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SOME MODERN PROCEDURAL DEVELOPMENTS*

WILLIAM W. DAWSON**

There is nothing startling about the subject of my address; it probably has been the subject of addresses at similar gatherings for at least a century. The matter which I shall discuss has been discussed many times. If there is anything new in what I shall say, it will be solely in my approach to the subject.

I have always liked to visit expositions, and this summer I have had a veritable orgy; I have seen two world's fairs. I have enjoyed the exhibitions of art; I have listened to propaganda of all sorts; I have seen marvelous machines and have wondered at lighting effects. What has interested me most is the glimpse into the future that has been given by great experimental laboratories. All that I have seen has been material, however. I have seen no exhibitions from any laboratories of social science. I have seen no attempt to explain how those of us who are responsible for development in this field are looking into the future and are to make our technique responsive to the demands of the future. That there is such development all of us know. To see it, however, one must take a long view. In the courtroom we always act as if our law were like that of the Medes and the Persians which knoweth no change. Our technique seems to require us to treat the law as fixed and certain. Legal history teaches us, however, that the law is never static, but is continually changing and expanding to meet the needs of changing and expanding life. There are always those who try to prevent this change, but they can only act as a drag; they do not really stop the progress of the law.

In 1215 such an attempt was made in the Provisions of Oxford by prohibiting new writs. By the use of these writs the jurisdiction of the King's court had been rapidly expanding, new relief was being afforded, and all this was to be stopped by an act of parliament. But the demands of life were too strong, and in 1285 came the statute of Westminster II. This, you will recall, was one of the statutes which did not seem to be revolutionary but from which most of our modern law springs. In one section the act provided that new writs could be issued in *consimili casu*. This simple phrase permitted the development of the actions of trespass on the

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case and assumpsit which formed the legal basis for our current practice in personal injury and contract. It was an event of great potentiality, and new causes of action were born.

I think it is possible to see matters of similar significance today. It seems to me that we may catch a glimpse of the law of the future just as we may see the city of the future as science and engineering reveals it to us. I see in the declaratory judgment, so widely adopted, a development as significant as the Statute of Westminster II. This subject has been ably presented to you on previous occasions,¹ and I have the temerity to discuss it again only because of its very great importance. As I look into the future, I can see that we shall be trying a large proportion of our cases as actions for declaratory judgments.

I know of no reform in the law that has spread so rapidly, except perhaps code pleading in the latter half of the last century. The reason for this growth is apparent when we consider the potency of the factors that have contributed to it. These have been stated to be (1) the growth of modern industry and commerce; (2) the increasing complexity of social and economic relations; (3) the interference of the state in ever greater degree with private enterprise, and (4) the rapidity of changes in political and economic conditions.² All of these factors forced upon the courts new situations and problems for the solution of which the older remedies were not adequate. Many of these situations represented not accomplished wrongs but rather disturbed social and economic relations. The parties, because of these disturbed conditions, were in a position of peril and insecurity. They were unable to determine their rights and privileges and hence unable to plan for the future.

It is relief from this condition that the declaratory judgment is designed to supply. The definition of the declaratory judgment is not set forth in the act, which grants power to the courts to "declare rights, status, and other legal relations". Professor Borchard has given a comprehensive definition: "A declaratory judgment is an affirmation by the societal agent of the state of the legal consequences attending a proved or admitted state of facts. It is the determination or sentence of the law that a legal relation does or

¹ Madden, *Declaratory Judgments* (1922) W. VA. BAR ASS'N REP. 231; Jackson, *A Proposal for Declaratory Judgment Procedure* (1938) 45 W. VA. L. Q. 31.

² Borchard, *Declaratory Judgments* (1933) 7 TULANE L. REV. 183.

does not exist."³ It is to be noted that this definition includes only the judgment itself. The declaratory judgment is a procedural outcome of a civil action for such a judgment, just as a money judgment is the outcome of an action of assumpsit on a promissory note. Hence we may properly say that the uniform declaratory judgment act has provided us with a new cause of action.

The development of a new cause of action is an event of tremendous importance in the law; it means that a new situation is recognized as a proper-subject of judicial relief. It is not a thing to be feared; it is rather to be expected in a living law. In an old case Lord Holt disposed of the objection that is so often made when a new cause of action is presented to a court: "And it is no objection to say that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too."⁴

To include this new cause of action in our judicial armory may require us to adopt more comprehensive concepts. It is difficult to define a cause of action. We use the term every day; we draw petitions stating causes of action, and we demur to those same petitions. We tell clients with regret that they have no cause of action. Many lawyers pass on the question solely by a process of analogy; the facts presented are like a reported set of facts that were held to constitute a cause of action. The difficulty with such a process is that it does not permit recognition of a new cause of action. Many lawyers will say that a cause of action consists of a right on the part of the plaintiff and a corresponding wrong on the part of the defendant. For such a definition there is distinguished authority. Professor McCaskill defines a cause of action as follows: "It is that group of operative facts, which standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded."⁵ This idea of the cause of action may be called the delictual theory. It is in accord with the formulary system of classical common law pleading. It will serve in modern personal injury cases and in most collection cases. Where, however, is the delict in an action for reformation, or an action to construe a will, or an action for partition?

³ Borchard, *Judicial Relief for Peril and Insecurity* (1932) 45 HARV. L. REV. 797.

⁴ *Ashley v. White*, 2 Ld. Raym. 938, 90 Eng. Rep. R. 1188 (1703).

⁵ McCaskill, *Actions and Causes of Action* (1925) 34 YALE L. J. 614, 638. Cf. OHIO GEN. CODE (Page, 1938) § 11237.

Judge Phillips presented a different concept when he said: "Primarily, an action is not 'for the redress or prevention of a wrong'; it is a proceeding to *protect a right*. The basis of every action is a right in the plaintiff; and the purpose of the action is, primarily, to *preserve such right*."⁶

Dean Clark has modernized and broadened Judge Phillips' definition. He says: "The cause of action under the code should be viewed as an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons."⁷ The action for a declaratory judgment is an aggregate of operative facts giving rise to right-duty relations between the parties. It indicates that these relations are in dispute; that the plaintiff is thereby in a position of peril and insecurity and he asks that relief be given him by declaring his rights and removing doubt before disaster has occurred. Even this definition is not satisfactory and perhaps we should discard the term as has been done in the federal rules.

Closely connected with the question of the cause of action is the question of judicial power. So deeply rooted is the old concept of the cause of action that there has sprung from it, as a corollary, the idea that a court can only redress a wrong; that it must punish the defendant who has committed the wrong, or must assess damages against him, or enjoin him from doing this or that. Unless action of this sort was demanded of the court, the courts in the past have many times said that no justiciable matter was presented to them; that there was nothing upon which a court might operate. The Supreme Court of the United States has projected this theory in many cases. Mr. Justice Holmes had this idea in mind when he said: "The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun."⁸

The action for a declaratory judgment has sometimes been banned from the courts on the ground that such actions were not within the power of the courts. Mr. Justice Sanford said: ". . . the judicial power . . . extends only to 'cases' and 'controversies' in which the claims of litigants are brought before them for the determination by such regular proceedings as are established for the protection and enforcement of rights, or the prevention, re-

⁶ PHILLIPS, CODE PLEADING (1896) § 31, note 2.

⁷ Clark, *The Code Cause of Action* (1924) 33 YALE L. J. 817, 837.

⁸ McDonald v. Mabee, 243 U. S. 90, 37 S. Ct. 343, 61 L. Ed. 608 (1917).

dress, or punishment of wrongs; and that their jurisdiction is limited to cases and controversies in such form, with adverse litigants, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case."⁹

It is true of course that a court must have a controversy before it; it must have a real question, otherwise it would waste time in deciding moot cases. Such a controversy may exist, however, without being in the form of the classical common law actions. The Supreme Court, in the case cited, says in effect that the question set forth cannot be a case because it is not within the prescribed forms. An actual controversy is necessary, not as a *sine qua non* of judicial power, but because our judicial technique requires adversary proceedings. Our theory is that truth can be more easily gleaned from the clash of adversaries.

The latest pronouncement of the United States Supreme Court is a frank admission that the action for a declaratory judgment is a case even though it does not follow traditional form.¹⁰

The United States Supreme Court has admitted that while the ordinary course of judicial procedure results in a judgment requiring an award of process or execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function.¹¹ The display of force is quite unnecessary to give effect to a decision. Professor Sunderland, the author of the first American article on declaratory judgments, has expressed this concept as follows:

“In early times the basis of jurisdiction is the existence and the constant assertion of physical power over the parties to the action, but as civilization advances the mere existence of such power tends to make its exercise less and less essential.

“If this is true, it must be because there is something in civilization itself which diminishes the necessity for a resort to actual force in sustaining the judgment of courts. And it is quite clear that civilization does supply an element which is theoretically capable of entirely supplanting the exercise of force in the assertion of jurisdiction. This is respect for law.

⁹ *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 74, 47 S. Ct. 282, 71 L. Ed. 541 (1927).

¹⁰ *Nashville, etc. Ry v. Wallace*, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730 (1933).

¹¹ *Fidelity National Bank v. Swope*, 274 U. S. 123, 47 S. Ct. 511, 71 L. Ed. 959 (1927).

If the parties to the action desire to obey the law, a mere determination by the court of their reciprocal rights and duties is enough. No sheriff with his writ of injunction or execution need shake the mailed fist of the State in the faces of the litigants. The judgment of the court merely directs the will of the parties, and the performance of duty becomes the automatic consequence of the declaration of right.

“It is not to be assumed that the peaceful acquiescence of the highly civilized man in the legal findings of the court implies any loss of power in the court itself. Quite the contrary. The greater the ease with which the court’s findings impose themselves on litigants, the more the real power of the court is demonstrated. But the force behind the finding of the court has become a latent instead of an active force. This transition is possible, however, only when the existence of the force is so well recognized and so clearly understood that no one would think it worth while to put it to the test. The entire cessation of actual coercive measures on the part of the court would therefore mark, not the disappearance, but the perfection of the rule of force.”¹²

The supreme court of Ohio has discussed the essentials of a judgment and has said nothing of the coercive power.

“The essentials of a judgment are that it should on its face appear to be the sentence or adjudication of a court or judicial tribunal, and to constitute the judicial act of the court. The judgment must be rendered in an existing action and must decide an issue either of law or of fact. A judgment upon an issue of pecuniary liability performs its main function when it adjudicates the existence or nonexistence of the liability sought to be established. A judgment also should be certain and definite and should state the time of its rendition, the parties, the matter in dispute, and the result of the action, with the relief granted. All of these essentials exist in this order for the payment of costs.”¹³

A declaratory judgment fits into this concept since it adjudicates the existence or nonexistence of liability.

This new cause of action will be widely used in the future in widely different types of cases. We already have many cases indicating how great the utility of this device really is. In most controversies regarding ordinary commercial contracts there is a point where the parties have defined the issues involved but differ as to meaning or legal effect. At that point counsel is consulted

¹² Sunderland, *A Modern Evolution in Remedial Rights — The Declaratory Judgment* (1917) 16 MICH. L. REV. 69.

¹³ *Symons v. Eichelberger*, 110 Ohio St. 224, 236, 144 N. E. 279 (1924).

by each party. If counsel agree, the controversy generally ends. If there is no agreement and no settlement effected, then each party acts upon the advice of his counsel, economic and sometimes social relations are severed, and a breach ensues. Under the declaratory judgment procedure this last fatal step may be avoided, rights determined, uncertainty removed and business relationships resumed.¹⁴

The declaration may be in a negative form; the plaintiff desiring to free himself from liability may seek a declaration that he owes no duty to the defendant. Cases of this type have occasioned some concern to the courts since the plaintiff would have been a defendant under the older forms of action. This question was presented to the English courts in the famous case of *Guaranty Trust Co. v. Hannay & Co.*¹⁵ The plaintiff had purchased a bill of exchange, with bill of lading attached, drawn on the defendant, an English company. The draft was accepted and paid at the plaintiff's London office. Subsequently it was discovered that the bill of lading was forged, and Hannay & Company demanded the return of their money. Upon refusal they sued the Guaranty Trust Company in New York. It was agreed in that case that the law of England applied. The trust company therefore brought an action for declaratory judgment in the English courts, asking for a declaration that they, by presenting the draft, had not guaranteed the genuineness of the bill of lading, and were not bound to repay. The court had some difficulty in finding a cause of action in the plaintiff but they granted the declaration. We can see now that the action consisted in relief from an unjust claim, a new cause of action.

We are familiar with the attitude of courts of equity toward restrictions on the use of land in deed or long-term contracts. Such restrictions will be enforced at the request of the beneficiary and the court will determine whether they are still binding. But equity offers no relief to the burdened party. This situation has been described as requiring the burdened party "to be hazardously active in the breach of such restrictions and passive in litigation."¹⁶

In *Hess v. Country Club Park*,¹⁷ the plaintiff was the owner of a lot which was restricted to residence purposes but was within the business zone as determined by municipal ordinance. He de-

¹⁴ *Herrlein v. Tocchini*, 128 Cal. App. 612, 18 P. (2d) 73 (1933).

¹⁵ (1915) 2 K. B. 536.

¹⁶ *Schenk, J.*, in *Strong v. Hancock*, 201 Cal. 530, 258 Pac. 60 (1927).

¹⁷ 213 Cal. 613, 2 P. (2d) 782 (1932).

sired to construct a commercial building on the premises. He sought and obtained a declaration that because of a change in the condition of the surrounding premises the restrictive covenants in his deed were no longer binding. He joined as defendants the original grantor, who had created the restriction, and the owners of adjacent lots.

In leases, particularly those running for long terms, perilous situations frequently arise. The lessor may force the tenant to leave for some alleged violation and then find himself sued for damages. The tenant may claim some privilege and find that by the assertion of a mistaken right he has forfeited the lease. These questions may all be judicially determined by the declaratory judgment, and the party relieved from peril and uncertainty.¹⁸

The action for a declaratory judgment does not supplant the action to construe a will; nor does it do away with equitable jurisdiction to construe a trust within the jurisdiction of a chancery court. The new procedure does, however, offer an alternative remedy which is often easier to apply.¹⁹

It may be that we proceed from status to contract as Mr. Maine suggests, but nevertheless there are many questions of rights, privileges and duties in the law to be determined by status. Perhaps the field will be enlarged in the future and even college professors will be held to have a status. That this field is growing there can be no doubt, but at the present time most of the cases involve domestic relations.²⁰

With the increase of governmental regulation of business it is necessary to increase our remedies for governmental aggression. This involves the whole field of judicial control of administrative action. The leading English case in this field deserves our attention, because administrative law has developed further there than we have dared to go even in recent years. *Dyson v. Attorney-General*²¹ arises out of facts which have a familiar sound. The plaintiff was a landowner and there was delivered to him "Form IV" issued by the commissioners of inland revenue and requiring, under penalty of fine, detailed information to be filed in regard to the plaintiff's property. The plaintiff filed his petition against the

¹⁸ *Aaron v. Woodcock*, 283 Pa. 33, 128 Atl. 665 (1925); *Washington-Detroit Theatre Co. v. Moore*, 249 Mich. 673, 229 N. W. 618 (1930).

¹⁹ *Sheldon v. Powell*, 99 Fla. 782, 128 So. 258 (1930).

²⁰ *Bauman v. Bauman*, 250 N. Y. 382, 165 N. E. 819 (1929); *Morecroft v. Taylor*, 225 App. Div. 562, 234 N. Y. Supp. 2 (1929).

²¹ [1911] 1 K. B. 410.

Attorney-General as representing the Crown, to declare the notice and forms illegal and *ultra vires* of the commissioners. The case was heard on the motion of the defendant to strike out the petition on the ground that it disclosed no cause of action. The question before the court was squarely the propriety of the declaratory judgment as a method of administrative control. In sustaining the action Farwell, L. J., said:

“ . . . it would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in the Commissioners can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty.

“ . . . If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression.”²²

This case went far to increase the use of the declaratory judgment in this field in England. It has been followed in the colonies. It should be noted that here, again, the declaration is negative in form, declaring an immunity or a no-duty to comply on the part of the plaintiff who, under older forms of action, could have raised the question only as a defendant in a suit for the penalty. In this country the same question arises in cases where the act complained of is also unconstitutional.

In attacking the legality of a tax assessment it is no longer necessary to pay under protest and then sue for the return of the tax, or in a taxpayer's suit enjoin the collection, but an action for a declaratory may be brought by interested parties and raise the question directly. An Indiana court holds that such a case involves a real controversy and that a declaration may be made.²³

Under the older forms of procedure it was necessary to wait for damage to be incurred or injury threatened in order that a case might arise to test the constitutionality of a statute. The action for a declaratory judgment permits the suit to be brought at once, before damage has been done or legal liability has resulted. The action may be brought by a public officer. Of course in each case there must be a real controversy; a litigant cannot use this procedure solely for the purpose of getting legal advice. It is a

²² *Id.* at 421, 424.

²³ *Zoercher v. Agler*, 202 Ind. 214, 172 N. E. 186 (1930).

safe prediction that the declaratory judgment will be frequently used to bring the question of constitutionality before the courts at an earlier point in the controversy than is possible under the old procedure.

This new procedural device will thus permit the law to respond to the demands of modern life and serve as an alternate remedy for many old problems. We are on the threshold of a new development in our jurisprudence.

The same narrow concept of the cause of action which I have discussed in connection with the declaratory process has colored and warped our concept of trial. Since no cause of action existed until the defendant had invaded a right of the plaintiff, then the trial assumed all the characteristics of a punitive expedition. In carrying out this expedition the lawsuit has many of the characteristics of a military campaign. The petition may be regarded as a piece of propaganda, not simply stating circumstances showing the need for judicial interposition, but rather justifying the plaintiff's demand for punishment of the defendant. We come by this warlike concept by honest inheritance, since we are not far removed from a warlike ancestry. In the trial of a case, as in a war, we conceal weakness and disclose strength to our opponent, with an utter disregard of truth. Until the day of trial we clamp a censorship on our sources of information. The pleadings have long been regarded as a means of conveying information, but you and I know that in most lawsuits the petition merely informs the defendant that the plaintiff has accused him of being a crook and the answer of the defendant calls the plaintiff a liar. If the true facts of the situation were available at once, then long drawn out litigation might be avoided and economic loss averted.

The new federal rules, having adopted a new philosophy of pleading, also provide for wide and open discovery before trial so that a complete disclosure of facts may be had. We have used this in Ohio to some extent, but we have been hesitant about making the fullest use of discovery. Our code permits us to take depositions before trial, but when we take them for purposes of discovery we call them "fishing expeditions". We seem to be ashamed of what we are doing. We should not have this feeling because long ago a forward looking jurist in Ohio, William Howard Taft, held that it was entirely proper to take the deposition of witness solely for purposes of discovery, even though the witness would be available at trial. Mr. Taft said:

“It is urged that this construction of the statute will give rise to great abuse; that a party will go fishing for evidence among the witnesses of the opposing party, and will learn the case of his adversary.

“To this it may first be said that it is an argument more properly addressed to the framers of the law than to the courts construing it. Secondly, there is likely to be no motive for ‘fishing’ unless the person whose deposition is sought has been unwilling to state his knowledge upon inquiry. If a witness is so reluctant as not to state his knowledge to a party seeking it, the witness can not complain if the party presumes that the knowledge thus withheld may be useful evidence to him on the trial of the case, and that his refusal to give information indicates a desire to avoid the trial.

“Witnesses do not belong to one party more than to another. What they know relevant to the issue should be equally available to both sides, and if they claim immunity from examination by deposition on the theory that their testimony is one side’s rather than the other’s, their claim is utterly indefensible. What a witness is presumed to know is the truth and that can not vary between the time of taking the deposition and the trial. If there is likely to be a variance in the testimony, the earlier a witness is committed to a statement the better for the sake of the truth. There is no objection that I know, why each party should not know the other’s case. Each is supposed to state his case in his pleading in the beginning. By serving notices under Sec. 5292 Rev. Stat., one party may compel the other to furnish a copy of such papers as he intends to use as evidence. If such is the rule in regard to written evidence it is hard to see that it is a great objection to our construction of Sec. 5266 that it may in some cases enable a party to take depositions which will disclose to him the evidence which his adversary will produce. . . .

“I have been considering the question from a standpoint of the party. It should perhaps be considered from the standpoint of the witness. His only right infringed is the consumption of his time. I can not think that once taking his deposition in addition to his testimony at the trial is so great a deprivation of his rights as to warrant a court in restraining a party from the exercise of his plain right under the statute. It is no greater than to be called upon in two trials of the same case.”²⁴

In the trial of a lawsuit we are seeking truth, not advantage of either party, and the means to secure truth should be available to both parties at an early stage in the litigation. It seems to me

²⁴ *Shaw v. Ohio Edison Installation Co.*, 9 Ohio Dec. 809 (1887).

that in the future we shall make greater use of discovery before trial as a means of securing the whole truth of a situation so that a complete and adequate remedy may be administered. Why should we fear such a complete disclosure of facts? Is not this the scientific method?

When all facts are known, then further procedure may be futile. The remedy may be clear without trial. Indeed, in some cases the parties know what the outcome will be when the lawsuit is started. It seems to me that this is true in many collection cases; the defendant has borrowed money and has not repaid it; or he has purchased goods and used them but has not paid the price. No claim of failure of consideration or breach of warranty has been made. Under our usual procedure the plaintiff sues in usual form, the defendant denies, and trial is had. But why should we have a trial? Each party knew all the facts. At this point a new procedural device, the summary judgment, is applicable. Under this procedure judgment may be quickly secured in those cases where no real defense is shown. This has been partially accomplished under our present practice, without specific statutory provisions, by striking sham pleadings. However, this is difficult and is little used. It is almost never applied to pleas of general denial.

The summary judgment has been used in England for more than fifty years and more recently adopted in New York, New Jersey, Michigan, Illinois, and other states. The new Federal Rules provide for this procedure in Rule 56. In England summary judgment was originally permitted in a restricted class of cases, but successive reforms have greatly expanded its use. New York permits it to be used in action to recover a debt or liquidated demand arising (1) on a contract, express or implied, or (2) on a judgment for a stated sum. In England it may be used in these cases and also in landlord and tenant cases for recovery of possession with or without rent. The federal rule is generally applicable in all types of cases and under it there should be much interesting experimentation.

The procedure is simple; the plaintiff files his petition in the ordinary way. He then files an affidavit that the claim is bona fide and that the defendant has no defense. He should include allegations of fact tending to support his conclusions and moves for judgment. An order is issued requiring the defendant to show cause why judgment should not enter, *i. e.*, the defendant is re-

quired to show his defense. This he may do by affidavit, but failing to do so, judgment will enter.

This procedure has been held constitutional where it has been adopted.²⁵ The practice in New York was held applicable in the federal courts under the Conformity Act.²⁶

Under the federal rule, if the hearing on the motion for summary judgment discloses that certain parts of the controversy can be disposed of but that certain matters are controverted in good faith, then the court may make an order limiting trial to controverted matters only. The summary judgment procedure thus supplements pretrial procedure for simplification and clarification of issues.

An examination of the dockets in those states where the summary judgment process is used discloses a surprisingly large number of cases disposed of by this method. Its use will increase and spread. We must prepare ourselves for its coming.

As we look into the future and examine the judicial procedure of tomorrow, we might see many other surprising devices, many of which we cannot presently examine because they are based on ideas not yet conceived. I have all too briefly discussed only three, the future of which I can foresee. The law of the future will expand under the declaratory judgment concept and will afford relief where now we seek in vain. Trials will be shortened by the use of discovery before trial and trials may even be avoided by the use of summary judgment. The bar so equipped will render more effective service in the world of tomorrow. We dare not meet that world unless we too progress.

²⁵ *Dwan v. Masserone*, 199 App. Div. 872, 192 N. Y. Supp. 577 (1922); *General Investment Co. v. Interborough Rapid Transit Co.*, 235 N. Y. 133, 139 N. E. 216 (1928).

²⁶ *Atkinson v. Bank of Manhattan Trust Co.*, 69 F. (2d) 735 (C. C. A. 7th, 1934).