of property at any given time, who can dispose of it, and what title those will get who acquire it from him. Hence the saying is that it is more important that the law be settled than that it be settled right. This is not, be it noted, the saying of mossbacked legal reactionaries. It was announced in England by Lord Westbury, a leading liberal and zealous law reformer. It was announced in the Supreme Court of the United States by Mr. Justice Brandeis. Nor does it mean that it is so important to leave settled rules of law as they are that judicial creative law finding is never to disturb them. It does not condemn such growth as we have seen in the law of contracts and the law of torts in the past fifty years. What it means is that in the law of property established rules which are known and understood, even if arbitrary, are not to be changed to make them conform to the logical exigencies of an analytical system or to conform to some theory of historical development which requires them to be stateable as the culmination for the time being of the unfolding of some historically dis-

covered idea, nor to conform to some philosophically derived ideal. Rules in the strict sense are the staple of the law of property. But that part of the law can by no means get on without principles; and if the starting points for legal reasoning have become out of accord with the modes of thought of the time, if the presupposition of rules has no relation to the social or economic order of the time and place, legal reasoning in order to meet new situations of fact and develop existing rules by analogy becomes confused, the rules, concededly arbitrary, become difficult of application to any but the most familiar situations — in short, we have the condition Mr. Sims described. It is unhappily true that the law of future interests in land was never thoroughly understood in some of our newer states, ceased to be understood in many others, and proceeds upon ideas so different from those of today that only specialists can make much of it. Ignorant decisions, in which attempt was made to solve its technical problems by the light of nature and well meant legislation proceeding on no clear understanding of the difficulties to be met and how to meet them, have aggravated what has become a thoroughly bad condition.

Our common law grew up in the Middle Ages around the law of estates in land and procedure. The land law got its classical formulation at the hands of Littleton, a judge of the Common Pleas in the fifteenth century. It was authoritatively formulated in the seventeenth century by Sir Edward Coke's *Commentary on Littleton*. It was received in America as stated by Coke and its main lines have stood fast as they were at the end of the Middle Ages.

Let us remind ourselves what these main lines are. A distinction between real property and personal property is fundamental in the common-law system. It is a historical not an analytical distinction and grew out of procedure. Things real were specifically recoverable in a real action. All other things were the subjects of personal actions in which one could get a money equivalent only. On this procedural basis

real property included freehold estates in land, title deeds and certain movable things which in England were by custom part of the inheritance and passed with the land, advowsons (rights of presenting clergymen to livings in the established church), tithes, profits (i.e. rights of taking something from another's land), easements (i.e. rights to use the land of another or restrict another's use of his land), certain offices which in England are inheritable, peerages, franchises, pensions, annuities, and rents. Only profits, easements, franchises, annuities, and rents exist in this country. But the category is still a curious medley. All other things capable of ownership are personal property, and for historical procedural reasons this includes estates in land less than freehold, e.g. estates for years, so that an estate for the life of a man ninety years old is real property while an estate for ninety-nine years from the first of February next is personal property.

As the common law of real property took form in the Middle Ages, it is feudal in character, that is, its ideas are those of a relationally organized society in which land was not owned but was held of a lord and the relation of lord and man, landlord and tenant, was the basis of a military system. All land was held mediately or immediately of the Crown. Hence, after the Revolution, with us all land is held of the state. In effect, long before the Revolution all substance of tenure, except as to life estates and estates for years had been gone. Some states by legislation have abolished tenure in form. But the whole terminology of tenure remains and, although in substance there is ownership of the land itself, the technical language and conceptions of our land law are those of the common law and so presuppose tenure. At common law, then, one does not own the land itself, but is seised of an interest in it, technically called an estate, which in this country he holds of the state. His estate may be freehold or less than freehold. A freehold estate is one of uncertain duration — one held for the tenant's life

or for the life of another, or to the tenant and his heirs after him. The highest estate known to the law is an estate in fee simple, held to the tenant and his heirs forever. In the seventeenth century it had come to be recognized as and was in substance absolute ownership, and Coke spoke of it as such. Also, under a statute of the thirteenth century there was the estate tail or estate held to the tenant and the heirs of his body or lineal descendants with no power of alienation. In some of the United States this type of estate was held inapplicable to American conditions and has never existed. In others it has been abolished by statute. Estates less than freehold are of certain duration and are not real property. Hence, if a lessee holding for ninety-nine years dies, his estate does not pass to his heirs. It is a chattel which passes to his executor or administrator and may be sold as such to pay the debts of the deceased.

Again, at common law estates may be in possession or in expectancy. Where the estate is one in possession, the holder is entitled to immediate possession and enjoyment of the land. Where it is in expectancy, the holder is entitled to possession and enjoyment of the land at some time in the future when a particular estate in possession comes to an end. Estates in expectancy are either reversions or remainders. A reversion is what remains in one who has created a particular estate out of a greater estate which he holds. There is a remainder when, after creation of a particular estate either a part or the whole of the residue is given to some one else. What is most significant about these estates is that although they do not entitle their owners to present possession or enjoyment of the land, they are present estates, owned as any estate is, and may be conveyed or may be disposed of by will, or may be inherited. Moreover, a remainder may be contingent, that is, may be limited to take effect upon some doubtful or uncertain event or in favor of some person not now determined or in existence. Here, as the feudal system was based on relation and service, it was a fundamental re-

quirement that there should always be a tenant seised who could and would be held to perform the services. Hence contingent remainders could not be limited on a particular estate less than freehold. Also a contingent remainder could be defeated by the tenant of the particular estate if, for example, he surrendered his estate to the reversioner before happening of the contingency — i.e. while there was only a contingent interest.

Another fundamental distinction, historical in origin, is between legal and equitable estates. As equity acted originally and still acts typically by bringing pressure on the person to compel the performance of some duty, where the duty is to hold something in trust for another or to convey something to another, specifically enforceable in equity, the substantial result is a formal ownership by the holder of the legal title to the property, which is all that a court of law will look at, and a substantial beneficial ownership in the beneficiary of the trust or the person entitled to the conveyance. For a long time it was thought, as indeed Coke argued in the seventeenth century, that the beneficiary had no interest of any sort in the property but only an obligation enforceable in equity. But with the development of powers of direct enforcement by acting on the title to the property, instead of indirect enforcement by coercing the holder of the title, it came about that there are too distinct things: first, an obligation, cognizable and enforceable only in equity, and second, an equitable ownership, secured by courts of equity and treated by them on the analogy of legal ownership against every one but a purchaser for value without notice. No purely equitable claim is good as against such a purchaser. The holder of the legal title may defeat the equitable ownership by conveyance to one who without notice of the facts takes the legal title for value. He has this power, but it is a wrong for him to exercise it. Thus wherever there is a case for equity to enforce a trust or any duty to hold property for another or convey it to another, there are two ownerships,

one legal, involving a power of transfer to a purchaser for value without notice and so of terminating the equitable ownership, and an equitable ownership, recognized fully but only in equity, and given the incidents of legal ownership so far as a court of equity can do so. This dual ownership is unaffected by the modern fusion of legal and equitable procedure.

A statute of Henry VIII undertook to put an end to this dual system by providing for executing the use, or older form of trust, putting the legal title in the beneficiary. But it did not execute all uses and it was easy for the courts in the seventeenth century to impose a trust upon the executed use and thus establish the system of equitable ownership as we now know it. In result, there was still the dual system, but the rules of the common law as to creation of future interests could be evaded. A use could be made to take effect in the future without any particular estate such as would be required in case of a remainder. This was called a springing use. Or, a use in fee simple could be created with a provision that on some contingency a use in fee simple to another should take its place. This was called a shifting use. Likewise, another statute of Henry VIII, the Statute of Wills, had the effect of allowing the creation of future interests which could not have been done at common law. By what were called executory devises a gift of real property could be made by will in which an estate was to take effect not at the death of the testator but upon some later event, or an estate could be created after a fee simple.

Nor did the development of complications stop here. Two rules grew up before the English law of real property was received in America which require special notice. One, known as the rule in Shelley's Case, from the decision in 1581 in which it was recognized as an established proposition, provides that where an estate of freehold is given to a person and in the same gift or conveyance an estate in fee simple or fee tail is given mediately or immediately to the heirs of that

person, such person will take a fee simple or estate tail, the word "heirs" being taken to describe the quality of the estate rather than to designate the persons to take an estate. Thus such person may convey his estate at once, subject to any intermediate gift of a particular estate, and the property may never come to his heirs. The effect of this rule in defeating the intention of a testator ran counter to ideas of the eighteenth and nineteenth centuries and much controversy has arisen and still continues as to the rule and its application. The other rule, known as the rule against perpetuities, provides that no interest in land shall be valid unless it must vest (i.e. become subject to no condition to its taking effect other than determination of a particular estate) not later than twenty-one years after some life in being at the creation of the interest. This rule begins to appear in the sixteenth century and takes form in judicial decision near the end of the seventeenth century.

It would be hard to conceive of a system of land law more complicated, more technical, more out of accord in its fundamental ideas with the conditions and modes of thought of America either in the formative era or today. It is a tribute to the technique of the common law and to the resourcefulness of American lawyers that we were able to build as well on this basis as we did. We put inheritance of land and conveyancing in the order of reason almost at the outset, and gradually changed many archaic details by legislation. We succeeded gradually, through judicial decision or legislation, in modernizing acquisition of rights in land by adverse user. The destruction of contingent remainders by surrender of the particular estate was prevented in England by creating a trust to preserve them. In America, the rule was still in force in some states in the present century and has had to be abrogated by statute. Also in the legislative reform movement in our formative era, some states sought to strike at the root of our received law of real property by enacting that all lands should be allodial, that is, should be owned as per-

sonal property is owned. But this achieved nothing of consequence. It takes more than the change of a word to get rid of what the law has been taking for fundamental for centuries.

As it is, our law of property has to be learned three times: As law of real and law of personal property, as law and equity, and as common law and statute. Nor is it easy to be learned. Our law of real property is not congenial to the student of today. History has come to be under a cloud in the social sciences, and history counts for more in this subject than anywhere else in the law. Over and over the teacher can only say, the reason for this is historical and often the historical reason shows how a rule arose but affords no reason why it should continue. As Mr. Justice Holmes put it, "it is revolting to have no better reason for a rule of law than that so it was laid down in the reign of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." It is almost only in the law of real property that such rules persist today. The reason of this persistence is, however, something more than blind imitation. The paramount need of stability in this part of the law leads to retaining archaisms which do no marked harm lest greater harm be brought about by innovations, the effect of which cannot be calculated with assurance. Unhappily, they often do more harm than is apparent on the surface and they make hard the path of the student. The starting points for reasoning are not those of today. The modes of reasoning are often mediæval, and the severe logic of the time of the Plantagenets is troublesome to students no longer brought up on Aristotelian consecutive thinking. Moreover, the presuppositions of the law of future interests, in which so much of the trouble lies nowadays, are not derivable from the general postulate of the law of property and are not jural postulates of life in civilized society in America of today.



What are these presuppositions? The one most basic is the importance of perpetuation of a family in the holding of the family lands. This was behind estates tail, and certain doctrines of equity which were applied in family settlements, i.e. settlements of trusts to perpetuate a family. It was also behind certain restraints on alienation of lands effected by provisions in settlements of trust or by limitation in wills. The English have had to enact somewhat drastic legislation to get rid of these restraints. Perhaps the presupposition which is behind the law of future interests today is that owners of property should be able to make what Spencer calls postponed gifts, that is, should be able to control the devolution of their property after their death, and that their intention as to the disposition they make should be carried out. In the last century it was argued that there was a natural right of testamentary disposition. It was argued also that such control of the devolution of property after death was an essential element of ownership, quite as much as the power of disposition *inter vivos*. The Roman law restricted testamentary disposition, providing limitations for securing a minimum share to the natural objects of a testator's bounty, or in the most recent mode of thinking, those to whom there was a duty of support. English law did not permit disposition of land by will until the Statute of Wills in the reign of Henry VIII. Before that statute, however, there could be a conveyance to uses declared in a will, and creation of future interests by springing and shifting uses which were not possible of creation as legal estates. The Statute of Uses (1535) executed the uses, i.e. turned the equitable into legal estates, and in that way and through the creation of trusts, the greatest variety of complex testamentary provisions for future interests became possible. It is difficult to say just how we are coming to regard such dispositions today. The development of inheritance taxation indicates a considerable change of opinion. But it has not become fixed enough to enable us to lay out a set of presuppositions upon which to rebuild with assurance.

In England, in and after 1922, legislation made radical changes in the law as to estates and future interests. The great difficulty there had been that so much of the land was tied up in family settlements and hence not readily alienable. Hence the English reform was directed to simplifying rights in land, making land readily alienable, and assimilating the law of real property as far as practicable to the simpler law of personal property. There must always be certain differences between the law as to land and that governing movables, as the civil law calls them. But our distinction between real property and personal property, which, as has been said, is procedural in origin, does not correspond to any analytical classification. The archaic classification of the older Roman law, *res mancipi* and *res nec mancipi*, disappeared in the maturity of Roman law and was formally abolished by Justinian. The modern Roman law makes a logical analytical distinction between immovable property and movable property, so that its rules, where they are different as to these categories, proceed upon differences in the nature of the things to which they are to be applied. If one compares the simplicity of a civil-law treatise, when it comes to take up property in land, with the complex, technical system in our books, he cannot but realize how much needless trouble we make ourselves by maintaining our traditional medieval, procedural classification. The law of personal property was not encumbered by ideas of the military organization of feudal society. It was not molded to requirements of tenure. One could own chattels; but, on the other hand, could only own estates in land, not the land itself. There did not have to be always some one in possession of a chattel, at hand presently to perform the feudal services. Thus the law of personal property could be shaped easily to the economic order of today. Naturally, the English statute of 1922 sought to make it the model for all property. Probably in the end we shall have to take absolute ownership of a parcel of land as the

starting point, as we do absolute ownership of a chattel, and build a system around that idea. But I fear such a reform is a long way off.

I have said that recent English legislation made radical changes. It did. Yet it made them on a conservative basis. It retained the distinction between legal interests and equitable interests, nor did it do away with the different types of interests which had been developed in the common law. It only put them in a different category. The act of 1922 provides for only two legal estates, that is, estates involving legal title, in land, namely, an estate in fee simple absolute in possession and a term of years absolute. There are no more legal estates in expectancy. All estates other than a fee simple in possession and an absolute term of years are made into equitable interests. Thus these other estates do not have the full protection which the common law extends to legal interests. An equitable interest originally was assertable only against the party who was bound in good faith and so not against a purchaser of the legal title for value and without notice. Hence, in England today one who seeks to purchase land may always safely deal with one who has a complete legal title in possession. Any interest other than present absolute and complete ownership or an absolute term for years, may be defeated by acquisition of legal title (which can only be a fee simple absolute or an absolute term for years) for value and without notice of other interests, which can only be equitable. Indeed, the English law, in order to remove restrictions on alienation and make land more readily saleable, to some extent allows a purchaser who acquires the legal title with notice of equitable interests to take free of them. Thus what were formerly legal estates in expectancy may now be cut off in order to allow sale of the whole interest, the reason being that otherwise the land might be tied up a long time with no means of those interested realizing on their interests which could not be sold separately for any fair price.

At common law, the real property of the deceased, if inheritable, passed at once to his heirs, or, if there was a will, to the devisee. It did not form part of the estate of the deceased which was to be administered. Personal property, on the other hand, passed to the executor or administrator of the deceased to pay debts and legacies and be distributed among the next of kin. It was necessary to go into equity to subject land to the payment of debts, where the personalty did not suffice, and in this country special proceedings in court by which the executor or administrator might obtain a license to sell lands for payment of debts were at an early date substituted by legislation. In certain cases, because equity would impose trusts or specifically enforce contracts of the deceased, or give effect to certain of his directions, equity might regard certain personal property converted into realty or *vice versa*. Thus the distinction between legal and equitable ownership might arise, and many complicated questions made difficulties in the settlement of estates and still do so in the United States. The English statute of 1922 does away with all this. The land of a decedent is made to pass to his executor or administrator the same as the personalty. But the personal representative may consent to the vesting of the legal estate in an heir or devisee without any sale, and can consent to vesting the title in any interested person without a sale, so that the interests of minors and insane persons cannot hold up the settlement of an estate or hinder alienation. All this greatly facilitates administration. In some of our states the personalty is made by statute to pass to the heir. This is a much less satisfactory mode of simplifying the common law. The idea in both cases is to assimilate the one type of property to the other.

In England, a large part of the land is held by trustees under family settlements involving entails and many future interests. Thus much of the land was tied up so that it could not be disposed of for such periods as to hinder, if not prevent, effective use for purposes supervening upon the original

settlement and made necessary by changed conditions. These settlements commonly tied up property for as long a time as the rule against perpetuities would allow. How long this might be is illustrated by a case in which a trust was limited to the life of any then living child of Queen Victoria and twenty-one years thereafter. The Duke of Connaught was then just born (1850). He lived till 1942. Thus the property was tied up for one hundred and thirteen years. To meet this situation English legislation gave large powers of alienation to trustees. By making future interests in land equitable, treating them like trust for sale or settlement in trust, the act of 1922 made it possible for the trustee to deal with them readily under his statutory powers.

How far, if at all, may we make use of the English reform in reforming our law of future interests? I fear very little. In the first place, one must question seriously whether the English perpetuating of the distinction between legal estates and equitable estates is in the right line of progress. The distinction grew out of the division of jurisdiction between the common-law courts and the Court of Chancery. It is purely historical and procedural and corresponds to no analytical difference. What it amounts to in substance is that one man is the owner while another man has some of the powers of an owner with respect to the property. It should be considered, therefore, whether it would not be better to make all interests legal interests, wholly abolishing the category of equitable interests. If this could be done while preserving the advantages of our system of trusts, it would be advisable. The double ownership in severalty and double set of rules are an anachronism. I submit that the desirable results of the present system could be attained by making the trustee not a holder of the legal title, as he is now, but the holder of certain legal powers. He should hold the powers in trust, not the title in trust. In other words, the trustee should be the holder of powers of administration and disposition, as to which he should be in a fiduciary relation to the beneficiary,

and legal ownership should be in the latter. If the trustee exercised the powers wrongfully, there would be the same duties of restitution which we now bring about through constructive trusts. For the rest, instead of constructive trust, remedies of rescission and restitution, available except against purchasers for value without notice would achieve the results we seek.

In recent years, there has been a very great increase in the creation of future interests by wills in the United States. There have come to be marriage settlements reminding one of their English prototype, although we have as yet nothing so elaborate and complicated as the English settlements in entail in order to perpetuate a family in its ancestral property. Wills disposing of large holdings of property tend to approximate the English type. But we have no such problem as the one which chiefly dictated the English reform. While in England the bad features of estates tail were sought to be met by provisions for barring the entail, for disentailing deeds, and later for large statutory powers of trustees, we took a different line from the beginning. In South Carolina, estates tail never existed. By the time of the Civil War, they had practically disappeared in all states. Virginia abolished them in 1776. New York turned them into fees simple absolute in 1782, and this course was taken in North Carolina in 1784, in Kentucky in 1796, and in Tennessee and Georgia in the fore part of the nineteenth century. Connecticut in 1784 gave the donee in tail a life estate with remainder in fee simple to his heirs. This had been followed by five states by 1835. In 1838, Indiana made estates tail into fees simple after the second generation. Thus American legislation of our formative era prevented the sort of thing from arising with us which has called for English legislation conferring wide powers upon trustees. We do not require to repose such powers upon them, and probably in any event should be averse to conferring such wide authority upon trustees as we know them in this country.

On the whole, looking at the decisions of the state courts the country over, we must recognize some decadence in the law of future interests in land. The federal courts, which from 1842 to 1938 had a unifying influence as to commercial law, left rules of property to the local law so that on the exceptionally difficult questions raised in this part of the law of real property there was not the guidance which the state courts had in other fields. Mr. Justice Miller once remarked that the pioneer judges in our western states often "did not know enough to do the wrong thing, so they did the right thing." This was in some ways an advantage in our formative era in that there was judicial clearing away of anachronisms and historical anomalies. But it was in practice a disadvantage because intelligent pruning of this sort requires a degree of knowledge which the pruners did not have. Often their prunings were not intended as such, and, done in the belief they were administering the law as it was, not infrequently had the effect of promoting confusion rather than improvement. For a time it looked as if the ingenuity of lawyers seeking means of mitigating inheritance taxation, state and federal, might give a new vitality to the law of future interests and lead to a new unifying influence through decisions of the federal courts in tax cases. But the Supreme Court of the United States has taken a different line. The English courts assume that Parliament knew the law of real property when it enacted a tax statute and hence that the law of future interests must determine the existence or non-existence of the kind of interest upon which the burden is imposed. Our highest court feels that those who draft a tax statute are not supposed to know the law and that a policy of enabling the government to exact the utmost from estates of decedents requires ignoring of the law of real property applicable to interests sought to be taxed. If the federal courts had authority to abrogate or reshape the law of real property in the states one could sympathize with what is said about "the refined technicalities of the law of real property,"

“the formal categories of property law,” “elusive and subtle casuistries which may have their historic justification,” and “unwitty diversities of the law of property” deriving “from medieval concepts as to the necessity of a continuous seisin.” All this is true enough if we are setting about to reform the law and put something better in its place. But the effect is to leave the law as it is for some purposes and abrogate it for other purposes. Thus the cases on taxation are serving only to add to the existing confusion.

Some progress has been made in the past fifty years, especially in the law of what we now call equitable servitudes. At common law there are three great classes of what the civilian used to call rights in another's property or now calls limited real rights. One category may be called by the Roman-law term “servitudes.” These are burdens upon some particular item of property for the benefit of a person other than the owner. At common law this included easements, in which the owner of a tract of land is bound to permit some one else to do something other than taking something from the land or the owner's use is restricted for the benefit of another's land; profits, in which the owner of land is bound to permit another to take something from the land, and covenants or formal contracts running with the land, i.e. enforceable against one interest, into whose ever hands it comes, for the benefit of another interest, whoever holds it. To this last type of servitude, equity added one of what were long called equitable easements, that is, equity would enforce restrictions upon the use of property which were not created by deed or adverse user, as in case of easements and profits, and were not recognized as covenants running with the land at law. Out of this grew the equitable servitude, created by contract, and enforceable against one who holds the property unless he is a purchaser for value without notice of the contract. The courts now hold that these servitudes continue as long as the purpose for which they were created can be carried out, but come to an end when that purpose can no longer



er be achieved. The law on this subject has had a marked development in the past forty years. On the other hand, the law as to covenants running with the land, other than covenants for title, got into confusion in our formative era and has become worse confused by courts which have failed to distinguish them from equitable servitudes. The other two categories, namely, securities and natural rights, or rights of neighbors, as the civilians call them, remain substantially as they were fifty years ago. One item, however, deserves passing mention, namely, the law as to use of the air space above land for aerial navigation. This shows our Anglo-American legal system at its best in creative finding of law. The difficulty was in the old maxim that the owner of the surface owned up to the zenith. The solution was found in the analogy of the stream in which the riparian owners on each side own to the middle thread and yet there is a general public right of boating and fishing.

Another important development is establishment of a principle of reasonable exercise of the liberties incident to ownership. This development recognizes an element of the postulate of the law of property which restricts the control of the owner to beneficial purposes and enables a neighboring owner to claim restriction of exercise of recognized liberties where such exercise is not beneficial to the owner exercising them (except to enable him to show his power or gratify his spite) and is injurious to the neighbor. This has grown up more in connection with the law of torts than in connection with the law of real property. So far as it has to do with development of the law of property, it represents pressure of the social interest in conservation of social resources. One thinks at once of legislation in the same direction, e.g. modification of the rules as to *res nullius* and ownership *ratione soli* by game laws, laws as to storage and conservation of water, and the statute as to waste of natural gas by using it to make lampblack, upheld by the Supreme Court of the United States in a well known case.

In this last connection there has in recent years been a very important development of legal recognition of the social interest in aesthetic surroundings. Fifty years ago Sir Frederick Pollock could say with assurance that our law ignored aesthetic relations and, comparing the English with the French in this respect, could quote Hood's lines: "Nature which gave them the goût only gave us the gout." In the United States, courts and legislatures were long engaged in a struggle over billboard laws and laws against hideous forms of outdoor advertising. Later, the interest pressed in another way in connection with town planning legislation. The courts are now willing to admit a policy in favor of the aesthetic as reasonable and constitutionally admissible. The idea of the Roman strict law was put thus by Gaius: "No one appears to act wrongfully who exercises his own right." The maturity of the law in the nineteenth century reverted to that idea. Jurists of that time did not like the restrictions on exercise of the owner's liberties which grew up in Roman law in the infusion of morals in the stage of equity and natural law. Dernburg said: "Sweeping and unwarranted conclusions" were sometimes drawn from the classical texts. But the law of today, both the civil law and the common law, has been following out those conclusions.

On the whole, however, one must admit that there has been little progress in our law of real property in the last fifty years. The real progress in that part of the law was made in the formative era from the Revolution to the Civil War. Then conveyancing was made over, tenure was substantially done away with except in terminology, descent and distribution were modernized and the law of wills was put on a better basis. Since then only details have attracted the notice of the legislator. Hence, instead of recounting the details of what has been done in the present century — not much in any long view — I have looked at the present condition of the law of real property and what we can do and ought to be doing about it.

It is impossible for anything human to escape wholly from its history. It is said that the street plan of Boston was shaped by the wanderings of seventeenth-century cows. Certainly the street plan of many a city in Europe was shaped by the medieval walls. There comes a time when the expense of tearing down and reshaping the street plan is deemed to exceed the resulting benefit. So it is to some degree in law. Reforms sometimes do as much harm as they do good. Whenever something wholly new is introduced into the body of the law it becomes a starting point for analogical reasoning and one cannot always predict with assurance what direction such reasoning will take, or what unsettling results will follow. In the law of property stability is a prime consideration. Hence, we have learned to be very cautious about more than pruning operations in reforming this part of the legal system.

Yet change must come. The law of property in land was given shape to the exigencies of the feudal organization of society at a time when England was the most perfectly organized feudal state in Europe. The king's court, becoming the king's courts of common law, in which our law grew up, had at first for its chief business to deal with disputes over land. Our law of property in land got well settled in the fourteenth century on lines which are wholly different from anything significant today and to ideas often repugnant to the modes of thought of our time. Just as the advent of the automobile has compelled more than one city to tear out buildings and reconstruct its street plan to the needs of traffic in the present, so, we may predict, the demand for a more understandable, more easily administered, and simpler law of real property, more predictable in its results with respect to future interests and testamentary dispositions, will bring us to a drastic modernizing even though it may involve some risk and much expense in the incidental clearing away.

## EQUITY

It is no more possible to make an analytical definition of equity, or to lay out the field of equity logically, than to make an analytical account of the distinction between real property and personal property. Both the distinction between law and equity and the distinction between real and personal property are fundamental in our common-law system. But each proceeds wholly on a historical and procedural basis.

Each of the three systems of law which have come to maturity, the Roman law, the English common law, and the modern Roman or civil law, has gone through three stages, if we begin at the point where there comes to be law in the lawyer's sense, that is, a regime of adjusting relations and ordering conduct by the systematic application of a body of authoritative precepts in a judicial process carried on by an authoritative technique.

First, there is the stage of the strict law, a stage in which the law, in the sense of the authoritative body of precepts, is a system of remedies and of strict rules of procedure. The moral aspects of situations governed by the law are wholly ignored. The law looks only to the form and applies rules rigidly and literally. For example, in our own strict law if the debt created by a bond was paid but the bond was not then cancelled or a formal release executed under seal, there could still be recovery of the amount in an action upon the bond. Likewise in the Roman strict law, although one had performed a formal contract, he had no defense to an action upon it unless there had been a formal release. Again, both in the Roman strict law and in our own, it was no defense to a formal legal transaction that it was procured by fraud or duress or was entered into under mistake. The form precluded all inquiries and could only be met by form. To this stage belong the Roman law of the Republic down to the generation before Cicero and the common law from the thirteenth

to the seventeenth century. The modern Roman law from the twelfth to the seventeenth century has much in common with it.

A stage of equity and natural law succeeds the strict law. In this stage there is an infusion of moral ideas from without. There is an attempt to make the legal and the moral coincide; to make moral precepts into rules of law simply because they are moral. Thus the law becomes a system of duties. As the Romans saw it, there were moral duties backed by the state and so duties of right and law. Both at Rome and in England, this change was brought about by equity. Equity enforced the moral duty of a person not to make an inequitable and unconscientious exercise of his legal liberties or use of his legal powers. The law stood as it was so long as no one went into equity or applied for equitable relief. But, when applied to, equity supplemented the law by setting aside transactions in case of duress or fraud or mistake, or, in our system by requiring a mortgagee to allow a mortgagor to redeem or by requiring a trustee to perform in good faith the trust under which he had acquired the legal title to the trust property. At Rome, the same official, the praetor, the judicial magistrate, administered both law and equity. In England, equity was administered in a separate court, the Court of Chancery. Hence in our system, equity is that part of the law which grew up in the Court of Chancery. But the Court of Chancery did not have any jurisdiction set off for it as did the common-law courts, the ecclesiastical courts, or the Court of Admiralty. The chancellor interposed up and down the whole field of administration of justice, wherever application was made to him and the complainant's case appealed to his sense of justice or fairness or to his sense of what he considered was demanded by good faith. At Rome, the stage of equity and natural law is represented by the classical era, from Augustus to the end of the first quarter of the third century. In the common law, it is the period of development of equity in the Court of Chancery, namely, the seventeenth and eighteenth centuries.

In the third stage, the maturity of law, there is a reaction from the overwide discretion, the subjectivity of the judicial process, and the personal element in the individualization of justice which mark the beginnings of equity. In the sixteenth century, when counsel for an executor argued that some things were for the King's courts of law and some things for the chancellor in equity and some between a man and his confessor, and that by the common law an executor was the owner of the chattels of the deceased and a debtor for the debts and legacies, the chancellor responded that the law of his court was none other than the law of God, and that the law of God was that an executor should not waste the assets. And if he does so, the chancellor added, and does not make amends if in his power, "il sera damné in hell." As the maxim is that equity follows the law, as the nearest approach to the divinely ordained sanction, the chancellor could send the defaulting executor to an English jail. In the seventeenth century, Selden, a great common-law lawyer of the earlier part of the century, could say that equity was a roguish thing: in law what the spirit is in religion — what any one chooses to call it. He added, in effect, that the measure was the chancellor's conscience, but it might just as well be the chancellor's foot, for one chancellor had a long foot and another a short foot and another an indifferent foot, and so also one chancellor had a long conscience and another a short conscience and many chancellors had indifferent consciences. Under Hardwicke in England in the eighteenth century, and under Eldon in England and Kent in New York in the first quarter of the nineteenth century, equity crystallized. The lines of the chancellor's jurisdiction were laid out and the principles of discretion in exercising it were established. The legal and the equitable were brought into balance. Where the strict law ignored morals and equity and natural law identified law and morals, the maturity of law contrasted them. Also in our law and in the modern Roman law the maturity of law shows us a system of rights. In Roman law

this stage is represented by the era of legislation and codification from Diocletian to Justinian. In the common law and in the modern Roman law, it is represented by the nineteenth century. One of the characteristics of the maturity of law is a certain decadence of equity.

By decadence of equity I mean a tendency to depart from the classical attitude of equity toward equitable jurisdiction and equitable remedies. There are four phases of this decadence of equity in the last century: (1) The superseding of equitable precepts by legal precepts in certain cases; (2) a tendency of established equitable rules or doctrines or parts of them to disappear in the fusion of law and equity in procedure; (3) a tendency to apply equitable precepts and doctrines in a hard and fast mechanical manner, as if they were legal rules; and (4) a tendency where certain rules or doctrines had been adopted by the courts of law to adopt them in such a way as to confuse the legal rules rather than to supplement them.

An example of the first phase may be seen in a decision in the highest court of a western state at the end of the last century. No proposition has been better settled in equity than that one who wrongfully holds trust funds with knowledge of their trust character is to be treated as constructive trustee for the beneficiary. Under the code of civil procedure, if anything, one would expect to see the roundabout method of constructive trust giving way to some more direct mode of enforcing liability. On the other hand, in the case in question, a legal doctrine was invoked to defeat the equitable result entirely. A servant of a trustee wilfully misappropriated trust funds in his hands. Instead of proceeding on the theory of constructive trust, or reaching that result by some direct route, the court held the servant was not personally liable on the ground that a servant cannot have possession. The reports of the last quarter of the nineteenth century are full of such things.

A good example of the second may be seen in *Graf v. Hope Bldg. Corp.*<sup>1</sup> In that case there was a mortgage securing a note for \$335,000, payable in 1935. Certain small installments of principal were payable from time to time, the one payable July 1, 1929, being \$1500. Because of these installments and the necessity of reckoning partial payments, it was a matter of some mathematics to ascertain what interest was due on any particular interest date. There was an acceleration clause in the note providing that if there was twenty days' default in the payment of any installment of interest the whole amount of the note should at once become due. Unhappily, the mortgagor corporation had an awkward way of doing business. The president alone could draw checks upon its deposits. About the middle of June he was called over to England on important business of the corporation. As an installment of interest was to fall due on July 1, he told the bookkeeper to figure out the amount of principal and interest which was about to become due and draw a check therefor, payable to the creditor, which he then signed, and directed that it be sent to the creditor at the appointed time. The interest due was roughly \$4600. By an error in the use of interest tables the bookkeeper reckoned it as \$4200. Thus about ninety-one per cent. of the installment was covered by the check, but a relatively small margin in an installment of \$4600 would remain due. Presently the bookkeeper discovered the error, sent the check and explained that there was a mistake, that there was \$400 more due and that the president of the corporation would soon be back and the matter would be attended to. The president returned on July 5, but his attention was not called to the mistake and the mortgagee, like Br'er Rabbit, "jes' lie low," and the moment the twenty days were up brought suit for foreclosure. In the meantime, the president of the corporation discovered the mistake, and his tender of the \$400 was almost simultaneous with the bringing of the suit. There

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<sup>1</sup> 254 N. Y. 1 (1930).



does not seem to have been the slightest injury to the mortgagee in the delay of less than twenty-four hours after the acceleration clause had by its terms become operative. Could the mortgagor have relief in equity under such circumstances? The trial court allowed it. The Appellate Division affirmed that result. But the highest court, the Court of Appeals, the judges dividing four to three, said no. There could be no relief in equity on that state of facts. Nine judges thought equity could and should relieve; but the four who thought otherwise were a majority of the highest court.

Relief against accident is one of the oldest heads of equity jurisdiction, and the case got down to two questions: What was meant by "accident," and had the principle of relief against accident hardened into a rule and as anything more disappeared from the jurisdiction of equity? It is true that the oldest cases in which equity intervened to relieve against accident were cases of forfeitures or penalties. I believe the oldest case we have in the books was one of a penal bond for a very large sum of money conditioned on the payment of a much smaller debt on a certain date. The debtor was prevented by a flood from reaching the creditor with the money at the appointed time. The acceleration clause is not exactly a penalty or forfeiture, but is by no means wholly unlike one, and the principle behind relieving from the one where accident led to a forfeiture is hard to distinguish, if it can be distinguished, from relieving from accident which brings the other into action. It should be noted that in the case of mortgages and penal bonds, equity went on a principle, not of relief against accident, but of looking at substance rather than form, and treating the bond or conveyance in the mortgage as security only. What the court decided, then, amounts to this: There is no longer a principle in equity that where a mistake has been made which injures nobody but the man who made it, as a result of which valuable rights are to be lost to him, or where he has been accidentally prevented from doing something, and his not do-

ing of that something has injured no one but himself, and he is going to lose valuable rights thereby, equity can relieve him against one who, without suffering any injury or loss, acquires rights or powers by virtue of the mistake or the accident. Unquestionably in the ordinary understanding of mankind it is unconscionable to insist upon taking advantage of such a situation. Thus we are brought to a broader question. Can equity still consider the unconscionableness of insisting upon the strict clause in new types of transaction not known when equity jurisdiction arose, or has it become crystallized in certain fixed categories, in certain definite formal rules, and all ethical considerations are foreclosed? We need not doubt how the old Court of Chancery would have answered this. We have seen how it was answered by a court of both law and equity jurisdiction with a fused procedure.

A case decided in a southern state at the end of the last century, may be used as an example of the third phase. A trustee who has conveyed the trust property in breach of trust may repent and sue in equity to get it back. This is an equitable doctrine, not inconsistent with the right of the beneficiary to follow the trust property or fund where the transferee took with notice. As it is equitable, one would expect that it would be applied equitably and hence ought not to be employed where it would work inequitably. But in the case referred to it was held that, as the trustee might have repented and maintained such an action at any time during the period prescribed therefor in the Statute of Limitations, when his suit was barred on its expiration, the beneficiary was barred by what barred him and could not maintain a suit thereafter. Thus a doctrine intended to do justice to the trustee becomes a rule barring infant beneficiaries of their right to follow trust funds because of the non-repentance of the person who has wronged and defrauded them. Though adopted by a few courts, this proposition has been generally rejected. But there are many like cases of hard and fast application of equitable principles as if they were legal

rules in the reports of the last third of the nineteenth century, and the tendency it illustrates had affected the whole exercise of equity jurisdiction fifty years ago.

In the concurrent jurisdiction of equity this question comes up continually: Is that jurisdiction to be exercised only in certain fixed categories, or is it governed by broad general principles of which the several categories are only illustrations of application in particular cases? The principle of the concurrent jurisdiction is simple: Is the remedy at law adequate, that is, will it get the party entitled what he is entitled to or a substantially satisfactory equivalent? But in the concurrent jurisdiction the chancellor has a margin of discretion whether to exercise it in view of certain practical difficulties, greater or less according to the circumstances of each case, and to be given more or less weight according to the degree of hardship upon the complainant if he is left to his remedy at law. In place of these simple principles the text writers and encyclopedia writers of the last century sought to set up a series of detailed rules as to when there was and when there was not jurisdiction. For obvious reasons, in many cases equity had not granted specific performance of contracts to sell stocks. Accordingly, the text books laid it down as a general rule that there was no jurisdiction where there was a contract to sell stocks or other securities. Equity had frequently granted specific performance in cases of installment contracts. It was therefore laid down as a rule that specific performance would be granted in such cases. The chancellors had found practical difficulties in cases where the contract was not sufficiently certain. Accordingly, it was laid down as a rule that there was no jurisdiction in the absence of extreme certainty and particularity. Practical difficulties had been found in enforcing construction contracts. The seventeenth-century master in chancery was a fine gentleman who frequented the king's court as well as the Court of Chancery in silks and satins and a powdered wig. He did not like to superintend building operations. He got plaster in

his wig and mortar on his clothes. Hence, for a long time the chancellors were disinclined to grant specific performance and it was laid down as a rule in the books of the last century that there was no jurisdiction in such cases. Also the chancellors found certain practical difficulties in dealing with contracts for continuous performance, and we came to be told that there was no jurisdiction.

This sort of thinking and writing went a long way in the last century, and the result was a real decadence in the concurrent jurisdiction of equity. Happily, there has been a change. More and more today the courts have been freeing themselves from the rigid categories that grew up in the last century and coming back to the simple question on the facts of each particular situation: Is the plaintiff's remedy at law adequate to secure his legal right? How the nineteenth-century arbitrary categories worked may be seen from a typical case. An employee had two bonds which he deposited with a corporation as security for the proper conduct of his employment. The employer refused to turn the bonds back. The bonds were closely held and were practically not procurable on the market, although there had been some sales from which a market value could be shown. The court looked into the text books and encyclopedias and found that equity would not ordinarily grant specific performance of a contract to buy or sell securities. So it said these bonds are securities; therefore no relief in equity. But here the bonds were not contracted to be sold to the plaintiff, so that he was adequately relieved if he got the value of his bargain. They were his bonds. The bailment had come to an end and he was entitled to his property in specie. Was the court doing the plaintiff ordinary justice, in case of a close corporation with securities of speculative value, when it said to him: As between you and this wrongdoer, take what a jury may consider the market value of the bonds? Such things are an abdication of the functions of a court of equity. The movement to return to the classical exercise of equity jurisdiction according to principles has gone on in the past thirty years.

Another step forward is the development of equitable protection of personality. This, too, is a matter of the past thirty years. Why did courts of equity hold that they could not secure a man in his personal rights, in his interests of personality, but were confined to protecting him in his interest of substance? Certainly one's legal right to his reputation, to his feelings, to his sensibilities, is as much a legal right as his right to his watch or his automobile or his house. Indeed, the right to reputation has been dealt with at law on a theory of reputation as an asset. Why should courts of equity have said that they would secure the one and ignore the other? If the existence of a legal right and inadequacy of the legal remedy is the test of jurisdiction, the legal right in each case is undoubted and the legal remedy of damages is as inadequate in case of repeated libels as in case of repeated trespasses. Where there is an injury to personality the legal remedy is grossly inadequate — much more so than where there is injury to a right of property.

There were a number of reasons why courts of equity hesitated to do anything to secure interests of personality. One of them was the inadaptation of the old procedure in equity to the type of case involving injury to personality. In the chancery practice testimony was not taken in open court at a trial. Instead, it was taken by deposition. The trier of fact in equity did not see or hear the witnesses. He heard depositions read to him or read depositions. That mode of trial in equity held back jurisdiction with respect to torts for a long time. Equity jurisdiction over torts did not make much of any headway until the end of the eighteenth century and had its real and significant development relatively late in the nineteenth century. In the middle of that century the codes of civil procedure began to provide for trial of equity cases by witnesses testifying before the court. But it was not until 1913 that the federal courts gave up the old way of taking testimony in equity. It was only in comparatively recent times, therefore, that the courts felt themselves

in a position to deal adequately with cases where it is exceptionally important for the trier of fact to see and hear the witnesses, namely, in appraising human conduct.

Again, reputation is a great part of personality and injunctions against defamation have been sought from the beginning of the movement for doing away with the rule that equity could only give relief to secure interests of substance. The English courts today have gone a long way in enjoining libels. If, however, the courts set out to give preventive relief to protect reputation, they at once encounter constitutional difficulties with respect to the guaranteed freedom of speech and of the press.

Perhaps a third reason was for a time decisive. Very difficult balancing of the claims involved has become necessary in many of these cases of securing interests of personality. One type of case, which has been coming before the courts frequently, calls for protection of one's sensibilities, his dignity, his feelings of honor in connection with family relations. It is not easy to be sure in such cases that the intervention of equity will not do more harm than good. Where the court is seeking to protect personality it is often difficult to frame an effective decree. The plaintiff's right, we may agree, is undoubted. His legal remedy is utterly inadequate. But consider one of the pioneer cases in this connection. A plaintiff sued to enjoin a defendant from persistent flirtation with his wife, and the court granted the injunction. It had no effect upon the flirtation so that the defendant was committed for contempt. After he finally got out of jail, the wife seemed to regard him as a martyr to his love for her, and he found a way out by shooting the plaintiff. That was the net result of the injunction, and it is the sort of thing a court of equity must bear in mind in such cases. In the classical equity the chancellor always asked of himself "what is going to be the result of my granting relief?" As a practical matter that question ought always to be asked in the concurrent jurisdiction. If there is doubt about achiev-

ing anything, as the aftermath of some of the cases of protecting interests in the domestic relations through injunctions seems to indicate, serious difficulties in the exercise of jurisdiction must be reckoned with.

Here, again, we come upon the phenomenon in nineteenth-century equity to which I called attention in another connection, namely, the tendency to make these practical difficulties into rules of jurisdiction. The jurisdiction is there, since the remedy at law is obviously inadequate. The real question is: Ought the jurisdiction to be exercised? Can it be exercised profitably in the case in question? It is not strange that courts of equity were slow in taking account of interests of personality.

But these interests have continually pressed for recognition in equity and cautious movement to do something about them began a good way back in the last century. Lord Eldon has the reputation of having been ultra-conservative. No doubt he was extremely conservative as a politician. Yet, like other learned chancellors who devoted the greater part of their lives to the administration of equity, he did some things in the exercise of his jurisdiction which were historically very radical. In 1818, in the leading case of *Gee v. Pritchard*, he did what then seemed an exceptionally radical thing. He really secured an interest of personality under a rather transparent appearance of securing property rights. The case was that a young man who had been brought up in the family of an English gentleman found himself with expensive tastes and no property left him in the will. So he conceived a blackmail project of publishing certain letters written by the widow of this gentleman. Suit was brought to enjoin the publication of these letters. Lord Eldon said, and this is well established, that the writer of a letter has a literary property in it. If I write you a letter and send it to you, the paper is yours, the autograph is yours, but the contents for purposes of publication are mine. So Lord Eldon held that the property rights in the widow's letters

for purposes of publication belonged to her as the writer, and that equity would protect her in that property right by an injunction. A good deal depends, if we look at the substance of the matter, on whether the letters have any literary value. Letters may have such value or they may have none. The letters in *Gee v. Pritchard* had absolutely none. Their only value was a nuisance or blackmail value. But after much grumbling and with some courts shaking their heads, the doctrine became established that courts of equity would enjoin the publication of letters and writings on a theory of securing a right of property in the contents, even if they had no value as property at all.

One need not say that the effect of *Gee v. Pritchard* was really to secure interests of personality, feelings and sensibilities, under a guise of securing property rights. For a long time the matter rested here. Publication of another's writings could be enjoined even if the only interest involved was one of personality. When, however, one was about to publish his own writings, defamatory of another, and the latter sought an injunction there was the difficulty that freedom of speaking and writing would be interfered with. The first step in the development of jurisdiction at this point was interference of courts of equity in cases of publishing false circulars in patent litigation. One who was bringing a suit to enjoin alleged infringement of his patent would get out circulars, sending them to customers of the adverse party, making statements as to the patent and threats as to those who bought from the alleged infringer. Thus the infringement suit could be used to coerce a blackmailing settlement. In the event, constitutional guarantees of freedom of speaking and writing, although urged strongly by some courts, did not succeed in protecting persons who published these false circulars in patent cases. The next step was taken in England and is very suggestive. The English Common Law Procedure Act allowed the courts of law to issue injunctions. There cannot be any question what was meant by that act.



By the ordinary canons of interpretation it meant that where a court of equity would have enjoined something in aid of a court of law, the court of law might issue the injunction directly. But the Court of Appeal in Chancery, in a somewhat reactionary decision, had refused to enjoin defamation. Thereupon the courts of common law said in effect that they had been given the power to issue injunctions by the Common Law Procedure Act, and if equity could not enjoin defamation they could. Thus injunctions against repeated or threatened libels became established in England in that backhanded way. So when law and equity were fused as to procedure by the Judicature Act, any division of the High Court could enjoin defamatory publications and they are enjoined in England today.

In this country after 1890, a right of privacy was coming to be recognized at law. Although in dispute somewhat as to its limits and in some jurisdictions, we may fairly regard it now as established by the weight of judicial authority, and in some states by legislation, as a legal right. There has come to be a legal right, so far as one is not a public personage, and so far as one's affairs have no public aspects, to keep one's own personal affairs to himself, in the interest of his feelings, his dignity, and his sensibilities. The legal remedy for infringement of this right is grossly inadequate. It cries aloud for equitable protection. Recent cases in states where the right is recognized secure it by injunction.

Then the next step came in certain pioneer decisions in this country enjoining infringement of domestic relations. I have spoken of one of these above. They have shown us some of the difficulties in equitable protection of personality. But they have brought home to us the principle involved and the importance of securing a class of rights which, if not protected in equity, as things are today, is not protected at all.

Primarily, the questions involved in these cases are questions of what we can expect to do through equitable relief. In some cases it is clear enough. Equity had to intervene a

good while ago to protect people in valuable names. A name may have a value in business, in commerce, in industry, and be property in a real sense. But from protecting names as property it was not a difficult step to protect persons in their names where the interests involved were simply dignity or feelings, or sensibilities — in short, personality. A doctrine has been developing in the cases that one can be protected in a misuse of his name where the injury is to personality only. This brings us back to the proposition with which I began. If the matter is looked at simply as one of certain hard and fast categories of cases in which equity has or has not jurisdiction, we had such a category at one time. We had a supposed rule: Equity has jurisdiction to protect property; it has none to protect personality. But if we look at the matter from the standpoint of the classical equity, asking whether there is a legal right and whether the legal remedies are adequate to get one what his right entitles him to, there is clearly jurisdiction in equity. Then comes the question, is it expedient to exercise that jurisdiction? Will equitable results flow from exercising it? Can a decree be made which will secure the legal right without too much interference with some other recognized right or liberty? Thus we have before us a great and developing head of equity jurisdiction which has grown into importance in the last two decades. It will be a task of the courts and lawyers of the immediate future to find through experience developed by reason how to make this new head of equity jurisdiction effective; how to avoid the practical difficulties. This is exactly what has gone on in equity from the time that lawyers began to sit in the Court of Chancery.

Another significant development is revived use of the visitatorial jurisdiction of equity over corporations. Visitation in order to correct abuses was a familiar idea in the beginnings of the common law. St. Paul had said by way of precept to the Corinthians, *omnia honeste et secundum ordinem fiant*, "let all things be done decently and in order." Accord-

ingly, it became a duty of the bishop to visit parishes and religious organizations and charitable institutions in order to see that things were so done. Justinian, in a constitution of 530 provided that even where the donor in a gift for pious uses expressly negatived control by the bishop, yet the bishop was to supervise its execution, and in a novel of 545 he repeated this. The *Corpus Iuris Canonici* had a whole title on this subject. In England, a constitution of a Papal Legate in the thirteenth century called upon the bishops to go about at opportune times correcting and reforming the churches. Regulations of these visitations are to be found in the English canon law authorities in the thirteenth and fourteenth centuries. The judges of England, after the Reformation, advised the Star Chamber that visitations were part of the episcopal office and did not require a commission under the Great Seal for their authority.

Presently this idea of visitation came to be associated with the idea of a corporation. It must be remembered that the corporations of medieval England were either religious or municipal. Visitation of religious houses by the bishop to prevent and correct abuses was abundantly provided for in the canon law, and when the practice grew up of exempting monasteries from episcopal visitation, pious and charitable foundations were still subject to visitation by a private visitor or, in the absence of provision for such a visitor, by the bishop. In the meantime, the common-law courts were called on, in the course of ordinary litigation, to pass upon the reasonableness of borough customs and by-laws. With the Roman law and the canon law in mind, it was easy to conceive that visitation was presupposed by the very existence of a corporation and hence as municipal corporations had no founders and so were not subject to visitation by a private visitor, they were subject to visitation by the king. Privileged religious houses came to an end at the Reformation. Thereafter ecclesiastical corporations were to be visited by the bishop and lay charitable corporations by the founder and

his heirs, unless the founder provided otherwise. As other types of corporation developed, it was natural to extend the idea of visitation to them also. Accordingly, Lord Holt could say at the end of the seventeenth century that "every private corporation has a visitor." As the common law stood when we received it, all corporations were subject to visitation in order to maintain their good government and secure their adherence to the purposes of their institution.

So far as visitatorial power was in the King, it was exercised by information in the nature of *quo warranto* or by *mandamus* in the King's Bench. But there were three grounds on which the Court of Chancery was resorted to in order to obtain the more flexible and individualized relief which was to be had in equity. One was that the King might choose his forum. He might elect to which of his courts he would apply to exercise his visitatorial jurisdiction. In England, this is well established as to municipal corporations and it would be clear enough in America if it had not been that the proposition was doubted in Massachusetts some seven years before the courts of that commonwealth got full equity powers. Massachusetts had no court of chancery and her courts had no equity jurisdiction originally and they only acquired it as it was gradually and grudgingly conferred by a long line of statutes. A second case where the visitatorial jurisdiction was exercised in equity was that of charitable corporations or other corporations charged with the administration of charities. This is often attributed to the general jurisdiction over trusts. But it is exercised upon information by the attorney general and has been put by the English Court of Chancery on the ground of a power of visitation. There is as much ground for holding that the jurisdiction over charitable institutions is visitatorial as there is for saying that the visitation of such institutions rests on a jurisdiction over trusts. Both ideas have entered into the established jurisdiction.

In any event, however, the visitatorial jurisdiction of the King's Bench is undoubted. Hence, if the remedies adminis-

tered by that tribunal were inadequate, equity would have a concurrent jurisdiction and the crown could elect in which court to proceed. This ground was adopted in a leading case in chancery in Ireland in 1828. Three remedies were available in the King's Bench: *mandamus*, *scire facias*, and *quo warranto*. The basis of *mandamus* to private corporations and their officers is the visitatorial jurisdiction of the state over all corporations which it has created, both public and private. Indeed, the cases frequently speak of equitable relief as an alternative remedy. But the area of visitatorial jurisdiction covered by *mandamus* is very small. *Scire facias*, too, is very limited in its application. It was resorted to in order to enforce the forfeiture of a charter for misuser or nonuser where an existing corporate body had abused its power. Obviously this was no adequate remedy for abuses, often highly injurious to the public interest, requiring correction but not destruction of the corporation. The most effective remedy at law was *quo warranto*. But in the absence of statute, the judgment in that proceeding was strict and drastic, that the franchise be seized into the hands of the crown. There was no power to limit the judgment of forfeiture. Accordingly, it was pointed out in the leading American case in 1875 that the remedy by information in the nature of *quo warranto* for abuse of corporate powers or for corporate activities injurious to the public is not adequate in many cases, and in consequence there is jurisdiction in equity.

For a time, however, doubt was cast upon this jurisdiction in the United States, by a decision in the New York Court of Chancery in 1818 and by a decision in Massachusetts before the courts in that state had been given the full jurisdiction of courts of equity in the Anglo-American system. In the New York case there was an information by the attorney general to enjoin an insurance company from engaging in an unauthorized banking business in contravention of a state statute. This was in the days when it was considered to be

the business of the law to allow to every one the utmost freedom of action and restraint of action was looked at jealously. The court dismissed the information on the ground that there was an adequate remedy at law by *quo warranto* and said that there was no visitatorial jurisdiction in equity in case of a private corporation. As to this case it must be said that it is at variance with the English authorities, it was rejected almost at once by legislation in New York, it is contrary to the current of judicial decisions in this country, and is at variance with the principles of equity jurisdiction. But it led for a time to assertion that the jurisdiction was limited to charitable corporations and municipal corporations, to which some grudgingly added public service corporations.

Today the proceeding by information in the nature of *quo warranto* is very generally governed by statutes. It is well settled that statutory extensions of common-law remedies do not take away equity jurisdiction because of prior inadequacy of relief at law. But under statutes and especially under codes of civil procedure allowing equitable relief along with legal relief in one proceeding which is neither legal nor equitable in form, courts in recent years have allowed conditional forfeitures, have adjudged partial ousters, and have allowed a wide discretion as to the form of judgment. What we have here is really a combination of information in the nature of *quo warranto* and information by the attorney general in equity. The discretion as to the form of remedy and its adaptation to the particular case belong to the equitable proceeding. Thus the attempt to limit that proceeding to charitable and municipal or perhaps to these and public service companies has been given up. There is no doubt that we have here a powerful engine for holding all kinds of corporations to their legal duties, even if we go on committing regulation of corporate action to administrative boards and commissions.

Again, in the past fifty years there has been real advance in the exercise of discretion in granting and molding reme-

dies. A good example may be seen in a decree ordering affirmative action in another jurisdiction. Let us say that A and B in Indiana are co-owners of land in Ohio. Could there be a partition in Indiana in equity? It is obvious there could not be a partition in kind. If commissioners under the appointment of a court of equity in Indiana went over to the land in Ohio in order to lay out the shares by metes and bounds, they would be simply trespassers who could be kicked off. The court could not protect them in the exercise of their functions. Statutes today give a decree of a court of equity a real power, giving it the effect in one way or another of passing title which may be necessary if the parties do not happen to be conveniently before the court. Such statutes in Indiana would not have any operation upon land in Ohio. From any standpoint, looking at the practical situation, it would not be practical to have a partition in kind. But it would be conceivably possible to have a partition by sale. Having both parties before it, being in a position to coerce them into what the court might regard as their equitable duty, it would be entirely possible for the court in Indiana to order a sale of the land. To conduct a sale, to compel the two parties before it to execute a conveyance which would have the effect of transferring the land in Ohio, and divide the proceeds between them, would be quite possible. The difficulty then would be not that the court could not do it, but that in the very great majority of cases certainly the court ought not to think of doing it. It is manifest that in the ordinary case there could not be a just and equitable or fair sale of property very far away from the property. Buyers require to see the property. They require to know something about it. They require to have some means of ascertaining its value. Other things being equal, the market for property is where the property is. Hence the normal, the reasonable and equitable place to have that sale is where the property is. Furthermore, it may be convenient or even necessary for the decree to have a real operation, that is, to pass title to

the property, either directly or under some statute whereby there is conveyance by officers of the court. That can only happen where the property lies. So partition ought to be where the land is. Consequently, in a long line of cases, courts of chancery have held that partition should be at the situs of the land. From this it was very easy for text writers to say that a suit for partition must be brought in the jurisdiction where the land lies.

But let me put a case. It happened not many years ago. A number of persons in an important city on our eastern coast became co-owners of a banana plantation in one of the Central American republics. Eventually trouble developed among them. There was no market for that plantation where it lay. No plantations of that kind at that time were likely to have a market in Central America. They were mostly owned by corporations or persons of wealth in this part of the world, or else controlled on the continent of Europe or in England. Furthermore, it had not been convenient to incorporate an enterprise of that kind in that part of the world because of certain conditions of the law in that particular republic at that time. So this property was held in common by the co-owners. The only market for it was in some of the important cities along our Atlantic coast, and the only place where all of them could be reached was in a federal court in one of our large cities. Why, then should not a federal court of equity, let us say in Boston, exercise its authority over the parties, all of whom were there in court? Being in a position to have a sale of that property at a place where there was a market for it, and being in a position to compel a conveyance to the purchaser, the court in Boston was clearly the effective forum. An agent could be appointed with power of attorney and could go before a tribunal in the Central American republic and transfer the title to some person to whom he was authorized to transfer it by his power of attorney. Then why should not the court with all the parties before it in a place where there was a market for the



property, compel a conveyance through a partition by sale? The practical district judge had the good sense to do that very thing.

That is the sort of thing that courts of equity are called upon more and more to do under the conditions of today. In view of the economic unification all over the world, courts everywhere may have situations before them involving transfer of property in remote places. Where the parties are before it the court has jurisdiction to give effect to the equities of such situations. Thus the question was not one of jurisdiction. It was one of discretion whether to exercise that jurisdiction or to say to these parties, go down into Central America, have some sort of proceeding down there, and at long range negotiate the sale with some one in the eastern part of the United States.

Another type of case brings out the same power. I remember very well when I was a law student, and that is more than fifty years ago, it was laid down as an absolute proposition that there could not be such a thing as a court of equity coercing affirmative action in another jurisdiction. It was said with much plausibility, on reasoning that was perfectly sound in the eighteenth century, that if a chancellor ordered a man in jurisdiction A to go over into jurisdiction B to do something, the moment the man got over into B, the chancellor lost his hold on him. The chancellor could not make him do anything, and in consequence a decree was nugatory. There being no power to coerce the performance, the court had no jurisdiction. But a situation has since developed of which we must take account, namely, that today most of the things we do we do through agents. There is very little that a man nowadays does by himself with his own hands. He acts through agents or servants. This is especially true of corporations, which can only act in that way. Most of the important business in the country today is done through corporations. Now let us look at a case to illustrate what may happen. In one of the states to the west of us there were two

railroad companies. Let us say we have state A and state B. Railroad X operated only in state A, but one of its tracks ran right up to the line between A and B and had to stop there. Railroad Y operated in both states A and B and had a tract of land in state B adjacent to the track of Railroad X that ran up to the state line. The local superintendents of the two railroads got into some difficulty and were playing a few pranks on each other. The superintendent of X got together a lot of old junk, worn out engines, worn out cars, worn out equipment, old wheels, and one thing and another, and shunted them along the track so that they were shoved over the state line and upon the tract owned by Railroad Y in state B. Now if Railroad X had happened to be amenable to the process of a court in state B it would have been a simple matter. When one commits a trespass of that sort and piles a great mass of stuff on his neighbor's land and it is going to be difficult and expensive to move it, a mandatory injunction can be had to compel the trespasser to move it off himself, not imposing on his neighbor the cost of removing it and suing for damages, which is not an adequate remedy. So if Company X had been available in state B that remedy could and would have been resorted to. But it was not available there. The offending railroad could be reached only in state A where both companies were operating. Accordingly, Company Y brought a suit in equity in jurisdiction A for a mandatory injunction to require Railroad X to send its servants and agents over there to B and move that stuff off. Naturally the rule was promptly invoked that you could not compel affirmative action abroad. The answer is that you can in practice. It is perfectly possible to commit a man in state A for contempt unless and until by giving proper instructions he compels his agents to do something in state B. If it is said that that cannot be done, the answer is that in this particular case it was done. More and more it is possible to find cases of that kind in the books. Cases are increasingly numerous in which courts of equity have been

coercing affirmative action abroad. They have been bringing back to us a consciousness of the importance of the doctrine of classical equity. The real question in these cases is: Has the court got the parties before it where it can coerce them into the performance of what equity requires? If it has, if it is in the position to render an effective decree, that is, in position to put pressure upon the parties to compel them to do their equitable duty, then comes the question what is the legal right? What is the plaintiff entitled to? Is his legal remedy adequate? If it is not the next question is, are there practical reasons why after all that jurisdiction should not be exercised? In the partition case, in any ordinary situation, all considerations of what is practical or convenient would cause the chancellor to say, "Go where the property lies." Yet the case of the banana plantation shows that the court may do a very grave injustice by refusing to exercise its power. In any ordinary case the place to coerce action is the place where the action is to take place. Yet the books today are coming to be full of cases where a consideration of everything that is involved leads the courts to exercise their powers of coercion over persons before them to give effect to legal rights which otherwise would be without any effective remedies.

In this connection attention should be called to the doctrine of the balance of convenience. This doctrine sometimes involves delicate weighings and valuing. It is not always easy to do what the doctrine calls for. Much of the tendency away from the doctrine in the last century was due to the circumstance that it was easier to take refuge in hard and fast formulas than to perform a somewhat difficult undertaking of weighing and valuing. But there is really something more involved than the difficulty of making nice weighings and nice valuing of convenience and of the claims involved. Where a public inconvenience would flow from the granting of the relief, the classical doctrine maintained itself continuously throughout the last century. But where the incon-

venience in granting the relief was a purely private inconvenience, there was a very strong tendency away from it. It was felt there was a danger that in the application of a doctrine of the sort, property rights might be subjected to the discretion of the chancellor. Accordingly the tendency in the last century was away from this doctrine of the balance of convenience. It is interesting to note that in recent cases it has been re-asserted as part of the general phenomenon to which I have called your attention in so many other connections. As other features of classical equity are reviving, so also we see a revival of this process of weighing the results of granting relief when granted in the exercise of concurrent jurisdiction.

What is involved in the application of the doctrine is brought out in a situation which gave the New York Court of Appeals much trouble. That court had before it in several cases a situation where a power dam had been put in. The extent to which the water would be set back, the extent to which it would be raised, had been nicely calculated by engineering operations. The dam had been put in as the result of particularly careful estimates and mathematical calculations and at much expense. Thus the situation was that it could not well be altered without great hardship. But in one of the cases it appeared that the water would be raised a few inches beyond the line where the power company was entitled to flow the water back. It would be raised a few inches on a perpendicular wall along a river. Thus a man along whose land on the face of a cliff the water came up to this point would now find so much taken away. His land was occupied to that extent. If left to the remedy at law the result was that he was in substance to be deprived of his property to that extent. He would be compelled to sell that much of the property. However, if he obtained the protection of a court of equity by an injunction, that injunction would have a very serious effect upon the power dam. It would not

be of great or substantial benefit to the plaintiff except that it would vindicate his ownership. But it would very seriously affect the dam.

The Court of Appeals in New York had that situation before it in a number of cases. In one of the cases the water was raised as I have described on the face of a cliff. In another case the water was pushed back on rocky land which was unsalable for any purpose except, perhaps, scenery. A few inches did not detract greatly in that respect. In one case the Court came to the conclusion that it had no discretion. It said it could not resort to any balance of convenience, while in another case, dividing five to two, the Court came to the conclusion that the hardship involved in granting relief was such that it was justified in leaving the plaintiff to his remedy at law. Possibly some logical acrobatics might be indulged in to reconcile those two cases. My own suspicion is that they could not be reconciled. They represent two tendencies to which I have been calling your attention. One case represents the practical attitude of balance of convenience, or as it might be put, of balance of hardship. The other case represents the nineteenth century attitude, the attitude of making relief a matter of course if the legal remedy is inadequate.

Is it possible to reach some conclusion which without a decadence of equity will not subject private property to the discretion of the chancellor? It seems to me perfectly possible to do so. There is a line here which will save us a useful doctrine, a doctrine that equitable remedies are not to be used to bring about inequitable results, and yet will not subject property to the discretion of a chancellor. My suggestion is that if the result of the equitable remedy in cases of this kind is going to be simply to vindicate the plaintiff's ownership, you can very well see that the legal remedy of damages at law is sufficient to do that. But if the result is going to make any substantial interest of property, anything substantial involved in his ownership, dependent upon the

chancellor's discretion, then I submit the nineteenth-century way of looking at the matter is right. The chancellor should be careful to insist still upon the classical doctrine of a balance of convenience but not to carry it too far, as it certainly was carried at one time.

Finally, in the revival of classical equity we must note the progress in molding relief with reference to results rather than upon fixed rules. A good example may be seen in the case of continuous performance. The New York Court of Appeals in a relatively old case refused to grant specific performance of a construction contract, holding that equity had no jurisdiction. But these construction contracts kept pressing upon the court for a better securing of plaintiff's legal rights. Other courts kept developing a more common sense attitude toward them until within relatively few years the courts in New York have been definitely breaking away from their apparently established attitude and adopting substantial devices to give effect to the plaintiff's rights. In one case a corporation was developing land adjacent to a municipality and entered into a contract with the municipality with reference to extension of a sewage system and conforming that system in its newly developed land to the system of the municipality. This involved construction work and continuous performance. It was not entirely practicable to order the defendant to do this work. The court therefore provided by its decree that the work might be done by the municipality, and the cost of it was made a lien upon the lands of the company which had contracted to do it. In that way the company was compelled to do what it had legally covenanted to do and the legal right of the municipality was given effect. We are getting decrees which bring about substantial results rather than decrees out of a form book.

Also more and more courts of equity are taking advantage of their power to mold relief by making decrees conditional. In a notable case decided some years ago in a Circuit Court of Appeals by the late Mr. Justice Sanford of the United

States Supreme Court, there was a contract by a water company to furnish water to a municipality. The municipality sought to break the contract and put up a municipal plant of its own. Suit was brought to enjoin such action and objection was made on the part of the municipality that the court could not be sure that the company would furnish good water. It was argued that the court could not be sure that the latest scientific devices would be installed or that the municipality would have the benefit of improvements and discoveries as it would have if it put in its own municipal plant. The court met this matter by its decree. It provided that the case should be retained on the docket to the end that "if at any time the plaintiff shall fail to perform its part of the contract, or advancements in science shall disclose new methods of improving the water which can be installed at a reasonable expense and can be reasonably required of the plaintiff in a water works system of the character in question, considering all the surrounding circumstances, or the water should become from any cause dangerous to the health of the inhabitants, the defendant shall have leave to apply to the court in supplemental proceedings for such relief as it may be entitled to receive in the premises, as a condition of keeping the decree for specific performance in full force and effect."

Here is a model of a conditional decree, an excellent example of a court of equity at its best. Comparing that decree with what we were given to read in the books a generation ago in the way of repeated statements that a contract calling for continuous performance was beyond the reach of a court of equity, it may be seen how much vitality there is in the doctrine that equity is dealing with the substance and not with the form.

Largely the progress in equity in the past thirty years has been due to intelligent exercise of the equity jurisdiction of the federal courts. What is going to be the effect of the new rules of 1937 fusing law and equity in procedure in the fed-

eral courts? If, as seems to be happening, the Supreme Court of the United States is to give up its superintending jurisdiction as to private law, the result may be unfortunate. If the Circuit Courts of Appeals are left to themselves, there may be a decadence of equity such as followed the codes of civil procedure in the last century. If this should happen it would give added momentum to the giving over of large fields of the law to administrative agencies, since we must have somewhere the individualization of justice which is brought about in our system by equity. Lawyers should bestir themselves to see that the progress in equity so well begun in the past thirty years is maintained and furthered.

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