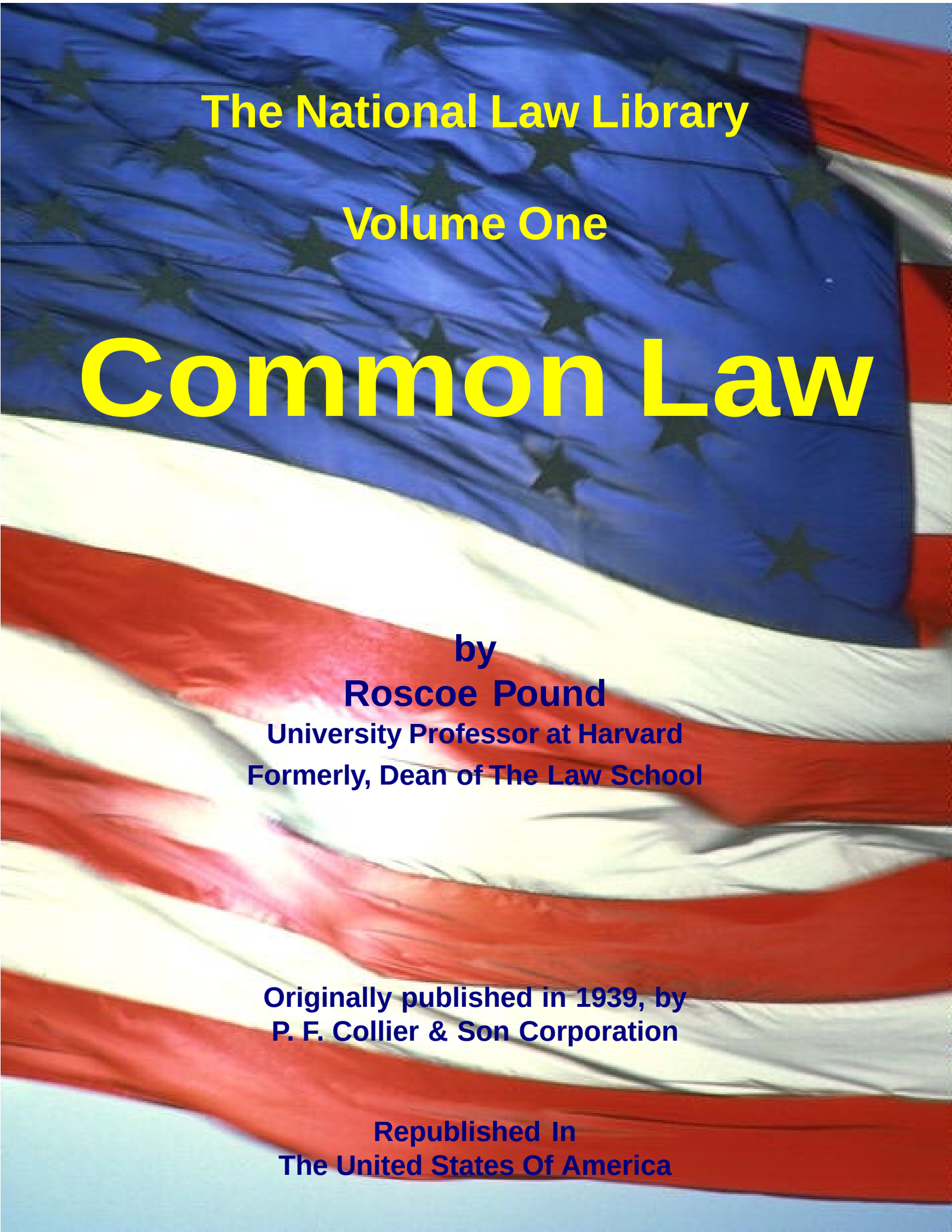

The National Law Library

Volume One

Common Law

by

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Originally published in 1939, by
P. F. Collier & Son Corporation

Republished In
The United States Of America

SUSPICIONS
NEWS MAGAZINE

Anno Domini 2002
National Law Library Vol. 1

Creator, Proprietor &
Christian Publisher
Alfred Adask

http://www.suspicions.info

POB 540786 Dallas, Texas 75354-0786
The United States of America

General Introduction

Blackstone's Commentaries were the result of his lectures at Oxford, intended for a general student body, not merely for students preparing for the legal profession. In his inaugural lecture, afterwards published as the Introduction to his Commentaries, he sets forth his purpose to methodize and explain the laws and constitution of England, adding that this was "a species of knowledge in which the gentlemen of England have been more remarkably deficient than those of all Europe besides." This Introduction, taking up thirty-seven pages of the original text, is devoted to demonstrating the importance of a wide knowledge of the method, system, and general principles of the law on the part of those who live under the English polity. Blackstone's idea was taken up eagerly in America after the Revolution. Wythe's lectures at William and Mary (1779), Wilson's lectures at the College of Philadelphia (1791), Kent's lectures at Columbia (1794) and Parker's at Harvard (1816) were meant for general audiences, not merely for law students. President and Mrs. Washington were among those who listened to James Wilson. The lectures were said to be addressed to gentlemen of all professions, and there was an announced aim of "informing the legislator and the magistrate" as well as the lawyer. Kent stated at the outset that he would set forth nothing "but what may be usefully known by every gentleman of polite education." As late as 1838, the catalogue of Harvard University stated, as one of the aims of the Law School, to afford elementary instruction in law for "gentlemen not destined for the bar but desirous of qualifying themselves either for public life or for commercial business."

Blackstone's Commentaries on the Laws of England, and to a less extent Kent's Commentaries on American Law, were meant for general readers as well as for lawyers and law students. But the rise of the apprentice law school at the end of the eighteenth and early in the nineteenth century led to a discontinu-

"It does not require a majority to prevail, but rather an irate, tireless minority keen to set brush fires in people's minds."
– Samuel Adams

ance of the academic lectures on law for general audiences, and Blackstone and Kent have had no successors. The multiplication of jurisdictions and enormous increase in detail of laws have precluded books and courses with the double purpose of instructing law student and layman. We have come to have, on the one hand, books for the lawyer and for the student training to become a lawyer, and, on the other hand, books of the Everyman His Own Lawyer type—books, at the least, of very doubtful utility.

Yet the need of some such thing as Blackstone and Kent and James Wilson had in mind, and of what Story wrote in the announcement of the Harvard Law School, is quite as great as in their time. Our American polity is characteristically legal. We make political questions legal and legal questions political. A government of laws and not of men calls for men who know something of the system and method and principles of law no less in the role of governed than in that of governors. It is only in an autocracy or a dictatorship that widespread knowledge of the system and principles of the law is superfluous.

In Continental Europe there has long been a type of book which meets this demand. Encyclopaedic surveys of the law begin in the eighteenth century, in the era of "enlightenment" in which men sought for the widest possible diffusion of knowledge. They aim at a systematic review of the law as a whole, from an analytical, a historical, and a philosophical standpoint. They are not at all complete dogmatic expositions, such as the practitioner of law requires. They do not aim to give a book in which any man may find the applicable rule of law in any jurisdiction on any state of facts. Even the cyclopaedic digests, run-fling to scores of volumes, can but partially do that for the trained and experienced lawyer. It cannot be done with any real assurance for the layman in the complex social and legal order of today. What can be done is to set forth in a systematic survey the main lines of the law of the time, as it exists in English-speaking lands with a common legal inheritance, setting forth the significant features of the history, both of the system as a whole and of its leading principles, and pointing out the philosophical presuppositions both of the system and of its rules, principles, and doctrines.

One would make a great mistake if he sought to use such a book as giving him the precise rules attaching definite detailed legal consequences to definite detailed states of fact, which obtain in any one of the forty-eight states of the Union, or in Canada or Australia, at the moment of its publication. But this does not mean that one cannot with such a book come to know much of the history, the philosophical basis, and the system of the law which obtains in those several jurisdictions, and of the principles on which its detailed rules proceed and the authoritative grounds of decision and of advice to those who seek counsel as to their rights and duties, which that system affords.

A distinction must be made between law and laws. Law is something more than an aggregate of laws. It is something which gives vitality to rules of law and makes it possible to use them as instruments of justice. Law develops laws to meet situations which the lawmaker forgot or did not appreciate. It limits them to their reason and spirit when the lawmaker fails to pursue his end with exactness. It supplies gaps in the legislator's scheme when he fails to pursue his end with completeness. Law has a continuity, while rules of law are set up, decay and are abrogated. Law has a vitality and tenacity that survives repeal of laws. One may know where to find every rule of law which obtains in the time and place and yet not know what to do with one of them unless he knows law. Law is something complex, involving a regime, a body of precepts, with rules, principles, conceptions and standards, a technique and received ideals, and a judicial and an administrative process; not merely an aggregate of rules. If one cannot use an encyclopaedic survey as an index of laws, he can use it as an introduction to law. He can find in it the different fields of the legal order laid out systematically, the main problems with which it must deal set forth and explained, and the historically given materials, from which rules of law are made or in which they are found, indicated in their general forms and with respect to their underlying principles.

Law is experience developed by reason and reason tested by experience. Experience and reason have co-operated in the history of civilization in finding or establishing certain modes of adjusting human relations and certain precepts for ordering human conduct which have had universal recognition since the classical Roman law. They have co-operated in finding many more which obtain and have long obtained throughout the English-speaking world. They have co-operated in discovering many more which have proved themselves effective instruments of justice in five generations of American life. It is a chief function of an encyclopaedic survey to set forth and explain these universal or pervading precepts.

Roscoe Pound

Note On Citations, Abbreviation & Technical Language

A lawyer's library consists of two kinds of books: first, collections of cases, statutes and constitutions, which are his only books of authority; and, secondly, index books, including textbooks, encyclopaedias, digests, citators, annotations, and handbooks of all kinds. Skill in the use of these indexes, by which the lawyer is enabled with due diligence to find every authority pro or con on any point that comes before him, is one of the principal objects of legal training. The layman cannot expect to vie with the lawyer in such an undertaking. To him, these books are repositories of law, history, business fact, human experimentation, but he must be guided through them. Citations in the work before us are limited to this function of guidance. Some parts of the work call for more of this guidance than others, and some authors have a greater predilection for it than others. No attempt has been made to enforce uniformity in this regard.

In a few places rather elaborate bibliographical data have been included. These, however, refer to social, economic and political discussions rather than to lawyers' books.

Most of the references, though written in the traditional lawyers' form, will be clear to the intelligent lay reader. He need only remember that the initial letters referring to the United States or to any of the states indicate the series of official reports of the highest court of the jurisdiction in question. The figures preceding the initials represent the volume; those following represent the page. Sometimes a section of the country is referred to in the abbreviations N. E., N. W., S. E., S. W., Pac., So. These refer to the reprints of cases for groups of states covering in the aggregate the entire United States, in the West Publishing Company's series. Other abbreviations, referring to the thousands of scattered volumes of English and American Reports or to law journals, will be found fully explained in the several dictionaries and encyclopaedias of law. In fact, the most important of them will be found in the ordinary large dictionaries.

It has, of course, not been possible, nor would it have been desirable, to avoid altogether the use of technical legal terms. The authors have generally done something towards defining such terms in their contexts. Further assistance in clarifying them will often be found by reference to the general index at the end of this series.

Nathan Isaacs

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Chapter I

Fundamental Conceptions

We may take for our starting point in the study or exposition of law the idea of civilization—the raising of human powers to their highest unfolding, that is, the maximum of subjection of external nature and the maximum of subjection of internal or human nature to the purposes of human existence. Put in biological terms, it means the maximum adjustment to an environment which is twofold, both physical and human. If man's progress in the subjection of physical nature is the more conspicuous in recent times, yet we must remember that it is the control of internal, of human nature that makes any extensive conquest of external nature possible. Men must be free from the necessity of continually defending themselves against attack by their fellow men if they are to conduct the patient, detailed, scientific investigations which are behind inventions. Maintaining, furthering and transmitting the accumulated experience of this control is nothing less than a condition of life in a crowded world. Without it, the great populations which civilized society makes possible could not exist. It is behind the division of labor which is at the bottom of the economic order. This maintaining and furthering of civilization is brought about through social control—the adjustment of the relations of men to other men, the ordering of the conduct of each man 50 as to comport with the activities of other men, and the adjustment of the relations of individual men and groups of men to the organized social group, through the application to each man of the pressure of his fellow men.

As an illustration, consider the queue before the ticket window at a theater when, perhaps, more are seeking to get in than can be accommodated. If those seeking admission did not line up, or were not lined up in this way, it might not be possible in the scramble for any one to get m. Compare the rush to get out from a burning building; few escape and many are trampled. By ordering the buying of tickets, or the exit from the burning building, as many are served as possible, with the least friction and waste. This ordering may result from customary recognition that lining up and taking one's turn is the thing to do, or it may be constrained by a policeman. In either event, social control makes it possible to do the most for the most people. As the saying is, we all "want the earth." There are many of us, but there is only one earth. So there is, as it were, a great task of social engineering, of making the goods of existence, if they cannot go round, go round as far as possible. This is what we mean by saying that the end of law is "justice." We do not mean justice as an individual virtue, we mean justice as a regime. We mean such an adjustment of relations and ordering of conduct as will make the goods of existence go round as far as possible with the least friction and waste.

Law is not the whole of social control. Social control may be exercised by a kin organization, or by a religious organization, or by a political organization of society, or by all of these concurrently. Since the sixteenth century, politically organized society has become paramount. Kin organization, for any groups larger than the family, has broken down, and as to the family, where the law of a generation ago conceded large powers to parents, and that of a century ago recognized large powers in the "head of the household," today truancy and incorrigibility are matters for juvenile courts,

and those courts and domestic relations courts may interfere almost, if not to the verge of, superseding parental authority. Also since the Reformation, religious organizations have steadily given way as agencies of social control In recent times, voluntary associations of all sorts have taken on much importance for this task. Professional and trade associations, labor unions, and social clubs, with their codes of ethics or standards of what is done and what is not done, and their internal discipline, are significant agencies. But they all carry on in subordination to the law. Courts may and do review expulsions, the only means by which such organizations may make their disciplinary codes or traditions effective. The law has a monopoly of force. Whenever employed by other agencies of social control, force is held by law within defined limits and its exercise is reviewed.

1. The Nature of Law

In current usage the term "law" is used in three senses which it is important to distinguish:

(1) One sense is the LEGAL ORDER, which has been spoken of above, the regime of ordering human activities and adjusting human relations through the systematic application of the force of politically organized society. The force of a politically organized society may be exercised arbitrarily and unsystematically, as for instance, in the case of Harun al Raschid walking the streets of Baghdad in disguise at night and relieving the tedium of royal existence by making use of his authority to judge delinquents. If one rogue made a clever jest, or told a good story, he might go free, while an-other much less dangerous malefactor, who added to a trivial offense the heinous crime of boring the Commander of the Faithful, might be given the extreme penalty. This is the antithesis of the legal order, which implies a systematic ordering, seeking uniformity and equality of operation.

We use the term law in the sense of the legal order when we speak of "respect for law" or of the "end (or purpose) of law," or of "law and order." Respect for law means respect for the legal order. One may respect the regime of social control ordered by law and yet detest some particular item of the body of legal precepts. For example, many law-abiding persons, who respected and upheld the legal order, resisted the fugitive-slave laws, and recently many such persons at least gave no more than a literal and passive support to the National Prohibition Act.

(2) The oldest and longest continued use of the term "law" is to mean the AGGREGATE OF LAWS- the whole body of legal precepts which obtain in a given politically organized society; the body of authoritative grounds of or guides to judicial and administrative action, and so of predicting such action, established or recognized in such a society. In this sense, we speak of "systems of law," of "justice according to law," of the "common law." We mean the body of received or established materials on which judicial and administrative determinations are expected to and, on the whole, do proceed.

(3) In a third sense "law" is used to mean what we may better term, with Mr. Justice Cardozo, the JUDICIAL PROCESS the process of determining controversies, as it actually takes place in the courts, and also as we conceive it ought to take place. To this today we must add the ADMINISTRATIVE PROCESS - that of administrative determination by boards and commissions and administrative officers, whether as it actually takes place, or as it is conceived it ought to take place. Many recent writers are using "law" in this sense, for example, to mean whatever is done officially. But in the older and stricter sense we may say that some things are done officially which are not done according to law. Law is not what is done, but a guide to how it is to be done. It would be more true to say, with a recent Russian jurist, that in an absolute regime there is no law, or rather only one rule of law, namely, that there are no laws but only administrative ordinances and orders.

When we speak of the History and System of the Common Law, or of Anglo-American law, we use "law" in the second sense.

But, it may be asked, why do we need law in the second sense? Cannot the legal order be carried on by a judicial and an administrative process, or even by an administrative process only, without law in the sense of an elaborate body of authoritative guides to decision? The answer must be that conceivably it can. But in any complex social order, in any highly developed economic order, the judicial and administrative processes cannot operate uniformly, equally and predictably except in accordance with authoritative norms (patterns or models) of determination and an authoritative technique of developing from them the grounds of decision.

An example of the part which these authoritative materials play in guiding the *judicial process* may be seen in a case which occurred in an oriental country subject to the common law. A law prescribed penalties for passing within a certain distance in front of a religious procession, or making noises along the line of such a procession. Another provision in the law gave the right of way to the fire brigade responding to an alarm of fire. It happened that such a religious procession was moving on a street, and at the

same time the fire brigade, responding to an alarm, was proceeding on a cross street toward the intersection. The fire brigade, clanging bells and blowing sirens, sought to cross immediately ahead of the procession, and, as the neighborhood was one in which religious animosities ran high, outraged partisans of the procession sought to overturn a hose wagon. They were prosecuted at the instance of adherents of a rival sect, while the firemen were prosecuted at the instance of adherents of the sect whose procession was interfered with. Each relied upon a section of the law. For the fire brigade, it was argued that the public safety was the highest law, and hence that the section giving it the right of way should prevail. For those who had sought to vindicate the rights of the procession, it was argued that duty to God was the supreme concern to which all else should give way. Happily, there was a rule in the English common law that where there are inconsistent provisions in a statute, the one last in order shall be taken as the last expression of the legislative will and shall govern, and on this basis the firemen prevailed. Here it was necessary to have an authoritative ground of decision which both parties could accept without derogation from their dignity. Reason tested by experience, and experience developed by reason give us solutions of such cases where otherwise the wisdom of Solomon would scarcely suffice.

Taking the term in the second sense, what is the nature of law? This question has been a battleground of jurisprudence, partly because law may be looked at from a number of points of view, partly because more than one element goes to make up the body of authoritative guides to determination and grounds of decision, and partly because more than one kind of legal precept goes to make up the element which has been chiefly looked at in discussion of the subject.

Law is often said to be an AGGREGATE OF LAWS, and from that standpoint it is defined by defining a law. But a law may be considered from the standpoint of the citizen subject to it, from the standpoint of the judge or administrative official called on to apply it, or from the standpoint of the counselor called on to advise as to the probable action of courts or of administrative officials on a given state of facts. Accordingly, there are no less than four theories as to the nature of a law. One is the command or *rule of conduct theory.* It holds that a law is a command of the sovereign, that is, of the law-making authority of a politically organized society, enjoining some particular course of conduct or prohibiting some particular item of conduct. In other words, a law is a rule of conduct established or recognized by the state. This is from the standpoint of the citizen at the crisis of action. Historically, it is the oldest theory.

Another is the *threat theory.* This also is from the standpoint of the citizen. But whereas the command theory thinks of the citizen as wishing to do right and seeking guidance in a command of the sovereign prescribing what is right conduct, the threat theory thinks of him as wishing to do something and considering what may happen if he does it. It conceives of a law as a threat of state force, prescribing what action on the part of state officials, wielding the force of politically organized society, is likely to follow upon certain states or situations of fact.

A third is the norm of *decision theory.* This is from the standpoint of the judge or administrative official at the. crisis of decision. It holds that a law is an imperative or authoritative norm or model or pattern of determination of controversies or of determining the course of administrative action. It considers that laws may be regarded as rules of conduct only because they are rules which tribunals will apply to conduct.

A fourth is the *prediction theory.* This is from the standpoint of the counselor at law, called on to advise clients as to what they may do and what they may not do with assurance of being backed up or at least not interfered with by those who wield the force of politically organized society. It regards a law as a basis of prediction as to how courts and administrative officials will act on a given situation or state of facts.

One of these points of view is as valid as another. But the basic idea seems to be that of a norm or pattern of determination which, as it is generally followed and applied by courts and administrative officials—as they find in it an authoritative ground of decision—can be looked at as a rule of conduct or as a threat of state force or as a basis of prediction.

2. Elements of a Body of Law

But there is more in law than an aggregate of laws. Three elements must be recognized: a precept element, a technique element, and an ideal element.

(1) The PRECEPT ELEMENT is the body of laws already considered. This element, however, is by no means as simple as has been supposed. It is made up of rules, principles, precepts defining conceptions, and precepts establishing standards.

Rules of law are legal precepts attaching a definite, detailed legal consequence to a definite detailed state of facts or situation of fact. This is the earliest form of legal precept. In-

deed, such rules are the staple of primitive law. For example: In the Laws of Hammurabi (King of Babylon, 2067—2025 B.C.), it is provided: "If a man has opened the waters and flooded the planted field of his neighbor, he shall measure back ten *gur* of corn for each gan." In the Roman XII Tables (450 B.C.): "If the father sell the son three times let the son be free from the father." In the Salic Law (between 486 and 507 A.D.): "If any one have called another 'fox,' he shall be adjudged liable in three shillings." In the Laws of Ethelbert (King of Kent, about 600 A.D.): "Let him who stabs another through an arm, make *bot* [reparation] with six shillings." In modern law, penal codes, the law of property, and the law of commercial transactions are full of such rules. For example: "If .. . my horse is taken away and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use" 3 Blackstone, Commentaries on the Laws of England, 5). Rules may be legislative in origin or may be customary, originating in our law in judicial decision.

Principles are historically the work of lawyers and law writers who come to distinguish one case from another and to find a general proposition logically presupposed by the distinction. They are traditionally received and thus are authoritative starting points for legal reasoning. A legal principle does not attach any definite consequence to any definite state of facts. It gives a starting point for judicial reasoning where a rule is to be found for a new situation of fact or choice is to be made between competing rules of equal authority, or a rule is to be interpreted. Thus it is a principle of the Roman law, adopted by the common law, that one man is not to be enriched unjustly at the expense of another. Hence if one who owes another forty dollars pays fifty by mistake, or if one pays for a horse and it appears that at the time of the agreement the horse was dead, unknown to the parties, or if money is loaned to a company in a transaction in which its charter does not permit it to engage, such cases being within the principle, recovery of the money not intended as a gift but held without equivalent on a mistake or on failure of the intended purpose is allowed as if the recipient had agreed to restore it.

Certain precepts define conceptions, that is, generalized categories into which we may put particular situations of fact, whereupon certain rules, principles and standards become applicable. These are worked out by law teachers and law writers and become traditionally received. Examples are: Trust, a holding of title to property for the benefit of another or for a charitable purpose; Sale, a transfer of property in a thing for a price in money; Bailment, a delivery of possession of a chattel for a specific purpose; Public Utility, an enterprise, individual or incorporated, which renders a public service and devotes property thereto.

Also certain other precepts establish standards, that is, certain limits of conduct from which one subject to the standard departs at peril of liability or of the invalidity of what he does, to be applied according to the circumstances of each case. They are the chief reliance of modern law for individualization of application and are coming to be applied to conduct and conduct of enterprises over a wide domain. Such standards are: "Due care," the standard exacted of one pursuing a course of conduct in which he may reasonably anticipate others may receive injury; fair conduct, exacted of a fiduciary; reasonable service and reasonable facilities, exacted of a public utility; fair competition, exacted of those engaged in competitive acquisition. Here "due," "fair," and "reasonable" are not defined precisely. They involve a certain measure of judgment in the light of experience, and often a certain moral element. No definite, detailed consequence is attached to any definite, detailed state of facts, nor is there a starting point for legal reasoning. There is a precept requiring action to keep within certain limits with a liability if it does not. "Due process of law," in American constitutional law, is such a standard. Lawmaking and administrative action must not be arbitrary and unreasonable. Difficulties have arisen from treating these standards as if they were rules analogous to rules of the law of property.

It may be asked, why should there be such a complex machinery of legal precepts? Why need there be anything more than rules, precepts affixing definite, detailed consequences to definite detailed states of fact, so that every one could know with absolute assurance exactly what his rights and his duties were—what he could do lawfully and what not—and judges would do no more than find the exactly appointed rule for each case? Why have, in addition, principles, conceptions, and standards? There are two reasons, one applicable to principles and conceptions, the other applicable to standards.

It is a wholly mistaken notion that there can be a complete and self-sufficient body of rules of law providing for every possible case. Men have often had this notion. Those who drew Frederick the Great's Code (1749) had it and provided that the judges were not to have the power of interpretation but were to be confined to a mechanical logical application of the prescribed rule to the

case for which it was meant. American legislators have sometimes tried to act upon this notion. Experience has always shown its futility. The possibilities of controversies are infinite; bodies of rules are finite. No lawmaker, even dealing with the simplest subject, has ever been able to anticipate all the questions which arose on the subject of his legislation. The only way to insure certainty and predictability for new cases, not governed by any rule, which constantly arise, is to work out principles behind rules—the principles they logically presuppose—and draw more rules from those principles, or to work out conceptions, *i.e.,* categories into which cases may be put, and attach rules and principles and standards to those conceptions. The rapid development of every sort of new instrumentality of communication in the last century and the multiplying of discoveries and inventions called exceptionally for a process of this sort. Stage coach, canal, railway, trolley, motor vehicle, airplane, succeeded each other faster than detailed rules could be worked out. The Middle Ages had established that the innkeeper and the carrier exercised public callings. The conception of a common carrier was extended from the carter and the stage coach to the railway, thence to the trolley line, thence to motor bus and air line. But along with these came gas lighting, telegraph, telephone, electric light, and recently electric power. The conception was at first extended to these until the wider conception of a public utility was worked out from the result. It was only in this way that the law could keep pace with the changes in the past hundred years.

Principles and conceptions lead to rules, but some things are not adapted to treatment by rule and must be dealt within another way. Bergson teaches us that things in space repeat themselves while things in time do not. Conduct, which is in time, never exactly repeats itself. Each item is to some extent unique. The legal order must find a reasonable, workable balance between the general security, which calls for rules, and the individual life, where, as life is a continual adjustment to change, rules cannot be made detailed enough nor enacted fast enough to do the work demanded of them. Where the law has to do with interests of substance—the economic order—rules in great detail are possible. Where it has to do with interests of personality, it is otherwise. It is possible and convenient to have blank deeds, blank bills of sale, blank promissory notes. Nothing more is called for than to fill in the blank spaces with dates, descriptions and amounts. It is not possible to provide a blank automobile accident. Courts and writers tried in vain in the last century to reduce negligence and contributory negligence to rules analogous to those of the law of property. Such attempts have always proved futile.

(2) A second element is an AUTHORITATIVE TECHNIQUE of finding the grounds of decision of particular cases in the authoritative body of precepts and of developing and applying them. This is the most characteristic and enduring element of a legal system. By way of illustration, two examples of difference of technique between the common law and the modern Roman or civil law will suffice. The common-law judge or lawyer reasons by analogy from judicial decisions but not from statutes. He thinks of judicial decisions as not only giving rules, where there are none in legislation, but as yielding principles to be found by comparison and analysis of cases and by analogical reasoning. He thinks of statutes as yielding only rules for the cases which they cover. He does not look in them for principles or analogies for the cases they do not cover. On the other hand, the civil-law judge and lawyer and law writer look to legislation not only for rules, but also for principles and analogies. They habitually reason from legislation by analogy to new cases not covered by legislation, but never from judicial decision. To them the course of judicial decision may yield a rule for a definite single. situation of fact, but not a principle nor an analogy. Again, in the common law a single decision in the court of ultimate review in a given jurisdiction establishes a rule in that jurisdiction for the situation of fact involved in the decision, and may be the basis of finding a principle for analogous cases. In the civil law, a single decision has no authority beyond the case and the parties thereto. Only a course of decision of the same question in the same way can establish a rule. It will be seen that these items of technique differ from the legal precepts to which they are applied. They do not attach any definite, detailed consequences to any definite, detailed states of fact, nor are they starting points for legal reasoning. They are modes of finding rules and of conducting legal reasoning. They are mental habits—traditional habits governing judicial and juristic craftsmanship.

(3) Third, there is an IDEAL ELEMENT: a body of received, authoritative ideals as to what social control is about, as to the end or ends of the legal order, and so as to the purpose of law and what laws should be and how they should be interpreted and applied. Professional and judicial ideals of the social and legal order are a decisive factor in legal development, since men tend to

do what they think they are doing, and judges to do what they feel they ought to do. Such ideals may be and many such are so generally established, with the weight of authoritative tradition behind them, as to be a form of law in the strictest analytical sense. An example of such received and established ideals is the ideal of a universal law merchant, leading courts to reason as to what such a universal law ought to be instead of giving effect to customs of local business, leading the Supreme Court of the United States formerly to distinguish between rules of property, where it followed local decisions, and questions of commercial law where it laid down one rule for the whole land, and leading more than one court to insist that local decisions on questions of commercial law were not to have the same weight as precedents and decisions on questions of property law. Other examples are the ideal of "American institutions" or "free institutions" so frequently applied by American courts in the fore part of the last century, and the traditional common-law antipathy to monopolies. Such ideals are decisive in choosing starting points for legal reasoning, in choosing from among competing analogies of equal authority, in interpretation, and in application of standards.

3. Relation of Law and Morals

In connection with the ideal element of law we are brought to one of the difficult fundamental questions of the science of law, namely, the relation of law and morals. One difficulty in this question is that both terms are used in more than one sense. We have already seen three uses of the term "law." The term "morals" is used in two senses, one to mean an actual body of ethical custom in some time and place—a body of received precepts as to what is done and what is not done, and, second, a body of speculative or taught propositions, organized on philosophical principles, as to what conduct ought to be. The first might be called "morality," the second, "morals." So the question comes to this: what is the relation of the legal order, of the body of precepts in which are to be found the grounds of judicial decision and administrative determination, and of the judicial and administrative processes, or of all three, to the morality of the time and place and to systems of morals.

There are three ways of looking at this matter: analytical, historical, and philosophical.

From the ANALYTICAL standpoint a sharp line is drawn between the legal precept, recognized and established as an authoritative ground of deciding cases and determining administrative action, and a precept of morality (ethical custom) or a principle of morals, not received or established as a ground of decision, but received as a canon of good or upright conduct in the ethical custom of the public or in systems of morals. For example, it used to be held dishonorable and unworthy of an upright man to plead the statute of limitations, or to plead that a debt was contracted while the debtor was under age. It is perfectly true that where there is a legal precept definitely covering a case, questions of morals are excluded. But this assumes that there is a legal precept definitely covering the case. If there is not, the moral precept is very likely to find itself presently incorporated in the law.

From the HISTORICAL standpoint, ethical custom precedes law. Experience of life develops into ethical customs; men come to recognize certain norms of upright conduct. These are formulated first as "moral laws" or rules of morals. Then legislators take them up and put them in the form of statutes, or jurists work them into legal principles, or courts put them in the form of authoritative grounds of deciding cases. Many examples of this process of development could be cited from legal history. The most striking example in American law is the development of mining law out of the customs of miners on the public domain in the Pacific and Rocky Mountain States at a time when there was no effective legal order there. But this process is not as common, nor as universal, as historical jurists have assumed. For the most part, jurists and courts have worked not so much by turning customs of popular action into legal precepts as by reasoning by analogy, and thus developing customs of judicial action and juristic thinking. There is a tendency to understand, or try to understand, the unknown or little known by the known or better known. Much of legal reasoning is a choice between competing analogies of equal authority, determined by applying the authoritative technique in the light of authoritative ideals. But to a certain extent, greater at some times than at others, custom is formative law.

From a PHILOSOPHICAL standpoint, we start from the proposition that the end of the legal order, and so of law, is justice.

Courts seek to make the authoritative precepts achieve justice and so, from that point of view, the ultimate criterion of the binding force of a legal precept is whether it is a just precept—just in its content and just in its application. If precepts are not in accord with the ideals of justice which prevail in the time and place, they tend to disappear or to be reshaped to those ideals. From the time of the contact of Roman lawyers with Greek phi-

losophers, there has been a theory of "natural law," *i.e.,* of an ideal law, to which positive law ought to conform. This idea, developed by medieval jurist theologians, and later by philosophical jurists, has been a great creative force in legal history. Along with it, there came into our law an idea of the Germanic law in the Middle Ages that there was a fundamental law above the ruling power in society. The king ruled "under God and the law." The English courts used this idea in the seventeenth-century contests between the courts and the crown, and it came into American legal and political thinking. But the most that can be said for it today is that it expresses a traditional ideal which affects choice of starting points for legal reasoning, interpretation of precepts, and application of standards.

4. Points of Contact between Law and Morals

A solution may be found in recognizing four points of contact between law and morals. One such point of contact lies in JUDICIAL DISCRETION, in things left to the personal judgment of judge or tribunal rather than referred to a legal precept. The law, however, fixes the categories of cases which are left to discretion. A court has no power to exercise it except in cases where it is so provided by law. Also discretion must be exercised as such. If, when something is left to the discretion of court or judge, the tribunal acts arbitrarily instead of using discretion, this is called abuse of discretion, and a reviewing court will set its action aside. For example, where a trial judge, having discretion to limit the time for argument to the jury, limited one side in a difficult and important case to five minutes, a new trial was granted. But except for such abuse of discretion, where a matter is left to the discretion of the tribunal, its action will not be reviewed.

A second point of contact is in JUDICIAL FINDING of the law when no precept is at hand directly governing a case to be decided. In certain circumstances, courts have to make, or creatively find, a rule to govern a new case. They cannot make a rule out of whole cloth as the legislature can. They must apply the authoritative technique to the authoritative materials. But, as has been said, there are often two or more possible analogies of equal authority, from which the court must choose the most satisfactory for the starting point of its reasoning. But in what respect "satisfactory"? In a great number of cases the answer must be, morally satisfactory.

A third point of contact of law and morals is in INTERPRETATION, that is, "genuine interpretation," namely, finding out what those who formulated a legal precept meant by it as to some case or state of facts that they had in mind. Here we must look primarily to the literal meaning of the words used. But they may be ambiguous or, if not ambiguous, may not give a "satisfactory" result. Here, again, "satisfactory" frequently means morally satisfactory, and a court must fall back on the intrinsic merit of the possible interpretations in the light of morals. This is especially true in a type of interpretation which requires a court to determine what the lawmaker must be taken to have meant with respect to a question which was not present to his mind; what he would have meant if he had thought of the particular question, as he did not. It may be that the statute is meant to cover the whole subject with which it deals, excluding the traditional law. In that case, if the lawmaker does not think of and provide for some case, yet the courts must decide by the statute. In such cases, the most that can be done is to consider the intrinsic merit of the possible interpretations as instruments of justice.

Finally, there is a point of contact of law and morals in the APPLICATION OF LEGAL STANDARDS. As has been said, such terms as due care, reasonable action, fair conduct, fair competition, involve a certain moral judgment in their application. This often makes application very difficult, and it is here rather than in cases involving rules or principles, that judges are likely to divide in opinion. Standards must be applied by a moral judgment guided by reason in the light of experience.

Chapter II

History of Common Law

1. The Common Law As a System

We use the term common law in four senses:

(1) As distinguished from the "CIVIL LAW" or modem Roman law, it is used to mean the system of law, i.e., the system of authoritative materials for the guidance of judicial and administrative action, which obtains generally in the English-speaking world.

(2) As distinguished from "EQUITY," it is used to mean that part of the system of the common law which grew up in the king's courts at Westminster from the thirteenth to the seventeenth century, in distinction from that part which grew up in the Court of Chancery.

(3) As distinguished from STATUTE LAW, it is used to mean the traditional element in the law of any common-law jurisdiction in contrast with its legislation. Thus the principle that one who acts must act with due care under the circumstances is a principle of the common law; the legislative provision that in case of contributory negligence in injuries to employees of railways in interstate commerce, the negligence of the plaintiff and that of the defendant shall be compared and the recovery shall be abated in proportion, is statute law.

(4) Sometimes, distinguishing the doctrines or precepts of seventeenth-century English law from those of nineteenth-century American law, it is used to refer to the old historical element which came over (in legal theory, at least) in the colonial regime. Thus, in some states legislation provides that the common law of England as it stood in the first year of James I shall be the rule of decision. Where the common law is made the rule of decision without any such limitation, it means the COMMON LAW AS A SYSTEM.

In the following pages, unless otherwise specified, the term will be used to mean the system of law which is behind the legal institutions and the laws of English-speaking lands.

There are two great systems or traditions of law in the modern world: the modern Roman or civil law and English or common law. (a) The modern Roman law, as its name indicates, is built on the law of Rome. Roman law, beginning as the law of the city of Rome, became the law of the Roman empire, and so of the ancient world. It began to be studied in the Italian universities in the twelfth century, and in the form it got in the universities became the modern Roman law, and eventually by absorption or reception, from the twelfth to the eighteenth century, became the law of continental Europe. It is now the foundation or a principal ingredient of the law in continental Europe, including Turkey, in Scotland, in Central and South America, in Quebec and Louisiana, in South Africa, in Ceylon, and in all Spanish, Portuguese or Dutch colonies or

lands settled by these peoples. (b) The common law, Germanic (i.e., non-Roman) in origin, was developed by the English courts from the thirteenth to the nineteenth century, and has spread over the world with the English race. It now prevails in England, Ireland, the United States except Louisiana, Canada except Quebec, Australasia, India except as to Hindus and Mohammedans with respect to inheritance and family law, and the principal British colonies except Ceylon and a few which had been colonized by the French. In general it may be said that the civil law is a law of the universities; its oracles are law teachers and commentators. The common law is a law of the courts; its oracles are judges.

2. English Law before the Norman Conquest

One of the elements that went into the making of the common law was a substratum of Germanic law—the law of the Germanic peoples who invaded the Roman empire in the earlier Middle Ages. Much is known about this Germanic law, but it need not be gone into here. The significant history of the common law as a system begins in the thirteenth century with the establishment of the common-law courts in the form they kept for centuries. A brief survey of English law before the Conquest (or Anglo-Saxon law, as it is called) and of the development of royal justice down to the thirteenth century will suffice.

(1) END OF PRIMITIVE LAW. Anglo-Saxon law was of the type we call primitive law. Primitive law and modem or developed law differ fundamentally with respect to the object they seek to attain. Modern law seeks for its immediate end the administration of justice. Primitive law seeks for its immediate end the preservation of the peace. Modern law seeks to satisfy the desire for justice. Primitive law seeks to satisfy the desire for revenge. Hence primitive law aims only at restraining private war and preserving order. Modern law suppresses revenge. Primitive law buys off revenge.

In primitive law, the help of politically organized society, in general, is extended at first only to prevent the wrongdoer from interfering with self-redress by the injured party. Later, as the state becomes stronger (as against kin groups or religious organization of society or both), it begins to take a more active part in order to prevent a general disturbance of the peace of the community by the blood feud and to keep self-help within bounds. Other tasks of social control are left to other agencies—to religion and kin discipline or the public opinion of one's kinsmen or of his brethren in some guild or in some primitive brotherhood. Very generally in Western Europe in the earlier Middle Ages, matters other than keeping the peace were taken in hand by the bishop in what became the courts of the church. But the church was not well organized as yet in Anglo-Saxon England, and the area of legal action was very narrow.

(2) MEANS OF ATTAINMENT OF END. A primitive legal order seeks to attain its end in three ways:

(*a*) By regulating private war. For example, the decree of the Diet of the Empire at Nurnberg (1187) required three days' notice before one prosecuted a feud against a wrongdoer. The Anglo-Saxon laws contain many provisions against proceeding by distress (i.e., by seizing the goods of the wrongdoer to put pressure on him to make amends) or by other forms of self-redress without demanding justice of the wrongdoer or obtaining the leave of the gemot (i.e., the assembly of the freemen of the county, or of the hundred, as the case might be). Again, the decree of the Truce of God of the Emperor Henry IV (1085) ordains that there shall be peace from Thursday to the end of Sunday and also on holy days. On such days no feud could be prosecuted; all feuds were suspended. Even a siege of a house or castle must be suspended to the extent that there could only be a blockade on those days. In the same way, in Alfred's Laws (892-3 A.D.) there is a provision as to the man who is "home-sitting." Where one's adversary, i.e., one who has wronged him and will not do justice, keeps to his home, one must give him notice and blockade him seven days in order to starve him out before making an assault on the house. The Germanic law was largely built around this institution of the peace, this regulation of private war. As we shall see in another connection, it had a large development in Anglo-Saxon law. The common law grew by extending the idea of the king's peace, the idea that certain peaces were under the protection of the king, who was affronted if his peace was violated. In that way the king's courts got a general jurisdiction over wrongs.

(*b*) A second means by which a primitive legal order attains its end of keeping the peace is by satisfying or endeavoring to satisfy the desire of the injured party for vengeance. The desire for vengeance is primitive and deep-rooted. The blood feud is a staple phenomenon of primitive society. As a legal order develops, the injured party is required to accept a composition for his vengeance, and is prevented from helping himself. The next step is to enable him to compel payment of the composition—to compel the wrongdoer

to buy off his vengeance. The endeavor to satisfy the individual desire for vengeance is the first step toward a wider conception of the end of the legal order. It is the first step toward recognition of an end beyond mere keeping of the peace. It is a step toward thinking of the peaceable ordering of men as but a means toward some end, the achievement of which involves the securing of peace and order.

(*c*) The third means by which a primitive legal order attains its end of keeping the peace is by affording some purely mechanical mode of trial which will obviate all disputes. A rational mode of trial, a debate, would very likely end in blows and result in exactly what the law was trying to prevent. Kipling puts into the mouth of a Punjabi farmer the difficulty as a primitive society sees it:

"A good stick is a good argument." It was necessary to resort to some absolutely mechanical mode of trial which could give rise to no disputes and could not be suspected of partiality.

(3) CHARACTERISTICS OF PRIMITIVE LAW. There are six general characteristics of primitive law which we may observe in Anglo-Saxon law:

(*a*) It was customary in origin (i.e., not legislative), and when written was a compilation of custom, with amendments in the later compilations only where, by the union of kingdoms, conflicting or differing customs of different groups or localities had to be reconciled. Thus in the Prologue to Alfred's Laws (his kingdom was a merger of older kingdoms), after explaining that he had found some such situations which had compelled him to make a choice, he adds: "I durst not set down much of my own."

(*b*) It is formal to a high degree. This is the most striking and universal characteristic of primitive law.

(*c*) It had but feebly developed sanction or executive power. The idea of sanction is wider than that of punishment. Punishment is an early and crude form of sanction, proceeding from a deep-seated human behavior tendency to hurt some one when something goes wrong. Gradually men learned better methods for civil wrongs: substituted redress, a money equivalent to get for a party what he ought to have or to repair the wrong, and specific redress, making the wrongdoer do what he ought to do or undo what he did wrongfully. Anglo-Saxon law had no effective apparatus for such things. It had no way of compelling a wrongdoer to come before a tribunal. The injured party had to bring pressure upon him by seizing his cattle or other property, and holding it till he did justice or came into court. The injured party had to get leave to do this, and the law sought to prevent the wrongdoer from interfering with his doing it.
But there was no official coercing him to come in. So with the judgment of the tribunal. No officials executed it. The party had to enforce it himself, and the judgment was his warrant for self-help. All that the law did was to try to prevent the judgment defendant from hindering him. There are remnants of this in our law to this day. In executing a judgment the sheriff is the agent of the judgment plaintiff. The latter must employ the sheriff to enforce the judgment. But the sheriff does it as his agent.

(*d*) It is limited in scope, dealing mostly with violent wrongs to person and property. The Anglo-Saxon laws are made up of four types of provisions: (*a*) detailed regulations as to self-help; (*b*) exact provisions for the special cases in which one may appeal for justice to the assembly of free men or to the king; (*c*) a tariff of compositions which the injured party must take for the wrongs specified and which he can compel the wrongdoer to pay—going into the most minute detail; and (*d*) often another tariff of penalties which the king may exact in order to buy off the king's vengeance for the affront to his dignity involved in certain wrongs. There is a remnant of this today in the fine imposed in a prosecution for a misdemeanor. The old books call it "ransom." It was a compromise with a king; a buying off of the king's vengeance. So the fine is historically a compromise with the state, a buying off of the state's vengeance, a making peace with the government for a misdemeanor by paying a sum of money.

(*e*) The measure of what an injured party may recover is not the extent of the injury done him, but the extent of the desire for vengeance awakened by the injury. The idea is not reparation but composition. Hence the Laws of Ethelbert (about 600 A.D.) provide for 50 per cent more composition where a bruise, even if much less severe, is not covered by the clothes than where one, even much more severe, is covered and so not visible to give rise to embarrassing questions derogatory to the victim's dignity.

(f) Largely the kindred is the unit rather than the individual man as in modern times. Thus the Laws of Ethelred (about 1000 A.D.) provide that if murder is committed in a walled town the burghers are to go and get the murderers "or their nearest kinsmen, head for head."

(4) ANGLO-SAXON TRIBUNALS. In the Anglo-Saxon polity the tribunals combined all the powers of government with little differentiation. There were no lawyers and no judges in any modern sense. The courts were open air assemblies of freemen. There were no records. The proceedings were preserved in the memory of the freemen, who were bound to attend. But a successful litigant might get leave of the tribunal to record the proceedings- i.e., a story of them—and the judgment in a "church book," that is, in the chronicle of some monastery. The tribunals were: (1) The hundred moot (*gemot*)- an assembly of the freemen of the hundred, held monthly; (2) the county court—an assembly of the freemen of the county, held twice yearly and presided over by the earl and the bishop. In addition, the king granted franchises to landlords to hold private courts or "hall moots" and exercise jurisdiction over their tenants in competition with the hundred moots. But small landlords also held petty courts on their estates. it is not known how this jurisdiction grew up. However, the Middle Ages confused *dominium* with *imperium*, ownership with jurisdiction.

3. Development of the Common Law

(1) THE KING'S PEACE. A great change came with the Norman Conquest, which made possible the development of an English law in the king's courts, whereas in the rest of Europe the Germanic law was not able to develop to the exigencies of social and economic progress, and so the modern Roman law, as developed in the universities from the twelfth century, was received and supplanted it. The kings before the Conquest had only been able to maintain a relatively feeble government. The Anglo-Saxon laws are full of exhortations to the people, as good Christians, to keep the peace better than they were wont. They are full of complaints that the peace is not kept and that masterful and stiff-necked kindred are wont to stand up in defense of a thief- i.e., to fight for him when it is sought to proceed against him. Only occasionally docs the king cease to exhort, and instead make a threat of personal intervention to deal with the thief or put down disorder.

For nearly twenty years before the Conquest, William, Duke of Normandy, had been at work imposing a measure of discipline upon the barons who held of him, developing a good central financial organization, and working out an efficient government for his duchy. As king of England, he had the experience and the strength of character and the will to perform the greater task of organizing a strong central government in his realm. He systematized administration and brought in orderly government and a vigorous insistence on the rights of the crown. Through the great survey known as Domesday Book, he established the crown as the ultimate landlord. All land was held mediately or immediately of the crown. Thus he made England "the most perfectly organized feudal state in Europe." The land law could develop on a sure foundation and grow into a great body of common law. Yet he continued the old English laws and customs except as to the rights of the crown, and simply provided efficient administration. Under the strong central government of the Norman kings, the royal administration of justice grew strong. Out of this grew the king's courts of justice, and in them developed the common law.

1. *Extension of the King's Jurisdiction*. A chief agency by which the king's tribunals got the jurisdiction which had been exercised by the county and hundred courts and prevailed over the local courts of landlords (aside from better judges and better modes of trial) was extension of the king's peace. This extension had gone a long way already in Anglo-Saxon times. There were three ways in which the developing political organization of society extended its authority. One was by restricting the sphere of self-redress, as has been seen. Another was by differentiating classes of wrongs. In some cases it was required that composition be accepted. In some cases the sanction of outlawry was added. The wrongdoer was proclaimed to be outside the protection of the law. In other cases, the law took the whole matter in hand. A third was by the truce or peace—exemption of certain places or times or persons from the feud so that neither the individual nor his kindred might do any violence there, then, or to them, without affront to the authority whose peace was infringed.

II. *Truce or Peace in Anglo-Saxon Law*. A bare outline of the truce or peace in Anglo-Saxon law must suffice:

(1) One form is the church peace. There was to be no violence and no prosecution of a feud in the church or in its precinct.

(2) Another is the *house peace*. Every one was to be secure against force and violence and against prosecution of a feud in his house; he and his household. This sanctity of the dwelling has continued in the common law. The saying is that an Englishman's house is his castle. The common law will not allow breaking in even by officers of the law to serve writs in civil

cases, and only after warning in case of felony or misdemeanor amounting to breach of the peace in criminal cases, and it safeguards against search of the house by officers of the law by requiring warrants issued by magistrates upon showing of probable cause under oath. This protection goes far beyond what is accorded outside the common-law world.

(3) Another is the *peace of public places and assemblies*, what the writers on the Germanic law used to call conveniently the folk peace (but the term is not in the sources) because this group of peaces was under the protection of the assembly of freemen. There are many forms.

(*a*) One form was the peace of the *gemot*. Every one was to be free from molestation going to, coming from, and while at the gemot.

(*b*) Another was the gathering of the army. When the king called the people to turn out in arms for defense of the realm, all feuds were suspended.

(*c*) Another was the peace of the market. The market was held in a stated place at stated times and every one was to be free to go to and come from it without molestation.

(*d*) Still another was the peace of the forest, where men were free to hunt and to gather wood. The feud was not to be prosecuted there, nor were violent wrongs to be done there.

(*e*) Another form was the peace of the great festivals. Very likely in pagan times there was a peace of such festivals. Every one was to be free to perform his duty to the gods on these occasions. In Christian times this became a peace of the great festivals of the church. There was to be no violence at Christmas, Easter, or Whitsunday.

(*f*) Also there was the peace of the walled town where the folk took refuge in case of armed invasion. At such times every one there was to be free from molestation.

(4) Historically, the most important was the king's peace. This took many forms. (*a*) In its oldest and simplest form this was the peace of the king's person and his presence. No violence was to be offered to him and none was to be done in his presence. (*b*) Also it extended to his house, (*c*) to the time of his coronation, and (*d*) to his servants, or as we should say, his ministers. Violence to them was an affront to the king. This was extended to persons specially taken under his protection. The king publicly took a person by the hand and declared the person to be under his protection. In the same way, a whole class of persons might be taken under the king's protection. For example, during the Danish rule all Danes were put under the peace of the king. If any one killed or wronged a Dane it was an affront to the king. (*e*) Also it was extended to the roads. There were four great roads which had come down from Roman times and along with the rivers were the avenues of trade and of moving the army for defense of the realm. The king took these old Roman roads under his special protection. The feud was not to be prosecuted on them, and they were to be free from violence. From these the king's peace was gradually extended to roads from the king's city or borough, from the walled town where his subjects took refuge, to all military roads, the roads by which the king moved his army, and at length to all highways. Any violence on any highway was an affront to the king. There is a reminder of this in the phrase "king's highway," which has remained in use. (*f*) Also the king's peace was extended over the chief waterways.

III. *Absorption of Other Forms of the King's Peace*. Finally, as it is said, the other peaces were absorbed in the king's peace, i.e., he took them over, so that his peace was over the whole kingdom, and everyone but the outlaw was said to be in the king's peace. There is a reminder of this today in the conclusion of an indictment: in England, "against the peace of our sovereign Lord the King, his crown and dignity"; in the United States, "against the peace and dignity of the State of ," or whatever style of describing the state the local constitution prescribes. There is a remnant also in the common law as to jurisdiction over crimes. Only that state has jurisdiction whose peace has been broken by the criminal act taking effect within its domain. It has taken legislation in recent times to bring in ideas of personal jurisdiction of the state over its citizens wherever they act, and jurisdiction in the courts of an injured state no matter where the act working the injury was done.

Whenever there had been a breach of the king's peace, it was for the king to vindicate his dignity and so later his courts had jurisdiction. This came to mean that they had jurisdiction over all violent wrongs, and this meant all cases where the cause of action could plausibly be put as such a wrong. Thus, until the forms of action were abolished, the plaintiff in ejectment set up an eviction "with swords, knives, and staves," and in trespass averred that the invasion of his person or property had taken place "with force and arms.

(2) THE KING'S WRIT. As we go back in legal history, there is continually less differentiation of function. It has been said of the Roman king of the period before the republic that he combined the functions of priest, captain of the host, enforcing discipline in time of war and order in time of peace, president of the assembly of the citizens, arbitrator of disputes between the citizens, and leader in the common exertions to put out fires. It was much the same with the Anglo-Saxon king and his successor, the Anglo-Norman king. Executive and judicial functions were not distinguished and creative legislation was not understood and was largely in the future. Indeed, although the genius of Aristotle perceived as a matter of logic the threefold distribution of powers with which we are familiar today, it was not till relatively modern times that the differentiation became at all thoroughgoing.

When the king was applied to for justice, or when he sought to vindicate his authority, or when he required some action to be taken, he sent his writ, i.e., formal letter, to the sheriff, or to some other suitable person, directing what was to be done. The king's writ was used for all purposes connected with the business of government. There was no distinction between the writs in what we should now call judicial proceedings and those used in purely administrative affairs.

There is little difference between the Anglo-Saxon writs and the Anglo-Norman writs. The latter were often the former put into Latin. But the Norman kings made much more use of them. There was a gradual differentiation of the judicial writ, but as a result of its origin as an executive order, it took the form at first of a command to the person addressed to give up something taken from the complaining party, or to pay the sum claimed as owed. What made the cause cognizable in the king's court was the affront to the king in not doing justice, and so defying the king's command. Only if the command was not obeyed was there to be anything in the nature of a legal proceeding. As applications to the king became more frequent, a regular set of writs for judicial proceedings grew up, which were no longer, except in form, executive orders. They were no longer thought of as commands to be obeyed; but rather as the appointed modes of bringing an action in the king's court. The court came to be thought of as having jurisdiction of the case itself, not simply of the affront to the king in not regarding his order.' When Glanvill wrote his treatise "On the Laws and Customs of the Realm of England" (between 1187 and 1189) he was able to systematize his account of the law by organizing it about the writs. He used writs as the basis of his exposition as a writer of today would use the decisions of the courts. The writs became fixed in form, and there came to be a fixed set of them, determining the causes which the courts could deal with, and the scope and course of relief.

Already in Glanvill we can see a distinction growing up between the original writ, which is the foundation of the litigation, the mesne process (to get the party complained of into court), and the writs to govern the procedure pending the cause, and the final writ of execution after judgment. In proceedings in the county court (which went on after the Conquest, but in time found its business more and more taken away by the king's courts till it had only a petty jurisdiction left), and in the courts of the local landlords, the action was begun by a complaint tendered to the tribunal wherein the complaining party set forth his cause of action. In the king's courts, on the other hand, because of the way in which their jurisdiction arose, only the original writ could sustain a legal proceeding, not, as Black-stone tells us, because the judges were only the substitutes of the king, and as such could only take cognizance of what was expressly referred to them, but because affront to the king in not regarding his order was the very basis of the king's jurisdiction.

One obtained a writ by applying to the king's chancellor, who was the king's secretary. Later writs were had by applying to the clerks in chancery. Issuing these writs was a source of royal revenue. Magna Carta made them demandable as of right on payment of the customary fees, since the king promised that he would not sell or deny to any one nor would he delay justice and right.

By the seventeenth century an elaborate system of writs had grown up, corresponding to the actions and proceedings which could be brought in the common-law courts. The requirement of an original writ came to America with the common law and obtained in more than one state down to the present century. But a simpler system of beginning by a summons to appear and answer the statement of the complaining party's case has substantially, if not quite universally, succeeded to it.

(3) STATE LAW AND CHURCH LAW. In establishing the jurisdiction of the king's court, out of which the king's courts at Westminster arose, it was necessary to contend not only with the older tribunals which had come down from before the Conquest, but also with another type of tribunal which was growing strong while the king's court and its jurisdiction were formative. The Christians were taught not to go to law with

each other. In the beginning, they avoided the courts of the state and had recourse to the bishop or overseer of the local flock. Their societies or congregations gradually developed what was to become a system of law depending for its enforcement on excommunication. In time, in the West, the Bishop of Rome obtained pre-eminence over a thoroughly organized universal church. About 500 A.D., a book collecting the canons (or rules of church law promulgated by the councils of the church) included also letters of the Popes from the year 398, after the manner of the letters of the Roman emperors in their capacity of ultimate judges, which at least helped establish a doctrine that the Popes had power to declare the law for the tribunals of the church throughout Christendom. There was another such collection in the seventh century. In the ninth century there was a collection which we now know as the "false decretals," in which, building on the seventh-century collection, there were added some sixty decretals purporting to come from the very earliest of the Popes and thus seeming to show that they had been legislating from the beginning. It looked like, and was accepted as, a compilation of an old established body of universal law postulating the primacy of ecclesiastical power, and the supremacy of the Bishop of Rome. The time was ripe for this. There was no organ of legislation for politically organized society. Local feudal jurisdictions were administering a local customary law. The church was all that made for universality, and so for the uniformity and predictability demanded by a stable economic order. In the tenth century, there began to be manuals of church law, and in the twelfth century about the time when the study of Roman law from the compilations of Justinian had been revived in the Italian universities, Gratian published the *Decretum* which became the foundation of the Body of the Canon Law (*Corpus Juris Canonici*). It was studied and commented on in the universities and was followed by collections of decisions and legislation of the later Popes, making an elaborate body of law, not complete till the beginning of the fourteenth century. The academic theory of the time presupposed a universal church and a universal empire, the one with jurisdiction over things spiritual, and the other with jurisdiction over things temporal, and a fundamental distribution of power accordingly. In the one domain there were the decretals of the Popes, in the other there was the legislation of the Emperor Justinian, compiling the constitutions (*i.e.*, enactments) and rescripts (letters of direction to judges and administrative officials) of the emperors before him, and giving legislative authority to a compilation of extracts from the writings of the classical Roman jurists. The two were studied and commented on side by side in the universities.

Before the Conquest, the church was not thoroughly organized in England. The Normans brought in, along with a strong royal administrative organization, a strong church organization. William I put an end to the bishop's or the archdeacon's sitting in the hundred court to hear cases under the church law, and also provided for giving legal effect to the sentence of excommunication pronounced in the ecclesiastical tribunal. The bishop seems to have continued to administer the canon law in the county courts down to the time of Henry I. But the universal system of church courts became established in England parallel with the growth of the king's court.

Struggles between church and state began in the reign of Henry I (1100—1135) and became acute in the reign of Henry II (1154—1189). In the reign of Henry I there was a strong central administrative machinery, but the sheriffs administered what was substantially Anglo-Saxon law locally according to the old custom. There was no real common law. Nothing could develop during the anarchy of Stephen's reign, but in the meantime the separation of the ecclesiastical courts from the local customary courts brought about by William I had greatly strengthened the church courts since the church now had a well systematized body of developed law and claimed a broad jurisdiction. Two chief difficulties were involved. Often the same persons were amenable to each jurisdiction, and many subjects were within the scope of each. Where a person amenable to each had been tried by one, it was obviously intolerable that he should be tried again for the same thing before the other. The church very properly insisted there should be but one trial and, perhaps naturally, insisted that the one trial should be had in the church courts. The concurrent jurisdiction over the same subjects could only give rise to clashes. Henry II, a strong ruler, insisted upon the supremacy of the lay law in such cases, at least in matters of conduct and lay relations, and in the Constitutions of Clarendon (1164) declared the claims of the king as against the church in what was put as the basis of a compromise. Except as to the punishment of convicted clergymen, the compromise prevailed and questions of property, of debt, and of crime were set off definitely for the courts of the state rather than for those of the church, leaving to the church courts ultimately for the chief subjects of their jurisdiction,

aside from the internal conduct of the church, matrimonial causes, testamentary causes, and administration of estates. But the probated will could not determine the title to real property (indeed, disposition of land by will was not allowed until a statute of Henry VIII) and administration of estates had to do with personal property only. A result of this bit of history is to be seen in the separate probate courts which are common in the United States. In England, the civil jurisdiction of the ecclesiastical courts continued down to 1857 when it was taken away from them by Act of Parliament and conferred on two royal courts, the Court of Probate and the Court for Matrimonial and Divorce Causes. In 1873, these courts were merged in the High Court of Justice established by the Judicature Act, and they are now represented by the Probate, Divorce and Admiralty Division of that court.

As a result of this limitation of ecclesiastical jurisdiction and of the strong royal administration of justice set up by Henry II, development of a body of law adequate to the needs of the kingdom became possible, and with the rise of a system of courts in the next century the history of the common law as such definitely begins.

(4) THE KING'S COURTS. Originally, court means the courtyard of a house. It was in this courtyard that the head of the house met and advised his dependents and transacted the business of the household. The courtyard of the king's house was the place where he received complaints, where those who had need of royal assistance appealed to him, and where a great variety of his daily business was done. Hence the "king's court" meant at first the place where the king lived, attended by his chief officials and his household. It came to mean the center of administration where the government was carried on in all its branches, whether the king was actually there or not. From this a number of derivative meanings arose. The whole body of officials and great personages in attendance on the king came to be called "the court." The Middle Ages spoke of the "High Court of Parliament" and in Massachusetts today the legislature is called the "General Court." Again, diplomatic representatives are said to be received "at the Court of St. James's" (of St. James's Palace), and persons entering into society are said to be "presented at court," court meaning the place where the king meets his councilors, or the legislators, or the ambassadors, or conducts social functions. As a chief part of the king's work came to be judicial, and came to be done in his name by justices appointed for that purpose, the term came to mean a place where justice is administered judicially and thence to mean the body of judges who administer justice in such a place. This became the most important meaning.

Finance is the basic activity of governmental administration. Naturally, the financial administration first developed. The first records are fiscal, and the first law book, the Dialogue on the Exchequer, is somewhat older than Glanvill's "Treatise on the Laws and Customs of the Realm of England" *(De legibus et consuetudinibus regni Angliae),* and shows a more developed organization. Judicial records followed and got their idea from fiscal records, and the common-law courts, as they came to be in the thirteenth century, developed in part from the judicial side of the king's court where all his business was done, and in part from the financial side of that court.

One feature of administration was the chancery, "a great secretarial bureau" headed by the chancellor, who was the king's "secretary of state for all departments." But it is not till long afterwards that chancery becomes a court. On its legal side, it is the bureau from which litigants obtain the writs by which causes are brought before the courts.

Many things contributed to develop royal justice in place of local justice. In the first place, one might go to the king's court when justice was not to be had elsewhere. A litigant whose case would ordinarily take him to the court of a lord, might go to the king at the outset and obtain a writ ordering the defendant (in modern speech) to do justice to the applicant in the lord's court, on pain of having the cause removed ultimately to the king's court. Again, Henry II provided that persons unjustly deprived of the possession of land were not to help themselves but were to bring a possessory proceeding in the king's court, in which one deprived of his possession (disseised) is to be put back in possession without regard to his title. Thus the king took possession of land (seisin) under his protection. No one was to be disseised (put out of land of which he was in possession under claim of title) without the judgment of the king's court. He also provided that in an action for land in his court the party in possession could put himself on *(i.e.,* submit his case to) the oath of twelve neighbors sworn to declare who had the better title, and, it seems, he required that no action for freehold land *(i.e.,* land held for life or to one and his heirs) should be brought in the court of the lord of a manor without a writ directing the lord to do justice and threatening removal to the king's court if he did not. More than this, the king freely sold writs ordering parties

to do this or that, so that, although the original case was not in royal jurisdiction, the contempt of the party in disobeying it was; and thus all manner of cases were taken over. Too much use of this type of writ, depriving lords who held courts of their rightful revenues, was one of the grievances of the barons and led to a provision in Magna Carta restraining it. But the king's courts, by using the possessory actions to try title, got around the check. Finally, the idea of the king's peace served to give the king's courts jurisdiction over cases which could be referred to or put on the analogy of trespass.

Soon after the reign of Henry II, the king's court begins to split into two departments, one having to do with breaches of the peace, and so with crimes and wrongs of every sort, and one with recovery of land and recovery of debts, which seems to have been regarded originally as recovery of property. But whether the second was a differentiation immediately in the king's court, or grew out of a practice of sending officers of the Exchequer about the kingdom to hold common pleas, is in dispute. At any rate, the first class of cases was said to be heard before the king in person, and the king actually decided cases, though less frequently, till the practice had stopped by the fifteenth century, and in the seventeenth century the judges of England laid down that the king could not sit in person in the court of King's Bench, though in theory that court was held before him. The second class of cases were called common pleas. The former court followed the king about wherever war or administration might call him. Magna Carta (1215) provided that "common pleas shall not follow our person but shall be holden in some place certain."

In the reign of Edward I the two tribunals became three. The old court before the king in person becomes, on the one hand, the court of Parliament, and, on the other hand, the court of King's Bench. In the fourteenth century, the Exchequer, the financial side of the old king's court, developed a court with a general civil jurisdiction by the fiction that the plaintiff, who wished to sue for a debt or an injury, was debtor to the king, so that unless he could recover what was due him, he would be less able to meet his indebtedness to the crown. But the court of Exchequer did not attain equal dignity with the King's Bench and the Common Pleas till the Tudor period.

Thus there came to be three superior courts at Westminster, the court of King's Bench, the court of Common Pleas, and the court of Exchequer, with an ultimate jurisdiction over them in Parliament (which proved to mean the House of Lords). Originally, the three superior courts had each a distinct jurisdiction. But each extended its jurisdiction by means of a fiction, and in time they came to have concurrently complete common-law jurisdiction, except that prerogative writs *(e.g., mandamus,* to compel performance of a duty owing to the public, and *quo warranto,* to inquire by what title one held an office or exercised a franchise) issued only from the King's Bench. Also the Exchequer had an equity jurisdiction which did not belong to the other two.

At the time of the American Revolution the common-law judicial organization was:

Courts of original jurisdiction—King's Bench, Common Pleas, Exchequer. In the King's Bench there was a Lord Chief Justice and there were three justices; in the Common Pleas, a Lord Chief Justice and three justices; and in the Exchequer, a Lord Chief Baron and three barons. The judges of these three courts were called the twelve judges of England.

Courts of appellate jurisdiction—the King's Bench over the Common Pleas until 1830. The Exchequer Chamber over the Court of Exchequer after an act of 1357, and over the King's Bench by a statute of 1585. In 1830, this court was given jurisdiction to review judgments of the Common Pleas. The House of Lords over the King's Bench and the Exchequer Chamber.

This appellate jurisdiction was exercised at common law only by a writ of error, requiring the parchment record of the judgment and proceedings leading up to it to be sent up, and examination of that record to ascertain whether there was any error of law apparent upon its face.

In 1873, the superior courts were merged by the Judicature Act in the High Court of Justice, where their jurisdiction is now in the King's Bench Division. By this, and the Appellate Jurisdiction Act (1876), appellate jurisdiction is in the Court of Appeal, which with the High Court, is a branch of the Supreme Court of Judicature, and ultimately in the House of Lords. Until the nineteenth century, all the peers might and many lay peers did sit on writs of error. But in 1841, the practice became settled that only peers who held or had held high judicial office should sit, and by the Appellate Jurisdiction Act provision is made for Lords of Appeal in Ordinary who are peers for life and are required to attend when the House is engaged in judicial business. Thus there is, in effect, a court distinct from the legislative body.

(5) THE LEGAL PROFESSION. Law, in the sense of a developed body of authoritative precepts for the guidance of judicial and administrative determinations, requires lawyers. One may say with entire truth that there is no

developed law, no systematic social control in a developed politically organized society, without lawyers. Law, as we know it, begins with lawyers. It begins when the tradition of conduct of transactions, decision of causes, and advising parties to controversies passes into the hands of a specialized profession. At Rome, a turning point is reached when the traditional formulas of actions are divulged, and when somewhat later, the first plebeian Pontifex Maximus begins to give consultations in public so that students can attend and take notes, and so teaching of law and a body of taught lawyers begin. Modern law of Continental Europe begins when Roman law became the rival of the law of the church, and presently set itself free from clerical control as lawyers came to be trained in the universities. In England, development of lawyers followed hard on the development of courts, and the common law resulted.

Justice according to law is justice administered by lawyer-judges aided by lawyer-advocates. The advocate is an indispensable part of a court in developed law.

There are four types of lawyer as we see it now: the agent for litigation, the advocate, the counselor or adviser, and the conveyancer or draftsman of documents. These distinctions go back a long way in legal history. In the Roman law there is the procurator (the agent for litigation), the advocate or orator (who tried the case for his client in the forum), the jurisconsult (a counselor, a teacher and writer of law books, who gave advice and expert opinions on the law), and later the notary, who drafted documents. At Rome, the agent for litigation, the advocate, and the counselor, were the important types. The drafting of documents in Cicero's time was part of the work of the jurisconsult. In England, the functions of advocate, counselor and conveyancer are combined, although there is usually a practical specialization. In America, there is no formal distinction, all functions king admitted to an attorney and counselor at law. But with us, there is often a specialization in practice. For our present purpose, the two significant types are the agent for litigation, at common law called attorney at law (now called solicitor in England), and the counselor at law (now called barrister in England). The agent for litigation represents his client. The client deals directly with him. He prepares the case, and has general charge of it as the client's agent. The advocate tries the case. He appears in court to make and argue applications, and to conduct the proceedings in the forum. In consequence, the typical distinctions are—A by B, his attorney, or A, attorney for B, and A "of counsel with" the plaintiff or the defendant.

In England, a legal profession was formative in the reign of Edward I. The courts were now well established. Their formative period was from Henry III to Edward I. The formative period of the legal profession was from Edward I to Henry VI. In the reign of Edward I, we find a body of lawyers in two branches, attorneys and pleaders, the latter called *narratores,* counters *(conteurs),* or serjeantcounters. The distinction was that between the agent for litigation and the advocate, which goes back to antiquity. One appears either in person or by attorney. If he appears by attorney, the attorney represents him. But the advocate is not a substitute for the party. If one has the assistance of an advocate, the latter does not represent him. The party is present by himself or by his attorney, and his advocate supports the case by his learning, ingenuity and zeal.

The beginnings of law regard representation in litigation as something exceptional. In all systems it develops slowly. This was quite as true in the Germanic law. The law of the Franks allowed only the king to appear by attorney. As at Rome originally, so in England, the appointment of an attorney was thought of as something solemn and unusual, only to be allowed on special grounds, and with the proper formality of a power of attorney. On the other hand, the appointment of a pleader was not a formal matter. It was only gradually in the development of the common law that the attorney was allowed to take the place of his client, and represent him for all purposes. At first, for example, he could not make admissions binding his client. But after the thirteenth century, the distinction between the pleaders (who later become the serjeants) and the attorneys, had come to be established, although until the fifteenth century the same person might act as apprentice *(i.e.,* student under a serjeant and on the way to become one) and attorney.

Development of the legal profession took place under the influence of the church courts, and so of the Roman tradition as against that of the Germanic law. In the thirteenth century, many professed both the canon and the civil law. Many practiced both in the common-law courts and in the ecclesiastical courts. Many who practiced only in the common-law courts were under orders. But in the thirteenth century, the church began to discourage the clergy from practicing, and the Fifth Lateran Council (1512-17) forbade their acting as advocates in the secular courts. In 1237, the advocates in the ecclesiastical courts were subjected to regulations, and these seem to have furnished the

model for regulating the pleaders in the king's courts. All through the thirteenth century there are references to them, and the Year Books (reports of cases decided in the courts) show a small group of men acting in all the cases. The earlier Year Books cite their opinions on a par with those of the judges, and Parliament calls for their opinions on the same basis. In the second half of that century, we begin to hear of serjeant and apprentice, the latter being trained by the serjeant. They came to be the barristers of today.

Already in the time of Henry III, while clergymen were still on the bench, it began to be recruited from the lay lawyers. In the time of Edward III, the proportion was eleven lawyers to nine clergymen; but it became settled in the fourteenth century that the judges were to be lay lawyers and serjeants. By the time of Fortescue (time of Henry VI), whose account of the medieval profession is classical, the development was complete. The legal profession was formed and organized.

As organized at the end of the Middle Ages, in the first rank were the serjeants, a close guild, selected by the crown on the nomination of the justices, from which the justices had come to be taken. Fortescue compares them to the doctors of the civil law, who alone were eligible to be advocates in the ecclesiastical courts. They were often made itinerant justices, and were regarded as already members of the Common Pleas. They must have been practicing at least sixteen years. They were created by letters patent, and were paid a fixed salary by the crown, doing some of the work now done by the law officers of the crown, the attorney-general, and the solicitor-general. They had a monopoly of practice in the Common Pleas, and could also practice in the other courts and before the Chancellor. They seem to have dealt directly with their clients, whereas a barrister today is retained by and deals only with a solicitor.

In the second rank were the apprentices, organized, not as a whole, but in four Inns of Court and ten lesser Inns of Chancery. The four Inns of Court flourish to this day, and now, as then, admission to the bar is in their hands. Call to the bar is call to the bar of an Inn. Also the training and discipline of the upper branch of the profession is in the hands of these societies. These medieval corporations, whose origin is unknown, but which are known from the fourteenth century, were self-governing, self-perpetuating bodies with powers of education, discipline and government very like those of the Fellows of a College at Oxford or Cambridge. There were three grades of membership: (a) the benchers or readers *(i.e.,* lecturers), those who had publicly lectured in the Inn. They ruled the society. The serjeants were chosen from them. *(b)* The utter *(i.e.,* outer) barristers, said to be "such that for learning and continuance are called by the said readers to plead and argue doubtful cases" in the moots. The benchers were chosen from these, one a year to lecture in the Inn, who was then called a "reader," and a certain number for the Inns of Chancery attached to the house. *(c)* The inner barristers, the youngest members of the society who were not yet ready to argue in the moots, were not called to the bar of the Inn, but could sit beside the utter banisters and recite the pleadings by way of exercise. The training consisted of three parts, lectures, the moots (argument of moot cases), and taking notes in court, and was elaborately organized.

It was in large part this elaborate educational organization, whereby the law of the courts was made into a well-systematized taught tradition, which enabled the common law to resist the onward march of the modern Roman law in the progress of the reception in the sixteenth century.

The organization which obtained in the eighteenth and nineteenth centuries was brought about by changes at each end of the medieval profession. At the top, the law officers of the crown, the attorney-general and solicitor-general (officials dating from Tudor times), came to be the leaders, and the king's counsel (barristers appointed specially to represent the king, but coming to be simply officially designated leaders) arose to contest the pre-eminence of the serjeants, who disappeared during the nineteenth century. At the bottom, there comes to be an increasingly sharp line between the attorneys and the barristers.

To begin at the bottom, as the idea that representation by an attorney was an exceptional privilege gave way in the fourteenth century, legislation began to separate the agent for litigation from other agents. The term "attorney" originally means agent. The agent for litigation came to be subject to control by the courts, and was beginning to be regarded as an officer of the courts. For a time, he might even have the advantage of training in the Inns of Court, or in an Inn of Chancery, and might be an apprentice and so might plead for his clients. As late as the seventeenth century, an attorney might be heard in court from the side bar, and in that century, the older barristers dealt with their clients directly instead of through the medium of an attorney. In other words, at the era of colonization, it seemed that the two branches of the profes-

sion might fuse, as they did in the United States and in Canada. But in seventeenth-century England the distinction was made sharp and definite and became settled. The attorneys were admitted directly by the court where they sought to practice, and were carried on its roll; the barristers were called to the bar of their Inns, and on this basis were received by the courts as qualified practitioners. Discipline of attorneys was in the hands of the courts; discipline of a barrister was under the control of the Inn which had called him to the bar. The Inns of Court ceased to admit attorneys as students, and so they had an apprentice training and were recruited from clerks, while, the barristers were drawn from persons of means and education. The change in the function of the jury from witness-triers to triers of fact, and the substitution of written for the old oral pleadings, made advocacy important, and made pleading a secondary matter. Hence, the training of the barristers tended toward moots and discussions and reading the reports and noting decisions in court, while the education of the attorney tended toward practical preparation of the materials with which the barrister was to work. Accordingly, the barrister (a term used first for the utter barristers, but in general use in the seventeenth century) ceased to have direct contact with the client. The attorney retained him, not the client. The attorney prepared the pleadings with the help of counsel in cases of difficulty; the barrister argued or tried the case on the basis of the pleadings. From the end of the seventeenth century, while an attorney had a legal claim for his fee, the barrister had not. The latter's fee is not a sum due on contract, but a gift or honorarium.

In America, we took the lower branch of the profession for the model in a fused profession. Like the attorneys in England, the American lawyers were unorganized. But the solicitors (as they are now called in England, that being the name given to the agents for litigation in the Court of Chancery) became organized in the last century, and the lawyers are coming to be organized in state bars in an increasing number of states in America.

(6) THE CUSTOM OF THE REALM. When the king's courts came to administer justice over and for the whole kingdom, they purported to administer a general customary law. The Germanic law in contrast with the codified Roman law known to the later Middle Ages, was customary, and when put in written form was declaratory of custom, not a product of legislation. Primitive man fears to do anything otherwise than in the customary way, lest he offend the gods. If some course of action has been pursued without offending them, it is to be adhered to, and thus becomes customary. The Germanic law of the Middle Ages was close to such modes of thought. Custom seemed to have a certain intrinsic sanctity. If there was a court with power to administer justice, there must be customs to guide decision. If they were not at hand in some authoritative compilation, they must be found. The king's courts conceived of themselves as administering the custom of the whole kingdom, or the common custom or the common law of England. But there was in fact no such general body of custom common to all England- certainly not on many matters upon which the courts had to pass. Glanvill tells us in his preface that "to reduce in every instance the laws and constitutions of the realm into writing would be, in our times, absolutely impossible, as well on account of the ignorance of writers as of the confused multiplicity of the laws." What this means is that at that time no one -knew what the custom was on many points, because custom did not mean merely custom of popular action, which, of course, did not exist as to much which had to be decided, but a rule of right and law, which was yet to be ascertained. Moreover, so far as there were customs of popular action and traditions of decision, they were local rather than general. A system of general "customs" had to be worked out from them or to supersede them. From the beginning, the common law has been spoken of as a body of customary law—as the common custom of England. All that this means is that it was traditional, not legislative, in form. As it arose in the courts, it is a body of customary modes of decision, not a body of customary modes of popular action. Nor, as a general thing, do the customary modes of decision formulate customary modes of popular action. There are cases, such as the incorporation of the custom of merchants in the common law, or the incorporation of the custom of miners on the public domain in our American mining law, where such a transmutation of customs of popular action into law has taken place. Speaking generally, however, it is rather analogical reasoning from decided cases to new ones that has shaped and given content to the custom of decision. But it was the belief that judicial decision was ascertaining and declaring the established custom of the land that made it possible for this custom of decision to establish itself as the law.

(7) PRECEDENTS AND CASE LAW. As has been seen, as a result of the Norman Conquest and establishment of a vigorous royal government, England got a strong central tribunal with gen-

eral jurisdiction before such a tribunal developed elsewhere. When this tribunal, or as it soon be-came, this set of tribunals, became established, the steady and systematic exposition and reception of Roman law on the Continent had not gone far enough to impose that system upon England. Later, when Roman law had been received elsewhere, through doctors of the civil law sitting as assessors or advisers to judges, or from the setting up of courts of appeal manned by doctors of the civil law trained in the universities, England, where the justices were taken from a bar trained, not in the universities, but in the Inns of Court, had a taught body of general law of her own, strong enough to hold the ground. This was achieved through the practice of courts in following their past decisions in like cases, in looking to their past decisions for the principles to be applied when new situations called for decision, and in using their past decisions by way of analogy in developing the law. Elsewhere in Europe the Roman law came to be used for such purposes. In England, the courts called upon to administer a non-existent common law of the realm, made such a law through regarding their past decisions as not merely decisions of the particular cases then before the court, but as solemn ascertainments of the law as well.

In the reign of Henry III, Henry of Bracton, a justice of the Common Pleas, kept a note book of the judgments rendered which has come down to us as our earliest collection of precedents. Afterwards, lawyers or students began to take notes of the arguments of counsel, and the reasons given by the justices for their decisions, and we have a substantially unbroken line of what look like reports of decisions from the reign of Edward I to the present. Those down to the time of Henry VIII (MSS., but many printed in the sixteenth and seventeenth centuries, and now being edited and published with all the resources of modern historical scholarship) are called Year Books. Just what these Year Books were and who wrote or compiled them, we do not know. They may have begun as collections of notes to compendia of procedure, and later have become something like professional newspapers. By the sixteenth century when they begin to be printed from the MSS., they certainly seem to serve the purposes of reports. At any rate, they give us, along with other things, a fairly continuous picture of the course of judicial decision from the thirteenth to the sixteenth century. For the sixteenth and seventeenth centuries, we have notes taken in court by lawyers, afterwards published as reports. In the eighteenth century, reporting decisions became a regular business of certain members of the bar who devoted themselves to it, and there came to be a recognized series of reports for each court. This continued down to 1865. Then the bar took the matter in hand, on account of the duplication and expense involved, and put reporting under the control of an Incorporated Council of Law Reporting for England and Wales, in which the profession and the bench co-operate to make the reports subserve the ends of the law and of the public, without imposing on lawyers or public the burden of profit to private enterprise.

In America, the first reports are notes taken in court by eminent lawyers and published by them or by others from their note books after their death. Later, judges often published reports of the decisions of their courts. The states, however, soon took charge of the matter, and in the case of all our courts of appellate jurisdiction, except the Federal Circuit Courts of Appeals, there are official reporters who are public officers and have for their duty to report judicial decisions for the information of the public.

There was a long development of our technique of finding the grounds of decision of particular cases in recorded judicial experience. At the beginning of the fourteenth century we find counsel arguing that a decision will fix the law for like cases thereafter, and we find courts in the middle of the century citing prior decisions on points argued before them. In the fifteenth century, we find judges referring to decisions reported in the Year Books, and this becomes the regular thing in the reports of the sixteenth century. In the seventeenth century, the doctrine is well established in detail, and it got its final form in the eighteenth century. As it stands, in England and America, a point of law solemnly decided by a court of ultimate review has become a part of the law, and is held to bind the judges in that jurisdiction in other cases involving the same point, and to bind them to apply the principle behind it in cases where analogy must be resorted to.

Our case law is much more than a matter of habit of decision. It is not that the common-law judges, having done a thing once, found a line of least resistance in doing it again, and then did it many times from force of habit. It is based rather upon the conception that they were bound to apply the customary precept, if one was known, and if one was not known, to find a rule from the principle of known rules. Our courts are held bound to decide every case upon principles of the common law, unless a statute governs, and hence must ascertain, upon the principle of prior

decisions, and announce an applicable rule of the common law. When this rule is thus ascertained by those who alone have the power to do so, it binds the court and all courts inferior to it within its jurisdiction, and has a persuasive authority of more or less weight, depending upon the standing of the court and the cogency of its reasoning, in all other common-law jurisdictions.

In the systems of law which have no such technique, the modern Roman law furnishes the great substratum of principles and doctrines upon which a court may always fall back. With us, the body of case law in the English-speaking world serves this purpose. In some twenty-five thousand volumes of reported decisions, the judges have before them the experience of all common-law tribunals in the decision of actual controversies of almost every conceivable kind. They may see exactly how every rule or principle they are called on to apply has resulted in its practical application in the past. They need take no step in the dark. Much legislative lawmaking is experimental, and many statutes fail for every one that accomplishes its purpose. On the other hand, the persistence and vitality of our judicially ascertained common law in every part of the world bears witness to the soundness of a technique which brings to bear upon each case all the judicial experience of the past.

Moreover, it is a mistake to think of our doctrine of precedents as a "government of the living by the dead." The precedent gives a binding rule only for the exact case, and so long as the exact case repeats itself, assures certainty and uniformity of decision in the jurisdiction in which it was laid down. But as cases arise in other common-law jurisdictions it will be continually re-examined. Study of the reports shows that the life of a rule is seldom more than a generation. At the end of that time, changed conditions raise new questions, or new forms of old questions, and the precedent can no longer do more than provide an analogy, a starting point in the search for a principle whence to derive a new rule for a new time. In every human activity, reason operating upon experience is relied upon in this way.

Knowledge that cases will be decided in the light of judicial decision of like causes in the past, enables a diligent lawyer to set before himself the exact materials from which the court will reach its decision in any particular case, to know exactly how the court will reason with respect to such materials, and to advise his clients with confidence. No amount of legislative detail or precision can compare with this in bringing about certainty and uniformity in the administration of justice.

(8) THE JURY. One of the chief factors in turning the ordinary course of litigation from the local courts into the king's courts, and thus in establishing the common-law system, was the superiority of the mode of trial employed in the latter. As has been said, in order to avoid wrangles and breaches of the peace likely to result from debate and argument, primitive law resorts to crude mechanical devices in order to determine the issues of fact upon which decision must depend. The Germanic law divided all litigation into two stages: an issue term and a trial term. At the issue term the parties stated their contentions. This was done in a very formal way. By applying highly formal rules to these statements, it was determined whether there was anything to try, and if so, what, reducing the case to a simple, narrow issue. The issue having been settled, the mode of trial was directed, and the case proceeded to the trial term. This mode of trial was not an investigation of the facts. It was an arbitrary mechanical device expected to reveal the judgment of God, or predicated on fear of ill consequences from a false oath, or presupposing the unchallengeable veracity of certain records and undoubted authority of charters.

In the old English law there were five of these modes of trial: by compurgation, by witnesses, by charter, by record and by ordeal. The Normans brought in another, trial by battle. One who was required to prove an issue by *com-purgation* brought forward a specified number of persons of a certain rank, who, after the party had taken an oath in terms of the issue, took an oath that his oath was "clean and unperjured." One who was adjudged to make proof by *witnesses* brought forward a specified number of witnesses, who without any examination, much less cross-examination, testified in the very words of the issue as framed at the issue term. *Trial by charter* or by *record* took place by producing the charter or record to the tribunal at the trial term for their inspection.

There were four forms of *ordeal:* by cold water, by hot water, by hot iron, and by the morsel. Each was preceded by a solemn religious ceremony in which the party was adjured not to undergo the ordeal unless in the right, and Heaven was invited to decide the issue. If the ordeal was by cold water, the party was bound and let down into the, water which was called on to cast him forth if guilty, but to receive him if innocent. If he sank down to a knot in the rope, he was pulled out and there was judgment in his favor. If the ordeal was by hot water, the party was required to plunge his arm into

a vessel of hot water and pull out a stone. His arm was bandaged for three days. If at the end of that time his arm had healed, there was judgment in his favor. If it had festered, there was judgment against him. In the ordeal by hot iron, the party was required to carry a hot iron for nine feet, when his hand was bandaged and the result determined as in the ordeal by hot water. In the ordeal of the morsel, which was appropriate to the clergy, the party was required to swallow a bit of bread or cheese weighing an ounce and containing a concealed feather or something of the sort. If he did so without serious difficulty he had judgment. If he choked, there was judgment against him.

In *trial by battle* the parties, or if they were infirm or in-capable of battle because of age or sex, their champions (that is, kinsmen or other appropriate persons who knew the facts) fought with staves in a ring before the justices from dawn until the stars appeared or one of them yielded. If one was vanquished, or if, having the burden of the suit, he did not prevail within the limit of time, there was judgment against him.

To these crude archaic modes of trial the king's court added *trial by jury* which became the normal mode of trial, and developed gradually into a rational method of ascertaining the disputed questions of fact. The jury had its origin in the inquisition or inquest, an administrative proceeding employed by the Frankish kings in matters of revenue, and possibly borrowed by them from a similar practice of Roman governors of provinces. The Frankish king, desiring to know the revenue which a locality should pay, sent for certain of the inhabitants and required them to state the facts under oath. This system was borrowed by the Norman dukes and was brought into England at the Conquest. At first it was used for all purposes for which the king might require to know facts within the knowledge of the freemen of a particular locality. The Duke of Normandy, and as William I, King of England, occasionally allowed *trial by inquisition,* as it was called, in litigation. Henry II progressively extended the use of the inquisition, first, to determine whether land was held by ecclesiastical or lay tenure, then to actions to recover possession of land of which one had been freshly disseised, then to actions to recover land of which one's ancestor had been disseised, and finally to actions for the recovery of land where such mode of trial was claimed (instead of battle) by the defendant. While this extension for civil cases was going on, Henry II provided in 1166 for what is now the *Grand Jury,* a body of men from the county, and from each hundred, who were to state under oath whether there were in the hundred or vill from which they came any persons accused of being, or believed to be, robbers, murderers, thieves, or receivers. In the reign of Henry III, the church forbade the clergy performing any religious ceremonies in connection with ordeals. As the ordeals were taken to depend on these ceremonies for their efficacy, they had to be given up, and jury trial was developed to take their place.

In its earliest form, *trial by jury* was a mechanical mode of trial. The issue having been put to the jury, they stated what they knew, not from evidence heard, but from personal knowledge and the repute of the neighborhood. But by a gradual course of evolution extending for some centuries, the jurors ceased to be witnesses and became witness-triers, and ultimately, purely triers sworn to render a true verdict on the evidence and the law as given them by the court. Legal control over the verdict so that the jury could be confined to the facts, and prevented from invading the province of the court and deciding capriciously contrary to the rules established for cases generally, came gradually in the sixteenth and seventeenth centuries. It was not complete until the nineteenth century, and in criminal cases juries are still in a position to acquit in the face of the law and the evidence without any possibility of review of their verdict. The original method was by attaint. A jury of twenty-four was required to say upon oath, not on the basis of evidence heard but of their own knowledge, whether a trial verdict was false. If it was pronounced false, the first jury was severely punished. But as the jury ceased to be witness-triers, and began to hear on evidence and render verdicts on that basis rather than on personal knowledge or neighborhood repute, the attaint procedure fell out of use. In the sixteenth century, the court sometimes punished jurors for contempt in rendering verdicts manifestly contrary to the evidence. This practice was put an end to by the decision in Bushel's Case (1670), one of the landmarks in constitutional law, holding that the jury was not bound to follow the direction of the trial judge, but was independent and not subject to punishment except in the proceeding of attaint. In the meantime, the courts found a better mode of controlling verdicts by granting new trials in cases of failure to follow the court's charge on the law, or of verdicts without or contrary to the evidence. For a long time, the measure of damages to be recovered was wholly in the hands of the jury. In a case where there was a covenant to pay a fixed sum per acre for any deficiency on a sale of land, and the jury found a ver-

dict for more than double what the covenant called for, Lord Chief Justice Coke said (1615) that the jury were "chancellors," *i.e.,* that damages were in their discretion. At first, in actions of debt and covenant, where if anything was due it was a liquidated or exactly ascertainable sum, later in actions upon contract generally, and at length in the nineteenth century in all actions except where a wanton and willful wrong has been done for which the jury may give what are called "punitive" damages, there came to be a settled legal measure of damages, to be explained to the jury in the charge of the court, and excessive damages became a ground of a new trial.

Under the conditions of today, jury trial in civil cases is expensive, dilatory and wasteful of the time of the court and of the public. Moreover, it is not well adapted to commercial litigation in metropolitan centers. Hence the civil jury has fallen into disuse in England, except for certain classes of wrongs where an emotional element is legitimately involved, and is coming to be much less used in the United States. Furthermore, in the United States we greatly relaxed in most jurisdictions the control of the trial judge, so that many abuses grew up in our jury trials. Yet we must not overlook that trial by jury was the first thoroughly rational mode of trial to develop in the modern world, and that features have grown out of it, such as trial of causes as a whole and not in bits, the oral examination and cross-examination of witnesses before the court, and rules for exclusion of immaterial and irrelevant matters, and as to the competency of evidence, which are of the highest value for the administration of justice. Next to our common-law doctrine of precedents, it has made our legal system what it is.

(9) THE SUPREMACY OF THE LAW. In the Middle Ages, law was thought of as something superior and anterior to the state. Society was thought of as held together by a system of reciprocal rights and duties involved in relations half human and half divine. It was a fundamental notion of Germanic law that even the king was bound by the law. The limitations on royal authority in Magna Carta, put as redress of specific grievances, yet were thought of by lawyers as declaring fundamental principles by which royal action was to be governed. If the king himself was not subject to the authority of the courts, those who acted in his name were. A statement of the reciprocal rights and duties involved in the relation of the king to his tenants-in-chief, when the king was no longer chief landlord but rather a governor, became a statement of the rights and duties involved in the relation of ruler and ruled. As it is put in a text attributed to Bracton (13th century), the king rules under God and the law. As early as the fourteenth century, the Court of King's Bench allowed cattle taken in distress for the king's taxes to be replevied from the king's collector because the latter had no warrant, and in another case refused to recognize the king's letter addressed to a sheriff, directing him not to execute the court's writ against an outlaw, because the king could only pardon under the great seal, but could not interfere with the course of justice in the courts by a private letter to the sheriff. Before the Reformation, there was a fundamental distinction between temporal and spiritual jurisdiction, which in more than one case, one of them as late as the reign of Henry VII, led the courts to hold that an Act of Parliament attempting to deal with a matter of spiritual cognizance was "impertinent to be observed." In the seventeenth-century contests between the courts and the Stuart kings, the judges established their authority to judge of the king's grants, and the acts of the king's ministers and agents as to whether they exceeded royal authority, and the great common-law lawyers of that time, and the courts in a few cases, claimed a like power to hold that legislative acts in contravention of fundamental law were of no validity. But the revolution of 1688 established the supremacy of Parliament, and it became settled that there is in Great Britain no such power as to statutes. In America, however, where Coke's Commentary on Magna Carta (as to Coke, see Chap. III, Sec. 4) had great influence, much of its exposition of the common-law rights of Englishmen being incorporated in our Bills of Rights, the idea of a fundamental law was familiar, and was taken up by the colonists in contests with the crown. Also in colonial times, courts had been required to pass upon the validity of colonial legislation with respect to colonial charters. Thus at the time our constitutions were framed, judicial power with respect to unconstitutional legislation was something well understood and taken for granted, and so passed into our constitutional law. From the Virginia Constitution and Bill of Rights (1776), there have been written constitutions, declared to be the highest law, in each of the states, and the Constitution of the United States (1787) declared itself the supreme law of the land—the phrase "law of the land" being taken from Magna Carta. The duty of courts to apply the fundamental law where contravened by legislation, as declared by the seventeenth-century English courts, became clear when the fundamental law took the form of a constitution, whereas in England after the

medieval division of jurisdiction between the spiritual and the temporal disappeared, and Parliament became supreme at the Revolution of i688, there was no longer a fundamental law above statutes.

At common law, the idea of equality before the law, and of universal subjection of all persons and classes of persons to one law administered in the ordinary courts of justice was carried to its furthest extent. Every public official is under the same liability, enforced in the same courts, for acts done without legal justification *(e.g.,* in excess of his legal authority) as any other person. In America, where written constitutions are universal, the ordinary courts in ordinary cases between private litigants may be called on to judge of the authority of legislative acts *(i.e.,* to determine whether they contravene constitutional prohibitions or go beyond the constitutional limits of legislative authority) and consequently whether they are to be recognized as legal authority and applied to the decision of the case, or are to be held, in the language of the Year Books "impertinent to be observed." In the same way in the British Dominions, where constitutions now lay down limits of provincial legislation, the courts and the Judicial Committee of the Privy Council at Westminster (the appellate tribunal as to the dominions and colonies) have continually to pass on questions whether provincial statutes are *"ultra vires," i.e.,* whether they go beyond the limits constitutionally fixed.

Everywhere in the common-law world, acts of executive officials and administrative boards and tribunals are subject to scrutiny in ordinary legal proceedings to determine whether they are within the legal powers of such officials. This is peculiarly a doctrine of the common law. Establishing it was the last achievement of the common law as a system administered in the king's courts of law. With the establishment of the doctrine in the seventeenth century, the development of the common law culminates. Thenceforth new agencies are at work to give flexibility to the system of judicially found precepts, to modernize it and to make of it the legal system of the English-speaking world.

4. Development of Equity

As the system of law administered in the common-law courts developed, as happens with all systems of law, it began to be too rigid on many points to be effective as an instrument of justice. One of the effects of system, in all things, is to petrify the thing systematized. In law particularly, the demand for uniformity and certainty arising from the exigencies of the economic order, makes legal systems subject to this rigidifying process. According to the famous generalization of Sir Henry Maine, three agencies work to correct this difficulty, and to restore or impart to the legal system the needful elements of flexibility and liberality. These are fictions, equity and legislation. Fictions are a crude device belonging to the beginnings of law, whereby the form of the law is preserved while the substance is changed, thus creating an appearance of conformity to old precepts which in fact are no longer applied. This agency can be effective only with respect to details, and operates chiefly in procedure. It is out of place in modern law. In the common law, fictions were used to extend the jurisdiction of the three superior courts, and to extend the scope of common-law writs and actions. In American law, we have but one example, namely, the citizenship of corporations for the purpose of jurisdiction in the Federal courts. By equity the legal historian means, in the words of Sir Henry Maine, "Any body of rules existing by the side of the original civil law, founded on distinct principles, and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those rules." Equity in this sense was a chief liberalizing and modernizing agency in the Roman law as in English law. In each case it led to a legal system suited to be a law of the world. In truth, equity, used in Maine's sense, covers up a general fiction, more audacious and of wider scope than the particular fictions above referred to, but essentially of the same character. In name and in theory the old law remains unimpaired and in full force. No one has authority to alter it, least of all those who administer equity. But alongside the strict law, a new set of precepts or body of appendices to and glosses upon it are developed which in effect wholly alter the practical administration of justice. In the maturity of law needed changes are made avowedly and directly by legislation. At an earlier stage, when legislation is rare and feeble, a body of law which had got beyond the point where ordinary fictions would do the work required, found relief in this idea of a system of equity administered alongside of and supplementary to the law which remained in theory untouched.

Six circumstances operated to require a development of equity in certain classes of cases, and so to create a court of equity and in time a system of equity. These six defects are the clue to differences between law and equity in the common-law system of today.

(1) The formal character of the rules of the common law as to property in land made gross

frauds and breaches of trust possible since the court of law recognized only the holder of the formal legal title.

(2) The system of writs and actions became rigid and could be developed only within narrow lines leaving many situations unprovided for as to which relief was obviously demanded.

(3) A court of law could not command a defendant to do anything specifically except in the case of certain "prerogative writs" addressed to public officers to command the doing of a legal duty specifically, or the not doing of some act in violation of a legal right. It acted, and courts of law today act, by judgment that a plaintiff have and recover money damages or possession of real property to which he has a legal right of immediate possession. But it happens often that money damages are wholly conjectural, or that the subject in dispute is so unique that money offers no fair equivalent. Hence, for example, as the law stood, without the aid of equity, a wrongdoer could compel the owner to sell a unique chattel for what the jury chose to assess as damages in an action for converting it. In such cases only a command addressed to the person of the defendant requiring him to perform his duty specifically will protect the admitted right of the plaintiff and secure justice.

(4) A court of law because of its mode of trial (by jury) could not deal with any but two-sided cases. There must be one party on each side, and only two sides, or else the parties on each side must have a joint interest so that they could all be treated as one.

(5) A court of law had only contentious jurisdiction. It had no preventive jurisdiction. At common law substantially the only preventive remedy is binding over to keep the peace. In many cases damages for a wrong after the event are quite inadequate. The only way of attaining an effective justice is interposition in advance to prevent. Such interposition was only possible in equity.

(6) A court of law had no power to make a conditional judgment, and no power to mold relief to the circumstances of particular cases. It could only render a fixed form of judgment.

In the Germanic law "the king exercised a jurisdiction based on broader principles of right and justice than that of the ordinary tribunals; he was not in a like degree bound down to the formality of the law, and could decide a case before his court according to the principles of equity." In the Anglo-Saxon law, there is an express provision: "If the law be too heavy, let him seek a mitigation of it from the king." Indeed, in England down to the Revolution of 1688 the king had a power of dispensing with the operation of acts of Parliament in particular cases for particular reasons of hardship or policy. The same power, as a power to dispense with the operation of common-law rules in particular cases for special reasons of hardship or inadequacy of the law, is the parent of the court of chancery, and hence of our system of equity. After the ordinary judicial powers of the king had been taken over entirely by the king's justices, and thence by the king's courts of law, this residuary power to do justice in special cases, according to the special circumstances of each case, remained. This power could not be invoked as a matter of right. It was exercised in the king's discretion as a matter of grace. At first, applications for exercise of this power were made to the king, or to the king's council, or to Parliament. But usually they came to be made to the chancellor, who, as "keeper of the king's conscience," was, as it might be put, his secretary for judicial matters. An ordinance of Edward III required them to be made ordinarily to that officer. Thus the chancellor succeeded to this extraordinary or residual jurisdiction of the king, just as the justices had succeeded to his ordinary jurisdiction, and a court of chancery arose, just as courts of common law had arisen.

Earlier exercise of this jurisdiction by the chancellor was governed by no system and was largely arbitrary. As late as the reign of Henry V, we find a suitor applying for relief on the ground that he was an old soldier who had served the king in his wars in France and was wounded in the service, and that he was injured in the service of the king's sister-in-law. Apparently these matters in his bill (petition for relief) were deemed quite as important as the facts of his case. In consequence, there was much jealousy of this in-definite and unsystematic interference with the ordinary course of justice. Parliament sought to legislate against it some ten times between 1390 and 1453. But some such jurisdiction was urgently called for if the courts were to do justice. Accordingly, a succession of great chancellors from the seventeenth century, by adopting the common-law doctrine of binding precedents, worked out a system of equity as well settled and uniform as the system of common law, differing only in a greater latitude of application to individual cases. Such latitude of application was made possible by a doctrine that fixed principles were always to be applied in view of the circumstances of the case in hand. This development of a system of equity was not complete until the nineteenth century, and in con-

sequence a part of it took place in this country, particularly through the decisions of Chancellor Kent in New York.

Equity consists of that part of our legal system which developed in the court of chancery and its analogues in America. The court of chancery did not have any special field set off to it as in the case of admiralty or probate. The chancellor interfered more or less over nearly the whole domain of individual rights. Hence in order to treat adequately almost any subject in our legal system, it is necessary to learn both the legal and the equitable doctrines and remedies relating to it. Thus the law of property is supplemented by the doctrines of equity as to trusts and equitable servitudes; the law of contracts by the doctrines of equity as to specific performance and accounting; the law of torts by doctrines of equity as to equitable waste and by doctrines as to prevention of torts; the common law of mortgages by the equitable doctrines as to redemption; the law of quasi contract by the equitable doctrines as to constructive trust.

Such a dual system is not inherently necessary. Conceivably all the rules which make up a legal system might have been applied and developed in one set of courts, and all the rules on any subject might form one body of doctrine. That is true everywhere in the world except in English-speaking countries. In Roman law the two were fused by the legislation of Justinian in the sixth century.

In New York in 1847, and in England in 1873, it was provided that law and equity were to be administered in the same court and under the same procedure. Also it was provided that legal and equitable relief might be awarded in one and the same proceeding. In England, however, the Chancery Division is a separate division of the High Court of Justice, and in the United States a small number of jurisdictions still have separate courts of equity. In the Federal courts, and in a larger number of jurisdictions, law and equity have been administered in separate proceedings although in one court. But under the new rules adopted by the Supreme Court of the United States there will no longer be a separate equity procedure in the Federal courts. The tendency is now universal to fuse law and equity completely for procedural purposes. Nevertheless, there are important differences in the administration of legal and equitable remedies respectively, and the historical distinction still continues to be one of the first importance.

5. The Law Merchant

In the Middle Ages, the sea law, like the Roman law and the canon law, was thought of as a body of universal law. Closely connected with the sea law was the law merchant, the body of customs of the merchants, frequently organized in guilds, and recognized generally as a class of their own. The ordinary law was not applied as between merchant and merchant, but as the merchant was itinerant, usually a foreigner, special tribunals existed to determine his controversies in accordance with the custom of merchants. In the Middle Ages this was not a uniform custom. Yet uniformity was sought by comparison of local compilations of custom, and as trade and commerce increased, there was a strong movement for a general law merchant. This movement for universality was furthered by the influence of the church, which insisted on good faith in transactions, and of the reception of Roman law which afforded a body of legal conceptions and principles of general application. Sea law came to be in the province of the court of admiralty. But in the seventeenth century by use of a fiction bringing acts and commercial transactions abroad within their jurisdiction by averring that the place in question was "in the Parish of St. Mary le Bow in the Ward of Cheap" the common-law courts took over commercial litigation. They, too, applied the custom of merchants or law merchant. But they treated that custom as a fact, to be ascertained by the evidence of merchants, that is, by expert evidence in each particular controversy. At the end of the seventeenth century, the growth of trade and commerce made continuance of such a condition of commercial law inconvenient. The courts began to take notice of customs which had been proved repeatedly and had come to be well known. In the eighteenth century through Lord Mansfield, Lord Chief Justice of the King's Bench, one of the great judges of common-law history, it became the settled practice not to take evidence, but to treat questions of the law merchant as other questions of law were treated. The judges had recourse to the common-law doctrine of precedents. They held that it was for the court to determine what the custom of merchants was, not for each case independently, but by ascertaining a rule for all like cases; and having so determined on any point, the decision became a precedent to be followed in like cases and to be developed by analogy. In this ascertainment of the rule of the law merchant, the courts could and did look to the Continental treatises on commercial law in which a system had been worked out along modern Roman lines. Thus the custom of merchants was converted into a custom of decision in mercantile causes, founded, however, upon the former in that the courts had

become familiar with, and embodied its more important features in, the judicial law merchant which was absorbed into the common law. This development was not wholly complete in England at the time of the American Revolution, and a part of it took place in America, particularly in New York. The chief subjects which represent the law merchant in the law of today are negotiable instruments, insurance, and to a less extent, agency.

6. The Legislative Reform Movement

Modernization of the common-law system, begun by the court of chancery, and carried on by the absorption of the law merchant, was completed for the nineteenth century by the legislative reform movement which went on parallel in England and the United States, to fix its limits roughly, from 1776 to 1875. It may be said to begin with 1776, because Jeremy Bentham (1748-1835), the great English law reformer and founder of the science of legislation for English-speaking peoples, to whose exertions the movement was in large part due, published his first book in that year, and because in the same year the American Declaration of Independence set free a new group of legislatures in a succession of new commonwealths to take a hand in overhauling the law. It is not so easy to fix an exact date for the end of the period. But in England it may be put conveniently as 1875, when the Judicature Act of 1873, the last of the great reform measures growing out of the movement took effect. For America, that date coincides roughly with a change in the character of legislation on purely legal matters. During the period there was far-reaching legislation on both sides of the water on husband and wife, married women's property, descent and distribution of the property of deceased persons, wills, conveyancing *(i.e.,* the mode of transfer of land) corporations, and procedure. Reform of procedure was urged in England in 1828, and a Commission made reports in 1852, 1854, and 1860, which have had much value ever since. In 1847, New York enacted a Code of Civil Procedure (drafted by David Dudley Field [1805-1894], the leading American law reformer) involving a general reform which has been adopted or followed in some thirty states, and has had a marked influence on legislation and rule-making as to procedure everywhere ever since. In England in 1873, there was an even more complete legislative overhauling of procedure which has set the model for twentieth-century lawmaking in this country. But in the last quarter of the nineteenth century; although legislation was still active in all common-law jurisdictions, it ceased, so far as the ordinary law was concerned, to be directed to sweeping and far-reaching changes. The time was one of political and economic and legal stability; a time of organizing and systematizing rather than of creative activity. The tendency had become one to codify and restate rather than to alter. In the present century, a demand for social legislation, felt in England from *1865* and in the United States after 1880, has begun to affect the law on many subjects, and to produce a new series of statutes making profound changes in common-law rules and doctrines. This is notable especially in the law as to employer and employee. Also the rise of administrative boards and commissions has produced a formative administrative law both in Great Britain and in the United States. No doubt a new period is at hand. But it is as yet too early to predict its course.

7. The Future of the Common Law

It will have been noted that the common law, thought of as a body of precedents, was overhauled in the seventeenth century and again in the nineteenth century. Very likely it may be overhauled once more in the twentieth century.

It would be idle to suppose that any system as a body of legal precepts will stand fast forever. It is true there are a certain number of rules, chiefly in the law of property, which have come down from the Middle Ages, and show no signs of losing their vitality. There are some borrowed from the Roman law which have stood since the great jurists of third century Rome, or even longer, and obtain throughout the civilized world. They formulate a proved experience of how to deal with certain constantly recurring situations of fact. Except for these, the body of precedents grows and takes new content and new shapes as civilization grows. There are some conceptions which define enduring categories and are no doubt as permanent in law as some of the achievements of antiquity are in architecture, or as some of the tactical arrangements of the Greeks in military science, or as some of the administrative devices of the Romans have proved to be in politics. But these conceptions, except the conception of a trust, are not peculiar to the common law.

What is characteristic of the common-law system and gives it continuity in time and unity in space, is a taught tradition of ideas and doctrines and technique. Especially characteristic are relation, the chief systematic idea, used as a starting point for analogical reasoning and a solving idea from the beginning, and the mode of thought and ideal behind the doctrine of the supremacy of the law. The common

law thinks of administration not as a process parallel with law, but as a process under law. It insists that the political order is not outside of the legal order and above it, but rather that it is the political side of the legal order, or the legal order seen from its political side. The antithesis of the common-law doctrine is that recently maintained by the jurists of Soviet Russia, namely, that in the socialist state there can be no law but only administrative ordinances and orders. As to technique, if we think of a tradition of decision, the common law is a tradition of applying judicial experience to the decision of controversies. The common-law lawyer is at his worst in finding the law in legislative texts. He is at his best in drawing principles from recorded experience and developing them into rules. If we think of a tradition of teaching and writing, it is one of teaching a systematic application of this technique and writing systematic expositions of its application. Above all, it is a tradition shaped in its beginnings as a quest for reconciling authority with reason, imposed rule with customs of human conduct, and so the abstract universal with the concrete particular. As the texts of the matured Roman law have been a quarry for lawyers and lawmakers and law writers and law teachers since the twelfth century, so we may be confident that the reports of the decisions of common-law courts in the maturity of the system in the nineteenth century will prove a quarry for English-speaking judges and lawyers and lawmakers and law teachers for generations to come.

Chapter III

Sources & Forms of Law

1. In General

A distinction must be recognized between what might be called the material source of legal precepts, that from which the content of precepts is derived, and the formal source, that from which it derives its validity as an authoritative guide to judicial and administrative determinations. Thus, the rule that one who diverts water from a running stream and appropriates it to a beneficial use obtains a property right to use the amount of water so diverted and used, had its material source in the customs of the mining country; its formal source is in Federal statutes and statutes in the states where irrigation is practised. Again, the rules that only riparian owners may divert the water of a running stream and that, as between riparian owners, each may make only such use of the water as is consistent with a like use by other riparians, took their content from the civil law, and more immediately from the French Civil Code. They obtained their legal force from judicial decision in the several states where the common law as to water rights prevails, following English decisions of the fore part of the last century.

We may conveniently distinguish the two ideas by using the term "source of law" for the material source and "form of law" for the form given to the precept by the formal source. In this sense, by "sources of law" we refer to the agencies and methods by which the content of legal precepts is found or made and shaped. By "forms of law" we refer to the modes in which the legal precepts are authoritatively expressed; the authoritative literary shapes they take on—what we turn to when we seek an authoritative statement of the precept.

Laws derive their legal authority from the state. But only a small part of the precepts that make up a body of law are found or invented or formulated by the organs of the state directly. Six sources are of importance:

(1) Usage. The legislature, or, as in the case of the law merchant, the courts, may take up a matter of usage and make it law. Thus the negotiability of "interim certificates" had its origin in the usage of businessmen. After the Court of Appeals in New York had refused to recognize this usage and thus give it the authority of law, it later was given the form of law by legislation.

(2) Religion. In primitive law this was a formulating agency of the first importance. In modern law the broad principles and fundamental moral conceptions with which religion has to do have long been settled and this source is not active.

(3) Adjudication. In the common-law system, adjudged cases. are a form of law in the jurisdiction in which they are decided by the ultimate tribunal. But adjudication in other common-law jurisdictions may be a source of law. It may give the content to the local decisions that provide the form. Also in any system adjudication formulates precepts which get authority in another form. For example, the rules of commercial law given legislative authority in the uniform state laws prepared by the National Conference of Commissioners on Uniform State Laws were for the most part formulated by judicial decisions.

(4) Scientific discussion by text writers and commentators. In the common law such discussions have no direct or intrinsic authority. But so far as criticisms of legislative and judicially found precepts by writers and commentators are well taken, so far as their deductions from the reported decisions are in accord with sound legal reason, and so far as the new propositions they advance afford satisfactory solutions of pressing problems, they commend themselves to courts or to legislators and are given authoritative form. The writings of Judge Story, Greenleaf on Evidence, Parsons on Contracts, Washburn on Real Property, Cooley on Torts and on Constitutional Limitations, Pomeroy on Equity, Bishop on Criminal Law and on Marriage and Divorce, Dillon on Municipal Corporations, and in the present generation, Wigmore on Evidence, Williston on Contracts, and Beale on the Conflict of Laws, have had much influence with American courts, and in the case of Judge Story's books, with courts everywhere in the common-law world, and have been significant formulating agencies.

(5) The general moral sense of the community, taking shape in ethical customs which may be given the guinea-stamp of the state's authority by legislation or by judicial decision.

(6) In recent times private agencies of preparation for legislation, such as committees of professional, trade and business associations, associations and other organizations interested in social and economic problems, research institutes, and foundations. Much important legislation on legal subjects gets its content from the activities of such agencies.

There are three *forms of law* in the common-law system:

(1) Legislation, of which, using the term in its wider sense, there are in the United States three varieties—constitutions, Federal treaties, and statutes—to which we must now add a fourth, namely, administrative rules and orders promulgated under legislative authority; (2) judicial decisions; (3) books of authority.

2. Legislation

At common law, the organ of legislation is Parliament. In America, the states at the Revolution succeeded to the powers and authority of the Crown and Parliament. By the Constitution of the United States, part of these powers and of that authority was delegated to the Federal government, and legislative power for that government was put in Congress, with certain limitations and restrictions. In the states, the constitutions provide for a legislative department and define the organs of legislation and their powers. In recent times, it has become not uncommon for legislatures to devolve a general lawmaking power, for example, upon a dominion or colonial legislature (British) or upon a territorial legislature (American). At common law a charter might delegate a certain lawmaking power to a municipal or public service corporation, authorizing by-laws (in case of municipal corporations called ordinances in America) governing certain subjects within the municipality or certain relations or situations in the conduct of the public service. In America today it is not infrequent to devolve upon important municipalities a considerable independent lawmaking power over local subjects. Also it has become increasingly common to delegate large rule-making powers, in matters of doubtful classification as between the legislative and the executive departments and as to the application of statutory legal standards, to administrative boards or commissions or officials. This secondary legislation raises many new questions, but in general its interpretation and application are governed by the principles of the common law worked out originally with respect to the older type.

At common law, a legislative act enacting legal precepts is called a statute. The old rule of the common law was that if no date was fixed in a statute, it took effect by relation from the first day of the session at which it was enacted. When legislative sessions came to be protracted this rule led to unjust results. In Great Britain, by a statute of George III, statutes take effect from the date at which they receive the royal assent unless a different date is fixed. In the United States, Federal statutes take effect from the date of approval by the President unless a different date is fixed. As to state statutes, the matter is governed by constitutional or statutory provisions which differ in the several states. Most of the states provide a certain time after passage and approval at which statutes shall take effect, but there are many different provisions as to taking effect in case of emergency.

Interpretation of statutes at common law proceeds on three presuppositions or postulates: (1) That the statutory formula provides one or more rules, in the strict sense of that term, that is, provides for definite legal consequences which are to attach to definite detailed states of fact. (2) That the formula was prescribed by a determinate lawmaker; that the lawmaking collectivity of today is analogous to the individual sovereign lawmaker of the later Roman empire, and hence had a will the content of which is discoverable and to be discovered. (3) That the formula prescribed was meant to cover a certain definite area of fact, dis-

coverable and to be discovered; hence that when that area is defined the formula was meant to cover all detailed situations of fact within it, and the intended rule for any such situation of fact is discoverable and to be discovered.

As was seen in another connection, legislation in a common-law jurisdiction rarely attempts more than a rule for a definite, detailed situation of fact. When it purports to do more it usually simply declares the common law. Recent legislation has increasingly established standards. But these new statutory standards are not standards of general application throughout the field of the legal order; they are imposed with reference to particular, defined subjects or situations. In other words, the first presupposition expresses the attitude toward legislation of the common-law lawyer which is involved in his traditional technique. There is, however, nothing in that technique to preclude taking a statute prescribing a rule as a clear indication of a policy or a generally received ideal; and it has been argued convincingly of late that statutes should be used by the courts in that way.

As to the second presupposition or postulate, in ordinary experience we may assume that the formula was drawn by some one to some end and agreed upon by at least a majority of the members of a legislative assembly. Thus for ordinary legislation the postulate is sufficiently close to the facts. We may well think of a collective lawmaking body in terms of an individual lawmaker in interpreting statutes, where it would be a mischievous fiction to postulate such a lawmaker for a body of traditional law or for general provisions of a bill of rights, formulating a long course of legal and political experience of English-speaking peoples.

As to the third postulate, as has been said, statutes are usually drafted by some one person to meet some one grievance in some one way and then given the guinea-stamp of the legislative body. This every day situation is put in generalized form. Where legislation is not of this type, it usually formulates and restates authoritatively the results of judicial development of some subject, with occasional substitution or interpolation of new rules. The latter call for interpretation, since frequently those who framed a formula to cover some subject to the exclusion of the traditional law, did not have in mind some particular state of fact which none the less is included in the field covered and so is within the purview of the formula. Thus there was in truth no intent as to the legal result to be attached to that particular state of facts. Yet the law requires courts to assume that the lawmaker had it in mind, and had in mind a legal result appropriate to it which he expressed in the text of the statute. The courts work out the application of the formula to the facts in question on that assumption. Like all postulates of application of organized knowledge to practical action, the assumption is a generalized expression of a practical means of meeting the problem. Interpretation must take account of the needs of those who advise and of those who decide. Giving of sound advice presupposes predictability. There must be fixed assumptions from which one who advises may proceed with reasonable assurance whenever a legislative formula is not to be adhered to rigidly. But decision requires a margin for doing justice in the case in hand. There must be some margin of freedom to mold application of the formula to the exigencies of unique as contrasted with generalized states of fact. The law seeks to maintain the general security and uphold the economic order by postulating a legislative intent to be derived from the given text by a known technique and to secure the individual life by the scope of adjustment to particular circumstances afforded by that technique.

Blackstone gives ten rules for the interpretation of statutes, which may be stated summarily as follows: (1) In construing a remedial statute we are to consider the old law *(i.e.,* the law before the statute), the mischief *(i.e.,* the mischief for which the common law made no provision), and the remedy. The reason of the remedy, applied to the mischief, is the criterion. (2) A statute which treats of things or persons of an inferior rank will not because of any general words be extended to those of a superior type. As the phrase is, words are known by their associates. The general words are limited to the type or class of the specific words. (3) Penal statutes, *i.e.,* statutes imposing penalties for violation of their provisions, are to be construed strictly. The courts are not to make crimes by extending statutes beyond the cases which they clearly cover. (4) Statutes against frauds *(i.e.,* providing for setting aside frauds or for civil restitution for frauds as distinguished from statutes imposing punishment or penalties for frauds) are to be "liberally and beneficially expounded." (5) One part of a statute must be so construed by another that the whole may, if possible, stand. Every clause is to be made operative if possible. (6) A saving clause repugnant to the body of the act is of no effect, whereas a proviso repugnant to the body of the act will prevail as the later expression of the lawmaker's will. But this technical rule is difficult to apply to legislation today and is not satisfactory. (7) Where the common law and a statute dif-

fer, the common law gives place to the statute, and an old statute gives place to a new one. (8) "If a statute that repeals another is itself repealed afterwards, the first statute is hereby revived without any formal words for that purpose. But this rule of the common law has been abrogated by statute in England and in the United States by Federal (as to Acts of Congress) and very generally by state legislation. (9) A statute cannot bind subsequent legislatures. (10) Statutes "impossible to be performed" are of no legal effect, and if "there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are with regard to those consequences void." This last rule is an attempt to state the doctrine prior to i688 as to statutes "impertinent to be observed." All that remains of it is that courts will avoid a construction which will bring about unjust or unreasonable consequences and, in the United States, will avoid a construction which would make the act unconstitutional or of doubtful constitutionality.

Other important rules for interpretation are that in case of ambiguity or unsatisfactory literal meaning we resort to the context; that other statutes on the same subject (as the phrase is, *in pari materia)* are to be looked to, that statutes are to be construed in the light of the common law (that and the statutes *in pari materia* being, as it were, the legal context) so that it may be made to fit harmoniously into the whole body of the law if possible, and that where technical terms of the common law are used the common-law definition of those terms is adopted. Another rule, often announced, is that statutes in derogation of the common law are to be strictly construed. But today almost any act reforming or improving the law is apt to be more or less in derogation of precepts or doctrines of the traditional law. The rule has often been abrogated by statute, and is out of accord with the conditions of contemporary lawmaking.

There is a doctrine in the civil law, rejected by some of the modern codes, that a statute may be abrogated by desuetude, *i.e.,* a long continued custom of popular action to the contrary. But under the common law the obsolete statute, if invoked, is an authoritative ground of decision, and only legislative repeal can deprive it of authority.

3. Judicial Decisions

All tribunals inferior to and subject to review of their decisions by a court of appellate jurisdiction which has decided a point of law are held bound absolutely by the decision. They have the duty of applying the rule thus established in all cases involving the point, whether they like it or not. The appellate court will also follow the decision and will, as a general rule, apply its principle by analogy in other cases. Yet, if the point has been decided but once and the court feels the decision, as Blackstone puts it, to be "flatly absurd and unjust," it will, although cautiously, overrule the prior decision of the point. Some courts will so overrule a line of prior decisions. But as a rule, when a question has been decided often in a certain way, and has thus become settled by repeated decisions, courts will leave it to the legislature to make a change. If a decision lays down a rule of property, the courts will not overrule it since to do so would unsettle titles and interfere with vested property rights. A rule laid down by judicial decision operates not only in the case in which it was announced, but in all like cases, so that its effect is retroactive. Hence, if it is overruled, titles acquired in reliance on it are defeated. But a statutory rule operates on future cases, and so has no such unsettling effect. If a decision has to do with a rule of commercial law, where uniformity with other states is often as important as a uniform course of decision within the state, a prior decision considered to be wrong will be overruled more readily. If it has to do with a matter of procedure, the courts are even more free to change their view, since the substance of rights will not be disturbed.

In jurisdictions other than the one in which the decision was rendered, or in courts of co-ordinate authority, it is said to be "persuasive" but not controlling. It must commend itself to the court in which it is cited as correct in reasoning and in accord with the principles of the common law. Usually, if only for the sake of certainty, a well considered decision will be followed elsewhere. If there is a long and settled line of adjudications in co-ordinate jurisdictions to a certain effect, a court in which the question arises for the first time will feel bound to yield its personal judgment to the weight of authority unless in an extreme case. Such a line of decisions is taken to establish the common law and clients have been advised, transactions entered into, and courses of conduct determined on the faith of it. Yet there may sometimes be good reason for a court, which has to establish a rule in its own jurisdiction, to reach an independent conclusion in such a case. Hence, courts of co-ordinate jurisdiction sometimes differ so that there come to be two or more divergent lines of persuasive authority on some subjects.

In passing upon the weight to be given to a decision as an authority, regard must be had more to what the court did than to what it said. It is the rule or

principle behind what the court did that has binding effect. What a court may say on a matter not before it for decision, and not involved in the decision is called *dictum* (strictly *obiter dictum, i.e.,* said by the way). *Dicta* have no weight except such as comes from their intrinsic reasonableness or from the eminence of the judges who deliver them. But the reasoning of the court which decided a question is of great value in enabling the lawyer to understand what was up for decision, how the question arose, and why it was dealt with as it was. Moreover, where a point material to the disposition of a cause was argued and decided, what the court said upon the point does not become dictum even though the case might have been or was decided the same way upon another point. Yet such a situation may weaken the authority of the case upon a point for which it is cited.

4. Books of Authority

There are very few books of authority in the common-law system. That is, very few text books, commentaries, or juristic discussions have the authority of law in and of themselves. In other systems of law, such books are numerous and sometimes of great weight. With us, as a general rule, such books have no authority of themselves. They are regarded only to the extent that they expound accurately the judicial decisions which they cite, and deduce correctly the principles of law to be derived from those decisions. In other words, they are a source, not a form, of law. Often, however, they are sources of much importance.

We have a few books which are truly books of authority. A treatise on tenures by Sir Thomas Littleton (Justice of the Court of Common Pleas in the reign of Edward IV) is an absolute common-law authority on questions of the law of real property. A commentary on Littleton by Sir Edward Coke (Solicitor General, afterwards Attorney General to Elizabeth; Lord Chief Justice of the Common Pleas, afterward Lord Chief Justice of the King's Bench under James I) is regarded as an authoritative statement of the common law for the classical period in which he practised, judged, and wrote. As the first year of the reign of James I is taken legally to mark the era of the colonizing of America, Coke's writings have special authority for us in defining the law which came to us in the seventeenth century. Besides the "Commentary on Littleton" ("First Institute"), Coke's "Second Institute of the Laws of England," a commentary on Magna Carta and the old statutes of Edward I, his "Third Institute," treating of pleas of the crown, *i.e.,* criminal law, and his "Fourth Institute," treating of the jurisdiction of courts, have much, though perhaps in the case of the two last less, authority. Littleton's "Tenures" and Coke's "Institutes" are books of authority wherever the common law obtains. In addition, two other books stand very near to them in authority in the United States because they state the common law, in one case, as it stood just before, and in the other just after, it had been received definitely in our several states. Sir William Blackstone's "Commentaries on the Laws of England" (1765-1769) was much used in America in the contests between the colonies and the crown which culminated in the Revolution, and was accepted by the courts after the Revolution as a statement of the law which we received. Kent's "Commentaries on American Law" (1826-30), the great American institutional book, while not strictly a book of authority, is so clear and accurate a statement of our common law as received after the Revolution, that it has generally stood for a decisive statement of it.

Chapter IV

The Common Law in America

1. Reception

When settlers go into a new country which is without law, in legal theory they carry their own law with them. Thus the common-law system became established in British America. True some parts were settled from other lands than England, New York by the Dutch, Louisiana, Michigan, Illinois, and Wisconsin by the French, Florida, Texas, California, Arizona and New Mexico by the Spanish. But in none of these places, except in Louisiana, did the Roman-Dutch or French or Spanish law get any foothold in the pioneer era before they came under English or American rule, and by usage or legislative enactment, or by both, except Louisiana, they came to be part of the domain of the common law. It is also a settled principle that when political sovereignty is changed the law remains unchanged and can only be altered by legislative adoption or judicial reception of some other system. Hence, the throwing off of British sovereignty at the Revolution left the English common law in force in America, just, for example, as Spanish law is now in force in Puerto Rico. But there was no desire on the part of the colonies, in declaring their independence of British sovereignty, to throw off English law. Coke's statement of the common-law rights of Englishmen and Blackstone's exposition of the common-law doctrine of the supremacy of the law were the basis of the claims made by the colonists against the mother country, and were taken by them to set forth their birthright as Englishmen. The Declaration of Rights of the Continental Congress in 1774 solemnly declared "that the respective colonies are entitled to the common law of England."

In fact, the decisive reception of the common law in this country came later than the legal theory would indicate. As has been said, law depends upon lawyers and lawyers are little needed until there is a considerable economic development, and there comes to be complicated litigation calling for more than can be expected from untrained magistrates assisted by presentation of cases by the parties in person or their equally untrained representatives. In the American colonies in the seventeenth century lawyers were few, little trained, and of little influence and there was little in the way of law. Colonial legislation becomes important at the beginning of the eighteenth century. But until the middle of the century, justice was generally administered by executive officials or by legislative assemblies governed by little or no law. Commonly the courts were magistrates' courts, and appeals went ultimately to the legislature or sometimes to the royal governor. Many things concurred to hold back the development of law and lawyers. At the time of colonization, the common law was still in the stage of the strict law. The common law as the colonists knew it had yet to be overhauled by equity and had yet to absorb the law merchant. Its records were in Latin and its reports in law French, and both its substance and its procedure were heavily burdened with formalism. Lawyers, as a class, were very unpopular in the colonies. Some would not permit them at all. Some would not allow them to receive fees. Some imposed

rigid restrictions upon them. In the era of colonization, education and discipline in the Inns of Court were for a time in decay. The attorneys were excluded from the Inns and left to themselves. But it was with the attorneys that the public came chiefly in Contact. Also law books were few even in England, and little printed information as to English law was available in the colonies. Coke's Institutes were published between 1628 and The first American law book, a reprint of Magna Carta and the great common-law statutes and of the Pennsylvania charter, was printed in 1687. Where the Puritan polity did not obtain, the royal governors commonly interfered with the administration of justice so as to make it often a personal justice rather than a justice according to law. This went on more or less down to the Revolution. In England, in the seventeenth century, the courts and the crown were engaged in a long and severe contest which only ended with the Revolution of i688. When a bar began to arise in America in the eighteenth century, it was soon in a contest with royal or proprietary governors, quite analogous to that going on between lawyers and crown in contemporary England. The Stuart kings regularly removed judges who did not decide as the king dictated, and colonial governors often proceeded in imitation of their royal masters. There could be little legal development under such a system.

At the end of the seventeenth century, the colonies began to grow rapidly in population and in wealth. Especially there was a great development of shipping, shipbuilding, commerce, export trade and fisheries. This economic development called for law and for lawyers. In the last half of the century, a more or less trained legal profession had come to exist, and in a number of the colonies there were some good lawyers trained in the Inns of Court. On the eve of the Revolution there was a strong bar in many localities. Also there were coming to be trained lawyers on the bench, although it was not until some time after the Revolution that the courts ceased to be made up chiefly of untrained magistrates. The reception of the common law and reshaping it into a law of America, and the development of a legal profession had been well begun.

After the Revolution a reaction set in. The conservatism characteristic of lawyers led many of the stronger to take the royalist side, and so the Revolution decimated the profession. For a time, the practice of law was chiefly in the hands of lawyers of a lower type and of less ability and training. Also after the Revolution a deep and widespread economic depression set in. The lawyers were largely simply debt collectors, never the highest type, and in the days of strict foreclosures and imprisonment for debt, became the object of demagogical attacks, so that legislation affecting the profession set back the standards of training and admission for a long time to come. Political conditions had an equally bad influence. The public was hostile to all things English, and it was impossible for the common law to escape the odium of its English origin. Three states legislated against citation of English decisions in the courts, and there was a rule of court against such citations in a fourth. Moreover, a large and enthusiastic party not only distrusted all things English, but was enthusiastically inclined to all things French, including French law. There was a general agitation for an American code to be drawn up either on French lines or without any regard to the law of the past by an exercise of pure reason. But French law books were not accessible, and the few that were translated were too late. Kent's "Commentaries," the writings of Judge Story, and, as economic conditions improved, the rise of courts manned wholly by lawyers, established the English common law as the law of America.

2. Forms of the Common Law in America

Seven elements go to make up the common law in the United States: (1) The decisions of the old English courts, (2) American decisions, almost entirely since the Revolution; (3) judicial decisions in England and the other common-law jurisdictions since the Revolution; (4) the law merchant; (5) the canon law (law of the church in the Middle Ages) so far as it was received in the English ecclesiastical courts, which had jurisdiction over probate and divorce, and entered into our law in the form of traditions of the practice and decisions of those courts in probate and divorce causes; (6) international law, to the extent that it is a common element in the laws of all civilized states; (7) English statutes before the Revolution applicable to or received in this country.

(1) Most of the states provide by statute (and elsewhere the same doctrine exists by custom recognized by judicial decision) that the common law of England shall be the rule of decision in their courts, so far as applicable, except in so far as cases are governed by constitutions or by statutes. The bulk of this American common law is made up of the *decisions of the English courts.* Two questions arise under the statutes adopting the common law: first, when are English decisions binding as authority and when persuasive only, and second, what is meant by "applicable" in this con-

nection? Statutes frequently provide expressly that decisions prior to colonization, *i.e.,* before the first year of James I (1603), shall be authoritative, so that subsequent English decisions are only persuasive as to what is the received common law. In some statutes the decisive point is fixed at the Revolution, and hence English decisions before the Revolution have binding force. In others, mostly western states, particularly those carved from the Louisiana purchase, where the potentially applicable civil law was superseded by statutory adoption of the common law, it is held that the statute does not require adherence to the decisions of the English common-law courts before the Revolution or before colonization, if the courts consider subsequent decisions, either in England or America, better expositions of the general principles of the common-law system. In such jurisdictions the authority of all English decisions is the same. They are persuasive only.

To be a part of our common law, these English decisions, or rather the rules and principles they lay down, must be applicable to the social, political, economic and physical conditions in America. But this does not mean that the question of applicability is open for all time, as often as and whenever a court is called upon to apply a received precept established by the old cases. It means that the precepts must have been applicable at the time the courts were called upon to determine whether they had been received into our common law. If they were applicable and were received and adopted as such, subsequent changes in conditions, which may make some change expedient, call for legislative rather than judicial alteration of the established law.

How was the applicability of English legal precepts to American conditions determined? There were no rules defining it. That precepts of the English common law were in force with us so far as they were applicable, and only so far as applicable, was not a principle with any such historically-given definiteness of content as the principle that harm, intentionally caused is actionable unless justified, through which courts and jurists have been writing a new chapter in our law of torts in the last generation. Nor was there any traditional technique of receiving the law of one country as the law of another which the courts could lay hold of and utilize in the making of American law. In some cases, as in the English doctrine that only tidal steams were navigable, the inapplicability to our geographical conditions was obvious. In other cases, the courts thought and spoke of "the nature of free government" or "the nature of free institutions" as the measure of applicability. In other words, they determined what was applicable and what was not applicable to America by reference to an idealized picture of pioneer, rural, agricultural America of the fore part of the nineteenth century, and this picture became a received ideal and so a part of the law.

An interesting question in this connection, much debated at one time by the courts and the text writers, grew out of a proposition in the classical English texts that Christianity was part of the common law of England. What did this mean, and in any meaning was it applicable to and received in America? Christianity, as a religion, could not be a form of the law because it was not formulated in legal precepts. In colonial times there was some attempt to make the "Word of God" a fundamental law where our law now puts the Constitution. But the most that could be claimed was that the Bible, though not a form, was a source of law in a country predominantly Christian, with an ethical custom shaped largely by religion. On certain questions of public policy where courts must seek for some objective evidence of the general moral sense, this idea may still have a certain importance.

(2) *Judicial decisions in the several states of the Union and in the Federal courts,* are of binding authority in the jurisdictions in which they are rendered, and persuasive authority in other American jurisdictions, as explained above (Chapter III, Sec. 3 Judicial Decisions).

(3) *Judicial decisions in England and in other common-law jurisdictions since the Revolution* have only persuasive authority. But the influence of the nineteenth-century English decisions has been very great. The exceptionally high order of ability of the English judges and of the bar that argued before them, made the persuasive authority of those decisions decisive on many questions which arose in England before they had to be passed on in America.

(4) The *law merchant,* so far as it was not already incorporated in the common law at the time of the Revolution, is a part of our received common law. How far, then, do more recent customs of business and commerce have the force of law as part of the law merchant? It would seem that the codification of the principal subjects of commercial law which has gone on under the auspices of the Conference of Commissioners on Uniform State Laws since *1895,* has done away with the creative force of business custom on those subjects. At least, it was so held in New York in deciding as to the negotiability of "interim certificates," treated as negotiable in the understanding and custom of the business world, but not within the category of

negotiable instruments as defined by the Uniform Negotiable Instruments Law.

(5) It would perhaps be more accurate to say that the *canon law* is a source, and that the decisions and the practice of the English ecclesiastical courts on marriage, separation, annulment, and divorce, and on probate of wills, are a form of our common law. Probate jurisdiction was often given to separate courts in this country, while divorce jurisdiction has usually been given to courts of equity or courts with equity powers. For such courts, in such cases, the canon law, as received and administered by the custom of English courts, was part of our legal inheritance.

(6) *International law* is in a sense a universal law in the modern world, as the canon law and the sea law were in medieval England, and as the Roman law was in Continental Europe. It is a common element in the law of all civilized states. In the absence of treaty or controlling rule of the national law governing a point, the courts look to the received usages of civilized states as they are set forth in treatises and commentaries recognized as authoritative statements throughout the world.

(7) *English statutes before the Revolution* which were in furtherance, development, or amendment of the common law, are, so far as applicable to America, a part of our common law. All such statutes enacted before colonization were received by us with the general body of seventeenth-century English law. But the colonies had their own legislatures, which were active in the eighteenth century, and English statutes after colonization were not always enacted to apply also to America. Hence, whether English statutes enacted after colonization and before the Revolution are part of our common law depends upon whether the particular statute was received as such. Most of the important. statutes of that period, *e.g.,* the Statutes of Limitations (1623), and the Statute of Frauds (1677), have been re-enacted in the several states. There are, however, a few which, without re-enactment are recognized as having been received. It should be added that the old English statutes were received as construed and applied in the decisions of the courts and, in the case of those before the seventeenth century, in the writings of Sir Edward Coke.

It is often said that general customs of popular action are also a form of law. In England, certain immemorial local customs, continuous from before the "time of legal memory," if peaceable and generally acquiesced in, reasonable, not uncertain in their terms, regarded as compulsory on all within their scope, and consistent with each other, were part of the law. But we have never had any such customs in America. With us, however, as at common law, a local custom or custom of a trade or business or profession, if reasonable, certain in its terms, generally received and acted on, and of such long standing as to assure that it is generally known, is presumed to have been in the minds of those who make contracts and enter into transactions upon which such customs have a bearing. Accordingly, they are resorted to in order to interpret or explain words or phrases, to show what was intended by particular provisions, and, so far as not contradicted by the terms of the contract or transaction, to show what the parties assumed and so intended. This is a rule of interpretation rather than a doctrine establishing a form of law.

Chapter V

Courts: Their Organization & Jurisdiction

1. Self-help

In primitive law primarily an injured person must help himself. It was only in certain rigidly prescribed cases that he could invoke the aid of public tribunals. For the most part, the law confined itself to limiting and regulating self-redress, and the judgments of a tribunal originally only gave to the complaining party the permission of the law to take what was found to be his due. At most, the law would do no more than prevent the wrongdoer from hindering this authorized self-help. In modern law, self-help and self-redress are narrowly limited. The civil law distinguishes self-defense from self-redress laying down a general principle that self-defense is allowable while self-redress is forbidden. By self-defense it means maintenance of one s right of physical integrity and of the physical person of a member of his household or a near relative, and maintenance of possession against attacks by others. At common law, there were six cases where self-help was allowable, but some of these are obsolete, and others have been much limited.

The cases of allowable self-help and self-redress at common law are: (1) Self-defense, (2) recaption of chattels, (3) entry on land in case of disseisin, (4) abatement of nuisances, (5) distress, and (6) seizure of heriots. In addition, there were two cases where a remedy for a private wrong was said to be effected by the mere operation of law. These were called the right of retainer and remitter.

(1) SELF-DEFENSE. At common law, self-defense is defense of one's person and of others standing in the relation of husband and wife, parent and child, or master and servant. In these cases, if the person himself or one in any of these relations to him is forcibly attacked in his person or possession, it is lawful to repel force by force. This legal privilege of self-defense extends to such degree or kind of force as is reasonably and in good faith believed to be necessary to make an effective resistance to the attack or to what is reasonably and in good faith believed to be an attack. But any degree or kind of force beyond what is reasonable under the circumstances exceeds the privilege and cannot be justified. The privilege extends also to protection of a dwelling house against intrusion, and this goes so far that one may assemble his friends and neighbors to defend his house against violence.

(2) RECAPTION OF CHATTELS. When any one has deprived another of possession of his goods or chattels, or wrongfully detains his wife, child, or servant, at common law the owner, the husband, the parent, or the master may lawfully retake them wherever he happens to find them, provided he does not do so in a riotous manner or bring about a breach of the peace. With respect to the relation of master and servant, this rule goes back to the days of apprentices when the relation of master and apprentice was analogous to that of parent and child.

(3) ENTRY ON LAND IN CASE OF DISSEISIN. At common law, an owner who had been put out of land by a disseisor had a privilege of entering upon the land and a power of regaining his seisin in that way. The old land law

regarded a person disseised as having only a right of entry, to which many technical rules were attached. All this is now obsolete. Entry is no longer required to enable the person disseised to convey his title or to enable his title to pass by descent. The entry was required to be peaceable and without force.

(4) ABATEMENT OF NUISANCES. Nuisances may be public or private. A public nuisance is an interference with the use of something dedicated to the public or the use or enjoyment of which is in the public at large, or the carrying on or doing of something which in itself or in the way in which it is done is or threatens a continuing injury to the public safety, health, morals or comfort. Any one may abate such a nuisance, *i.e.,* remove the thing or structure which constitutes it, provided he commits no breach of the peace in so doing. Where one person unlawfully obstructs a right of way or interferes with some right appurtenant to another's land, there is a private nuisance. So, too, where one maintains or carries on upon his own land something which is or threatens a continuing injury to neighboring land by rendering its occupancy unhealthy, unsafe, or uncomfortable. In such cases, the person whose right is obstructed or interfered with or a person who is specially and peculiarly affected by the injury or threat to the general health, safety, morals, or comfort, may justify a trespass to go upon the land where the nuisance is maintained and remove or abate it, if he can do so without breach of the peace or unnecessary damage.

(5) DISTRESS. Distress is the taking of a chattel out of the possession of a wrongdoer into the custody of the person injured, to procure a satisfaction for the wrong. The important forms are distress for rent in arrear and distress of cattle damage feasant. The landlord may distrain *(i.e.,* seize) goods brought by the tenant upon the land and hold them as security in case of non-payment of rent or non-performance of duties owing by the tenant to the landlord. This form of distress has been much modified by statute m most American jurisdictions and in some has been abolished. In case of trespass upon land by cattle, the person in possession of the land where they are doing damage may seize and hold them as security for payment of the damage. Under pioneer conditions in America, where it was the custom to pasture cattle on wild, uncultivated lands, especially on the public domain, and hence to allow cattle to run at large, there were statutes, known as the "herd law" requiring owners to fence out cattle from their lands, and abrogating the common law as to trespass by cattle in case of lands not fenced. As the states have become settled, the common law has largely been restored in this connection. Distress of cattle damage feasant is generally permitted, but has been modified or regulated by statute m many jurisdictions.

(6) SEIZURE OF HERIOTS. At common law, on the death of a tenant in certain cases, the landlord was entitled to certain of the goods left by the tenant, and in order to maintain his right he might seize the identical thing to which he was entitled. This species of self-help has never obtained in the United States.

Where a person indebted to another made his creditor his executor, or the creditor obtained letters of administration of his debtor's estate, the common law gave a remedy to the creditor by allowing him to retain so much as would pay himself before any other creditors of equal degree. This is called retainer. It has been abolished by statute in a number of states. Also where one who had the true title to land, but was out of possession and could not enter without recovering possession in an action for that purpose, afterward acquired the freehold by a subsequent, defective title, he was remitted, or sent back by operation of law to his older and better title. Remitter is now obsolete.

Except in these few cases, the common law requires resort to the courts for relief.

2. Courts in General

A court is said to be "a place wherein justice is judicially administered." It is a tribunal presided over by one or more judges for the exercise of such judicial power as has been conferred upon it by law. It must sit at the place designated by law, and the persons authorized to administer justice must be at that place for the purpose of administering justice at such times as may be designated by law. The times fixed by law for the transaction of judicial business are called terms. At the time when the common-law courts were formative, the church exempted certain holy seasons from being profaned by the tumult of forensic litigations. Particularly, the time of Advent and Christmas gave rise to a winter vacation, the time of Lent and Easter required a vacation in the spring, and the time of Pentecost called for a third. Also there was a long vacation between midsummer and Michaelmas allowing for hay time and harvest. The periods of time not included within the prohibited seasons were called the terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael, being named from some feast of the church immediately preceding their commencement.

Subsequently, the terms were regulated by acts of Parliament. Hilary Term began January 23 and ended February 12; Easter Term began the second Wednesday after Easter Sunday and ended the Monday after Ascension Day; Trinity Term (after 1541) began the Friday after Trinity Sunday and ended the second Wednesday thereafter; Michaelmas Term began October 9 and ended November 28. The Judicature Act of 1873 abolished these terms. In the United States in most jurisdictions the terms of courts are provided for by statute. In a few jurisdictions terms have been done away with and the courts are open at all times.

Three circumstances determined American judicial organization: (1) The organization of English courts at the Revolution; (2) the need of a rapid making over of English common law and legislation into a common law for America in a period when little could be achieved in such a field by legislation and hence courts alone could be looked to; (3) the demand for decentralizing the administration of justice and bringing justice to every man's door in the rural American community of the first half of the last century.

(1) ENGLISH COURTS AT THE REVOLUTION. The system of English courts at the time of the Revolution was too arbitrary and involved to serve as a model to be followed in this country in detail. But, overlooking concurrent jurisdictions, concurrent powers of review, and such anomalies as the writ of error to the Common Pleas from the King's Bench, a general outline could be perceived which was the model of our several systems. To begin at the bottom, this was: (a) Local peace magistrates and local inferior courts for petty causes; *(b)* a central court of general jurisdiction at law and over crimes, with provision for local trial of causes at circuit and review of civil trials in banc in the central court; *(c)* a central court of equity in which causes were heard in one place, though testimony was taken in the locality; and *(d)* a supreme court of review.

In the United States, all but five or six jurisdictions merged the central courts. But with that salutary act of unification, most of our jurisdictions stopped. For a season there was no need of unification. The defects in the English organization that appealed to the formative period of Amen-can judicial organization lay in the second and third of the tribunals above described, namely, the central court of law and the central court of equity. In a country of long distances, in a period of slow communication and expensive travel, these central courts entailed intolerable expense upon litigants. It was necessary to bring justice to every man's door. The French judicial organization, local courts of first instance, district courts of appeal and a central court of review, attracted attention, not only because of the general interest of the period in all things French, but because it suggested a means of localizing the administration of justice. The influence of the French system upon the Federal judicial organization and upon the reorganization in New York in 1846 is obvious. But the model was English at a time when English judicial organization was at its worst, and the circumstances in which our judicial system was set up did not make against the policy of multiplying courts which is characteristic of the beginnings of a legal order.

(2) FORMATIVE PERIOD OF AMERICAN LAW. In the formative period of American law, the chief problem was to discover and lay down rules; to develop a system of certain and detailed rules which would meet the requirements of American life and leave as little as possible to the personal judgment and discretion of the magistrate. This apparently determined the whole course of our legal development until the last quarter of the nineteenth century, and in particular, it determined our system of courts and judicial organization. Above all else, we sought to insure an efficient machine for the development of law by judicial decision. Often it was less important to decide the particular cause justly than to work out a sound and just rule for the future. Hence; for a century the chief energies of our courts were turned toward the development of our case law, and the judicial hierarchy was set up with this purpose in view.

(3) AMERICAN JUDICIAL ORGANIZATION. The general type of American judicial organization provides four courts or sets of courts.

(a) First, we have a *supreme tribunal* of exclusive or substantially exclusive appellate jurisdiction, composed of a fixed number of judges who usually may sit only in that tribunal and are not available for any other court. This tribunal reviews the work of the superior courts of first instance. Sometimes, as in the Federal judicial system, the judges of this tribunal may in certain cases do the work of the courts of first instance. But usually, except for a very limited original jurisdiction, these courts are exclusively appellate, and their judges have no power to sit in other tribunals. In America, such a thing as the chief justice presiding over an important trial for homicide and insuring that the best judicial talent in the state is applied to the case, is possible only in a few jurisdictions.

It is not uncommon also to have an intermediate court of the same type, or a number of intermediate courts, set up between the ultimate appellate court and the superior courts of first instance, thus creating to a greater or less extent an unfortunate system of double appeals. The worst type of this intermediate appellate tribunal is manned by judges who can sit nowhere else. In a better type, the judges are available in other courts. Occasionally special courts of criminal appeal are set up also. More generally, these intermediate courts have both civil and criminal jurisdiction.

(b) In the second place, we have a set of *superior courts* of first instance having general jurisdiction at law, in equity, and over felonies and more serious misdemeanors. Usually certain fixed districts or circuits are set off, and a judge or a certain number of judges are assigned to each—a system based on the circumstances of a rural population with respect to which it is possible to frame districts substantially equal in probable volume of litigation. In the worst form of this type, these judges cannot sit elsewhere. In others, there are somewhat crude provisions for exchange, or for one judge calling in another to take his place. Provisions for calling in another to aid in disposing of arrears are less common. Recently, there has been increasing provision for applying the whole force of this set of courts when and where it is needed. In the past, the staple remedy for arrears in our tribunals has been to create more judges, so that one is compelled to the conclusion that in comparison with population and volume of business, either our courts in many states are grossly over-manned, or the English courts are grossly undermanned. Moreover, until recently there has been no way of providing for the utilizing of the whole force of this set of superior courts where the exigencies of judicial business demand it. It has been no one s business to see that it is so employed. In a few states, the judges of these courts are judges for the whole state and have a flexible organization with power in a chief justice to assign judges wherever they are needed. In this respect, the present organization of the Federal courts is excellent. In addition to the ordinary superior courts of general original jurisdiction, special local criminal courts of concurrent jurisdiction are sometimes created. Such tribunals of concurrent jurisdiction commonly are manned by judges who cannot sit elsewhere, and the judges of other tribunals cannot be assigned to them.

(c) Third, there is a set of *probate courts,* usually one in each county, with or without in addition a magistrate's jurisdiction and a petty civil jurisdiction. Often laymen may or do preside over these courts. Hence they are distrusted and their decrees or judgments usually are not reviewed directly by the appellate tribunals, but must be taken to the superior court of general jurisdiction, the causes retried therein and reviewed on appeal therefrom. A few states wisely commit probate jurisdiction to the superior courts of first instance.

(d) Fourth, there is a set of *magistrates' courts,* held by one magistrate for each locality, or as separate courts by several magistrates for each town, or by a certain number for each county. They have usually a petty civil jurisdiction, a petty criminal jurisdiction, and jurisdiction to bind over graver offenders to the superior court of first instance. Too often these petty courts are organized on hard and fast lines which give rise to controversies over jurisdiction which are wholly needless. A graver fault is that they are manned almost always by laymen, often of no very representative type, and, in the past at least, were usually supported by fees. In consequence, there was no confidence in them. In all but the most trivial causes, trials *de novo* may be had in the superior courts of first instance on appeal followed by review in an appellate tribunal or sometimes by two successive reviews at an expense out of proportion to the interests involved. Police courts in small towns and cities, and more recently, municipal courts in large cities, are assimilated to these. Such municipal courts are too often but substitutes for the system of justices of the peace. They are given a court organization, and a much higher type of magistrate, and to that extent are a real advance. But too often the limitations that a sound distrust of justice's courts has imposed upon the latter are applied to this better type of court.

(4) UNIFICATION OF THE JUDICIAL DEPARTMENT. The idea of complete unification of the judicial department of government was first worked out practically in the project for the English Judicature Act. It was the intention of those who devised the plan of that Act to carry out the principle of unification by cutting off the appellate jurisdiction of the House of Lords at the top, and by incorporating at the bottom the county courts in the newly formed supreme court of judicature as a branch thereof. The recommendation as to the county courts was not adopted, and the appellate jurisdiction of the House of Lords was restored in 1875. Thus the unity and simplicity of the design were impaired seriously. But the plan

deserves careful study as a model modern judicial organization. Its chief features were: (a) to set up a single court complete in itself, embracing all superior courts and jurisdictions; *(b)* to include in this one court, as a branch thereof, a single court of final appeal. In the one branch, the court of first instance, all original jurisdiction at law, in equity, in admiralty, in bankruptcy, in probate and in divorce was to be consolidated; in the other branch, the court of appeal, the whole reviewing jurisdiction was to be established. Even this partial unification has proved most effective in enabling the courts to dispose of the great mass of litigation in the England of today.

In England, before the Judicature Act, the superior courts were made up each of a chief justice and three puisne justices. The Court of Chancery consisted of the chancellor, the Master of the Rolls, and, in the nineteenth century, a number of vice-chancellors. The Court of Exchequer Chamber was made up of the justices of the superior courts other than those of the court from which a cause was brought up on writ of error. There was also a Court of Appeal in Chancery in which the chancellor sat with two Lords Justices of Appeal. In the United States in appellate courts there are usually a chief justice, and a certain number of associate justices, two, four, six, or eight. But there are some states which depart more or less widely from this type. In the courts of general jurisdiction of first instance, there is much variation in the several states. At first, there was usually such a court in each of a number of circuits or districts, with one circuit judge or one district judge for each. Later the press of business led to a number of judges of coordinate rank and authority in some or all of these circuits or districts. Sometimes one of these judges is designated by some title as a presiding judge. Sometimes the court is organized as a tribunal for the whole state with a chief justice and with judges assigned to sit in localities as dictated by the volume of business to be done. Organization of this type is becoming more common and is demanded by the volume of litigation with which such courts have to deal today. In general, the English common-law courts as they were at the Revolution had been the model as to the composition as well as to the organization of these courts, except that instead of the judges of a central court going circuit, as in England, local circuit or district courts have been set up, each more or less an analogue of one of the superior courts at Westminster.

(5) BAR OF THE COURT. A body of lawyers practising before it (bar), is an important part of a common-law court.

It is of the first moment to have a body of practitioners imbued with the spirit of a profession, and by training and organization and discipline held to high standards of professional conduct, of duty to the court, and of duty to the client. Unhappily, this was not as clear in pioneer America as it is in our large cities today. The idea of a profession seemed repugnant to rising American democracy. The feeling was strong that all callings should be on the same footing, namely, the footing of a business—of a money-making calling. To dignify any calling by holding it a profession, and to prescribe high qualifications for and limit access to it, seemed undemocratic and un-American. Moreover, pioneer America distrusted specialists. Faith in versatility was preeminently an article of the pioneer's creed. In consequence, there was a general rejection of the common-law idea of an organized, responsible, self-governing, profession. Some states threw the practice of law open to non-lawyers with bad effects on American legal procedure which are still manifest. Some provided that any one might enter the profession with no other qualification than good character. All the states, by legislation or by increasingly lax administration of their requirements and lack of public or professional interest in the matter, made entrance into the profession easy with a minimum of qualification. As population increased, and large numbers of lawyers were admitted in great urban centers, discipline became lax, and many forensic abuses, such as offensive conduct toward witnesses and abuses in the fomenting of litigation, grew up. As the practice of law was regarded as only a business, organizations grew up in large cities in which lawyers, physicians, runners, and even professional witnesses, came to be engaged in preying alike upon the victims of accidents and those responsible for accidents.

The first step to restore professional organization, standards, and discipline was taken when the American Bar Association was organized in 1878. Following the example of the American Bar Association, state bar associations and local bar associations, which had become dormant or had only a perfunctory existence for social purposes, were revived or newly organized. In its first fifty years, the American Bar Association had promoted the National Conference of Commissioners on Uniform State Laws, which had brought about uniform legislation in the states on important subjects of commercial law. It had brought about notable progress in the reform of legal procedure, a matter which had remained in a stag-

nant condition after the impetus of the legislative reform movement had been lost. It had codified professional ethics and brought about a like codification in the several states, putting professional conduct and discipline on a sound basis. It had gone a long way in meeting the conditions of admission to the bar, and raising the level of legal education.

A turning point was reached about 1890. Since that time improvement has been continuous and relatively rapid. It has become general to centralize admission to the profession in the hands of the highest court of the state, and to provide adequate requirements, administered by a central board or commission or committee, for the older system of examination by local committees appointed for each case. In the third decade of the present century, a movement began for organization in each state of the profession as a whole, with powers of self-government, and responsibility for discipline. In the ten years from 1921 to 1931, nine states of which Alabama and California were types, had provided for in-corporation of the bar, and had strong organizations maintaining discipline and making for high standards of professional conduct. In the next five years, five more states had so provided, and in sixteen more such organization had been approved by the state bar association, or was being urged upon courts and legislatures. Thus suitable machinery is being developed for dealing with the abuses which grew up from survival of pioneer ideas, and of methods appropriate for pioneer communities, into the metropolitan cities of today. From a legal standpoint, the lawyer is an officer of the court with the duty of helping the court in its task of administering justice. An organized profession makes this common-law conception of the lawyer a reality.

3. Jurisdiction

With respect to the scope of their jurisdiction, courts are either of general jurisdiction or of special or limited jurisdiction. The former are usually called superior courts, the name borne by the three common-law courts to which they are analogous. In England, the courts of special or limited jurisdiction were magistrates' courts, certain inferior local courts, and certain special administrative tribunals. In this country very generally, although not universally, the courts of justices of the peace, the county courts, and judicial tribunals under one name or another inferior to the courts of general jurisdiction of first instance, were made courts of record, while quasi judicial tribunals, and later special administrative tribunals of one kind and another remained in the common-law category of tribunals of special or limited jurisdiction. Courts are also either of original jurisdiction or of appellate jurisdiction. A court's jurisdiction is original when causes, or a certain class of causes, are brought there in the first instance. It is appellate when, having originated in some other court, causes are brought to the court in question to obtain review of the order or judgment entered. Courts are often given both kinds of jurisdiction. Thus the Supreme Court of the United States has original jurisdiction of controversies between states of the Union, though its jurisdiction is chiefly appellate.

Jurisdiction may be also exclusive or concurrent. The jurisdiction of a court is exclusive when controversies, or a class of controversy, must be taken before the court in question and nowhere else. It is concurrent when they may be taken before the court in question or some other tribunal at the choice of the plaintiff, or removed from one to the other at the choice of the defendant. Thus the United States District Courts and the superior courts of general jurisdiction in each state have concurrent jurisdiction of actions at law or suits in equity in which a Federal question is involved, or there is a diversity of citizenship, that is, where the parties on one side are residents of the state, and those on the other side residents of some other state or states. The United States District Courts, on the other hand, have exclusive jurisdiction of bankruptcy.

In order to determine a cause, a court must have jurisdiction both of the subject matter and of the person against whom, or thing with respect to which, it renders judgment or makes an order. Jurisdiction of the subject matter means power to entertain the kind of proceeding which is brought before the court. This is determined by law. Jurisdiction of the person is obtained by service of process, that is, by reading to, or delivering to the person, or today under statutes by leaving at his residence, or delivering to him by registered mail, a writ in the name of the sovereign commanding his appearance in court. In some jurisdictions, instead of such a writ, a notice of the bringing of the suit is served by an agent of the plaintiff. If the proceeding is directed not against the person but against property, the court acquires jurisdiction over the property by seizing the property, or by publication of notice, under the provision of statutes.

Jurisdiction of person or property may be conferred by consent or appearance where the court has jurisdiction of the subject matter, but if the court has no jurisdiction of the subject matter, it cannot acquire such jurisdiction by consent of the

parties. The rules as to jurisdiction over person and property are for the protection of the individual litigant, to insure a due notice or opportunity for the persons or the claimants of the property to set forth their claims. Therefore, the persons or claimants of the property may waive this protection if they like. The rules as to jurisdiction of the subject matter, the statutory or constitutional precepts providing where litigants shall go with causes of different kinds are for the protection of the public. They are intended to insure adequate tribunals for the various types of controversies, adapted to their importance, and so cannot be waived by private agreements. Thus a person privileged to be sued only in a court of the locality where he lives, may, if he likes, appear in court elsewhere and thus give the court elsewhere jurisdiction over him. But if a court is set up with jurisdiction in probate cases, for example, without more, no consent of the parties will authorize it to adjudge a controversy as to non-payment of a promissory note, or breach of a business contract, or a defamation.

At common law there is an important distinction between courts of record and tribunals of an inferior grade said to be not of record. Where a court has jurisdiction of the subject matter and the parties, although its proceedings may have been irregular or erroneous, and its final judgment quite wrong, the proceeding and the order or judgment are yet valid unless and until a competent reviewing tribunal sets them aside for the irregularity or the error. They cannot, as lawyers put it, be impeached collaterally, but only in a direct attack by way of error proceeding or appeal. On the other hand, if the court is without jurisdiction of the subject matter or of the party against whom it makes an order, or of the property against which it proceeds, no matter how regular its proceedings or how correct its judgment in point of law or on the facts, the proceeding and judgment are void, *i.e.,* of no effect for any purpose. In the case of a court of record, that is, one which has a common law record in which the process for bringing the person or property into court, the pleadings, and the judgment, are formally set forth so that the record can be reviewed upon a writ of error, the record and proceedings and judgment import absolute verity and are binding upon parties or property until duly set aside by a reviewing court. Every act of such a court is presumed to have been done rightly until the contrary appears, and the record proves itself and its recitals without reference to the evidence on which they are made, or on which the order or judgment proceeded. In case of courts which have no such records, all tribunals of special or limited jurisdiction, and all special commissions, there is no such presumption. When proceedings of such tribunals are relied upon, every fact necessary to give jurisdiction must appear upon their face, or must be set forth and shown before they will be given effect.

Chapter VI

Common-Law Actions

So much of substantive law is, for historical reasons, bound up in procedure, that the system of the common law cannot be understood without an understanding of the common-law actions. Although these actions are now superseded by more simple and flexible forms of procedure, they have given rise to or correspond to important distinctions in the substance of the law which are of daily application. It must be remembered that the idea of substantial interests to be secured, and of rights by which they are made effective, comes late in legal development. The logical sequence is interest, right, duty, action, remedy. In order to secure the interest recognized and delimited by the law, it confers a legal right, secured by imposing a corresponding duty. To enforce the duty it allows an action, which has for its end a legal remedy. But historically the order of development is the reverse. One complained to the king, who gave a writ affording a remedy. Out of the writ an action developed. Behind the action men came to see a duty to be enforced, and a correlative right was found by jurists behind the duty. Recently, it has been seen that behind the right is an interest (claim or demand) which is recognized and delimited by the law. When remedies were understood but not rights, the only limits of the remedy were formal. Today when interests and rights are defined and remedies are understood to exist only for securing them within the defined limits, there are better means of controlling judicial action than hard and fast formal procedure.

An *action* is a set form of proceeding to bring a case to the point where the facts are to be judicially ascertained so that if they are found to bear out the complaining party's diagnosis of his cause of complaint it will lead to the legal remedy appropriate thereto. In Roman law, in which the idea of an action developed, the most important of the four old actions involved a dramatic ceremony of a conflict over possession of property or a claim of a debt followed by intervention of the magistrate to keep the peace and agreement of the parties to arbitrate the dispute. Accordingly, one who sued was said to "act law" and the proceeding was an "action of law." In the classical period of Roman law (from Augustus to the third century) a plaintiff pointed out the clause in the edict of the praetor (the judicial magistrate) upon which he relied for his action and if his complaint came within it, the praetor gave a formula appointing a *judex* to try the case, defining what was to be tried, and directing what the judgment was to be. Under this procedure the action came to be determined by the right asserted. In the common law the idea of actions developed from the system of writs. Bracton (thirteenth century) tells us that there are as many actions as there are forms of writs. But the writ was directed to the remedy, not framed on the right. Hence the common-law actions are determined by the remedy sought. So it was in the Germanic law.

1. Writs for Recovery of Property or Performance of a Duty

As has been said, at first the king's court did not act on every sort of ordinary dispute. Men were to come to the king with difficult cases which could not well be determined in the local courts, or with matters affecting government. Standard forms of writs for such cases were an obvious administrative device. As the jurisdiction of the king's court grew, new forms of writs were devised, and this meant the development of new forms of actions. In a way, this reproduced the development of the Roman actions, and the influence of the Roman law (but not of the history of Roman actions) on the formative common-law system is evident. In the reign of Henry Ill there begins to be a Register of Writs, that is, a collection of the forms of action under their appropriate writs. Those having to do with RECOVERY OF LAND go into minute detail according to whether one claimed he, himself, had been disseised, or his immediate ancestor, or claimed in title of grandfather, great-grandfather, or remoter or collateral relative. Besides these based on disseisin, another type developed later in which the case is that the person on the land held lawfully but his title had failed. At first, the case was that the land had been made over as security for a debt which the debtor is now claiming to pay and recover the land. On this model a series of writs grew up called WRITS OF ENTRY. Early in the thirteenth century a writ of entry *sur disseisin* was provided to cover the case where disseisor had died and his heir was holding the land by descent. In time this type of writ also had developed in minute detail.

A WRIT OF DEBT is to be found in Glanvill (end of the twelfth century). It has the same form as the writ of right to recover land, and has all the look of a recovery of property detained rather than of a sum owed. Indeed, the action to recover a money debt and the action of detinue to recover a specific chattel are at first one, and we read much later that where the parties traded horses and one of them had both the horses, the other could maintain an action of debt for one horse. In time, that action divides into two—debt for a liquidated sum of money owing upon contract, detinue for a specific chattel owing to the plaintiff but detained by the defendant. As trial in an action of debt was by compurgation except where the debt was established by an instrument under the debtor's seal, the action came to be used only for such cases, and other actions developed for what were called "simple" contracts. Much of the law of contracts was shaped by the procedure in the action of debt, and the action of detinue in the same way had not a little to do with determining the development of the law of personal property. The law grew out of the actions, not, as one would logically expect, the actions out of the law.

Another writ of the same general type was ACCOUNT, known from 1232. It is based on a duty of rendering a reasonable account owing to the lord of the manor by a bailiff who has collected the profits. Partly by a fiction and partly by extension of the principle to analogous cases, the action was made to cover cases in which one was bound to account to another for something which had been delivered to him or which he took or held as a partner, or as an agent. The action of account became obsolete because of the cumbrous and expensive proceedings involved. Instead, resort was had to equity in a bill for an account, the right to the account being legal, but the remedy now exclusively equitable.

Further departure from the idea of demanding property, in what is still the same type of writ, is to be seen in the WRIT OF COVENANT. In this writ, instead of the word "render" the command is that the defendant "perform"—that "justly and without delay he perform the covenant." About the beginning of the fourteenth century it became settled that a covenant must be under seal *(i.e.,* in a deed, which at common law is any instrument to which the maker has formally affixed his seal).

2. Writs for Recovery of Damages

In all of the foregoing actions the writ begins "Command A that justly and without delay he render to B," except that render is replaced in the action of covenant by perform. This seems to have exhausted the possibilities of growth in the form of writ which had grown up for disputes over land. In a new type of writ, which comes in at the end of the twelfth century, instead of a command to make restitution, the command is to appear in court and show why the defendant did some act of which the plaintiff complains. This type is based on a breach of the king's peace. The action of TRESPASS which arose in this way, gave rise in its further development to almost all of the actions in ordinary use at the time of the Revolution and received as common-law actions in this country. What particularly distinguishes the writ in trespass and the actions later derived from it is that the action calls for recovery of damages rather than specific property or specific performance of a duty. Such a distinction runs through all systems of law. In Roman law, actions were either *in rem,* asserting a right to a thing, or *in personam,*

asserting a claim against a particular person that he pay or do or perform. In the Germanic customary law there were two main types of procedure, a demand for a thing or for something due (which seems not to be clearly distinguished in the beginnings of law), and a complaint that a wrong had been done. Under the influence of Roman law the classification into writs beginning "Command A that he render," and those beginning command A to appear before the court "to show wherefore," involving different forms of procedure for each, gives way to one based on the judgment, so that, for example, detinue, in which the writ calls for restitution of a specific chattel, but the judgment in practical effect allows the defendant to choose between restoring the chattel or paying its value, comes to be put with the actions derived from trespass. In the later scheme of actions they are said to be real, personal, or mixed: real, where one claims a freehold estate in real property *(i.e.,* land, or at common law also certain inheritable rights such as advowsons, that is, rights of presentation to an ecclesiastical benefice, tithes, hereditary offices, peerages, franchises, annuities, hereditary pensions and rents); personal, where one claims a debt or personal duty or damages in lieu thereof; and mixed, where real property is demanded together with damages for a wrong, as in the action of waste, brought to recover the land with threefold damages against a tenant for life who does injury to the land to the prejudice of those having the inheritance. Here we have an approximation to a logical scheme.

ACTIONS DEVELOPING FROM TRESPASS. Trespass almost at once set off a number of varieties, trespass *de bonis asportatis* for taking chattel property from plaintiff's possession, trespass *quare clausum fregit* for trespass upon land, trespass *de ejectione firmae* by a lessee against any one who puts him out of the leased land. Out of the latter, when at the end of the fifteenth century the courts came to allow recovery of possession as well as of damages, there grew by use of fictions, the ACTION OF EJECTMENT which was one of the actions received in America. A still further development threw off the action of trespass on the case, or ACTION ON THE CASE, which again developed a number of varieties giving rise to further actions. The action on the case was brought on the special facts of the particular case, considered as amounting to a wrong, but not one done directly to person or property or forcibly or in breach of the king's peace. The distinction between the action of trespass and the action on the case is established at the end of the fourteenth century. By the sixteenth century, ASSUMPSIT has split off to cover cases of *simple contract,* and that presently divides into *special assumpsit* upon a simple contract, and general or *indebitatus assumpsit* upon a liquidated debt by simple contract or for restitution in the form of money damages where one person through fraud or duress or mistake is unjustly enriched at the expense of the other. Another development out of the action on the case was TROVER, brought where one wrongfully converts to his own use *(i.e.,* asserts dominion over) another's chattel.

Another action in which the writ is of the type of trespass but of independent development, is REPLEVIN. The mode of enforcing feudal dues and services was for the lord to distrain, that is, seize, chattels which the tenant had or had brought on the land. The tenant could give security to the sheriff that he would make good in a court of law his claim to the property and it would be returned to him. The lord would then avow the taking, *i.e.,* justify the distress. If he established his justification, there was judgment that the property be returned to the lord. The action was used in England, in all cases where goods were distrained, to try the legality of the distress. In America, it came to be used generally for all cases where one claimed an immediate right of possession of chattels in the possession of another.

3. Common-law Actions in America

Looking back over these actions as they had developed when they were received as part of the common law in America, it will be seen that a logical analytical scheme, based on the right asserted after the Roman model, would reduce them to four: an action for the *recovery of real property;* an action for the *recovery of personal property;* an action upon a *contractual or quasi contractual obligation (i.e.,* upon a promise or undertaking or a duty of restitution in case of unjust enrichment by mistake or through fraud or duress), and an action for *damages for a wrong.* This was attempted under codes of civil procedure or practice acts in some of the United States in the last half of the nineteenth century. But no logical plan was behind the development of the common-law actions and such logical schemes worked out after the event do violence to the things classified.

In England, the REAL ACTIONS, so far as recovery of land was concerned, had been out of use for more than a century before Blackstone *(1765).* They were not received in this country except that the writ of entry *sur disseisin* is in use in Massachusetts, New Hampshire and Maine. Instead we received the action of EJECTMENT, an action

to recover possession of land but made to do the work of recovery of the land. To do this, the real plaintiff made (or asserted) a fictitious lease to a nominal plaintiff (usually "John Doe"), who went on the land and was (or claimed to have been) ejected by a "casual ejector." He then brought an action against this casual ejector on whose behalf a letter was then written to the defendant notifying him of the action, and that the casual ejector had no title or interest, and suggesting that the real party come in and defend the action. The latter was allowed to do this upon admitting the lease and the entry and ejectment. Thus the common law came to have no action for the recovery of property as such. All our actions with respect to property were "possessory," *i.e.,* founded upon possession or an immediate right of possession. Many rules and doctrines of the substantive law resulted from this.

As the common-law actions came to America, then, they fall into two classes: (1) to recover possession, and (2) to recover damages. EJECTMENT to recover possession of land, has been spoken of. There are two actions to recover possession of personal property. DETINUE is brought to recover possession of a chattel acquired lawfully by the defendant, but subject to a superior right of immediate possession in the plaintiff. REPLEVIN lay to recover possession of a chattel taken by defendant from the plaintiff. As has been said, replevin, or statutory equivalent actions, almost entirely superseded detinue in this country.

Of the ACTIONS TO RECOVER DAMAGES, some are *ex contractu,* that is, based upon a contract or undertaking or a situation of fact which the law treats as giving rise to an equivalent obligation, while others are *ex delicto,* that is, based upon a wrong, or, to use the legal term, a tort. Of those to recover *ex contractu,* DEBT in origin and strictness is not an action for damages. It was an action to recover a liquidated sum of money due upon specialty (promise under seal), record *(e.g.,* judgment), statute *(e.g.,* a penalty payable to the party suing and collectible in a civil action), or simple contract. As compurgation was not received in America, the action could be and in places came to be used to its full scope. But as penal bonds by way of security were the usual form of contract at common law, and in case of breach the common-law courts would enforce the full penalty of the bond without regard to the actual damage, equity required the obligee to be content with the amount of his damage, treating the bond as what it was in substance, namely, security for the damages. In one way and another, the law took over this conception, and in this country the recovery in debt became a recovery of damages for not paying the debt or not performing the condition of the penal bond. If, however, the promise under seal was not to pay a liquidated sum of money but to do or perform something, the action to recover damages for non-performance is COVENANT. To recover damages for breach of a simple contract *(i.e.,* one not under seal), the action is SPECIAL ASSUMPSIT, setting up an actual promise and breach. In case of a debt upon simple contract, or upon bill of exchange, promissory note or check, or to recover upon quasi contract (duty of restitution dealt with in law as if there had been a contract to restore), the action is GENERAL or INDEBITATUS ASSUMPSIT, setting up the ground of indebtedness and a fictitious promise to pay and breach, so that here again the remedy in case of a liquidated debt is in form damages. The action of ASSUMPSIT grew out of the ACTION ON THE CASE, the breach of promise being treated as a wrong. This circumstance has had decisive effect in the law of contracts.

Of the actions *ex delicto,* TRESPASS lies to recover damages for a direct physical interference with the person or property. If it consists in taking chattel property out of the plaintiff's possession, the action is called TRESPASS DE BONIS ASPORTATIS, or TRESPASS DE BONIS. Where the trespass is committed by wrongfully going upon plaintiff's land, the action is TRESPASS QUARE CLAUSUM FREGIT, or TRESPASS QUARE CLAUSUM. Where the object is to recover damages for wrongful acts not within the scope of other actions, and not breaches of contract, which cause injury without direct interference with person or property *(e.g.,* libel, slander, a nuisance, deceit, negligence resulting in injury without direct physical interference with person or property, wrongful interference with advantageous economic relations) the action is CASE. If the wrong is in conversion of another's chattels to ones own use, the action is TROVER.

Legislation in America greatly simplified the scheme of common-law actions. They were all abolished by the codes of civil procedure after the middle of the nineteenth century. Massachusetts substituted an action of contract and an action of tort for the respective actions *ex contractu* and e*x delicto.* Other states merged these actions respectively in *assumpsit* or *case,* or at least allowed the one for all actions *ex contractu,* and the other for all actions *ex delicto.* Today one form of civil action is all but universal and the common-law actions have substantially disappeared.

Chapter VII

Procedure

1. At Law

A common-law court has TWO KINDS OF JURISDICTION, summary and formal. The *summary jurisdiction* is exercised upon motion or informal application, leading to an order or, as it was called at common law, a rule. It has four purposes: (1) To prevent infringement of the regulations of the courts, (2) to prevent abuse of the authority of the courts, (3) to prevent the authority of the courts from bringing about hardship, and (4) to enforce discipline and good conduct on the part of officers of the courts.

If a rule or regulation of the court has been infringed, and the infringement is promptly challenged, a court will on application set aside the proceeding had in violation of its rules. More important, if the process, or the power or authority of the court, is abused, it will intervene summarily to set aside the resulting action or proceeding and to restore matters to their rightful condition. For example, where a confession of judgment is obtained from an ignorant person by fraud, or a judgment is obtained in violation of good faith against a party who relied on representations made to him and so did not appear to contest it, the court will set the judgment aside in order to prevent the perversion of judicial proceedings to bring about injustice and oppression. Also, in the discretion of the court, in order to prevent hardship, it may in its summary jurisdiction dispense with some of its procedural rules and with some of the legal precepts governing procedure. For example, where the law or a rule of court fixes a certain time for a pleading, the court may on application extend the time. Or it may set aside a judgment regularly obtained where it has been taken by default against a defendant who has a good case but by mistake or accident or oversight let the time for appearance go by. Likewise, if an officer of the court or a member of its bar (who, in the eye of the law, is such an officer) or any person within its immediate control misconducts himself or gains any advantage to the prejudice of others which he cannot in good conscience retain, the court may not only discipline such officer or person, but in a summary proceeding may compel undoing of the wrong or restitution of what has been improperly obtained. Thus, if one collects a judgment, and the judgment is afterward reversed, the court may on motion therefor order restitution of the money. So where money is paid to a receiver through mistake of law, although a court would not ordinarily entertain an action to recover money paid by mistake of law, it will not allow its receiver to retain money which has come into his hands in this way, but on motion will order him to restore it.

On the other hand, the *formal* (or *de cursu,* that is, of course) *jurisdiction* is exercised only in actions or formal proceedings.

An ACTION AT LAW may involve six stages: (1) original and mesne process, to begin the action and get the defendant or defendants into court; (2) the pleadings or formal statements of the contentions of the parties, so as to bring the case to a single issue proper to be tried by a jury; (3) the trial; (4) proceedings after verdict; (5) judgment; and (6) execution. To these may be added (7) appellate proceedings to review the judgment, if any are taken.

(1) In all systems, in the BEGINNING the law is slow to put pressure on the person of a de-

fendant. It seeks indirectly to put pressure on him to submit a case to the tribunal, and it is some time before it learns to render a judgment against him in case he fails to appear, instead of coercing him to appear. At common law, if pursuant to the command in the original writ a party did not appear in court to defend, a series of writs, known as mesne process, was resorted to in order to bring him in. In a real action, and in actions be-ginning with a writ commanding something to be done, there was first a summons or notice to the party to obey the writ. If this verbal monition was not obeyed, there was a writ directing the sheriff to seize his goods (to be forfeited if he did not appear) or to take sureties for his appearance (to be fined if he failed to come into court). In other cases this was the first process without summons except that in actions of trespass *vi et armis* or analogous cases taken to be trespasses against the peace, the original writ directed attachment in the first instance. If notwithstanding the attachment the defendant did not appear, there was a writ commanding the sheriff to distrain his goods further from time to time, and to take the profits of his land until he came in. If he remained obstinate, a writ issued to take his body, *i.e.,* to arrest him. If then he absconded, he might be outlawed at the end of a long and involved process. All this was at length superseded by a writ of summons notifying him to appear, and the taking of judgment against him if he did not.

(2) After the defendant has come into court, or in technical language, has appeared, in person or by attorney, the next step is to settle the issue or issues to be tried. This is done by the PLEADINGS, that is, by formal statements of the contentions of the respective parties as to the facts.

At first, the pleadings were oral, in French until 1362, then in English. The writ was brought into court with the sheriff's return *(i.e.,* report of what he had done) endorsed upon it, and when it had been read, and any objections to it had been disposed of, the plaintiff's pleader *(narrator,* serjeant-conteur, afterwards serjeant, finally his counsel) set forth the particulars of his demand in a connected story (count, *conte, i.e.,* tale or declaration). Thereupon the defendant's counsel set forth his defense *(plee,* plea), and further pleadings ensued until the parties were at issue on some point, that is, until one party having denied the last pleading of his adversary the other joined issue, *i.e.,* called for trial upon it. If either party considered the last pleading of his adversary bad in point of law he demurred to it *(demeurer,* to abide), *i.e.,* abided by a determination of the question of law without answering further. In that case there was an issue of law to be decided by the court. By the time of Henry III, the forms had become fixed substantially as they were to stand for six centuries. As the several pleadings were settled, often in colloquy between court and counsel, the enrolling clerks entered them upon the "plea roll," which when issue was joined became the "issue roll," and after judgment had been entered on it, the "judgment roll." In time, instead of leaving it to the clerks to enroll the pleadings as they conceived them to have been delivered orally, the lawyers handed in drafts of them as they desired them to be entered, and finally the pleadings were conducted by exchange of papers between the lawyers until an issue of fact or a demurrer was arrived at. Then the whole series was enrolled as the issue roll. Down to 1731 the "record," *i.e.,* the enrolled pleadings, proceedings and judgment, were in Latin.

Pleadings began with the declaration. As Coke puts it, this was "an exposition of the writ, adding time, place and other circumstances, that the same may be triable." It was required to correspond to the writ, to state all facts necessary in law to support the action, and to set them forth with certainty so that issue could be taken upon them. The declaration might contain a number of counts, or statements, of a cause of action; either the same cause of action stated in different ways, or distinct causes of action. But all the counts had to belong to the same form of action, except that as debt and detinue were originally one action, counts in each might be joined. Counts stating the same cause of action in different ways were used in order to prevent a "variance," *i.e.,* a difference in some material fact between the declaration and the evidence adduced at the trial. Pleas might be in abatement or in bar. A plea in abatement does not answer the case made in the declaration, but sets forth some ground for abating the original writ or some informality in the declaration, pointing out how the plaintiff should have proceeded. Such a plea is said to be "dilatory." A plea in bar was either a traverse, *i.e.,* denial of some essential part of the declaration, or in confession and avoidance, that is, admitting the facts set forth in the declaration but setting up some affirmative defense, e.g., in an action on a promissory note, payment of the sum due. A traverse concluded "to the country" (the words were "and of this the said [naming the defendant] puts himself upon the country") that is, it tendered an issue. A plea in confession and avoidance concluded with a "verification." The words were "and this the said is ready to verify." Originally the defendant was allowed but

one plea to each count, a rule growing out of the exigencies of the mechanical modes of trial. But by a statute of the reign of Queen Anne he was permitted (on getting leave of court) to plead as many pleas, each stating one different defense, as his case might require.

If the plea concluded "to the country" the plaintiff might join issue by a replication of *similiter*—"and the said [naming the plaintiff] doth the like." Or if the plea was in confession and avoidance he might by replication traverse a material point or confess and avoid. In this way the pleadings went on by rejoinder of the defendant surrejoinder (of the plaintiff) rebutter (of the defendant) and surrebutter (of the plaintiff) until an issue was joined as to each count and each plea. A traverse by the plaintiff concluded: "and this he prays may be inquired of by the country" *(i.e.,* jury). A traverse by the defendant concluded: "and of this he puts himself on the country." Issue was joined by a *similiter.* At any stage, instead of traversing or confessing and avoiding, a party might demur to his opponent's last pleading and upon the latter joining in the demurrer there was an issue of law.

Demurrers are either general or special; general if the pleading was challenged on a substantial point, special if the defect was technical and formal. Originally there was no such distinction. But a statute of the reign of Elizabeth required the demurrer in case of a technical and formal defect to specify it, whereas in a general demurrer it was only necessary to assert that the pleading demurred to was insufficient in law.

Certain applications might be made during the pleadings or before trial of the issue. Under the old oral pleading one who relied on a deed *(i.e.,* an instrument under seal) brought it into court, whereupon the other party might pray to hear it read (for at that time as a rule only the clergy could read). From this grew the practice of *profert* and *oyer.* When a party in his pleading set up a common-law deed, or letters of administration of an estate of a deceased, he was required to make *profert, i.e.,* to say in his pleading that he brought the instrument into court *(profert in curiam).* The other party might then "crave *oyer"* (law French for "to hear"), on which the one who had made *profert* was bound to give him the contents of the instrument that he might put it at length at the head of his pleading and thus make it a part of the record. If the instrument was not under seal so that profert was not required, the adverse party instead of craving oyer applied to the court by motion to be allowed to inspect it. Also if a plaintiff is a non-resident, that is, lives out of the jurisdiction of the court, so that if his action fails it would be at least difficult for the prevailing party to collect Ms judgment for the costs of the action, the court will on motion stay the proceedings until the plaintiff gives security for costs. But this application must be made before issue is joined. Again, there may be an application by motion to change the venue.

(3) As the business of the King's courts grew and JURY TRIAL became the normal procedure, it was inconvenient to bring jurors from every remote part of the kingdom to Westminster. Hence, legislation beginning in 1285 provided for taking verdicts in the county before commissioners of assize in case of real actions, or commissioners of *nisi prius* (who were to be justices of one of the courts) or commissioners of oyer and terminer *(i.e.,* to hear and determine all pleas arising in the county of a specified type). In time, the same commissioners came to be named in each of these commissions so that between the terms of court at Westminster the judges of the superior courts went regularly about the kingdom to the different circuits for the purpose of jury trials. The court in which causes are tried by jury is still called a *nisi prius* court, and the proceedings are said to be at *nisi prius.* The name comes from the words of the writ summoning the jury. It was required that a jury be sent to Westminster unless before *(nisi prius)* a certain date the justices came into the county.

In the margin of the declaration a county is designated as that in which the cause arose. This is called the venue. If the action was "local," *i.e.,* the cause of action could only have arisen in one place, as in an action for possession of land or for trespass upon land, there could be but one venue. But if it was "transitory," *i.e.,* could have arisen anywhere, as in an action upon a debt or a contract or for a trespass to the person or chattel property, the plaintiff might "lay the venue" *i.e.,* designate a county as the place of trial, as he liked. This power of choice was abused so that it was enacted in the reign of Richard II that the venue should be laid in such cause in the county where the cause of action arose. If this was not done, or if in cases not within the statute the venue laid was inconvenient, the defendant might move to change the venue to the proper county.

At the trial, the first step is to empanel and swear the jury. As this is proceeding there may be a challenge "to the array" or the entire panel, or "to the polls," *i.e.,* to some particular juror or jurors. The challenge to the array is on the ground of irregularity in the make-up of the panel

or partiality of the sheriff or officer who arrayed it. The challenges to the polls are for incapacity to serve as juror, or for partiality (because of relationship to a party or interest in a case, or being master or servant of, counselor or attorney for, or associate in a corporation with, one of the parties), or to the favor, based on some probable ground of suspicion, such as acquaintance with one of the parties. These challenges are tried by triers, two persons appointed by the court, if the first juror called is challenged, but as jurors are found in-different and sworn, by the first two jurors sworn. When twelve jurors have been sworn that they will "well and truly try the issue and a true verdict render," the trial has begun.

Next, the junior counsel for the plaintiff states the pleadings in order to show what the issue is, and the leading counsel for the party having the right to begin addresses the jury, stating what the party expects to prove to them and how. Who is to begin is determined by considering which party would fail if no evidence were adduced. If the plaintiff has anything to prove as to damages or otherwise, he is to open and close. If the damages are liquidated, or a mere matter of calculation, the party holding the affirmative of the issue is to open and close. The right to open and close is important because of the advantage of reply or the last word in argument. The party entitled having opened his case, his witnesses are called and examined by his counsel and cross-examined by the counsel for his opponent. When all these witnesses have testified, counsel for the opponent lays his case before the jury and argues as to whether and how far the witnesses adduced have made out a case. He then may call witnesses who are examined and cross-examined, as before. If he calls witnesses, counsel for the party who began has a right to argue in reply. The judge then sums up the evidence, and instructs the jury as to the law, and the jury, after consideration of the evidence, the arguments and the charge of the court, return a verdict (oral at common law) which is recorded. Instead of a general verdict for plaintiff or defendant, however, the jury may find a special verdict stating all the facts, and leaving it to the court to decide what verdict is required by law in view thereof. In the latter event the case is argued to the court as upon a demurrer and judgment pronounced. This trial procedure has been variously modified in some details in different states, but the main lines still obtain in all jurisdictions.

Only the writ, the pleadings, the recital of the trial, the verdict, and the judgment went into the record. But it might happen that counsel for one party or the other desired to make part of the record some ruling of the court at the trial, *e.g.,* in the admission or rejection of evidence, or the charge of the court, or some part of it, in order that the ruling or direction to the jury might be reviewed. This was done by a bill of exceptions, provided for by a statute of Edward I (1272). Counsel drew up a statement of his objections and the ruling of the court and presented it to the trial judge before a verdict. If the objections were truly stated, the judge was bound by the statute to seal the document which was then tacked to and became a part of the record so that the objections could be reviewed by a writ of error. Bills of exceptions are now disused in England, but they or their statutory equivalents are commonly in use in America.

It might happen that the evidence of plaintiff or of defendant was not sufficient in point of law to sustain a verdict in their favor. In that case, the trial judge might direct the jury to return a verdict against the party so failing in his proof. If, however, it was the plaintiff who failed to make a case, the trial judge might so rule and the plaintiff "suffer a non-suit," *i.e.,* have it entered on the record that he did not appear when called to hear the verdict and so lost the benefit of the proceeding by abandoning his case. This non-suit could not be entered unless, on advice that the court held there was no case, the plaintiff chose to allow it; but it was advantageous to him to do so as otherwise the court would direct a verdict against him.

(4) AFTER VERDICT certain motions might be made. Either party, if defeated, might move for a new trial, or for a *venire de novo.* A plaintiff, against whom a verdict had gone, might move for judgment *non obstante veredicto.* A defendant who had a verdict against him, might move in arrest of judgment. The motion for a new trial has been explained in another connection. The motion for a *venire de novo (i.e.,* that a new jury be summoned) is the same in effect, but was not in the discretion of the court as was the motion for a new trial where made on grounds other than misdirection of the jury or error in rulings on evidence. It could be made in case of wrongful disallowance of a challenge of a juror, or defect in the verdict by which it was made uncertain and ambiguous. The motion for a judgment *non obstante veredicto* (notwithstanding the verdict) was based on the face of the pleadings, claiming that notwithstanding the verdict, the plaintiff was entitled to judgment because the defendant had admitted the plaintiff's case and taken issue and had a verdict upon a point which did not make

a defense. The motion in arrest of judgment also is based on the face of the record. It claimed that there should be no judgment for the plaintiff on the verdict because the pleading would not sustain it. If the motion was granted, the result was to stop the proceeding without the plaintiff obtaining a judgment.

(5) Supposing no such motion to have been made, or made successfully, the next step is JUDGMENT. A judgment may be either interlocutory or final. The former does not terminate the action, such as on demurrer (nowadays) where the party against whom it goes may by leave of court plead over, or on a plea in abatement, or where judgment is rendered by default and the amount of recovery is not liquidated, or precisely ascertainable on the face of the record. In the latter case the judgment at common law was that the plain

tiff recover his damages, and a writ of inquiry issued directing the sheriff to ascertain the amount by a jury and return the inquisition, as it was called, into court. Thereupon, and in other cases where the verdict finds the amount of the damages, or they are liquidated, there is final judgment. This brings the action to an end.

(6) At common law COSTS abide the event of the action. Originally, if the plaintiff failed in his action, he was fined for his false complaint, while the jury were instructed that if they found for the plaintiff they were to take into account the expense to which the plaintiff had been put by defendant's wrongful defense. By the statute of Gloucester (1278) it was provided that the demandant *(i.e.,* plaintiff in a writ of right) should recover against the tenant "the cost of the writ purchased," and that the act should apply "in all cases where a man recovers damages." This statute was held to include all the costs of the action begun by the writ and to cover all the important common-law actions. Thus the plaintiff became entitled to judgment for costs if he prevailed. Later by statutes of Henry VIII and James I, it was provided that the successful defendant should have judgment for costs as the plaintiff would have had had he succeeded. These statutes are common law in America. But today the subject is largely regulated by statutes.

(7) In the common-law procedure, a judgment is REVIEWED by writ of error, issuing from the reviewing court and directed to the court in which the judgment was rendered, commanding the latter tribunal to certify the record to the upper court so that it may be examined for error of law and the judgment either reversed or affirmed. The writ itself does not prevent execution of the judgment. In order to hold off execution pending the proceedings for review, the party who obtains the writ must give security in double the amount recovered to prosecute his writ of error, and to pay, if the proceeding is not prosecuted or if the judgment is affirmed, the amount of the judgment, damages and costs, and such sum as may be awarded as damages for delaying execution.

Next, within a fixed time from allowance of the writ, the plaintiff-in-error *(i.e.,* the party who is seeking review of the judgment) must procure a transcript of the record, certified by the clerk of the court which rendered the judgment, have it attached to the writ, and delivered to the clerk of the reviewing court. Thereupon, the plaintiff-in-error assigns errors, *i.e.,* states the respects in which, and grounds on which, he claims the judgment is erroneous in point of law, or errors appear on the face of the record, to which the defendant-in-error may demur. But more commonly he will plead a "joinder in error," *i.e.,* assert that there is no error in the record and submit the record to the judgment of the court, or may plead affirmatively a release of errors, or the statute of limitations (at common law twenty years). Issue is reached as in the regular course of pleading at common law, after which, if an issue of fact is joined, it is tried by jury, if one of law, there is argument upon it. The judgment is either to affirm the judgment below or to reverse it; in the latter case either entering such judgment as the lower court should have entered, or remanding the cause for further proceedings according to law. If the judgment is reversed and the judgment plaintiff had in the meantime enforced the unsuperseded judgment, the plaintiff-in-error may have a writ of restitution restoring to him what had been taken.

If the judgment is not superseded, or has been affirmed, the prevailing party may have execution. If it is a judgment for the possession of land, the writ is *habere facias possessionem* directing the sheriff to put the plaintiff in possession of the land recovered. If it is for a sum of money, there are three writs: *fieri facias, capias ad satisficiendum* and *elegit.* The writ of *fieri facias (i.e.,* directing the sheriff to cause to be made from the goods of the defendant a certain sum of money) allows seizure and sale of any chattel property of the defendant except his necessary wearing apparel, and application of the proceeds. upon the judgment. There may be as many such writs as are necessary to pay the judgment in full. The writ of *capias ad*

satisficiendum (i.e., directing the sheriff to take the body of the defendant for satisfaction of the judgment) belonged to the days of imprisonment for debt and when executed resulted in the judgment debtor's being in the custody of the sheriff in the county jail, or being removed by writ of *habeas corpus* to the prison of the superior court in which the judgment had been rendered. All this became obsolete with the abolition of imprisonment for debt. The writ of *elegit* was provided for by a statute of 1285. It allowed one who had recovered a debt or damages to choose between a writ of *fieri facias,* and having the sheriff deliver to him all the chattels of the debtor, except his oxen and beasts of the plow, and half of his land. The chattels are appraised and turned over at their appraised value. If they did not suffice to pay the judgment, the sheriff delivers possession of half of the land which the plaintiff could then hold until the rents and profits have satisfied his claim.

Such is the course of an action at common law. The details have been much modified everywhere by statutes or practice acts, but the main outline still obtains.

2. In Equity

(1) Equity procedure was derived from the procedure of the church courts, and thus indirectly from Roman-law procedure. In consequence it differs fundamentally from the course of the common law. A suit in equity begins by submitting to the Chancellor an "ENGLISH BILL," *i.e.,* a PETITION in English, and so originally informal as compared with the formal Latin writ and recorded pleadings in an action at law. However, in course of time the bill became highly formal in its several parts and in its language. The bill sets forth the complainant's case, asserts that he is without remedy at common law, prays for relief, and asks that the defendant be required under penalty to answer upon oath the matters charged against him. Upon this bill a writ of *subpoena* issues commanding the defendant under a money penalty to appear and answer the bill. There was a series of writs to compel appearance, if the defendant did not appear, whereby pressure was put on him to do so. This culminated in "a commission of rebellion" treating him, says Blackstone, "as a rebel and contemner of the King's laws and government," for not obeying the King's command. Then if he was not found by the commissioners, a sequestration issued to seize all his goods and the profits of his land, and hold them subject to the order of the court. After all this, if there was no appearance, the bill was taken as confessed and the court made a decree accordingly. Most of this is long obsolete like mesne process in procedure at law. The sequestration to compel appearance is still sometimes used where it is necessary to have control over the person of a defendant.

(2) When the defendant has appeared, he may DEMUR, or PLEAD, or ANSWER. The DEMURRER challenges the legal sufficiency of the bill and seeks the judgment of the court whether the defendant is bound to answer it, because it does not show a cause for equitable relief, or does not show a right in the complainant, or seeks to require the defendant to answer or disclose something as to which he is legally privileged. If the demurrer is sustained, the bill is dismissed. If it is overruled, the defendant must answer. Pleas are to the jurisdiction, or to the person, or in bar. A PLEA to the jurisdiction sets up want of jurisdiction in the court over the subject matter where this does not appear on the face of the bill. A plea to the person shows a disability in the complainant to sue. A plea in bar sets up some matter which operates to preclude the plaintiff from claiming relief. The usual defense is by answer, but one may demur to part of a bill, plead to another part, and answer as to the remainder. The ANSWER is upon oath unless oath is waived by the bill, and is signed by counsel. It must meet specifically everything in the bill, either by denial, admission, or confession and avoidance. If anything material is not so met, the answer may be excepted to for insufficiency and a further answer required. The answer can only pray that the defendant be dismissed. Where relief against the complainant is desired it must be sought by a cross bill.

If the complainant considers that the answer does not state a defense and that upon the facts admitted he is entitled to a decree (the technical term for the judgment of a court of equity) he may set the case down for hearing upon bill and answer. In this event the answer is taken to be true, and the question is as to the legal result upon the parts of the bill admitted and the new matter in the answer also taken as admitted. Otherwise the complainant files a general replication to the effect that his bill is true and the new matter untrue as he is ready to prove. To this the defendant used to rejoin, averring the like, thus joining issue upon the facts in dispute.

(3) In equity there was no trial by hearing witnesses in open court as at law. The TESTIMONY was taken in the form of *depositions.* These depositions were taken before examiners or commissioners upon interrogatories (short and pertinent questions in writing) framed by counsel for the respective parties. The depositions were transmitted sealed

to the court and not opened until all witnesses had been examined, when they were "published," *i.e.,* opened so that the parties could take copies of them. The same course was taken on a cross bill, and it was generally arranged that the bill and cross bill should come on for hearing together so that one decree could be made on both. The taking of testimony by deposition continued in our Federal courts until 1913, longer in some state courts, but generally modified in different states. At present it is the practice to hear witnesses in court at the hearing as in a trial to a court without a jury at law.

(4) At the HEARING, as the chancery practice was, junior counsel for the complainant made a brief statement of the substance of the bill. Then his leading counsel stated the case, the matters in issue, and the points which he raised as to each. Thereupon such of the depositions as were considered to bear on these points were called for and read by one of the clerks. Counsel for the complainant now argued the case. Next, counsel for the defendant stated their case, had the depositions read on which they relied, and argued to the court. The *decree* was pronounced dealing with every point raised and minutes of it were taken down by the clerk. But in complicated cases the court indicated the main lines and left it to counsel for the prevailing party to draw up a draft decree which was submitted to the other side and settled after argument if objections to the draft were raised. Or a question or a number of questions might be referred to a master in chancery to make inquiries and report, and after the report was confirmed by the court the decree would be framed accordingly. Costs in equity are in the discretion of the court.

A court of equity may direct that a verdict of a jury be taken for the information of the court on some point at issue. This used to be done by bringing an action upon a "feigned issue" *(i.e.,* a fiction of a wager upon the issue of fact) in the court of King's Bench. In this country, in courts having both law and equity powers, a jury is called to try the issue as the court frames it. The verdict in such cases is advisory only. The court may follow it or not as its best judgment on the case requires.

Before the final decree is signed and enrolled, a party may *petition for a rehearing.* After the decree he may bring a *"bill of review"* for some error on the face of the decree or upon new evidence which he did not know of and could not have had or made use of when the decree was made.

In England, appeals were taken to the House of Lords, not by writ of error as at law, but by bringing the pleadings and the evidence before that tribunal to be heard *de novo.* The decree might be affirmed or reversed or modified. In this country, the ultimate court of review passes on appeals in equity as well as writs of error at law.

(5) DECREES of courts of equity command something to be done, or prohibit the doing of something. They are in the form of a command to the defendant to do or not to do. The mode of enforcement normally is by committing the defendant to jail for contempt in not obeying the decree. He "purges himself" of the contempt by showing that he has obeyed, or that without his fault it has become impossible to obey. Another mode of enforcement is by sequestration, that is, seizure of the defendant's property to be held subject to the order of the court in order to bring pressure upon the defendant. Where the decree calls for payment of money, legislation a good while ago permitted enforcement by execution. Also where the decree provides for conveyance of property, legislation has provided either for record of the decree in the proper registry of deeds with the effect of thereupon transferring the title, or for conveyance by an officer of the court or some public officer designated in the statute, which conveyance has the same legal effect as if made by the party himself. Recently, provision has been made in many jurisdictions for cases where a defendant is required by the decree to do something or build something by providing that the work may be done under the direction of an officer of the court and the cost collected from the defendant by appropriate process.

Such was equity procedure as it came to us. It has been much modified by statute and practice acts and rules of court, but the main outlines have stood except where procedure at law and in equity has been fused, as under the codes of civil procedure and the most recent practice acts.

Chapter VIII

Rights

1. Interests

It has been said that the task of social control is to maintain, further, and transmit civilization. To this end the legal order, as a highly specialized form of social control through politically organized society, seeks to order human conduct and adjust human relations so that in the endeavor of human beings to utilize the goods of existence, if they do not suffice to go round (that is, to satisfy all the wants or desires of every one), they be made to go round as far as possible with the least friction and the least waste. Thus the immediate task is to adjust or reconcile or harmonize conflicting and overlapping claims or demands or desires of human beings living in a politically organized society. Those who assert such claims or demands or desires seek to have them recognized and secured by politically organized society, and thus bring pressure to bear upon legislative bodies and courts and administrative officials to do something about them. Some of these claims have long been recognized and secured. Others, newly arising, are only beginning to be considered. Others which have been long urged may be only recognized in part. Others long recognized may have lost the legal security they once had, or that security may have been more or less impaired through the pressure of competing claims.

In the science of law we speak of these claims or demands or desires as interests. We may, therefore, define an interest as a claim or demand or desire which individuals, either individually or in groups, seek to satisfy, of which, in consequence, the ordering of human relations must take account. The legal order does not create these interests. Interests in this sense would exist if there were no legal order, and no body of authoritative guides to conduct or to decision. Competition of individuals with each other, competition of groups or societies of men with each other, and competition of individuals with such groups and societies, in the endeavor to satisfy human wants and desires, bring about conflicts between interests which civilized society must adjust if it is to maintain the conquest of external nature and harnessing of it to man's use which is half of civilization.

Interests, then, are not created by law. But the law classifies them and recognizes a larger or smaller number, depending on the stage of legal development. It then defines the extent to which it will give effect to those which it recognizes, both in view of other interests and in view of the possibility of effectively securing them through legal institutions and the judicial or the administrative process. Some are directly recognized and secured. Others get only an indirect recognition through limitations imposed on expressly recognized interests. For example, at common law the interest of the child is indirectly recognized by limiting the father's privilege of correction. When interests have been recognized and the limits of that recognition have been fixed, the next step is to devise means for securing them within those limits. One of these means is the conferring of legal rights and imposing of correlative duties. The purpose is to adjust or harmonize conflicting or overlapping interests so as to permit of the fullest development and exercise of human powers and capacities.

Commonly we speak of a person as having a right when we feel that some claim which he makes, or which is asserted on

his behalf, whether to have or control something, or to do something, or to be free from having something done, is morally well grounded and ought to be recognized and acceded to by all upright and just persons. A right in this sense, backed by the force of politically organized society, is one of the meanings of the term "a right" in the law. But the term is used with a number of meanings which it is necessary to discriminate. In most discussions of "natural rights" *(i.e.,* ideal rights—the rights which the ideal man would assert in an ideal society) the term is used in the sense of interest—either as interest which one feels should be recognized and secured, or a morally recognized interest as it is also legally recognized, delimited, and secured. The legally recognized and secured interest, and the legal conception through which it is secured, thought of as somehow a unit, make up one meaning of "a right" and may be spoken of as a right in its widest sense. In a narrower sense a legal right is a capacity of exacting acts or forbearances by another or by all others which the legal order recognizes or confers or gives effect to through the force of politically organized society in order to secure some interest. When we speak of a legal right of possession or the right of a creditor to payment of the debt, we use the term in this sense. Certain other legal institutions, recognized or created in order to secure recognized and delimited interests, are also called rights. One is what is better called a power, *i.e., a* legally recognized or conferred capacity of creating, divesting or altering legal rights and so of creating duties. For example, an owner has a power of disposal. He may divest himself of the capacities of an owner and invest another with them. Another is what are better called liberties, general conditions of legal noninterference or hands-off, in which the law secures certain interests by leaving men in certain fields of activity to free exercise of their natural faculties. Our bills of rights are for the most part bills of liberties in this sense. Take, for example, the "right to pursue a lawful calling." Here the law keeps its hands off of the whole field and allows each of us to choose freely his own vocation. Again, the term is not infrequently used to mean what is better called a privilege—a special condition of legal hands-off, where the legal order does not interfere on some special occasion, or in some special situation, securing some interest by exempting certain activities on certain occasions from the operation of rules which would otherwise impose liability. An example may be seen in the law of defamation. If confidential inquiry is made of one about a servant, and one gives a confidential answer in good faith, in the course of which, and as part of which, he makes a defamatory statement, he does not incur liability as in an ordinary case of defamation. The occasion is said to be privileged.

CLASSIFICATION OF INTERESTS A convenient classification recognizes three types of interests: (1) individual, (2) public, and (3) social. But this does not mean that every claim or demand recognized by the legal order, or every claim or desire pressing for recognition may be put for every purpose in one or another of these three categories. By individual interests we mean claims or demands of human beings involved in or looked at from the standpoint of the individual life as such—asserted in title, one might say, of the individual life. By public interests we mean the claims or demands of human beings involved in or looked at from the standpoint of political life, that is, of life in politically organized society—asserted in title, one might say, of political life. By social interests we mean those wider claims or demands or desires involved in or looked at from the standpoint of social life in civilized society—asserted, one might say, in title of social life. These claims or demands or desires are asserted by individual human beings. But they are not for that reason all of them individual interests. For some purposes it is convenient to look at a given claim from one standpoint while for other purposes it may be convenient to look at the same claim or type of claim from one of the other standpoints. This is particularly important when we are valuing claims with respect to other claims in order to delimit them. We must be careful in such cases to compare them upon the same plane. If we put one claim as an individual interest, and the other as a social interest, before comparing them or weighing them, we may decide the question in advance in our very way of puffing it. Usually it is best to put claims in their most generalized form, that is, as social interests, in order to compare them. But for exposition of the details of the legal system, it is generally better to look immediately at the individual interests which the legal order is seeking to secure.

(1) INDIVIDUAL INTERESTS. It is convenient to classify individual interests under three main heads: interests of personality, interests in the domestic relations, and interests of substance. Interests of personality include the claims or demands involved in the individual physical and spiritual existence. The interests in the domestic relations include the claims involved in what has been called the expanded individual life. Interests of substance

are the claims and demands involved in the individual economic life. Classifications are necessarily somewhat arbitrary. Classification proceeds on analytical lines, whereas the things classified are likely to have developed historically without regard to logical sequence or relation. Thus defamation may seem to infringe both interests of personality and interests of substance, since one's reputation is an asset as well as part of his personality. Also malicious prosecution of a civil action may infringe both of these types of individual interests. Likewise, the common law action for seduction is based on infringement of an interest of substance, and generally in the common law injuries to the domestic relations are treated as injuries to the economic existence. This is due to historical reasons and the exigencies of the action on the case which was the only available remedy at common law. It is analytically unjustifiable, and these and like anomalies are disappearing in the modern development of the law.

Interests of personality include inviolability of the physical person, with which are closely connected freedom of will, security of mental and nervous conditions, and free choice of location. Looking at these more narrowly, they include immunity of the body from direct or indirect injury, preservation and furtherance of bodily health, immunity of the will from coercion *(i.e.,* freedom of choice and judgment as to what one will do), immunity of the mind and nervous system from direct or indirect injury, and preservation and furtherance of mental comfort, immunity of one's feelings, and freedom from annoyances such as invasions of privacy. Secondly, they include claims to individual honor, dignity, and reputation, and, thirdly, claims to free belief and opinion. This type of interest always presses hard for recognition and securing. But it involves difficulties of delimitation because of competition of other interests with which it comes into conflict and because of inherent difficulties in securing such interests with the practical machinery of the legal order. Thus there are difficulties of proof as to nervous and mental injuries not objectively manifest, and the interests of others in free exercise of their faculties have to be taken into account when the over-sensitive assert claims to the comfort of their thoughts and emotions. Over-sensitiveness may make some matter very serious to a particular individual which is too small, when looked at in general, for the law to take up. Moreover, the staple and most convenient remedy of the law, money damages, is only fully applicable to interests of substance. In the nature of things, it can only give a partial security to interests of personality.

Individual *interests in the domestic relations* are involved in the relation of parent and child and husband and wife. They are: (1) claims of parents, (a) against the whole world to the society, custody, and control of children, especially while they are of tender years, and power to dictate their training, prescribe their education, and form their religious opinions; the chastity of a female child as ministering to a parent's sentiments of self respect and honor; and the industrial services of the child; *(b)* claims of parents as against the children, to obedience and respect as matters related to the parent's personality, to services for the benefit of the household, and, if the parent is indigent and infirm, to support from a child of age, capacity, and sufficient means; (2) claims of children, *(a)* against the whole world not to have the relation injuriously interfered with, and *(b)* against the parent, claims to support, to society and affection, to education, and (as asserted and recognized in some European countries) a claim of an unmarried daughter to have a portion to enable her to get married; (3) claims of husbands, *(a)* against the whole world not to have the relation interfered with, *(b)* as against the wife, to the wife's society, to her services for the benefit of the household, and in case of an indigent and infirm husband, to support from a wife of means and ability (recognized in but a few jurisdictions by statute); (4) claims of wives (a) against the whole world not to have the relation interfered with, *(b)* against the husband, to society and to support. Obviously it is not possible, or if possible not always practicable, to secure all of these claims to the full extent to which they are asserted. In no field of the law is the task of weighing and valuing conflicting and overlapping claims more difficult. It is necessary to weigh them with respect to the individual interests of the other party to the relation and the social interest in the family as a social institution, the protection of dependents, and the rearing and training of sound and well bred citizens for the future.

Individual *interests of substance* include claims of individuals to the control of corporeal things (property in the narrower sense), to freedom of industry and contract as an individual asset, to promised advantages (claims to performances by others having a pecuniary value—called incorporeal property), to economically advantageous relations with others, contractual, business, official, social and domestic, and to free association with others. The law may be made more thoroughly effective with respect to these interests than as to any others. Inter-

ests of personality are not easily protected by specific relief. The law cannot restore the condition of things which existed before the injury, nor are such interests easily or accurately measured in money so as to be secured adequately by a money judgment. On the other band, this remedy is well adapted to interests of substance, and here also specific relief, *i.e.,* restoration of the conditions which existed before the interest to be secured was interfered with, is usually effective. With respect to interests of personality such relief is difficult and often impracticable. In case of interests of substance it may usually take the form of dispossessing the wrongdoer and repossessing the one whose interest the law seeks to secure. But in the case of the claim to free industry and contract, to promised advantages, to advantageous relations with others, and to free association with others, difficult weighings are necessary because of the other interests, individual, public, or social, with which they conflict or which they overlap.

(2) PUBLIC INTERESTS. Public interests are of two chief sorts: (1) interests of the state as a juristic person, including interests of personality, of the integrity and freedom of action and honor of the state personality, and its interests of substance, and (2) interests of the state as guardian of social interests.

(3) SOCIAL INTERESTS. In the scheme of social interests there stands first the claim or demand, asserted in title of the social group and generalized in terms of social life, to be secure against those forms of action or courses of conduct which threaten the social existence. It may be called the social interest in the general security. It includes the public peace and order, the general safety, the general health, the security of acquisitions and the security of transactions. Next may be put the security of social institutions by which the general security is maintained. It is the claim or demand involved in life in civilized society that its fundamental institutions be secured from those forms of action and courses of conduct which threaten their existence or impair their efficient functioning. It includes an interest in the security of domestic institutions, an interest in the security of religious institutions, and one in the security of political institutions. Recently an interest in the security of economic institutions has been pressing for recognition.

Third may be put the social interest in the general morals; the claim or demand involved in life in civilized society to be secure against acts or courses of conduct subversive of good morals or offensive to the moral sense of the general body of individuals. It is an interest in security of the received ethical custom of the community as a social institution. Fourth may be put the social interest in the conservation of social resources; the claim or demand involved in life in civilized society that the goods of existence shall not be wasted. Fifth is the social interest in general progress; the claim or demand involved in social life that the development of human powers, and of human control over nature for the satisfaction of human wants, go forward. It calls on the legal order to further agencies of economic, political, or cultural progress and to restrain interference with them. Finally, but by no means least, there is the social interest in the individual life; the claim or demand that if all individual desires may not be satisfied, they be satisfied at least so far as is reasonably possible and to the extent of a minimum human life. It includes a social interest in individual free self-assertion, physical, mental, and economic, a social interest in individual opportunity (the claim or demand involved in social life that all individuals shall have fair opportunities, political, physical, social and economic), and the social interest in the human life of the individual (a claim that each individual have secured to him the conditions of at least a minimum human life under the circumstances of life in the time and place).

Social control through the legal order seeks to secure as much of this whole scheme of interests as it may with the least sacrifice.

Social interests are maintained directly and as such, for the most part, by the criminal law. In the common-law system public interests are maintained chiefly by the ordinary actions of private law given to the state or to public officers on behalf of the state, by private actions allowed to individuals where individual and public interests coincide, by the prerogative writs, such as mandamus (to command performance of a public duty owed to some individual who applies for the writ) and *quo warranto* (to inquire by what right some one holds a public office or exercises or claims to exercise some franchise), and by the criminal law. Individual interests are maintained by rights, powers, liberties and privileges conferred upon or recognized in individuals and vindicated in private actions.

2. Means of Securing Interests

In order to secure the interests which it recognizes within the limits as it delimits them, the legal order imposes duties and liabilities, confers legal rights, recognizes and con-

fers legal powers, recognizes liberties, and recognizes and confers legal privileges. Legal rights, legal powers, liberties, and legal privileges, have been explained above. There is a legal duty when one is bound to do or not to do something because of some interest, individual, public, or social, which the legal order undertakes to secure through the force of the state invoked in judicial or in administrative proceedings. Absolute duties are imposed in order to maintain social interests without regard to any corresponding individual or private right. They are enforced by the criminal law. Relative duties are imposed in order to secure individual interests. In such case the relative duty corresponds to an individual legal right. Such duties are enforced in private actions based upon the right.

Another mode of securing individual interests is to require people generally to conform at their peril to certain legally defined standards of conduct. If injury is caused by their departure from these standards, they are required to repair the injury by payment of damages. That is, the law imposes a liability, a condition where one incurs a risk of having to make reparation by way of damages if he departs from the legal standard of conduct.

Distinction should be made between natural fights, legal fights, and political rights. *Political rights* are powers or capacities of taking an active part in the government, which the state concedes to or recognizes in certain categories of citizens. Ancient law did not distinguish legal fights from political fights. It allowed legal fights only to those who had also political fights. In modern law, we consider that *natural rights* belong to or reside in human beings; that legal or civil rights belong to or reside in persons, either natural persons (human beings), or juristic persons (associations of men recognized by law as the subjects of rights, such as municipalities and private corporations); and that political rights belong to certain categories of citizens or of persons on whom the state has conferred a partial citizenship. Obviously, possession of one of these forms of fights does not of itself imply possession of the others. In modern times the legal order aims to accord legal or civil rights to all natural persons to the extent of their moral or natural rights, so that all human beings are persons, *i.e.,* subjects of at least some legal fights. Thus the bills of rights guarantee liberties to persons not merely to citizens. The general tendency has been also to extend political fights widely, denying them only because of alien national character, or natural deficiency in the maturity of judgment required for exercise of political power.

There are three elements of a *legal right:* person, object and fact. The *person element* involves two: a person entitled in whom the power or capacity of influencing the action of others, or of another, resides or inheres,—the person on whom the legal order confers the right—and a person obliged, the person or the persons on whom the corresponding duty is imposed, on whom, therefore, the capacity of influence through the force of politically organized society operates. The *object element* (not always present) is spoken of commonly in the science of law by the term "thing." 'Thing" *(res)* is the material or corporeal, or the immaterial or incorporeal object with respect to which a right exists and is exercised. The *fact element* is the act (exertion of the will manifested outwardly) or event (operation of external nature independent of human will) which determines the character and scope of the right or gives rise to it, or with respect to which it exists.

In respect of those against whom they may be asserted, rights are of unlimited or of limited incidence, *i.e.,* may be assertable against every one (against the whole world, as the phrase is), or assertable against some particular person or persons only. The former are usually called rights *in rem,* from the Roman action *in rem,* in which a title was asserted generally against every one, and action *in personam,* in which a claim was asserted against the particular defendant. Examples of the first are, the right of ownership of a tract of land, a right of possession of a chattel, one's right to his reputation. Examples of the latter are, the right of a creditor against his debtor to exact payment of the promised sum of money, the right of one who *has* performed some service for another at his request, without stipulation as to the reward, to a reasonable compensation, the right of a beneficiary under a trust against the trustee to have the trust carried out in good faith.

3. Scheme of Legal Rights at Common Law

Put in the most general terms, the rights *in rem* recognized by the common law are personal integrity, personal liberty, society and control of family and dependents, and private property. The right of personal integrity is one not to be injured in body or mind by the aggression or by the negligence of others. It covers life (although originally, and until nineteenth-century legislation, the taking of life wrongfully did not result in any civil liability), body, and health, both bodily and mental. As to mental health and comfort, for fear of imposture, the law for a long time was hesitant to provide

security. How far a right of privacy will be recognized as a phase of this right has been in dispute for more than a generation. The right to one's reputation is recognized also as a phase of this right to the integrity of one's person. But as personality is much more difficult to secure through the law than substance, and because of procedural reasons, the common law has protected reputation in its economic aspect, treating defamations as injurious to substance. The right to personal liberty (to give it the name used by Blackstone) is one of free choice of location except as restricted by law in order to secure other interests, and except as restrained lawfully by the proper public officers acting in the legally appointed manner. As to the right to society and control of family and dependents, this was recognized in the husband and father to the fullest extent at common law and was reinforced by privileges of "moderate correction," *i.e.,* reasonable chastisement for disobedience and wrongdoing. But as between husband and wife, the law has ceased to enforce claims to each other's society, and as between parent and child, powers of control and discipline by parents have been much relaxed by the setting up in the present century of juvenile courts and courts of domestic relations. As to the right of private property, as Blackstone uses the term, it covers the whole field of interests of substance—corporeal property, incorporeal property, such as patents, copyrights, and shares of stock, the claim against everyone that the promisee's right upon a contract shall not be interfered with by inducing the promisor to break it, and the claim of one who stands in any advantageous economic relation to others that outsiders shall not impair the relation unless they can justify by asserting some legally recognized interest of their own.

The rights *in personam* recognized at common law are contractual, arising independently of pre-existing rights, out of legal transactions; quasi contractual, that is, rights to have restitution or compensation for a benefit conferred, which are imposed by law in order to prevent unjust enrichment of one party at the expense of another; fiduciary, that is, rights to have a trust or confidence executed specifically in good faith; and delictal, that is, rights to compensation arising from violations of pre-existing rights *in rem.* Fiduciary rights are recognized and enforced only in equity. In such cases there may be a right against every one not to have the fiduciary relation interfered with, an equitable property right in the subject matter of the trust, and a right *in personam* against the fiduciary as explained above.

Chapter IX

Persons

1. In General—Personality and Capacity

In law, PERSONALITY means capacity of having, acquiring and exercising rights, using that term in its widest sense. A legal person is an entity having interests which the law recognizes and secures, or, as it is commonly put, a subject of rights. The type is the individual human being or natural person, and in modern law every human being, as a natural person has also a legal personality. In addition, certain associations of natural persons, in certain relations or for certain purposes, are treated by law as subjects of legal rights and so as persons. In the science of law these are known as juristic persons.

Juristic personality begins when the legal requirements for recognition of a group of associates as a legal person have been fulfilled, and the law in consequence clothes the association with the capacity of exercising a legal control over or influence upon the acts of others. Natural personality, the legal personality of the individual human being, begins upon birth and survival of birth. But two questions have arisen upon the last proposition, one as to cases where the common law for certain purposes treats an unborn child, in the mother's womb, as having capacity for rights, if afterward born alive, the other as to cases where an injury wrongfully caused to the mother before birth results in birth of the child in a defective condition. Although recent codes in some countries have provided for liability in such cases to the child afterward born alive, the common-law authorities deny it on the ground that there was no legal personality in the child until it had an existence separate from the mother, so that until birth the injury would be to the mother only. As to the first question, it is true that the law of property treats the unborn child, if afterwards born alive, as if already born so that a guardian may be appointed for it, it may take by gift in a will, and may acquire an estate in land by conveyance to its use. In the law-French term used in the common law, the child *en ventre sa mere* is said to be treated for such cases as if already born. The Roman law had a like doctrine which is expressed in the modern Roman law in the maxim *nasciturus pro jam nacto habetur*- the unborn child is taken as already born. But what this really comes to is that in case of property rights accruing while the child is in the mother's womb, the rights are reserved to await birth, and in the event of birth alive, are treated as having accrued to the child before birth.

In the case of a juristic person, legal personality terminates on the legal dissolution of the organization. In the case of a natural person it terminates at death, but may also terminate by civil death. Civil death is a loss of legal personality by a person naturally alive. At common law originally such civil death took place in three ways: when a person was banished, when he abjured the realm (that is, underwent a self-imposed banishment, taking an oath not to return to the kingdom unless by permission—a means whereby confessed criminals who had fled to a sanctuary might save their lives), or when he "entered into religion," that is, went into a monastery and became a monk, renouncing this world. Such persons were considered as entirely cut off from society. Their heirs inherited their property, as in case of a natural death, and administration might be granted on their estates. The case of civil death by entering a monastery

became obsolete at the Reformation, and the other two came to an end with the obsolescence of banishment and sanctuary. But in a number of our states there are statutes providing that persons convicted of crimes and adjudged to imprisonment for life shall be civilly dead. What this means is that the pre-existing legal personality comes to an end, so that their heirs inherit and their estates may be administered upon as in case of natural death. But as a natural person survives this civil death, and all natural persons are therefore legal persons, it follows that a new and different legal personality comes into existence. This legislation making a person who has been sentenced to imprisonment for life civilly dead is out of line with the common law and is quite indefensible. It would be enough to provide that imprisonment should create legal incapacity for things which are incompatible with the condition of being imprisoned.

CAPACITY for rights (legal personality) must be distinguished from capacity for legal transactions *(i.e.,* for acts intended to produce legal consequences to which the law, giving effect to the intention, attaches the intended consequences), capacity for wrongs *(i.e.,* for acts involving civil liability for infringement of rights *in rem),* and capacity for crimes *(i.e.,* for breaches of absolute duties for which the law provides penal consequences). Loss of legal personality, therefore, is quite another thing from lack or loss of capacity for legal transactions or for wrongs or for crimes or for all of them. A person may have legal rights and yet be incapable of legal transactions, or incapable of incurring legal liability, or incapable of incurring responsibility for what would otherwise be accounted crimes. A person civilly dead has lost his legal identity. The old legal personality is gone and there is either a new one, as in modern law, or none at all, as in ancient and medieval law, in its place. But a person whose legal personality is unaffected may have lost (as in case of insanity) or may not have attained (as in case of children of tender years) legal capacity to act in some or in all cases. Hence the law distinguishes between persons of full capacity and persons of partial or limited capacity. Ancient law conceded full legal capacity to a narrowly restricted class of legal persons. Modern law, on the other hand, endeavors to make legal capacity coincident with the possession of will (required as an element of an act) and judgment (required as an element of a valid legal transaction). The only exception in modern law is that for historical reasons and because of survival of ideas of the unity of the household, married women have been until recently, and still are in some jurisdictions, under a partial legal incapacity for legal transactions. With this exception, the legal incapacities recognized in the law today coincide substantially with natural incapacities.

In the common law there are now five conditions which create a total or partial legal incapacity. They are: Infancy or minority, coverture (the condition of being a married woman), idiocy and lunacy or insanity, conviction of treason or felony, and alienage.

2. Infancy

At common law a person is said to be an infant until he has attained majority, that is, the age of twenty-one years. An infant has entire capacity for rights and so may own property and acquire it by descent or in any way not involving a legal transaction on his part. On the other hand, he cannot bring or defend legal proceedings by himself and so has privileges or exemptions from the rules that govern persons *sui juris.* If he claims redress for a wrong done him, he must sue by his guardian or by his next friend, *i.e.,* some person who is willing to undertake the action on his behalf and incur the risk of liability for costs. In consequence of this disability to sue by himself, the infant is not held to the rules as to time of asserting his claims and negligence in not ascertaining and acting on his rights which obtain as to persons of full age. The statute of limitations does not begin to run against him, nor does the time of adverse possession begin to be reckoned against him until he comes of age. Also the infant cannot be sued at common law except by joining his guardian, who is bound to protect him against legal no less than physical attacks. As to legal transactions, there is only a partial capacity. Originally, it was held certain legal transactions by infants were wholly invalid, that is, incapable of being ratified when the infant came of age. Such was said to be the case where the court could definitely pronounce the transaction prejudicial to the infant. But in most jurisdictions it has come to be held that an infant is sufficiently protected if his transactions, other than contracts for necessaries, are held voidable, *i.e.,* subject to his decision, when he comes of age, whether or not to abide them. This is undoubted in case of conveyances, sales, purchases and acquisitions of property while under age. As to appointments of agents, the older cases regarded them as wholly void. But the tendency now is to leave the question of benefit or prejudice to the infant when he comes of age. As to contracts, if they are for necessaries, they are binding. If not, they are to be avoided or ratified by the infant as he may

determine when he comes of age. Necessaries are those things which are reasonably needed for the subsistence, health, comfort, and education of the infant, considering his property and station in life. As to ratification, if there is a promise to do some one act, or a promise wholly to be performed in the future, it does not bind the infant until he ratifies it on coming of age. If, on the other hand, the contract has been performed or involves continuing rights and duties, it is valid until he disaffirms it.

Infants are liable civilly the same as adults for the wrongs they commit. They, not their parents are liable, and this goes so far at common law that if an infant commits a wrong by the authority or command of the parent, the parent is also liable but the infant is not excused from civil liability. If, however, the wrong grows out of a breach of contract, so that in case of an adult there could be an action either upon contract or upon tort, the infant cannot be held since the effect would be to enforce the contract. Also where malice, that is, intention to injure, is an element of the wrong, whether or not the infant may be held civilly liable depends upon whether he is of sufficient age so that malice may be imputed to him.

According to the Roman law, under seven years of age there was no capacity to act. Over fourteen years of age there was full capacity to act. Between seven and fourteen one could engage in legal transactions, but they were not valid unless the guardian interposed his authority. As to wrongful acts, however, it was a question of fact whether the particular person was *doli capax, i.e.*, capable of intentional wrongdoing. The common law writers took this over from the Roman books and laid down that under the age of seven there could be no criminal intent, between seven and fourteen there was a presumption of incapacity for criminal intent which could be rebutted by showing it did exist in the particular case, and that over fourteen such capacity was presumed. Many states have raised the age below which there is no capacity for crime, some to nine years, some to twelve. This is now generally a matter of statute. Also the whole subject has come to be treated very differently under modern juvenile court legislation, which puts juvenile delinquents under the jurisdiction of equity over infants rather than of the criminal courts.

An important question arises when an infant sues for an injury and the defense of contributory negligence is raised. Some courts took over the three Roman categories and applied them to these cases. Others adhered to the idea of three categories but changed the exact ages somewhat. The best view is that there is no fixed rule as to age in this connection, but in each case of a child not so young that all reasonable men must say there could not be negligence, and not so old that the ordinary standard of due care is applicable, there is a question of what may reasonably be expected of this particular child under the circumstances.

At common law the king, and so in this country the state, is said to be *parens patriae,* in the position of a father or patriarchal head of a group of kindred, and so to have a general power and duty as to dependents and defectives. This power and duty is exercised through the court of chancery. Hence, although parents are the natural guard-inns of their children, in case of cruelty, bad character, neglect, or ill treatment, or where the infant had property of his own, in case of insolvency or mismanagement endangering the property, the court would appoint a guardian of property or of the person or both. In the United States, as a rule, courts of equity do not exercise this jurisdiction. It is committed to probate courts or analogous tribunals. But the juvenile courts have generally been given the equitable jurisdiction of the court of chancery in this regard, and it has proved very effective for dealing with juvenile delinquency and conditions conducing thereto.

3. Coverture

At common law it is said that husband and wife are legally one person. The wife is called a *feme covert,* a woman whose legal personality is merged in that of husband and wife, while an unmarried woman is spoken of as a *feme sole.* The doctrine of legal unity of husband and wife is a lawyer's way of generalizing a number of rules coming down from an older stage of social development in which the wife was one among the dependent members of a patriarchal household. In the older Roman law, the wife was in the *manus, i.e.,* under the authority, of the husband. In the Germanic law she was in the *munt* or *mund* (medieval Latin, *mundium), i.e.,* under the power or guardianship of the husband. He had the same power over her as over the other dependent members of the household, and, as a remnant of the idea of property as household rather than individual property, the property of husband and wife was an undivided property, an institution surviving in the countries of Continental Europe and those which derive their law therefrom, as the regime of community property. Progress of civilization, the example of the matured Roman law in which the wife had been wholly freed from the condition of incapacity and subjection to authority in which she stood in the older law, and the teachings of the

church, which looked upon the wife as a moral unit, to be treated therefore as a legal unit, led to a progressive breaking down of the old marital authority, which none the less survived in the incapacities of coverture till the nineteenth century.

As incidents of the unity of legal personality of husband and wife at common law, a husband could not convey property to or contract with his wife. It was necessary for him to convey to a third person, who then conveyed to the wife. Nor could she devise land to her husband by will, because, it was said, she was supposed to be under his coercion and a will must be made freely. But he could bequeath to her by will because the gift did not operate till she had acquired a separate personality by his death. Also he could make her his agent because she could represent the common personality. The idea of community of property, however, did not come into the common law. On marriage the property in the wife's chattels passed to the husband. He was said to have title by marriage. Also he was seized of her life estates in land (although in her right) and was entitled to the profits, and acquired a usufructuary interest in her estates of inheritance entitling him to the use and to the rents and profits.

Again, she could not sue for an injury to her person or property except with her husband's concurrence and in the name of husband and wife. Nor could she be sued except by joining the husband as a defendant. Neither could be a witness for or against the other except where the husband was prosecuted for an offense against the person of the wife. But, as in the civil law and in the eyes of the church they were separate persons, a married woman could sue and be sued in the ecclesiastical courts without her husband.

A married woman could not convey her property during coverture except by a fine (see Chapter XII, Sec. 10) in which she was separately and secretly examined to insure that she was acting of her own free will. Except for this, she had no capacity for legal transactions. Moreover, except in case of murder and treason, she was supposed, where she committed a crime in the presence of her husband, to act under his coercion. As in the case of dependent members of the household, the husband had a legal privilege of restraint and "moderate correction." But in the seventeenth century the privilege of correction *(i.e.,* chastisement) became obsolete, and a wife threatened with violence could have her husband bound over to keep the peace. Yet it was not till the nineteenth century that it was settled that there was no legal privilege of restraining an erring wife of her liberty by locking her in the house.

On the other hand, the wife's claim to support was amply secured. If the husband did not provide her with necessaries, she had a power to pledge his credit for them, and those who supplied her with them could recover from the husband. A court with matrimonial jurisdiction could award her alimony. Today statutes impose penalties for non-support of a wife and provide for orders of support by magistrates or in courts of domestic relations, and it is now held that a wife who supports herself out of her separate estate may have an action against the husband for restitution. The husband was not liable for debts contracted by the wife after marriage, except for necessaries. But he became liable on marriage for her ante-nuptial debts.

In order to get control of the wife's chattel property, especially in order to get possession of her credits and debts due her, it was often necessary for the husband to go into equity. Here he encountered the maxim that he who seeks equity must do equity, and was required by the court to settle her property in trust for her as her separate estate. Thus she got through courts of equity all of the rights of a man or an unmarried woman and as to her settled property a fuller protection than was afforded the latter by law. The court of equity compelled the trustee, as to dealings with the property, to do whatever she required of him. Thus she had complete contractual capacity in equity as to her separate estate, but in other matters was not bound legally by her agreements.

All these things were changed by legislation in the nineteenth century. Married women now have the same legal capacities as other persons, except that here and there they have the protection of rules which arose in connection with their common-law disabilities and survive after the disabilities have been removed.

4. Insanity and Idiocy

An insane person is said legally to be *non compos mentis,* a term including all forms of insanity. Such persons, being incompetent to manage their own affairs, are under the protection of the king, or, in this country, of the state. They have no capacity for legal transactions requiring will and judgment, so that when they have been judicially declared insane and placed under guardianship, contracts which they attempt to make are wholly void. If not so adjudged, contracts which they make while incapable of understanding their nature and effect are voidable. But if the other party acted in good faith without knowledge or notice of the insanity, and the contract has so far been carried out that the *status quo* cannot be

restored, it is binding. Also contracts are binding when for necessaries furnished the in-sane person or, as is generally held, to his wife and children. Likewise, an insane person is liable upon quasi contract (see Chap. XI, Sec. 4, p. 255). Where the contract of an insane person is voidable, he may himself disaffirm or ratify on becoming sane or this may be done by his guardian during his insanity or by his personal representative *(i.e.,* executor or administrator) after his death.

For torts (wrongs) which do not involve a mental element, an insane person is liable as a normal person would be. But the rule is otherwise if the tort is one involving "malice," that is, an actual intention to do the known wrong, such as malicious prosecution, slander or libel. As to crimes, at common law a crime requires two elements, act and in-tent. If because of mental disease either of these elements is lacking there cannot be responsibility under the legal theory. But the English courts and many American courts go on the intent element only and make inability to distinguish right from wrong the decisive point.

Capacity for making a will calls for ability to understand the condition of one's property, one's relations to the persons who might be the objects of his bounty, and to hold in mind all these things without prompting, so as to form an independent rational judgment about them. One who propounds a will for probate must, if capacity is challenged, establish this mental condition.

In England, on petition of the attorney general or of some friend of the insane person, a writ *de lunatico inquirendo* (of inquiry concerning a lunatic) issued from chancery to determine whether or not the person was insane and to provide for security of his person and property. Guardianship was entrusted to some person called a committee. In the United States he is more usually called a guardian, or in some states a conservator, and is appointed on petition of a relative or public officer, as provided by statute, by a probate court or court of probate jurisdiction, or by a court of equity.

In the civil law, a guardian may be appointed for a "prodigal," that is, a person who, though sane, has a rooted propensity to spend or waste the corpus of his property so as to be in danger of becoming a public charge. The common law makes no provision for such cases. But there are statutes in some states providing for guardianship of spend-thrifts and habitual drunkards who are incapable of managing their own affairs.

In case of idiocy there was a similar procedure by writ *de idiota inquirendo* or by commission to inquire into the mental condition of the person in question, resulting in appointment of a committee, as in lunacy. In the United States, also, a committee or guardian or conservator is appointed by the same court and in the same way as in case of a lunatic.

5. Conviction of Felony

By the common law, all felonies were punishable by death, and a consequence of conviction of felony was attainder. After judgment of conviction was pronounced the felon could not be a witness in court, his chattels were forfeited to the crown, and his real property escheated *(i.e.,* passed to the person of whom he held, which would be the crown, or with us, the state). There was said to be "corruption of blood," so that he could not inherit nor transmit by inheritance. The United States abolished forfeiture and corruption of blood, in case of conviction in Federal courts, in 1790. New York abolished them except in case of conviction of treason. Some states by constitution abolished forfeitures for felony during the life of the offender. Others abolished both forfeiture and corruption of blood entirely, and they are now substantially done away with. In England, in 1814, they were abolished except for cases of murder, and in 1833-34 were abolished entirely.

6. Alienage

At common law an alien *(i.e.,* noncitizen) cannot acquire title to real property by descent, nor take by curtesy or in dower (see Chap. XII, Sec. 7, p. 282), nor can a citizen take real property by representation from an alien. An alien may, however, take land by conveyance or devise (gift by will) and hold until by a proceeding for that purpose called "inquest of office found" there is an escheat. His title is good as against every one but the king (state) as long as he lives, but on his death the estate at once vests in the king (state) without any proceeding for that purpose. If he conveys the land the purchaser gets good title against every one but the king (state) subject to proceedings for escheat. On the other hand, aliens can acquire, hold and transmit personal property the same as citizens, and can take a mortgage upon land as security for a debt and, if necessary, foreclose the mortgage by proceedings in court. They can sue and be sued as any other person may, even in the case of resident alien enemies in time of war, so long as they are allowed to remain in the country.

In the United States, treaties, which under the Federal constitution are binding upon the states notwithstanding state legislation or common law, often provide that aliens, citizens of some other country, may hold land, or acquire it, or transmit it, by inheritance.

7. Juristic Persons

With us, an aggregate of natural persons, recognized by law as a legal person, is called a corporation. There is said to be a franchise by which they are authorized to have a corporate name and seal, to sue and be sued as a person distinct from the members, and to have what is called perpetual succession, that is, to continue without reference to death of members, transfers of the interests of members, or other changes of membership. The rights, powers, and privileges of the corporation are not in any way affected by such changes.

In England, certain corporations exist by prescription, that is, they have always existed by immemorial usage. Except for these, corporations are created by royal charter or by Act of Parliament. Business companies are incorporated by complying with the terms of a general statute for that purpose. In this country they are either created specially in each case by a legislative charter or are (as is usual today) created by compliance with the provisions of a general statute providing for incorporation of companies.

The most important classification distinguishes between public corporations and private corporations. The former are governmental entities, municipal corporations, counties, cities, towns, districts and the like. All others, even if their objects are public, as in case of a railroad company, a bank, or an insurance company, are called private corporations.

A private corporation has such powers as are given by its charter or by the terms of the general incorporation law under which it is organized and the provisions of its articles of association (or whatever name the statute gives to the agreement of its organizers) pursuant to the law. Corporations can only act through their agents and are civilly responsible for what those agents do within the scope of their authority. As to criminal responsibility, the eighteenth-century law books laid down that a corporation could not be indicted. Blackstone said it could not commit a crime; the crime would be the individual offense of the agents or members who acted. A change of view began when there came to be statutory crimes not involving criminal intent. It was held at first that a corporation could be fined for not doing something which a statute required it to do. A few jurisdictions today go no further. But many jurisdictions today will hold a corporation criminally liable for both nonfeasance and misfeasance in case of nuisance or of statutory offenses not involving a criminal intent. This is perhaps an orthodox common-law view. Some jurisdictions go further and will hold a corporation for any crime for which a fine is an appropriate punishment unless it requires a specific intent. Also a growing number of jurisdictions go much further and will hold a corporation for any crime for which a fine is an appropriate punishment.

In case an aggregate of persons assumes to act as a corporation without authority, or exceeds or abuses its powers, it can be ousted of its franchise or dissolved by proceedings in *quo warranto* brought by or with the leave of the king (state). Except as changed by statute, only the state in a quo warranto proceeding is empowered to question the corporate existence of a body of men who in good faith, in a matter where there could be a corporation if the law were complied with, assume to be one and are dealt with by others as such.

Chapter X

Acts

1. Nature and Consequences

In legal understanding, an act is an exertion of the will manifested externally. It is distinguished from an event, which takes place independent of human will. Acts are subject to the control of the will and are regarded as resulting therefrom. They may have legal consequences because they were done with the intention of bringing about such consequences and the law recognizes and gives effect to the intention, or because they infringe interests (social, public, or individual) which are recognized and secured by the legal order, and so involve responsibility for breach of an absolute duty or liability for breach of a duty correlative to some right, or because they are so carried out as to depart from the legal standard of conduct under the circumstances, and so involve liability for injury to some interest secured by a legal right. Those performed with the intention of producing legal consequences, to which the law gives the intended effect, may be called legal transactions. In general, where such acts are done by competent persons and in the prescribed manner, the law carries out the intent by conferring or recognizing rights or powers or privileges. Examples are: Conveyances and transfers of rights, creating rights in the transferees; contracts, creating rights in the promisees; appointments of agents or hiring of servants, creating powers; and giving of licenses, creating privileges. In general, it may be said that capacity for rights requires legal personality, capacity for acts requires will, and capacity for legal transactions requires will and judgment. Thus capacity for legal transactions is much more limited than responsibility for crimes and liability for civil wrongs. For example, if no other defect exists, an infant over seven years may be responsible, and a minor over fourteen but less than twenty-one years of age will be responsible for breach of an absolute duty. Yet the infant under seven years of age may be liable for torts (civil wrongs) while the minor (under twenty-one) has not a complete power of entering into legal transactions. As a rule, the common law holds a person to liability for infringement of a private right where it would not hold him for breach of an absolute duty. An insane person may be held to damages for a tort, but not to punishment for a crime.

2. Representation in Acts

One may act by himself or through another who has a legal power of binding him or making him liable. In Roman law it was considered that one could be represented in act but not in will. That is, where one determined to do something, he could carry out his intention by directing some one to do it for him. But he could not confer on another a power of exercising his will for him and determining independently what he should do or be held for. The most that could be done was to acquire through some one under his power, if he chose to take advantage of the acquisition. If he did so, the law made him liable for the disadvantages, if any, in order to prevent unjust enrichment at another's expense. Or he could contract with another

that the other should do something on his behalf and thus, without having acted himself, have a claim upon contract to the benefit of what was done and a liability to indemnify the one who acted from liability for doing it. The law of the church in the Middle Ages, on the other hand, considered that one was morally and so legally bound by the acts of those whom he authorized to represent him, and its maxim, now commonly phrased as *qui tacit per alium facit per se* (one who acts through another acts himself), was taken over by the common law.

Although the act of the agent or servant is spoken of legally as the act of the principal or master, the case is rather that the agent or servant has been given a power or is recognized by law as having a power of creating, altering or divesting rights of his principal or master, and of creating or altering duties and creating liabilities imposed upon the principal or master. The principal confers upon the agent and the law recognizes a power of binding the principal by acts within the scope of the agent's authority. This is recognized by law in order to secure the principal's individual interest. But the law also, against the principal's individual interest, in order to secure the social interest in the security of transactions and free course of trade, confers directly upon all agents a power of binding their principals (as between the principals and third persons) by acts within the apparent scope of their authority; that is, a power of creating rights in others against the principal and corresponding duties in the principal. It is wrong for the agent to go beyond the scope of his authority, as actually conferred on him by his principal, in this way. He has no right to do it. He is liable to the principal for the resulting damage if he does. But he has the power.

Death of the principal terminates the agent's authority. In the civil law there is one exception to this. Where the agent has not known of the death of the principal, and executes the agency m good faith, the Roman law considered that good faith required that what he did innocently without notice of the death of the principal be adhered to. The French civil code provides to the same effect, and the civil-law rule is followed in a few of the United States. The common law is otherwise, even where the authority was given in contemplation of the principal's death and although it was agreed that death should not terminate it. Such is the prevailing rule in the United States. But there may be a contract between principal and agent that the agent shall not be liable for acting without authority in such cases, and that he is to be indemnified by the principal's estate if he incurs a loss innocently by so doing. If, however, the power is given by way of security, it is not revocable by the principal so long as the duty secured remains unperformed, and death of the principal will not terminate the authority under such circumstances.

By the common law, if there is an agency, if the agent has power to bind the principal and in fact acts as agent, the principal is bound as to third persons, and has the advantage of and may enforce the transactions had by the agent with third persons, although the agency was undisclosed and not known to the persons with whom the agent dealt. Here also our law differs from the civil law in which the transaction is legally regarded in such cases as only between the agent personally and the third person. But in the civil law the principal may hold the agent for the benefit derived from the transaction, or the agent the principal for indemnity for loss incurred through it.

Agency, the relation of principal and agent, is one of a type known in law as a fiduciary relation. That is, it is one of trust and confidence involving duties of good faith. Hence, an agent cannot represent principals with conflicting interests in the same transaction unless his double employment is known or disclosed and acquiesced in or agreed to. If the double agency is not known, either party may avoid the transaction. Also the agent must inform the principal fully of any adverse interest of his own. In all matters involved in the exercise of his authority the agent must make a full disclosure to the principal of facts affecting the agency, and must act and account for his acts with entire good faith.

In the common law the relation of master and servant *(i.e.,* employer and employee) is assimilated, as to liability of the master, to that of principal and agent. The master is liable to third persons for the wrongs done by the servant in the course of his employment. Indeed, this representation in wrongful acts is carried so far that, although as a general rule the master is not responsible for crimes committed by the servant unless he directed their commission (in which case both he and the servant are responsible criminally), where one is carrying on some enterprise or course of conduct through servants or employees and the latter, contrary to the master's or employer's orders and without his knowledge and without his fault, carry out their employment in such a way as to constitute a nuisance, the master or employer is criminally liable. These doctrines as to liability for

the wrongful acts of employees grew up at a time when servants and employees were hired individually, were under the full control of employers as to the conduct of their work, and were subject to be discharged by the employer. With the coming of a regime of collective bargaining and closed shops the reason behind them is disappearing and it is likely to become a problem how to maintain the general security against injuries to third persons by the acts and negligence of employees and against nuisances without fault of the employer, by new and just rules.

3. Legal Transactions

As has been said, a legal transaction is an act intended by the party or parties performing it to have legal consequences, to which the law, recognizing the intention, gives effect and attributes the intended results. Acts intended as legal transactions may be valid, that is, may be such that the law gives them the effect intended, or they may be void, or they may be voidable. If void, they are wholly without legal effect. If voidable, they have legal effect unless and until they are challenged, but they are subject to attack for some defect, and if attacked therefor, will fail to bring about the legal consequences intended. They are void where there is a complete disability in the person acting, or where not done in the manner which the law prescribe; or where their end and purpose is something which the law refuses to recognize as legitimate (as the legal phrase runs, is "against public policy"), or where they involve infringement of some interest, social or public, which the law regards as of more importance than the general interest in carrying out the intention of those who perform them. As a general proposition they are voidable where there is some defect of capacity in the person acting, or where the intention to which the law is asked to give effect is not formed freely or intelligently or under circumstances which make it just and right to hold the party thereto. If one was forced or defrauded into a transaction or it was entered into through mistake of the parties, equity relieved against it, even if it was enforced in the courts of law, and it became voidable.

(1) FORM OF LEGAL TRANSACTIONS. In the beginnings of law, legal transactions are held strictly to form. A conveyance has no effect unless it follows a fixed form. An agreement or promise of itself has no legal effect except as it is clothed in a prescribed form. Nothing is implied. There must be an express declaration of every intended item. No item will be implied on the ground of general understanding or fair conduct and good faith. In modem law, requirements of form have largely disappeared. Those which still obtain are of two kinds, historical requirements, and modem requirements. Much the greater number of forms in the law of today are historical. Some have survived from the stage of formal law. In other cases substantial rules devised for purposes now forgotten, have outlived their occasion and become formal requirements. Another type of forms has developed or has been devised in modern times to serve substantial modern ends. Forms still have an important role where the law seeks to maintain the social interest in security of acquisitions and security of transactions. Thus conveyances of land, wills, and negotiable instruments are required to conform to certain formal requirements, and certain contracts are required to be put in writing.

Even where a legal transaction is not required to have been entered into by a certain form, the law may require it to be proved in a certain way, if it is to be enforced in the courts and may thus in substance impose a form. Thus the Statute of Frauds (1677) provides that no action shall be brought against an executor or administrator upon a promise to answer for claims against the estate out of his own property, or to charge a person upon a promise to answer for the debt, default, or miscarriages of another, or upon an agreement upon consideration of marriage, or upon any contract to sell or sale of lands or inheritable incorporeal property or any interest in them, or upon any agreement not to be performed within a year from making it, unless the agreement is in writing or there is some note or memorandum of it in writing signed by the party sought to be charged or some other person duly authorized by him. This does not require the transaction to be put in writing. But if sued on it must be established by a writing.

Modern law gives legal effect to formless transactions because of a jural postulate of the economic order that those with whom we deal in the general intercourse of society will act in good faith and hence will make good the reasonable expectations created by their promises or other conduct (see Chapter XI). Accordingly, legal transactions may be implied from conduct although there is no direct expression of intention. For example, if a creditor accepts from a debtor a year's interest in advance on a sum of money now due, the transaction had is the paying and accepting of the interest. But it is a necessary conclusion from this transaction that the further transaction of extension of the debt for one

year was intended, and so that transaction is said to be implied. So also where in common honesty and the experience of life silence would be taken as a declaration of intention, *e.g.,* where it would be expected reasonably in view of the relation or previous dealings of the parties, it may have that effect.

(2) GROUNDS OF AVOIDING LEGAL TRANSACTIONS. Where a formal legal transaction of the common law had been entered into, the strict law administered in the common-law courts looked only at the form, not at the substance or intention behind the form. On the other hand, equity, looking at the substance rather than the form, granted relief by canceling the formal instrument or rescinding the transaction and enjoining enforcement of it in a court of law, whenever it was shown to be inequitable to give effect to it because it had been brought about by force or fraud or mistake. When, later, equitable defenses came to be allowed at law, the result was that these grounds of equitable relief became grounds of avoidance of transactions which nevertheless would stand as legally effective unless and until attacked in equity or by equitable defenses.

(a) *Force.* As to force (legally called *duress),* a distinction has to be made, in the language of Mr. Justice Holmes, between "duress by threats," and "overmastering physical force applied to a man's body and imparting to it the motion sought to be attributed to him. In the former case, there is a choice and therefore an act, no less when the motive commonly is recognized as very strong or even generally overpowering." In the latter case, there is no exertion of the will and so no act. For example, if one stands over another with a club and threatens to beat his brains out unless he puts his seal to a deed, and the deed is sealed through fear of this, there is an act, but an act done under duress against which equity will relieve. But if one man holds a person while another presses his seal ring down upon wax upon the deed so as to seal it, there is no act on the part of the person whose deed it purports to be and he can plead *non est factum* (the deed was not executed) at law.

As to what will be regarded as duress sufficient to avoid a legal transaction, the law has moved somewhat cautiously. It begins with the narrowest sort of objective standard, peril of life or limb, threats of producing severe bodily suffering. It comes to be extended to threats which would overcome the will of an ordinary reasonable man. Ultimately the test becomes still more liberal, namely, a threat of a serious evil, so that although an ordinary reasonable man might have resisted it, equity may well relieve this man who did not have the strength of will to do so. Hence threats to the family of the person who acts or to injure his property or business, or to spread grossly slanderous reports about him may amount to duress sufficient to avoid the transaction they procure. Indeed, the law might well go further and look at the state of mind of the actor, not merely at the threats which brought it about. The objective view, looking to the nature of the threats, is urged as required to uphold the security of transactions. But this could be done as well by treating the considerations behind the objective view as evidentiary. If one asserts that he was foolishly alarmed, the ordinary experience of men is evidence against him. Yet there are foolish persons who become foolishly alarmed, and they should be protected against extortion by those who intentionally excite their fears for that purpose.

To constitute duress there must be a threat of wrongful application of force or wrongful doing of something injurious to the actor. Hence if, for example, a judgment creditor threatens to levy execution where he is legally entitled to do so but his doing so would be financially disastrous to his debtor, the latter cannot avoid on the ground of duress a transaction had in fear of that result.

As relief from transactions entered into because of threats is equitable, it will not be granted against third persons who have acquired rights under the transactions in good faith, for value, and without notice of the duress.

(b) Fraud. Likewise, at common law fraud is no defense to an action at law upon a sealed instrument or specialty. Relief must be had by suit in equity to cancel the instrument or, today, by an equitable defense. If the instrument is negotiable, it may still be necessary to go into equity to enjoin transfer to a purchaser for value without notice, and to cancel the instrument to prevent wrongful use of it. The term fraud includes every form of deception whereby one is induced to do what he would not have done had he known the truth or all the facts. There may be misrepresentation of material facts or a wrongful creation of a false impression as to the facts without actual statement, or active concealment of facts material to what is to be done, or failure to disclose facts on the part of one who is under a duty of disclosing them. Besides these cases of actual fraud, equity gives relief against legal transactions in case of what is called constructive fraud, *i.e.,* where advantage is taken of a confi-

dential relation to obtain some benefit from a person who has a right to rely on the other for advice or sound judgment, or where one in a confidential relation to another does not make a complete disclosure of the facts and act with entire fairness. In cases of fraud, as of duress, relief will not be given against a third person who takes under the transaction in good faith, for value, and without knowledge of the fraud.

It is usual to state the test of fraud objectively: what would deceive an ordinary reasonable man? But it may be questioned whether this means more than that there must be a reliance on the representation. What a reasonable man would have believed is evidential on that question of reliance.

(c) Mistake. There are three classes of cases where relief is given or the transaction is set aside for mistake. In a bilateral transaction, *i.e.,* one in which two parties take part on different sides of the act, it may be that although they each think they mean the same thing, one of them means one thing and the other another. Here there is only an apparent transaction. There is none in reality. Such a situation was presented in the well known English case in which there were two ships, each named "Peerless," each coming from Bombay to Liverpool with cotton but one sailing in October, the other in December. The writing called for cotton to arrive "ex Peerless from Bombay." It was held that if the plaintiff meant to sell cotton leaving Bombay in December, while the plaintiff meant to buy cotton leaving Bombay in October, there was no contract. Here it was not necessary to go into equity. In another type of case one may intend one thing and by an error of expression, *e.g.,* a clerical error, may be held to something different from what he intended. For example, he may give instructions to a scrivener to draw a conveyance of lot 4 and by clerical error the deed may name lot 9 and be signed, sealed and delivered without discovering the mistake. Here equity will reform the instrument to make it express what was intended. In a third type of case there is what is known as essential error, that is, mistake of one or both of the parties with respect to some essential element of the transaction. They agree and they express their agreement correctly, but they agree because of the error. Or, if the transaction is unilateral, there is an intended declaration of will, correctly expressed, but .it is made because of mistake as to some crucial fact. The mistake may be as to the nature of the transaction entered into, or as to the person dealt with, in case the person is material *(i.e.,* it really matters with whom one is dealing, as, for example, in a sale on credit), or as to the thing involved. If the parties, for example, contracted about one piece of land because they erroneously believed it was another, there would be an essential error. As to mistakes with respect to characteristics or qualities of the thing involved, it depends upon whether the characteristics or qualities in question would in ordinary business understanding determine the nature of the thing. In these cases of mistake, equity will rescind the transaction, or, today, there may be an equitable defense.

(3) QUALIFICATIONS OF LEGAL TRANSACTIONS. Legal transactions may be absolute and unqualified, or they may be qualified as to the time or manner at or m which they are to take effect, or they may be made dependent upon conditions for their taking effect or their continued efficacy. While conditions are in a sense a form of accessory provision in legal transactions, they stand with provisions as to the time and manner of taking effect or of performance as integral parts of the transaction, limiting and qualifying the expressed will to which the law is expected to give effect.

(a) Strictly a *condition* is a future uncertain fact upon the coming to pass whereof the parties make the legal effect of the transaction dependent. In a thoroughgoing analysis we must distinguish a true condition, which is a future uncertain but objectively possible fact, from apparent conditions, where at once, because of the existence or non-existence of a past or present fact required as its basis, the transaction takes or fails of effect, or, because of the objective impossibility of that which the parties assumed might be made a condition of taking effect, their wills have not been directed to a possible result and the law cannot bring about the intended consequences. So also if they assumed that taking effect might be made to depend upon a fact which the law forbids or will not recognize, their wills have not been directed to a legally possible or legally recognizable situation and the law will not give them effect. But common-law writers have generally used the term condition in a wider sense, holding that the uncertainty in regard to a fact need not be objective uncertainty, if that uncertainty exists in the mind of the party who seeks to make that fact a condition.

Conditions may be *express,* that is, expressed in the transaction as intended terms thereof, or *implied,* that is, taken to be terms of the transaction

by reasoning applied thereto either in the light of the nature of the transaction or of ordinary experience of such transactions. Those so implied are called conditions implied in fact. They are logical presuppositions of what has been expressed in view of the nature or ordinary understanding of such transactions. In the law of contracts, the books speak also of conditions implied in law. But these are not true conditions. They are rather equitable defenses which took the form of conditions because of the exigencies of pleading.

With respect to their operation, conditions are precedent or subsequent. A condition *precedent* is one upon which the taking effect of the transaction is made to depend. A condition *subsequent* is one which operates to terminate or defeat the operation of the transaction after it has taken effect. Until the condition precedent has been performed or the fact made a condition precedent has taken place or been ascertained, the transaction remains inoperative. On the other hand, where the condition is subsequent, the transaction goes into effect and remains operative until and unless the condition is performed or the fact made a condition takes place or is ascertained; but in that event its effect is brought to an end. At common law, if a condition precedent is impossible or illegal, the transaction fails because it can never take effect. If a condition subsequent is impossible or illegal, the condition fails because the transaction has already taken effect and there is nothing legally available to defeat it. To this there is, however, one exception. In the case of impossible or illegal conditions precedent in testaments (wills disposing of personal property) equity adopted the rule of the Roman law (differing from that applied by the common law to conveyances, to devises or gifts of real property in wills, and to contracts) and treats the impossible or illegal condition precedent *pro non scripto* (as if not written), *i.e.,* strikes it out as it would an impossible or illegal condition subsequent.

(b) As to the reckoning of time, there is a common-law maxim that the law does not regard fractions of a day. This maxim is applied when a period of time is in question. Thus a person comes of age at the first moment of the day preceding the twenty-first anniversary of his birth. If, on the other hand, a point of time is in question, the maxim does not apply. Thus, where there is a question of priority of record of conveyances or of priority of liens, the law looks to the exact moment when the decisive act was done. Differing from the Roman law, which in reckoning a period of time counted both the first day and the last, the common law excludes the day from which but includes the day to which. Thus, if a note is payable ninety days from date, the day of its execution is excluded. If the last day falls upon Sunday or upon a legal holiday, it is not counted, but the next succeeding day is taken for the end of the period. Intervening Sundays and legal holidays are counted except where the period is less than a week, in which case the common law excludes them.

4. Torts

Wrongful acts which amount to breaches of absolute duties are crimes. They are prosecuted by the state (at common law the king) in criminal proceedings, leading to penal treatment in order to deter repetition of the offense and to deter others from committing such offenses in the future. Acts which infringe individual rights *in rem* and so are in breach of the correlative duties are torts. They give rise to civil proceedings by or on behalf of the aggrieved person, leading to judgments at law for damages or to decrees in equity enjoining their continuance or repetition or directing restoration of the *status quo* before the wrong. The books speak of crimes as public wrongs and of torts as private wrongs, meaning that the interests involved in the one case are social and in the other individual.

Three postulates (presuppositions) of life in the civilized society of today underlie the law of torts:

JURAL POSTULATE I. In civilized society men must be able to assume that others will commit no intentional aggressions upon them.

In a primitive society there is no such presupposition. Men must go about armed and keep below the sky line lest they be attacked. It was not so long ago that every gentleman wore a sword, not as an ornament but as a necessary precaution, and there have been times and places in our own country in which every one carried firearms as a matter of course. But such things are incompatible with an effective division of labor and a developed economic order. Such an order presupposes the first postulate as its very foundation. From that postulate we derive a generalization which is behind a large part of the law of torts:

COROLLARY OF JURAL POSTULATE I. One who intentionally does anything which on its face is injurious to another is liable to repair the resulting damage unless he can establish a liberty or privilege by identifying his claim to act as he did with some recognized public or social interest.

Historically, the law of torts grew up by development of the action of trespass and the action of trespass on the case. Hence for a long time the law seemed to depend on a procedural distinction between direct injuries to person or corporeal property whether intentional or negligent (trespass), and indirect injuries whether intentional or negligent to person or corporeal property, or intentional injuries to economically advantageous relations (case). It was not till the nineteenth century that analytical legal science substituted for this historical procedural approach a distinction between intentional aggression, whether the resulting injury is direct or indirect, and negligence. Thus the law as to intentional aggressions began as a series of carefully defined named torts by way of aggression upon the person or corporeal property and a general principle, as a starting point for dealing with new types of intentional aggression, was not formulated till the last quarter of the nineteenth century.

The Named Torts. First among the older named torts the books put *assault and battery.* An assault is the intentional doing of something which would reasonably put another in fear of immediate injury to his physical person. There must be intention to threaten and an actual threat not by words but by act. The remedy at common law is an action of trespass *vi et armis.* If the threat is carried out to the point of actual physical contact with the person of the other, there is a battery. But the action of trespass *vi et armis* lay also where there was a non-intentional but negligent and so wrongful direct contact with the person of another, as where one seeking to stop a dog fight swung a stick so carelessly as to hit a bystander. Hence such cases were called cases of battery also, distinguishing them from cases of negligent indirect injury to the person, as where one digs a ditch and negligently leaves it uncovered with no warning to passers-by and another falls in and is injured. Today, as we have given up the purely procedural categories, the two last cases are put in the same class as negligent, distinguished from intentional, injuries. Differing from the civil law, which gives an action to secure one in his dignity or honor against the shame and humiliation involved in an insult, at common law a threat of or an indignity (other than defamation) which does not involve contact with the physical person, or an insult which would rouse shame, indignation or anger, but not fear, does not give rise to an action.

Another named tort, closely connected with the fore-going is *false imprisonment-intentional* wrongful interference with another's free choice of location, forcible deprivation of another's general freedom of movement. The restraint must be general. A threat of immediate violence if one does some particular thing is an assault. If one is confined to some particular place by such a threat, there is an imprisonment. There need not be an actual touching of the person. If one who has or reasonably appears to have the authority of law behind him tells another that he is under arrest and the latter submits, or if one submits to a reasonably apparent intention and reasonably apparent present ability to take him into custody, an action will lie. As the interference with the physical person is direct and immediate, the action is *trespass.*

Intentional damage to or interference with possession of *corporeal chattel property* is also a trespass, and if dominion is wrongfully exercised over the chattel by one not the owner, there is the tort of conversion for which the remedy is an action of trover. Intentional going upon the land of another, even by mistake or without thought of invading his possession or ownership, is likewise a trespass, and gives rise to an action of trespass *quare clausum.*

Deceit is an injury to one's general substance. Originally there was a writ of deceit. But it came to be superseded by an action on the case. The requisites are a representation of fact made by defendant to plaintiff, which was untrue and known by defendant to be untrue, was made with the intention that plaintiff should act upon it, was acted upon by the plaintiff in reasonable reliance on it, and so caused a damage plaintiff. When one willfully tells another what he knows to be false, intending that the other shall rely and act on what he is told and thus be injured, there is an intentional aggression upon the latter's general substance. Deceit differs from trespass in requiring an actual pecuniary injury. In assault and battery and false imprisonment, the injury is not of a kind to be reckoned in money. In trespass to property, title is involved. One who continuously trespasses upon another's land for the period of the statute of limitations may by adverse user acquire a right to go and come over it, which is to be prevented by an action in which the owner is allowed nominal damages in vindication of his title. Neither of these considerations applies in an action for deceit. Here an actual injury to the plaintiff's substance must be shown. The representation need not be the sole cause of plaintiff's acting to his injury. It is enough if it is a material misrepresentation, that is, if it really contributes as

a factor in bringing about the action had in reliance on it. But it must be a representation, *i.e.,* must assert something as an existing fact, not a promise to do something or that something will be done in the future. It may be made by conduct as well as by words. Under the prevailing rule it must be intentionally false. Negligent use of words or negligent inducing of action with no intention of deceiving does not give rise to an action: This is out of line with the general doctrine as to liability for negligence and is not adhered to in all American jurisdictions.

A named tort which involves both personality and substance is *malicious prosecution.* The social interest in the general security calls for prosecution of offenders, and many might escape prosecution if it were not for the initiative of private individuals in bringing their offenses to the notice of the public authorities. It would be against the policy of the law to discourage this by .imposing liability on those who initiate in good faith what prove to be unfounded prosecutions. But such prosecutions are serious injuries to the reputation, and often to the economic status, of the person prosecuted. If they are brought without reasonable cause to believe them well founded, and for reasons of spite, or without a reason which the law can recognize, they are unjustified aggressions upon reputation and economically advantageous relations. Hence an action on the case lies where a prosecution which has terminated favorably to the accused is shown to have been instituted maliciously and without probable cause. A prosecution is so terminated when the magistrate fails to bind over the accused or the grand jury fails to indict, or the public prosecutor enters a *nolle prose qui* (refusal to prosecute), or the prosecution is dismissed or abandoned. It is malicious where the determining motive is not an honest desire to enforce criminal justice but personal ill will or a desire to use criminal justice to further some personal interest, such as to collect a debt or to compel the surrender of property. If there is probable cause, however, one who institutes a prosecution is not liable no matter what his motive. The question as to probable cause is, was a reasonable man, knowing what the prosecutor knew as to the facts, justified in making the complaint or invoking the prosecuting authorities. There has been a conflict of opinion as to liability for malicious prosecution of a civil action. If the defendant in the action is arrested or his property is seized, there is no doubt that upon favorable termination of the proceeding, the person who instituted it maliciously and without probable cause is liable. Where person or property is not seized the older authorities deny an action. But it would seem that on principle any special damage caused by such a proceeding ought to be recoverable. Recovery of costs does not include such damage.

Defamation may be written (libel) or oral (slander). In either case, as to civil liability, the common law requires "publication," *i.e.,* communication of the defamatory matter to a third person. Communication directly to the person defamed does not affect his reputation. If the defamatory statement is on its face injurious, one who publishes it knows he is attacking the reputation of the person defamed and is liable at his peril for the truth of the statement. As in case of an assault, he is liable unless he can justify. Moreover, if a reasonable person in the position of those to whom it is communicated would believe it to refer to some particular individual, there is an intentional act injurious to the latter's reputation. In case of libel, words which would bring the person defamed into general hatred, ridicule or contempt are actionable without more. In case of slander, on the other hand, in order to be actionable the words must impute a crime or a contagious or infectious disease, such as would lead to one's being cut off from society, or must affect a person in his trade or business or in "an office of honor or credit" which he holds. Otherwise, special damage must be shown. One feature of the common law in this connection is not satisfactory, namely, denial of liability (unless there is special damage) for imputing unchastity to a woman without going so far as to charge an indictable crime. This has been remedied by statute in many jurisdictions and in others by judicial decision, holding the rule inapplicable to this country. Truth of the defamatory statement is an absolute defense in case of slander, even though the words were spoken maliciously and without reason to believe them. The rule is the same in case of libel where a civil action is brought for damages. Here the law gives effect to a social interest in free communication of the truth. But in a criminal prosecution for libel it was held in England formerly that truth was no defense. Libelous publication even of the truth was considered to endanger the peace. This has been changed universally by constitutional provisions or statutes or judicial decisions holding the old rule inapplicable to this country, and, as a general proposition truth is made a defense in a criminal prosecution for libel if published for good motives and justifiable ends.

While truth is a justification, untrue defamatory statements may be privileged and so ex-

cepted from liability. Privilege may be absolute, *i.e.,* not to be defeated by showing malice, or qualified, *i.e.,* subject to be defeated by showing that the communication was made from some improper motive such as spite or ill will. There is absolute privilege in the case of legislative and judicial proceedings and acts of state, *i.e.,* of chief executive officers acting for the state. In such cases the public interest in free and unhampered exercise of their office by legislators, judges, and high executive officers is decisive. But statements by counsel in the trial of a case, while absolutely privileged in England, in America are privileged only with respect to matters connected with the case. If counsel goes afield to defame maliciously he is held to exceed the privilege. So in case of a witness. What he says in answer to questions put him is privileged, but the privilege does not extend to attempts to take advantage of the occasion in order to wreak his private spite by volunteering defamatory statements. Because of the social interest in general dissemination of in-formation as to what goes on in public proceedings, legislative, judicial, or administrative, a fair and accurate report either orally or in writing or print in a letter or book or pamphlet or newspaper is privileged, even if the statement reported is not. Also there is qualified privilege in case of confidential communications made to one who has an interest in receiving them in response to inquiries which there is a social duty of responding to. For example, if a prospective employer inquires of a former employer as to the character of a former employee, the occasion is privileged and there is no liability for a defamatory statement made in good faith, without malice, and not communicated more than is reasonably involved in answering such an inquiry. Indeed, there is authority to the effect that where one has important information which affects another's property or human life, there is a moral duty to warn one who has a grave interest in knowing the facts, and so a fair confidential communication to that person is privileged.

Another type of qualified privilege covers fair comment upon or criticism of persons in public positions or matters of public interest. If one criticizes public men and public actions, no matter how severely, the social interest in publicity and criticism of public persons and affairs is decisive. Such publicity and criticism are regarded as agencies of progress. But if one takes advantage of the occasion to go beyond criticism and make defamatory statements of fact, he must justify. Intentional aggression of this sort is antisocial.

So much for the named torts. It will have been seen that they presuppose a general principle of liability for what on its face is an aggression upon the personality or the substance of another unless justification or privilege can be shown. On this principle the courts have been able to deal with all manner of intentional interference with the general substance or interests in intangible things or socially or economically advantageous relations of others, holding such interference, where it causes actual damage, actionable unless justification or privilege can be shown. Examples are, *inducing a breach of contract* on the part of one bound by a promise to another, *unfair competition,* and *appropriation of devices and names* which have been given value by enterprise and expenditure on the part of another. In these cases the usual remedy today is by injunction.

Intentional aggression is perhaps less usual and less a menace to the general security in recent times than want of care in a course of conduct. We may formulate another jural postulate in this connection.

JURAL POSTULATE II. In civilized society men must be able to assume that others will act with due care with respect to consequences that may reasonably be anticipated.

Negligence. On this basis the common law applies to all conduct the standard of what a reasonable, prudent man would do under the circumstances of the particular case. One must foresee what a reasonable prudent man would do as to *possible danger* to others and act as such a man would in view thereof. If one fails in either respect and injury to another results, he is liable in an action on the case. The standard is abstract and objective- not what this man could reasonably be held to do in view of his character and personality, but what a standard reasonable man would do in his position under the circumstances. The law does not inquire into individual ignorance or stupidity or impulsiveness or slow reaction time. The ignorant, the stupid, the impulsive, or the slow moving, if, for example, driving an automobile, may be socially dangerous. Mr. Justice Holmes puts it thus: "As the purpose [of the law] is to compel men to abstain from dangerous conduct, and not merely to restrain them from evil inclinations, the law requires them at their peril to know the teachings of common experience, just as it requires them to know the law." But the age, station in life, and physical condition of one who acts are taken account of in determining objec-

tively what should be expected of the standard person so circumstanced.

Failure to come up to the legal standard of conduct is called *negligence.* If one sues to recover on the ground of negligence, he must establish negligence by a "preponderance of the evidence," that is, must show it on a balance of probability. But where the circumstances of an accident were under a defendant's control and in ordinary experience such an accident would not have happened without negligence, such proof suffices to make a case. The maxim is *res ipsa loquitur, i.e.,* the thing speaks for itself.

There may be *negligence in failure to do* as well as in doing. In such case there must be a duty toward the one injured owing by the one who fails to act. This duty may exist because of some relation between the parties, such as husband and wife, parent and child, carrier and passenger, or employer and employee, or because one has assumed to act and so is bound not to leave off action without due care, or because it is imposed by law. Except in such cases, one is not bound legally to be the Good Samaritan. If he discovers another in a situation of peril he may act to save him and a trespass in the emergency may be privileged. But the mere peril to a fellow man to whom he is in no relation will not oblige him to act.

Certain duties, however, are imposed upon the occupiers of premises with respect to the *condition of the premises.* A trespasser upon land is not an outlaw. He is liable for the trespass but does not forfeit the protection of the law by trespassing. Hence the ordinary principle of liability for aggression applies if the occupier of the premises on which he is trespassing does him a willful or wanton injury. There is good authority to the effect that this is the measure of liability even to a known trespasser. It would seem, however, that as to him the general principle calling for due care should govern and there is authority for calling on the occupier to use due care toward trespassers reasonably to be anticipated. But this is in dispute. As to licensees (persons on the premises by permission of the occupier), there is the same duty of not injuring wantonly and willfully and as they are known to be or to be likely to be on the land they present the same case as the anticipated trespasser. Likewise there is a duty of warning a licensee against hidden dangers, and where the licensee is a business guest or invitee (a person on the premises in the interest of the occupier on a proper errand or on business with him), there is also a duty of having the premises in a reasonably safe condition and liability for an injury to him if through negligence they are unsafe and he is injured. In the latter case it is held everywhere that there is a duty of warning and due care as to things being done on the premises.

Where a *manufactured article* is made negligently so as to have a dangerous hidden defect and is sold to a dealer who with no knowledge of the defect sells it to a buyer who is injured, the older authorities would not allow the buyer to recover from the manufacturer, with whom he was in no relation. Recent authorities, however, very properly apply the general principle of negligence. If the article was manufactured to be sold to dealers in the expectation that they would sell to buyers, who would be injured if the article was defectively made, that principle calls for due care as to the danger to buyers which should reasonably have been anticipated.

It happens frequently that one who suffers injury through the negligence of another has himself contributed to the injury through his own negligence. In such cases the orthodox common-law rule was that if the plaintiff's own negligence contributed in any degree as a proximate cause of the injury, he could not recover. In recent years this common-law rule has not been popular and there has been legislation altering it in some jurisdictions or as to some situations. For example, the Federal employer's liability statute and statutes as to railway employees in a number of states provide that *contributory negligence* can be shown in mitigation of damages but shall not bar recovery. The civil law divides the damages in proportion to the negligence of the respective parties. But this is not practicable with our common-law mode of trial. In admiralty, the rule was and is in this country that the loss to each is to be added and the whole divided between the two. This is still the rule in England if different degrees of fault between the two cannot be established; but if they can be fixed the loss is to be apportioned accordingly. At best, no rule perfectly satisfactory in practical application can be worked out since there are no scales to weigh negligence.

It should be added that if one negligently creates a situation in which he or his property is in danger, and another comes, as it were, upon this set stage, and having a clear chance to avoid injury, acts negligently and causes injury, as he might by the exercise of reasonable care and prudence have avoided the consequences of the other's negligence and the injury which he brought about in view thereof, this person who had the "last clear chance" is liable. He alone was acting at the crisis of

the accident. This doctrine, for a long time in dispute, has prevailed. Similarly if defendant has been negligent but plaintiff alone is present at the crisis of the accident and acts negligently in view of the circumstances negligently created by the defendant, the plaintiff's negligence is the cause and he cannot recover. If both are active at the crisis of the accident and both are negligent, the common law allows no recovery.

There remains a third postulate, the applications of which have given rise to some dispute:

JURAL POSTULATE III. In civilized society men must be able to assume that others who maintain things or carry on activities which are likely to escape or get out of hand and do damage, will restrain them or keep them within their proper bounds.

Liability without Fault. If one maintains something in a place or in a way which threatens the general security, he is liable for a nuisance. If he maintains something or carries on something without due care he is liable to those injured. But supposing he maintains something or carries on something which is not a nuisance, and he is not negligent, and yet if the something gets out of hand without his fault it will do damage. How far does he maintain it or carry it on at his peril of restraining it so that his neighbors shall not be injured? In the beginning if one caused damage to another he was liable irrespective of fault and after modern doctrines of liability came in some of the older rules hung on, notably liability at one's peril for trespass by his cattle, so that although he used all care and his cattle or horses were turned loose by a wrong-doer, he was liable for their trespasses. In the same way at common law in case of injuries by wild animals he maintains, one is absolutely liable. But in case of injuries to persons by domestic animals which in normal experience do not attack mankind, he is liable only in case he knew of a vicious propensity of the particular animal and did not restrain it. Thus there are a number of undoubted cases where one must at his peril restrain things he maintains although there is no nuisance and he is not negligent. In a leading case in England, this type of liability was extended to a case where one maintained a reservoir on his land and without negligence on his part the water escaped and did damage to a neighbor. The English courts recently have applied the doctrine of that case to what we should call an automobile tourist camp where those who came upon the land committed trespasses and acted to the annoyance of neighbors. The doctrine has been rejected by many American courts, but has been followed by many others. The social interest in the general security, under modern conditions, seems to call for it increasingly.

Chapter XI

Obligations

1. Nature and Classification

An obligation, in the sense in which the term is used in the science of law, is a legal relation between a person or a group of persons and another person or group of persons by which the one is bound to some definite act or forbearance or course of acts or forbearance for the benefit of the other. The term comes from the Roman law .and has been taken over by the science of law from the writers on the modern Roman law. In common-law usage obligation is used to mean a bond or sealed instrument creating a debt. But the term is used in the Roman sense in the constitutional provision as to impairment of the obligation of contracts and is in good usage in that sense in English and American treatises on jurisprudence.

In Roman law there was, as one might say, a contractual theory of torts. A wrong gave rise to a claim on the part of the person injured to a penalty recoverable from the wrongdoer by the legal proceeding appropriate to collection of a debt. When the penalty came to be thought of as a penalty of reparation, the debt analogy had fixed the conception of an obligation ex *delicto.* In our law, on the other hand, there is, as one might say, a tort theory of contract. Bonds were given in double the amount of the debt, conditioned to be void if the debt was paid when due, or in a sum much greater than the value of a promised performance, conditioned to be void in case of performance at the promised time. If the bond became absolute by non-payment or non-performance at the appointed date, the whole amount could be recovered in an action of debt. Equity, however, treated bonds in such cases as security for what was actually due or for what was promised, and would not allow collection of more than the actual debt or damages. Also, in order to evade wager of law, in case of debts due on simple contract the common law came to allow *assumpsit* (an action on the case), as for a tort in deceiving a promisee who had done something or made some promise in exchange for another's promise. Hence in the common-law system one sues for damages for non-performance of a promise instead of to exact performance of it as in the civil law and in equity. Roman law recognizes four categories of obligations: *ex contractu, quasi ex contractu, ex delicto,* and *quasi ex delicto.* The last two of these Roman categories are not usefully applicable to our system. But there is an important distinction in procedure between actions *ex contractu* and actions *ex delicto.*

The jural postulate underlying the law of obligations may be stated thus:

JURAL POSTULATE IV. 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 (a) will make good reasonable expectations which their promises or other conduct reasonably create; *(b)* will carry out their undertakings according to the expectations which the moral sentiment of the community attaches to them; and *(c)* will restore specifically or by equivalent what comes to them by mistake or failure of the presupposition of a transaction, or other unanticipated situation whereby they receive at

another's expense what they could not reasonably have expected to receive under the actual circumstances.

Obligations may arise (1) from legal transactions, which may be contracts or may be settlements and assumptions of express trusts, (2) from exercise of some office or calling, (3) from fiduciary relations, and (4) from unjust enrichment at another's expense, or, as recent civilians put it, from unmerited acquisition of benefits.

2. Obligations Arising from Legal Transactions

The intention of the parties to a legal transaction may be directed to the creation of a relation between them; either a relation whereby performance of some promise or promises may be exacted and is due, or one whereby some course of conduct may be exacted and is due for the benefit of another with respect to some property or fund or power although not promised. Accordingly, obligations may arise from contracts or from the creation and assuming of express trusts.

(1) CONTRACTS. A contract is a legal transaction in which the declared will takes the form of a promise or set of promises. It is a legal transaction in which the intent to which the law gives effect is that one of the parties shall be bound to some performance (either act or forbearance, *i.e.,* by acting or by abstaining from action) which the other or another may exact, or that each of the parties shall be so bound toward the other. As it is usually put, there are three elements: (1) parties from whom and toward whom performance is due, (2) a declaration of will in such form or under such circumstances as the law of the time and place may require, and (3) an act or acts due to the one party or to a designated third party, and demandable legally from the other. The parties must have capacity for legal transactions, and the presuppositions of the transaction must not contravene the law nor run counter to good morals.

This analysis, and, indeed, the whole theory of a legal transaction, are the work of the nineteenth century. Hence the terminology may require some modification since the psychological science of today may not like the term "will" which the science of law of the last century took as denoting a fundamental conception. Also there is dispute about what it is to which the law gives effect. A doctrine that the law effectuates not the actual intention but the declared intention has gained ground and is now announced by standard English and American writers and by American courts. Historically, the common law did not enforce a promise but rather a recital of a debt or duty which was so made as not to be denied, or an agreement which was part of a bargain so that it was analogous to deceit not to perform in view of the reliance by the other party. But in the seventeenth century ideas of the inherent moral force of a promise made themselves felt in equity, which regarded intention as the significant thing, and the legal science of the nineteenth century, influenced by civilian ideas of will as the central conception, led to a general statement of our law of contracts in terms of a legal transaction. As the law has developed, therefore, it may be said that, subject to practical limitations on effective legal action, the purpose of enforcing promises is to give effect to intention. But in order to maintain the social interest in the security of transactions, the law must set up objective tests of intention or presuppose it where the ordinary understanding of men would take it to exist.

In a commercial and industrial society stability of promises is a social and economic institution of the first importance. A social interest in the security of transactions calls for securing the individual interest of the promisee, that is, his claim to be secured in the expectation created, which has become part of his substance. But the law has never responded wholly to this demand and the jural postulate on which it rests. In its beginnings the law seeks only to cover a narrow field of social control and there is no necessary correspondence of law and morality in the period of the strict law when remedies were formative. In a later stage of legal development, in the seventeenth and eighteenth centuries, there was a vigorous movement to bring law and morality, and even law and an ideal of morals, into accord. It is in this stage that the law of contract has a real development. In the credit economy of today, promises are so much the normal course of dealing that reliance on them is virtually taken for granted. We assume that agreements should be enforced unless there is good reason to the contrary. But the common law took shape in a different economic order. It developed at a time when men felt that an agreement should only be enforced legally when reason could be shown for enforcing it.

Contracts may be (*a*) formal or *(b)* real or *(c)* simple.

(a) Formal Contracts. The formal contracts of our legal system are common-law specialties, the written acknowledgment of indebtedness, sealed and delivered (bond) or the formal promise to do or not to do something made in a sealed instrument (covenant), or the solemn acknowledgment of indebtedness upon a condition, made in court and put on the record (re-

cognizance), and mercantile specialties *(i.e.,* formal contracts of the law merchant) or negotiable instruments, namely, bills of exchange and promissory notes, to which modern times have added checks payable to bearer or order and recent statutes have added some further categories. The significant characteristic of a formal contract is that the instrument or record is itself the contract, not merely evidence of it. Accordingly, if it is lost or destroyed there can be no action at law. The remedy is in equity by suit to restore it and enforce it when restored. The common-law specialties were enforced in actions of debt (on a bond or recognizance) or covenant (on a promise in a sealed instrument, but concurrent with debt after the seventeenth century). In case of a lost or destroyed record of a recognizance, the court itself in which the recognizance was taken has at common law a power of restoring its own record.

A *seal* at common law was an impression upon wax. It goes back to a time when the impression of one's seal ring was a means of identification as one's signature is today. The legal effect was originally to preclude denial of any of the recitals in the instrument sealed. Hence to this day the form of a formal promise to pay a fixed sum of money is a recital that one is bound to pay it. The instrument (called a *deed* at common law) is legally effective when sealed and delivered. The requirement of an impression on wax has been much relaxed. Corporations commonly impress upon the paper to be sealed. In some jurisdictions the practice is to attach a wafer to the document. In others a scroll or scrawl or printed device saying "seal," is used. In others the word "seal" or the abbreviation "L.S." *(locus sigilli)* are used. Statutes allowing various substitutes of the sort are very common. In twenty-one states seals have been abolished. In many others, by statute, the seal does not suffice of itself but simply differentiates the sealed promise from a simple contract by giving rise to a rebuttable presumption of consideration. In a few others, by statute, written contracts are given the effect which sealed instruments had at common law. As a result of such legislation abolishing or doing away with the effect of seals, there is a serious defect in the law of many American jurisdictions in that there is no way of making a gratuitous promise legally binding. To remedy this, the National Conference of Commissioners on Uniform State Laws has recommended a statute making written promises binding, although gratuitous, where they contain an express recital that they were made with the intent to be legally bound. But this useful provision has thus far been adopted in two states only.

A *recognizance,* like a bond, is an acknowledgment of indebtedness subject to a condition upon which it is to become void. It is entered into orally and put on the record of the court which precludes any denial of the recital. Recognizances are used in judicial proceedings to secure the attendance of parties and witnesses in certain cases. Today they are governed everywhere by statutes.

Negotiable instruments are creatures of the law merchant. They must be in writing, must contain an unconditional order (bill of exchange, check) or promise (promissory note), must be payable in money, must contain no order or agreement independent of that to pay money, must be certain as to the parties, the amount payable and the time of payment, and must be payable to bearer or to order. In addition to the decisive characteristic of a formal contract that the instrument is the obligation itself, not merely evidence, they have at least four other characteristics of formal as compared with simple contracts: (1) Only parties to the instrument can sue or be sued on them, so that an undisclosed principal cannot sue or be sued on a bill or note as he may on a simple contract. (2) In pleading the instrument itself is set out without stating the consideration or the circumstances of making it. (3) They take effect on delivery, not at the time when the payee learns of the instrument and assents. (4) Finally, a prior obligation, for which such an instrument was given, is merged in it. But they are like simple contracts in requiring a consideration, though, differing from simple contracts, it may be a "past consideration." The most significant features of such instruments are that they are transferable by indorsement, the indorsee on indorsement and delivery taking legal title to the instrument, and that an indorsee for value without notice of defenses, who takes before maturity of the obligation and in the due course of business, takes free of defenses and then, contrary to the general rule as to transfers, gets more than the indorser had to give him. Both in England and in the United States, the subject today is governed by statutes—in the United States by the Negotiable Instruments Law, enacted in substantially all American jurisdictions.

(b) Real Contracts. In a formal contract, the binding force of the transaction is given by its form. In a real contract it flows from the delivery or transfer of something (a *res,* whence real contract). One who has received something from another is bound from the very fact that he has received something. The obligation may call for the repay-

ment of money loaned (debt) or for the redelivery of a tangible chattel delivered together with certain duties of good faith as to the care and use of the chattel (bailment). The term "real contract" comes from the Roman law, but has been used by good common-law authority, and is very convenient to describe a type of contract which has been not a little affected by civil-law ideas. As has been set forth in another connection, originally, in addition to an action of *debt* for money loaned, debt for a chattel, or later detinue, lay on what today we should call a bailment. The obligation in the action of account arose from the receipt of property by a guardian or bailiff or one who took to another's use. But *assumpsit* succeeded debt where there was no specialty and equity took over fiduciary relations. A debt arising from a loan of money, not from a formal contract, lost the appearance of a real contract for reasons heretofore explained. There remained bailments, as to which the law had no little development after the beginning of the eighteenth century.

A *bailment* is a delivery of possession of personal property (without transfer of ownership) by one person (the bailor) to another (the bailee), for some specific purpose. It gives rise to duties of carrying out the purpose in good faith, of care and custody of the property, and of returning or accounting for it when the purpose is accomplished. It may be for the sole benefit of the bailor, or for the sole benefit of the bailee, or for the benefit of both. The bailments for the sole benefit of the bailor are *depositum,* a bailment of goods for mere safe-keeping, without reward, and *mandatum,* a bailment of goods in order to have some active service done to or in connection with them, without reward. The bailment for the sole benefit of the bailee is loan for use *(commodatum),* a lending of something to another for his use, without hire or reward. The bailments for the benefit of both bailor and bailee are pawn or pledge *(pignus)* a delivery of possession of goods as security for a debt or promise, with a power of sale in case of default, and letting and hiring *(locatio)* which may be a letting of a thing for hire *(locatio rei)* or a hiring of work and labor upon or in connection with something delivered *(locatio operis faciendi).* The Latin names by which the several species of bailment are commonly known are taken from the Roman law, from which also the idea and definition comes in each case except *mandatum.* In the Roman law, *mandatum* is a commission to another who undertakes to do something gratuitously. There is no requirement of delivery of anything. It is not a real contract. The common law (but there is some question about this, as will be shown in connection with the subject of consideration later) does not recognize *mandatum* except as a real contract, a gratuitous undertaking to do something to or about a thing bailed.

Unfortunately in the leading case, decided in England in 1703, the court took over from the civilians a terminology of grades or degrees of *negligence,* or of the diligence, the lack of which constitutes negligence. In consequence, the books speak of "gross negligence," of ordinary negligence or "want of ordinary care," and of "slight negligence." Ordinary care is that which an ordinary prudent man habitually takes in his own affairs under like circumstances. Slight care or diligence is supposed to be that exercised habitually by a person less prudent than the average, but still capable of care and diligence. Failure to come up to this standard is gross negligence. The highest degree of care or diligence is measured by a man of more than ordinary prudence. These degrees are somewhat artificial and, like all legal standards, allow much margin of application. The idea of negligence was not well worked out in our law of torts till the nineteenth century. The law of bailments bad developed fully in the meantime before a better view of negligence could be applied. But the degrees of care (and so of negligence) have proved reasonably workable in this branch of the law. In case of bailments for the sole benefit of the bailor, it is said that the duty of the bailee is one of slight care as to safekeeping and care of the thing bailed. He is liable only for gross negligence. In case of bailments for the sole benefit of the bailee, the latter is held to great or extraordinary care or diligence. Where the bailment is for the benefit of each, there is liability for want of ordinary care, or, as it is said, for ordinary negligence. Benefit or reward is a circumstance to be considered in determining what is due care under the circumstances. It will be seen, therefore, that the question of negligence is in effect the same in the three classes of cases; whether there is negligence depends on what is due care under the kind of bailment involved.

In case of letting and hiring and gratuitous loan for use, the transaction contemplates use of the bailed thing by the bailee. But such use must be limited strictly to the purpose, manner and time fixed by the agreement. For example, if one hires a car to go to Boston, he has no right to use it to go to New York. If he hires a pleasure vehicle he has no right to use it as a truck. If he hires it for a week he has no right to use it for ten days. In such cases he becomes liable for damages arising from his breach of the contract. But a further question

arises as to whether he may be held for conversion of the thing bailed. A conversion is a wrongful exercise of dominion over the chattel of another. In such case the owner may sue the wrongdoer for the value of the property converted. It would seem that exceeding the terms of the bailment with respect to purpose or manner or time of use is not of itself inconsistent with recognition of the owner's ownership and without more is but a breach of Contract. There is good authority for this view But the majority of jurisdictions follow an older rule which treats intentional deviation from the terms of the bailment in these respects as a conversion.

A bailee for hire who does work upon or in connection with the thing bailed has a *lien* upon it to secure his compensation, that is, he can hold it until that compensation is paid. Originally, this lien existed only for bailees who were obliged to receive the goods of others, *e.g.,* the innkeeper, bound at common law to receive travelers and their luggage, or the common carrier, bound to receive goods tendered for carriage. It was extended to cases where the thing bailed had received additional value from the labor and skill of an artisan, and ultimately to almost all cases where the bailee does work upon or performs services in connection with the thing bailed. There was an exception in the case of stable-keepers and agisters, *i.e.,* those to whom cattle were bailed to be fed or pastured. But statutes have extended the lien to these also. The lien secures only the claim for services as to the thing bailed. It does not cover other claims against the bailor except that wharfingers and factors have what is called a general lien, that is, they may hold the bailed goods in their hands as security for the "general balance of account" *(i.e.,* a balance growing out of a series of transactions in the same line of business or of the same kind).

At common law the lien authorized retaining of possession until the bailee's claim was satisfied. The bailee could sue for his compensation, and also hold the property till he was paid. However, statutes in all jurisdictions now provide for a power of sale.

In addition to specialties and real contracts, there was at common law an old category of *"warranties,"* that is, express promissory representations incidental to other transactions. For example, in case of a sale there might be an incidental express warranty of the quality or nature of or title to the thing sold. Warranties were sued on upon a theory that the breach was a wrong. But they came also to be thought of analytically from the standpoint of contract and may be sued on either *ex delicto* or *ex contractu.* The significant development of the law of contracts, however, followed the enforcement of "simple contracts," *i.e.,* agreements not in the category of specialty or bailment, by an action of *assumpsit,* in form *ex delicto* for the wrong in not performing a promise exchanged for an act or for an-other promise. Thus there was a great extension of the area of legally enforceable promises. Indeed, Lord Mansfield (Lord Chief Justice of the King's Bench, 1756-1784) sought to establish and came very near establishing that no promise in writing and no business promise should be *nudum pactum (i.e.,* a "bare agreement" not legally enforceable). But a reaction set in at the end of the eighteenth century, and it was not until the present century that a new tendency to extend the sphere of legally enforceable promises became manifest in common-law jurisdictions. Such an extension is obviously going on today through growth of exceptions to the requirement of consideration, through stretchings of the idea of consideration, and through strained interpretations of transactions so as to bring them within recognized categories.

(c) Simple Contracts. In the common' law the theory of enforcing simple contracts is one of giving effect to bargains. This basis of enforcement of promises and agreements is not wholly in accord with the postulate above set forth, nor, as the common law develops it, with the theory of a legal transaction. Moreover, as has been indicated above, the postulate and the theory of a legal transaction are not entirely consonant. The common law has never given effect to promises on the basis of the subjective will of the promisor. It is true that courts of equity, inheriting modes of thought from a time when the chancellor "searched the conscience" of a defendant by examining him under oath, have assumed that they were able to reach a subjective situation where the common-law courts, relying on verdicts of juries at trials in which until the second third of the nineteenth century the parties could not testify, were unable to do so. But in spite of this and of strenuous advocacy of the will theory on the part of nineteenth-century text writers, the objective theory prevails in the common law. Likewise this view bas been gaining ground in the civil-law world for a generation. It is now a generally accepted doctrine to rest the enforcement of promises upon an idea of giving effect to the expectations created by the conduct of the promisor in order to maintain the security of transactions in an economic order resting on credit. Yet it is not reasonable to expect the carrying out of an undertaking which was

not intended as a promise except as it may have created the appearance of intention and have been relied upon as having been intentionally made. Accordingly, a reconciliation of the two approaches is possible, as may be seen in the Restatement of the Law of Contracts promulgated by the American Law Institute.

As the common law sees it, then, an agreement is a manifestation of *mutual assent* made to one another by two or more persons. As such it is not legally enforceable where not in the form of a specialty, unless it is a bargain, that is, an exchange of promises or an exchange of a promise for an act. Where the promise is exchanged for an act the contract is said to be unilateraL Where promises are exchanged it is said to be bilateral. The usual manner of manifesting mutual assent is by an offer made by one party and accepted by the other, that is, a conditional promise conditioned upon some act or forbearance by the person to whom it is made or (in American law) by some third party, or a counter-promise, in either case the performance or counter-promise to be given in exchange. The offer must be communicated to the offeree. Indirect information that another is willing to enter into a certain bargain does not justify treating such information as an offer. But offers may be made generally to any one who will accept, as well as specifically to particular persons. Examples are general letters of credit, addressed to any one who advances money upon them and offers of reward for apprehension or conviction of crime or for furnishing evidence leading to apprehension or to conviction. Such offers may be addressed to the first person complying with their condition, or to everyone who complies therewith. In any event, acceptance must take the form of doing the act or exercising the forbearance or making the promise called for by the offer.

As a general proposition an offer may be revoked before acceptance unless the offerer has bound himself to keep it open for a certain time either by making his conditional promise under seal or by a collateral contract upon consideration. But a difficulty arises where the offer calls for a unilateral contract, acceptance to take the form of a series of acts or a continuous course of action, and there is no contract to keep it open till the acts can be performed or the course of action completed. Here it may be very unfair and indeed contrary to good faith to revoke after some of the acts have been done and the rest are being done, or the course of action is in progress but has not been completed. The courts have met this situation by construing such offers, wherever at all possible, as calling for a bilateral contract and treating the action of the offeree in beginning the series of acts or course of action as a promise to do what the offer calls for. In the civil law the situation is met by the doctrine of *culpa in contrahendo.* The revocation under such circumstances is treated as an actionable breach of good faith, a wrong entitling the offeree to recover damages which he has suffered in reasonable expectation of a contract.

Offers terminate on rejection by the offeree, on expiration of the time specified for acceptance, or, if none is specified, by expiration of a reasonable time for acceptance, or by supervening events making the proposed contract illegal or making such a result as the offer presupposed impossible. Acceptance varying the terms of the offer does not make a contract. It amounts to a counter-offer, and is a rejection of the original offer, requiring acceptance as in case of any other offer.

If the offer provides how acceptance is to be communicated, that means of communication must be used. Otherwise acceptance may be transmitted by the means employed by the offerer in communicating the offer or by the means customary in the time and place in like transactions. If acceptance may be made by mail, it is complete when a letter of acceptance properly addressed and stamped is put in the mails. But a revocation, in order to be effective, must be received by the offeree before he has made a contract by acceptance.

For historical reasons in the common-law system, in order to have a legally enforceable simple contract there must be not only manifestation of mutual assent but also *consideration.* The latter requirement grows out of the enforcement of simple contracts in the action of *assumpsit.* The earliest cases of this type of action on the case were those in which one who had undertaken to do something carried out his undertaking unskilfully or negligently to the injury of the promisee. Later the action was extended to cases of failure to do something promised, the promise being part of a bargain. Later still a promise to pay a pre-existing debt was held enforceable by *assumpsit,* the debt being said to be the consideration *(i.e.,* reason for making) the promise. The Roman law had a phrase *nudum pactum* (bare agreement) and a maxim that no action arose from such bare agreement. There must be a reason for enforcing it, and reason was found in its coming within certain established categories of contract. In the modern Roman law, reason for making a promise was taken to be reason for enforcing it and so an intention of gratuitously benefiting another would suffice. The exigencies of assumpsit (seeming to call for something in

the nature of a tort, to be found in not performing after the promisee had acted on the created expectation) and the ideas of civilians as to *causa* (presupposition as reason for making and so for enforcing), combined to induce a theory of reason for making as reason for enforcement in the common law, which has given us the legal requirement of consideration. The exact nature of the consideration required has been the subject of much discussion. In general, writers of the last century had settled fairly well upon the idea of some detriment to the promisee, *i.e.,* the doing on his part of something which he was not already legally bound to do, done in exchange for the promise. Such is the view taken in England today. But historically there were two ideas, one behind special assumpsit (the detriment idea), and one behind general assumpsit (the benefit idea). Hence it has been not uncommon to say that to be consideration there must be either a detriment to the promisee or a benefit to the promisor in exchange for the promise. The latter type of consideration *(benefit)* becomes important where the consideration comes from a third person, as where A promises B something in exchange for an act or a promise by C for A's benefit, or A in exchange for an act or promise by B promises something to B for C's benefit. The English law does not recognize promises made to one for the benefit of another nor consideration proceeding from a third person. They are, however, both recognized in America and are warranted both by the general theory of legal transactions and by historical ideas of consideration. Moreover, enforceability of contracts for the benefit of third persons is clearly called for by the jural postulate behind obligations. The objection to enforcing such agreements goes back to the Roman law and is based on an analytical proposition that the third person was not a party to the agreement. This objection is giving way throughout the modern world to the policy of enforcing promises as called for by the economic order and the broader analysis based on the idea of legal transaction.

As the act in case of a unilateral contract, and the promise in the case of a bilateral contract must be a *legal detriment,* the promise in the latter case must be to do something which one is not legally already bound to do or in a way or at a time to which he is not then legally bound. Forbearance to press a doubtful claim, as to which the parties are really in doubt, is a consideration even if it turns out that it was in fact or law unfounded at the time the agreement was made. But an agreement to take part of a liquidated sum of money presently due in satisfaction of the whole debt is not binding because in paying part when he was bound to pay the whole, the debtor did no more than he was already legally obligated to do. This last rule has been changed by statute in some jurisdictions.

Today there is growing dissatisfaction with the requirement of consideration. There are coming to be many cases of legally enforceable promises where there is no bargain and no common-law consideration. For example, in subscription contracts there is no bargain. It used to be said that the promise of each subscriber was the consideration for the promise of the others. But it was not given in exchange for them. More recently these subscriptions have been given legal obligation on a theory of what is called promissory estoppel along with certain other cases of gratuitous promises afterwards acted on. They are held enforceable after the promisee has begun to act in reliance on them. Again, some courts enforce promises which recognize a tangible moral duty, as where one promises to compensate for some material benefit received or material loss inflicted, but under no legal duty to do so and with nothing presently exchanged for the promise. Old categories of enforceable promises are those to pay a debt barred by limitation or by bankruptcy or to perform an undertaking obtained by fraud. Here it is said that there is a "waiver" of the defense. But why should not a waiver, an intentional giving up of a known right, when in effect it is a promise, itself require consideration? Yet waivers are given legal effect in many cases simply as legal transactions without any basis of consideration or estoppel *(i.e.,* representation of something which, when the representation is acted on, one is precluded from denying). There are cases also in which courts have enforced a mandate in the Roman sense, that is, a gratuitous undertaking to do something for another where there has been no bailment. If the promisor enters upon the performance and acts negligently in the way he conducts or abandons it, he is liable for a tort. But if he simply does nothing and damage results he can only be held on the theory of a contract. Other examples are: so called stipulations of parties and their counsel as to the conduct of and proceedings in litigation (such promises are given effect without regard to form or consideration), and promises by a parent that a child shall have his earnings free of the parent's claims. If acted on, such a promise is binding although nothing was given in exchange for it.

Likewise a number of exceptions, or of cases where something is treated as consideration which would not be so regarded in a court of law, have grown up

in *equity.* For example, equity enforces promises to make a gift where the donee has acted to his injury in reliance upon receiving the promised thing so that there would be something in the nature of a fraud if the promise were not kept. Also equity treats intention to secure creditors, or to settle property on a wife or to provide for a child as a sufficient reason for making a promise which it will treat as consideration so as to correct defective execution of the intention in a way that amounts to specific enforcement of it. Courts of equity have even enforced gratuitous promises in this way simply on the ground of "moral consideration," *i.e.,* a moral basis of making the promise. Finally, equity enforces a gratuitous declaration of trust, so that if one says, "I will give you my watch," without more, there is no legal result; if he says, "I hold my watch in trust for you" without more he may be compelled to execute the trust. It is evident that the law is moving toward a further widening of the circle of legally enforceable promises, and it is significant that in England the Law Revision Committee, appointed by the Lord Chancellor to recommend improvements in the law, recommends abolishing the requirement of consideration and making all promises made as legal transactions *(i.e.,* made with the intention of producing legal obligation) legally binding and enforceable.

Originally the common-law courts considered the two sides of a bilateral contract as independent. Each promise was consideration for the other, but either was independently enforceable without regard to whether the promised counter-performance was made or tendered. Equity deemed it un-conscientious to demand performance when one had not performed or was not willing and ready to perform himself and the equitable defense was taken over by the law by treating promise and counter-promise as conditions each of the other, so that one can only maintain an action upon the promise in a bilateral contract by showing compliance with the legal condition of performance on the plaintiff's part.

(2) EXPRESS TRUSTS. When one person transfers property to another upon an expressed trust and confidence that the latter will use or administer or hold it for the benefit of a third person, or declares that he will use or administer or hold property which he has, or exercise a power which he has for the benefit of another, while the strict law, looking only at the legal title, gives no legal effect to the trust, equity enforces it according to the terms of the transfer or declaration. As equity originally acted and typically acts today *in personam,* the court put pressure on the person holding the legal title (called the trustee) to execute the trust for the person to be benefited (called *cestui que trust).* Thus, on the one hand, there is an obligation, a relation between trustee and *cestui que* trust whereby the latter can exact and the former is bound to execution of the trust in good faith, and, on the other hand, an equitable ownership of the prop-city by *cestui que trust* which will be considered in another connection. The trustee is bound to the utmost good faith in doing what the carrying out of the trust calls for, and in all his dealings with *cestui que trust* to make full and complete disclosure to the latter as to the property and his dealings with it, to use due diligence in management of the property and to account for the property and its income or profits or proceeds, and dispose of it according to the terms of the trust.

3. Obligations Arising from an Office or Calling

In the relationally organized society of the Middle Ages there were certain common callings which were thought of as what we might call public employments. Those who exercised them were performing a service due the community, and were held to such service and its incidents by the law. Such callings were the surgeon, the tailor, the smith, the victualer, the baker, the miller, the innkeeper, the carrier, the ferryman and the wharfinger. Most of these came later to be regarded by the side of the law as private callings. But two, the innkeeper and the carrier, partly from the nature of their callings in any society and partly, perhaps, because they were subject to special rules and liabilities in Roman law, retained their aspect of public callings and have been treated accordingly by the common law continuously to the present day. The nineteenth-century law sought to refer the duties of innkeepers and of carriers to the law of bailments and for a time sought to treat all manner of the newer public service agencies of the time on the analogy of the common carrier. The telegraph company was a common carrier of messages, and later so was the telephone company. The gas company was a common carrier of gas and the water company of water, and the electric light company and power company of electric current, and so on. But it was increasingly plain that they were not bailees in any sense as was a carrier of goods, and although the innkeeper is a bailee of the guest's luggage, he owes duties to the guest which are clearly not those of a bailee, nor is the carrier of passengers a bailee except by a strained analogy. Hence today we recognize a category of offices and callings involving general duties toward the public

and therefore obligations as between officer and individual citizen and between utility and patron.

In an early stage of legal development, when the field of social control through the force of politically organized society was very narrow, one way of securing performance of a promise was to have the promisor take an oath, or otherwise bind himself by some religious ceremony to perform it. In the Middle Ages it was a common practice to swear upon relics, or at the shrine of some saint, to perform a promise, and we still have a remnant of this in the oaths often required of public officers and of executors, administrators, and guardians. These promissory oaths are no longer regarded as in any sense contracts. Indeed, many jurisdictions require officials, who have duties toward those of the public who rightfully apply to them, to give bonds for the full and faithful performance of such duties, and make those bonds directly or indirectly available to those who are not served or are not served properly or fully. But in a well known case in the seventeenth century it was held that a judgment creditor could sue the sheriff in an action in form *ex contractu* for not levying an execution, or not paying over money collected on execution, although there was no contract between the plaintiff and the sheriff, because "though there was no actual contract, yet there is a kind of contract in law." That is, the law creates an obligation because of the office and the duty toward any one of the public applying to the sheriff to execute his office, which that office involves. Thus in addition to the actions upon tort which lie against such officers for injuries to individuals through wrongful acts under color of their office, there may be recovery in actions in form *ex contractu* for not performing or not properly performing the office when properly applied to. Also performance of a specific duty (not involving discretion) owing to a private individual by a public officer may be enforced by the writ of *mandamus,* sued for at common law in the King's Bench in the name of the king, on the relation of the person applying, and in the United States similarly in the name of the state on his relation.

At common law an innkeeper is held to profess a public calling and hence, as rendering a public service, is bound to treat all alike for a reasonable compensation. So far as he has accommodations he is bound to receive and serve all proper persons who come to him as guests in a proper way and at a suitable time and may be indicted as well as sued civilly for refusal to do so. Likewise the innkeeper must exercise reasonable care to provide for the comfort and safety of a guest, and is liable for loss of or injury to the guest's goods brought with him to the inn unless the loss or damage was due to inevitable accident, or the acts of the public enemy *(i.e.,* of enemy operations in time of war), or fault of the guest. This liability has been modified by statute in various ways in all jurisdictions. Also the innkeeper in order to secure reasonable compensation has a lien on all the guest's property in the inn.

One who holds himself out to carry goods for hire for whomsoever may employ him, as exercising a public calling, is called a common carrier. At common law he must carry for all who choose to employ him, and is liable in a civil action (but not criminally also, as in the case of the innkeeper) for refusal to do so. He is bound to furnish equal facilities to all without discrimination and must have reasonable facilities, but if they are reasonable, is not held beyond their extent. He may insist on payment of his charges in advance and is not required to accept for carriage goods of a dangerous or suspicious nature or goods not in a condition to be fit for carriage.

Under the common law a common carrier is liable for loss of or damage to the goods carried, irrespective of fault on his part, while they are in his possession as a carrier, except where caused by "the act of God" *(i.e.,* inevitable accident through the force of the elements) or the public enemy. To these exceptions the course of modern decision has added the act of the shipper, the action of public authority, and the nature of the goods. Subject to these exceptions, he is bound to deliver the goods safely. Moreover, in case of loss or damage from one of the excepted causes he is bound to use due care to avoid the peril and to make the loss as little as reasonably possible; and if the carrier deviates materially from the usual or the agreed route, he becomes liable without regard to the exceptions.

At common law the charges of the common carrier must be reasonable, but if they were, a lower rate to one shipper than to another was not forbidden. Modern cases, however, have tended to insist on equality of rates as well as on reasonableness, and this is now provided for everywhere by statute. Likewise on the general principle which we have seen in the case of other bailees, the common carrier has a lien for his proper charges provided the goods were delivered to him by a person having authority to deliver them for transportation.

With the coming in of canals and turnpikes, new questions arose. These highways were to be used by all patrons equally, without discrimination, at reasonable rates, and provided with

reasonable facilities. But the patrons furnished and used their own boats or vehicles. The rules as to common carriers were not all of them applicable. When railroads came in, it was sometimes held at first that every one was to be entitled to operate his own trains on the track as he could drive his own wagon on the turnpike. It soon became obvious, however, that this was out of the question, and that the analogies of bailment and of the common law as to carriers of goods were by no means adequate as the basis of a satisfactory body of law. The common carrier of passengers was under duties to accept and carry those who tendered themselves for transportation, to the extent of the reasonable facilities he was bound to provide. He was bound to treat all alike with respect to reasonable rates and accommodations. He was bound to reasonable diligence to avoid delay beyond his undertaking and liable for damage due to negligent delay and for injury to the passenger due to his negligence. But both in this case and in the case of carriers of goods, under modern conditions of transportation, the common-law remedies of assumpsit and action on the case proved quite inadequate. For example, the sums involved in individual cases were likely to be too small to justify any particular aggrieved patron in appealing to the courts. Hence legislation has taken over all important features of the subject and has committed it largely to administration rather than to courts. Likewise the common law has passed on from the analogies of bailment and the old-time carrier to the wider conception of public utilities. Thus transportation of every kind, light, power, transmission of messages, and every sort of public service of these types, have come to be governed by general principles, calling for adequate facilities, reasonable incidental facilities and accommodations, and equal service without discrimination at reasonable and uniform rates. In all this there is a continuous development from the historical doctrines as to carriers. But the detailed applications have largely been developed by recent legislation, and the whole conduct of such enterprises has come to be supervised or regulated by administrative boards and commissions.

4. Obligations Arising from Fiduciary Relations

Whenever there is a confidential relation, such as principal and agent, partnership, executor or administrator and creditor next of kin or legatee, director and corporation, husband and wife, parent and child, guardian and ward, or medical or religious adviser and person relying on such adviser, courts of equity applied the analogy of an express trust, and held those in whom confidence was reposed in such cases to the standard of fairness, full disclosure, and entire good faith to which they held trustees. Also courts of equity applied by analogy their jurisdiction over fraud and treated any abuse of the confidence reposed, any failure to come up to the standard of fair conduct and good faith, and any use of the relation to obtain personal advantage at the expense of the person reposing confidence or entitled to the benefit of the relation, as a "constructive fraud" to be undone by the court or to be relieved by restitution or by requiring a full and entire accounting for profits or advantages inequitably obtained. Likewise they required specific performance of the duties involved in or attaching to the relation. Thus in all cases of fiduciary relations there are obligations cognizable and enforceable in equity.

5.Obligations Arising from Unjust Enrichment

Where one has received and holds money or property turned over to him from another through mistake, or obtained though duress or fraud, or holds money or property under a legal transaction after failure of the presupposed or agreed equivalent or presupposed basis of the transaction, or where one has been constrained by legal or strong moral coercion to perform another's duty and so, without officiousness, has benefited that other, there is an unjust enrichment of the one at the other's expense. In cases of this sort, the Roman law enforced a duty of restitution by means of remedies appropriate to contract, and the Roman books said there was an obligation *quasi ex contractu*. In such cases equity may impose a constructive trust, *i.e.,* may treat the person so unjustly enriched as holding property in his hands as trustee for the person to whom he ought to make restitution. But where a sum of money is so held, or the case does not call for accounting for property so held or for its profits, and where restitution of the money value of property will suffice, in the eighteenth century the common-law courts came to allow an action of *indebitatus assumpsit* on a fiction of an implied *(i.e.* implied in law) promise to restore the money or the value. In such cases the books have come to speak of "a quasi contract," which is not a desirable term for a situation creating a duty enforceable *quasi ex contractu.* The Restatement under the auspices of the American Law Institute speaks of "restitution" rather than quasi contract, and this term, which includes cases where a constructive trust is applied in equity as well as those where a recovery of money may be had at law, is preferable to either quasi contract or the older phrase "contract implied in law."

6. Accessory Obligations

The duty arising from a legal transaction may be accessory, that is, in the intention of the parties, and so, equitably, it may be one to become responsible for what is primarily the duty of another. In the better usage in all such cases there is said to be suretyship. The one whose duty is to be the liability of another is said to be the principal. The one who undertakes the liability is said to be a surety. In a not uncommon American usage, however, the term surety is more narrowly limited: where the liability for another's duty is undertaken as a distinct transaction (e.g., a collateral promise to pay a debt if the principal debtor fails to do so) it is called guaranty; where it takes the form of a direct and unconditional promise to the creditor, as by joining with the person for whose duty one is to answer in what is in form the joint promise or undertaking of both, it is called suretyship. The common law originally, looking at the form of the transaction, considered that there was an independent contractor or else a co-contractor. But equity, looking at the substance rather than the form, worked out a general doctrine of secondary liability with certain resulting rules designed to prevent unjust enrichment and to require good faith toward the person secondarily liable.

By the Statute of Frauds (1677) re-enacted in substantially all common-law jurisdictions, a promise to answer for "the debt, default, or miscarriage of another" must be established by a memorandum or note in writing "signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." The application of this statute has given rise to many difficulties. Probably the best that can be said in short compass is that if the promisor is to the knowledge of the creditor a surety (using that term in its wider sense) his promise is within the statute.

As a general proposition, a surety is not liable unless the principal is bound legally. But one may guarantee performance by or on behalf of one who is not capable of making a binding or fully binding promise, as, for example, a married woman at common law, an insane person, an infant, or a corporation of limited power of contract. This, however, presupposes that the creditor and the surety knew of the incapacity at the time the contract of the surety was made, and that the contract was made in view thereof.

Suretyship is a transaction calling for entire good faith and full disclosure of all facts material to the risk. For example, if a surety company guarantees the conduct of an employee, the employer must disclose all information as to prior dishonest conduct. Also the creditor must act in entire good faith toward the surety in his dealings with the principal. Without notice to and consent of the surety he must not vary or alter the contract with the principal so as to vary the undertaking for which the surety is liable, especially if it varies the risk, and he must not give time to or release the principal. If he does, the surety will be released. If he has security put up by the principal and releases it, the surety, who would be entitled to the benefit of that security on payment of the debt, will be released to that extent. Likewise, if there are a number of sureties, and the creditor releases or deals inequitably with one of them, the others will be discharged to the extent of the contribution from the released co-surety to which they would have been entitled. In the maturity of Roman law, legislation of the Emperor Justinian A.D.) provided that the creditor should exhaust his remedy against the principal before proceeding against the surety. In the modern codes this rule has been variously modified and in, some commercial codes has been abrogated as to mercantile transactions. It has been abolished in Scotland. The common law does not recognize any such right in the surety. But an old decision in New York adopted the Roman law on this point to the extent of a right of the surety to call on the creditor to proceed first against the principal, and such a right exists in a number of states either by judicial decision or by statute.

A surety who has paid the debt, is entitled to indemnity from the principal and to be subrogated to securities held by the creditor, that is, to be put in the creditor's place to enforce them or realize upon them. Also if there are co-sureties, one who has paid the whole debt is entitled to contribution from the others, and if some are insolvent from the rest in proportion of the debt to the number of solvent sureties. These rights are creatures of equity, but indemnity and contribution are enforceable at law in the action of indebitatus assumpsit on equitable principles.

7. Transfer of Obligations—Assignment

In a developed economic order promises are an important form of wealth, and transfer of economically advantageous promises is an ordinary incident of business. But the beginnings of law could not conceive of the transfer of claims against others, as it could of transfer of material property, and when the exigencies of business demanded it, such transfer had for a long time to be achieved by roundabout means. Both in Roman law and in the common law, the creditor was allowed to appoint an agent

(attorney in fact) to enforce the claim for him, in the creditor's name, and in theory as the creditor's legal proceeding. Accordingly, at common law the assignee did not get legal title to the claim assigned to him, but only a legal power of attorney (protected in equity as an agency for the assignee's benefit) to sue in the name of the assignor and keep the proceeds of the litigation when he collected them. There was an exception in the case of negotiable instruments, the title to which passes by endorsement. The New York Code of Civil Procedure of 1848 required all actions to be brought in the name of the real party in interest. Also the English Judicature Act (1873) provides for passing the legal title by assignment, and similar legislation is now universal. But one who takes by an assignment, as distinguished from taking a negotiable instrument by indorsement, takes subject to all defenses and set-offs of the debtor. Only claims *ex contractu* and *quasi ex contractu* are assignable, unless statutes (as they do frequently today) allow assignment of claims upon tort. At common law there was fear of maintenance, that is, of undue pressure by the great and locally powerful if such claims could be assigned to and enforced by them.

8. Extinction of Obligations

Obligations may be extinguished *(i.e.,* the relation involving duty and power of exaction may come to an end) through performance, merger, novation, set-off or release. As to performance it should be noted that it may sometimes be excused, as, for example, in case of supervening impossibility, unless expressly or from the nature of the transaction the promisor has undertaken that risk. Merger means that both sides of the relation have come to be united in one person, as where the debtor succeeds by inheritance to the claim of the creditor. Novation is a substitution by agreement of a new obligation for a pre-existing one. If D owes C and they agree with T to substitute T as creditor or as debtor, as the case may be, a difficulty arises as to consideration, since English courts insist that consideration must proceed from the promisee, not from a third person, and that there cannot be a contract for the benefit of a third person, enforceable by him. No such difficulty exists in America.

In the civil law, mutual debts cancel one another without judicial action. This is not true at common law, but where the common-law rule operated inequitably one could go into equity and have a set-off, that is, have them applied each in satisfaction of the other, so that only the balance was recoverable. This applied only where the claims were assertable *ex contractu.* However two English statutes of 1729 and 1937 respectively allowed set-off at law in case of mutual unconnected debts and legislation everywhere now allows set-off freely in actions at law.

Release is a discharge of an existing obligation or right of action. At common law it was thought of as in the nature of a conveyance, and so was required to be by deed, under seal. Equity would enforce specifically a covenant not to enforce, and so that came to be an equitable defense at law and to operate as a discharge without resort to equity. Thus at common law a release calls for seal or consideration. But in a few states the courts now give effect to a release by mere acknowledgment of satisfaction without consideration.

A negotiable instrument, before maturity, is intended to pass from hand to hand in the course of business like money. Hence, before it is due it can only be discharged by surrender, destruction or cancellation of the instrument itself. A release will not discharge it until it has become past due.

Chapter XII

Property

1. Nature of Property and Possession

For the purposes of the science of law, property may be thought of as resting upon the following postulate:

JURAL POSTULATE V. 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.

A convenient way of coming at the subject analytically is to distinguish three stages of proprietary rights. In the first, called in the Roman law "natural possession" and in the common law "custody," there is a mere condition of fact, a mere physical holding of or control over a thing with no other element. As the purpose of the beginnings of law is to keep the peace, when one person has actual physical control of something, others are required to abstain from interfering with it. In the second, there is a legal addition to the foregoing. Where one has gained actual physical control, and is in a position to assert it immediately or mediately intending to exercise it for his own purposes, the law protects his relation to the thing although he may not be in actual physical contact with it at the moment of interference. He is said to be in possession or to have a right of possession. He has a capacity protected and maintained by law, that is, a legal right, to continue in possession and to be restored to it if deprived of it. Possession here is a legal conception in contrast with natural possession or custody, which is a pure conception of fact. It is said that in case of custody, the law secures the relation of the physical person to the object, while in case of possession it secures the relation of the will to the object. In a third stage, the law recognizes a capacity for control of things which one cannot possibly hold physically (e.g., ten parcels of land in ten different localities), and even of things of which others have the actual physical control (e.g., of which a servant is in custody), or of which others are in possession (e.g., a man in Massachusetts owns land which is in the possession of a tenant in New York). This general capacity to control an object recognized and given effect by the legal order is called ownership *(do mini urn).* The conception comes from the Roman law from which it was taken over in the seventeenth century. It is not the same as the medieval idea of seisin, an enjoyment of property based upon some title.

Possession involves two elements, one physical *(corpus),* the other mental *(animus).* The physical element is actual physical control, but not necessarily for one's own purposes. One may control through the actual physical control of some one subject to his will. Thus a servant may have control, but exercise it purely for the master's purposes and according to his instructions. As has been said, this is a wholly *de facto* situation. But in order to keep the peace the law extends further the idea of what it will protect as a *de facto* relation without regard to the right back of it. When physical control of an object once exists, the power to reproduce it is enough until the happening of something inconsistent with it. For example, one who is in his office is in possession of the furniture in his home although at the moment he may have no direct physical control over it. The mental element is the will to exercise the control for some purpose of one's own. Thus, a servant exercises control, if he has it, for the

master's purposes. A bailee exercises it for his own purpose of carrying out his duties under the bailment. Hence the servant, so long as he acts as such and does not exercise control for his own purposes, is not in possession, while the bailee is in possession. Both elements must co-exist. One may retain possession by mere will, having once had physical control and no one else having taken such control with the requisite *animus* so as to dispossess him. But one cannot obtain possession by mere *animus*

At common law the theory of possession is of importance in procedure, in connection with acquisition of property and transfer of title, and in the law as to liens. Ownership is the aggregate of rights, powers, liberties and privileges conferred or recognized by law with respect to the relation of a person to an object, when this aggregate is thought of as a whole. Certain or many of these rights, powers, liberties and privileges may be detached from the whole, but the residue is still ownership. Whenever the detachment comes to an end, they fall back into and are merged in the whole. An owner may have leased a parcel of land to a tenant, granted a right of way over the land to a neighbor, granted a right to take coal or oil from under the surface to another, mortgaged the land to another to secure a debt, and assigned the rents to fall due under the lease to still another. What remains in him of the totality of rights, powers, liberties, and privileges of an owner may be very little. Yet as the lease expires, the right of way is released, the gas and oil is all taken out, and the debt is paid, these detachments from the whole come back into and are swallowed up in it. The ownership is the same before and during the detachments and after they come to an end.

2. Things Not Capable of Ownership

Certain things are from their nature capable only of use, not of ownership. Thus the air, the water of a running stream, the sea, and the shore of the sea were said in Roman law to be *res communes.* They could be used by all, but no one could own them. The general idea was taken over into the common law from the Roman law. But as to the water of a running stream, at common law only persons owning land along the bank, regarded as so situated as to be able to make the least wasteful beneficial use, may divert and use it. As to the shore of the sea, between high and low water mark, ownership was at common law considered to be in the king, and rights as to public use were thought of as public rights in something owned, not as resulting from incapacity of the shore to be owned. Roman law had another category of things not capable of ownership, namely, *res publicae,* things owned by no one but subject to public use. The common law thinks instead of public rights of use of what is the property of the crown (with us the state) or of some public corporation. But the property of the state in the shore of the sea or in a navigable stream is not ownership in the same sense as the state's ownership of the furniture in the state house or of the cash in the vaults of the state treasury. The Roman conception is more in accord with the actual situation.

In England, only streams where the tide ebbs and flows were regarded as navigable. But that feature of the common law was not applicable in America. Here streams which may be used for boats or for the floating of logs in lumbering operations have been held navigable and so public highways to be used in a reasonable way by all, including even a privilege of reclaiming stranded logs, doing no unnecessary damage to the owner of the banks and of the bed of the stream. The public right in such case extends to fishing as well as to transporting. Above the flow of the tide or where the stream is not tidal, the bed of the stream belongs to the owners of the banks, each owning to the middle of the stream, subject to the public right. So also as to the shore of the sea between high and low water mark. However owned, it is subject to a general public right of navigation, fishing, and taking of shell fish. As to roads and streets, at common law the adjoining owners own to the middle of the highway subject to the public right to use for passing and repassing and the general purposes of such a thoroughfare. In the United States, however, there are frequently statutes putting the ownership of streets in municipalities and of roads in counties or other public corporations.

Roman law recognized still another category known as *res nullius,* in which there was no ownership in any one but every one might acquire certain rights. Such is the common. law as to wild animals. Any one so situated as to be able to do so without trespass may kill and acquire property in the carcass or may reduce to possession and tame, so as to have a right of possession as long as, the animal has a habit of returning to its captor, or may keep in captivity untamed. But if the captured wild animal escapes and returns to its wild state, all rights in it are lost, so that another may afterwards take possession of it in the same way. Killing of wild game is now generally regulated by statute.

3. Legal and Equitable Ownership

As equity acted originally and still acts typically *in personam*

(i.e., by bringing to bear 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, enforceable specifically 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 *cestui que trust* or in the person entitled to the conveyance. For a long time it was thought, as indeed Coke argued in the seventeenth century, that in such cases there was no interest of any sort in the property on the part of the beneficiary, 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 through coercing the holder of the title, and especially with the working out of the consequences of enforcement of trusts and specific enforcement of contracts in equity, it came to be seen that in these cases where equity has jurisdiction there are two distinct things: first, an obligation, cognizable and enforced only in equity, to which the holder of the legal title is held by the action of the court upon his person, 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 whenever there is a case for equity to enforce a trust or any duty to hold property for 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 (although not the equitable obligation to account for the property or its proceeds) 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 in such cases is unaffected by the fusion of legal and equitable procedure. It should be added that the two forms of ownership must subsist in different persons. if the equitable ownership is acquired by the owner of the legal title, the former is merged in the legal ownership. But in some cases, in order to prevent unjust enrichment or other inequitable result, equity will prevent such a merger and preserve the separate equitable ownership for certain purposes.

4. Kinds of Property—Real Property and Personal Property

A distinction between real property and personal property is fundamental in the common-law system. It is a historical, not an analytical, distinction, and grows immediately out of procedure. Things real were specifically recoverable in a real action. All other things were the subjects of personal actions in which one got a money equivalent only. (1) REAL PROPERTY is said to include lands *(i.e.,* freehold estates in land), tenements *(i.e.,* things held by tenure), and hereditaments *(i.e.,* things which pass to the heir at law as distinguished from those which pass to the personal representative—executor or administrator—and after payment of debts and legacies are distributed among the next of kin). The term "hereditaments" is the most inclusive, covering substantially, if not all of, the other two except life estates m land and life peerages, which are "tenements" but not "hereditaments." Hereditaments are said to be either corporeal or incorporeal. Corporeal hereditaments are estates in land which pass to the heir, title deeds, and certain movable things which in England were by custom part of the inheritance and passed with the land (heirlooms). Incorporeal hereditaments include advowsons *(i.e.,* rights of presenting clergymen to livings in the established church), tithes (a claim to a tenth part of the profits of a parcel of land belonging to an ecclesiastical person and inheritable by that person's successors), commons (or, as we now say, "profits," *i.e.,* rights of taking something from another's land, as by pasturing cattle there, or cutting wood, or fishing), ways (or, as we should say today, easements, rights to use the land of another or restrict another's use of his land limited to some specific purpose other than taking a profit from it, *e.g.,* a right of way across another's land), offices *(i.e.,* certain offices which in England are inheritable), dignities *(i.e.,* peerages), franchises, corodies or pensions (where granted, as in England to a person and his heirs), annuities and rents. Only profits, easements, franchises, annuities and rents exist in America.

(2) All other things capable of ownership are PERSONAL PROPERTY (chattels), and for historical procedural reasons this includes estates in land less than freehold (estates for years, at will, or at sufferance) which are called chattels real. This category of chattels real is quite anomalous. Apparently the letting of land for terms of years for purposes of husbandry did not come into use in England till the fourteenth century. By that time, the procedure had been fixed with

reference to quite a different type of tenants for years, namely, money lenders, who, to evade the ecclesiastical prohibition of usury, took as security an estate for years sufficiently long to enable them to realize principal and interest from the profits of the land. Such tenants were not given the protection of the real actions and could only recover damages, as in case of a chattel. Eventually, as has been explained, the tenant for years could regain possession by the action of ejectment. But the nature of the estate had become settled.

5.Tenure

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 the relation of lord and man was fundamental, land was held of a lord rather than owned, and the relation of lord and man, landlord and tenant, was the basis of a military system. The main features of feudalism had developed in Anglo-Saxon England. But the Norman conquest led to a definite systematizing and a special development which made England, as to the land law, "the most thoroughly and consistently feudal of all the European states." All land was held, mediately or immediately of the crown. The important forms of tenure (holding land) were knight-service, socage, and frankalmoign. Knight-service was a military tenure. The tenant *(i.e.,* holder of an estate) by that tenure was bound, if called upon, to attend his lord to the wars for forty days in every year. Thus the services involved were uncertain as to the time when they were to be performed. In socage there was a holding by some certain and determinate service, *e.g.,* doing homage (a ceremony of submission to the lord) or swearing fealty to him, or doing both or either together with rendering a rent. Where the service was honorable as in the cases put, it was "free socage. Frankalmoign was the tenure by which religious houses, ecclesiastical and charitable foundations, and the parish clergy held by a general service of prayers for the soul of the donor and for his heirs. Some of the incidents of tenure by knight-service or in socage were relief, that is, money payable by the heir on succeeding to the estate (originally paid to induce a regrant to the heir); wardship, that is, the lord became guardian of the heir who succeeded, if the heir was under fourteen and the tenure was military; marriage, or the value of the marriage if the heir under the lord's wardship refused to marry the wife the lord bargained for, or twice the amount if the heir married another; aids or sums of money to ransom the lord if captured, for making the lord's eldest son a knight, and to provide a portion for the lord's daughter to be married; and fines, sums of money payable to the lord on alienation of the estate by the tenant. But by a statute of 1660 all tenures were turned into socage and the incidents above mentioned were abolished.

Whenever land was conveyed a relation arose between the one who conveyed and the one who acquired. The latter held of and owed services to the former. So if A held of the king and conveyed to B who conveyed to C, C held of B, and B held of A. The tenancies under A and B were called mesne tenancies. Obviously in time the multiplication of these mesne tenancies became a serious matter. If any of those holding next above C failed to perform the services due to his immediate lord, C, who had performed what was due from him might find his property on the land distrained for non-performance by some one who had no interest in acting since he had parted with his estate. Also, if, for example, something supervened to put an end to the tenancy of B under A, the estate of C under B would go with it. To remedy this, a statute of 1290, called the *Statute Quia Emptores,* abolished mesne tenancies by providing that in all cases of land held in fee simple (complete ownership) it should be held directly of the chief lord of the fee. In colonial America, the charters provided that land should be held of the crown in free and common socage. Hence after the Revolution, land was held of the state. But long before this the substance of tenure had been gone. New York, by statute, abolished tenure and declared all lands to be allodial, *i.e.,* owned, not held. But the whole terminology of tenure remains in the law of that state and, although in substance everywhere 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.

6. Estates

At common law, for reasons above explained, one does not own the land itself but is seised of an interest in it, technically called an estate, which he holds in England of the crown, in America of the state. His estate may be freehold or less than freehold, and if freehold, freehold of inheritance or not of inheritance.

(1) A FREEHOLD ESTATE is one held for the tenant's life or for the life of another or to the tenant and his heirs after him, the latter, of course, being *freehold of inheritance.* The highest estate known to the law is an estate in *fee simple, i.e.,* 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. It was created by conveyance or gift to a person "and his heirs," the latter words being necessary since, as Coke puts it, estates in land begin in ceremony. Originally, also, there might be a conditional fee, that is, one limited to some particular heirs. In that case the tenant for the time being could alienate the whole estate, as in a fee simple, the restriction applying only to inheritance. But by the statute *De Donis* (1285) the power of alienation was put an end to. From this arose the *estate tail,* an estate to a person and the "heirs of his body," *i.e.,* lineal descendants (tail general), or heirs male of his body *(i.e.,* males deriving through males), or heirs female of his body *(i.e.,* females deriving through females), or heirs of his body by his present wife (tail special). Here the words "heirs of his body" were requisite to create the estate. There was no power of alienation to cut off the succession of the lineal heirs nor the reversion to the donor or his heirs on failure of lineal heirs of the donee. In some of the United States, estates tail were held inapplicable to American conditions and have never existed. In others, they have been abolished by statute, commonly by turning them into fees simple. In England the whole subject of interests in land was simplified and modernized by legislation in 1925.

A *life estate* is one held for the term of one's own life, or for the life of another person or a number of other persons named, e.g., until the death of the survivor of them. If an estate is granted to a person without defining what estate it is to be, he takes a life estate, a remnant from the time when the interests given by the feudal lord to his vassals were not inheritable. An estate to a widow so long as she remains unmarried or to a man until he acquires some position, is a life estate because they are of uncertain duration and may subsist for life unless the contingency happens and defeats them. Two other forms of life estate are created by the law, not by act of the parties, namely, tenancy by curtesy and tenancy in dower. If a wife dies seised of lands in fee simple or fee tail, if the husband has issue by her capable of inheriting the estate, he will hold the land for his life as tenant "by the curtesy of England," or in the United States, tenant by the curtesy. Also on death of the husband a wife at common law takes a life estate in one third of all the lands of which he was seised at any time during the marriage unless she has joined in a conveyance in such a way as to bar her dower in some particular parcel. Curtesy and dower have been the subject of much legislation varying greatly in the different states.

(2) ESTATES LESS THAN FREEHOLD are for years, at will, or at sufferance. An *estate for years* is created by lease (a contract whereby the land is let to the lessee or tenant for some determinate period, usually a certain number of years) followed by entry upon the land. The term may be for half a year or for a quarter, but will none the less be treated by the law as a tenancy for years. The Statute of Frauds (1677) requires leases for more than three years to be in writing. An *estate at will* exists where one lets land to another to hold at the will of the lessor and the tenant takes possession under the lease. Such an estate is at the will of both—either may terminate the tenancy when he chooses. In modern times, tenancies at will are treated as tenancies from year to year. An *estate at sufferance* is where one who comes into possession of land by a lawful title holds possession afterwards without title, *e.g.,* where tenant for years holds over after expiration of his term without any new agreement or leave of the landlord; or where tenant at will continues in possession after the death of the landlord, that event having the legal effect of putting an end to the tenancy. The significance of a tenancy at sufferance is that the landlord cannot treat the tenant as a trespasser until he has brought it to an end by entry on the land. These estates less than freehold, and the law of landlord and tenant which they give rise to, have been the subject of much modern legislation everywhere, and the details now vary greatly from one state to another.

Estates may be *in possession, i.e.,* may entitle the holders of them to present possession and enjoyment of the land, or they may be *in expectancy, i.e.,* may entitle the holder 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 present estates of which the holders are said to be seised, but the enjoyment is to be in the future. They are either reversions or remainders. (a) A *reversion* is what remains in one who has created a particular estate out of the greater estate which he holds. For example, if A who is tenant in fee simple creates an estate for years in B, or a life estate in C, there is a reversion in fee simple in A. As the Middle Ages saw it, B or C held of A and owed him service and the law protected A's right against any action of the holders of the particular estate injurious to the inheritance. The reversion is real property and, like any other estate of inheritance, passes to the heir or heirs on the death of the person who holds it for the time being. In an estate tail there is a reversion in fee

simple in the donor, since the estate tail is less than a fee simple and, being carved out of it, leaves a residue in the donor which may come into enjoyment whenever the succession of lineal descendants of the donee fails. *(b)* 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. Thus, if A holds in fee simple, he may convey to B for life, remainder in C in tail, remainder to D in fee simple (thus disposing of the whole estate) or he may make no disposition of the residue after the estate tail, so that he has the reversion in fee simple. There can be no remainder or reversion after an estate in fee simple, and in consequence of the Statute of Quia Emptores no service can be reserved and no tenure can exist between one who creates or conveys an estate in fee simple and the taker of such an estate. But the statute does not apply to estates less than a fee simple and certain consequences of tenure are still important, as between the holders of particular estates and those in reversion or remainder, especially in case of estates for years. The law as to remainders did not become fixed till the fourteenth century.

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, so that it may happen, when the particular estate is at an end, that the remainder will not take effect. For example, if there is a gift to A for life, with remainder to the eldest son of B in tail, and B has no son at the time of the gift, B may have no son thereafter or A may die before a son is born. Or, if there is a gift to A for life, and in case B survives A, remainder to B in fee simple, if B dies first the remainder will not take effect, whereas if the gift was to A for life, remainder to B in fee simple, in case B died first his heir would inherit the remainder and it would take effect on B's death. As the feudal system was based on relation and service and was in a sense also a military organization of society, it was a fundamental requirement that there should always be a tenant seised who could and would be held to perform the services. Hence a contingent remainder of freehold could not be limited on a particular estate less than freehold. Thus if there is a conveyance by A to B for twenty years, remainder to the heirs of C, a living person, in fee simple, as no one is heir of the living, so that the remainder is contingent, it fails since the freehold is not in the tenant for years, and if it passed out of A there would be no one to take it and be at hand to perform the services. If, on the other hand, the conveyance is to B for life, remainder to the heirs of C, there is a good contingent remainder, since B is in possession by virtue of a freehold estate and can be held for the services. It will be noticed also that 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. In the seventeenth century this came to be guarded against by giving a remainder to trustees to preserve the contingent remainders.

Two other rules deserve brief 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 is given mediately or immediately to the heirs of that person in fee simple or in tail, 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 persons to take an estate. Much controversy has arisen as to this rule and its applications. The other, known as the *rule against perpetuities,* provides that no interest shall be valid unless it must vest *(i.e.,* become subject to no condition precedent to its taking effect other than determination of a preceding estate) not later than twenty-one years after some life in being at the creation of the interest. This rule, required by the possibility of creating freehold estates in the future otherwise than as remainders, which grew out of the Statute of Uses (1535) and Statute of Wills (1540), to be spoken of below, begins to appear in the sixteenth century and takes form in judicial decision near the end of the seventeenth century.

Putting of the title to property in one person for the benefit or advantage of another is an idea which has occurred independently to more than one system of law. It reached its fullest development in uses and trusts in the common law system. Before the Conquest, both in France and in England the purpose of a gift was expressed by the Latin phase *"ad opus"—to* the need or want of this or that. This word *opus,* passing through the forms *oeps* and *oes* in French, came into English as "use" from similarity to that word, derived from the Latin *usus.* At the time of the Crusades lands were frequently conveyed to friends of the Crusader with directions in the form of a use. Also an owner might wish to change his estate, *e.g.,* from a fee simple to an estate tail, and to do this must convey to a person who he was confident would carry out the expressed purpose by reconveying, in the case put, to him and the heirs of his body. By the fourteenth century such conveyances

whereby the legal title was in one for the benefit of another had become common, and the trust or confidence was enforceable by the chancellor in equity. There were obvious advantages in this; but it lent itself to frauds and was a means of defeating the incidents of tenure, which was an important source of royal revenue.

In 1536 the Statute of Uses provided, as it is put, for executing the use. That is, in case of a conveyance by A to B to the use of C, it put the legal title in C, where the court of chancery before the statute would have compelled B to hold for or convey to C. So, also, if A declared by deed that he held a tract of land to the use of C, equity would compel A so to hold it, and the statute executed the use, making C the legal owner. So far as no use was declared, unless there was something to create a beneficial interest in the person holding the legal title, *e.g.,* a consideration, there was what was called a resulting use, *i.e.,* the holder of the legal title was required by equity to hold for the benefit of the person who had conveyed to him. Thus 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 as in case of a remainder. For example, A could convey to B and his heirs to hold to the use of C and his heirs after the death of D. This was called a springing use. Or A could convey to B and his heirs to hold to the use of C and his heirs, but in case C went abroad to live, to D and his heirs. This was called a shifting use. As equity would enforce uses in these cases, the statute executed them, so that the legal title would pass accordingly. But equity would not execute a second use, raised upon a prior use, as to A and his heirs to the use of B and his heirs to the use of C and his heirs. Hence the Statute of Uses executed the first use only and the second is a trust, cognizable and enforceable only in equity.

Future interests could be created also under the Statute of Wills (1540) by an executory devise, *i.e.,* a gift of real property by will in which no estate is to take effect at the death of the testator but upon some later event, the legal title until that event being, by common law, in the testator's heir. Here no particular estate was required, and an estate could be limited *(i.e.,* created by the devise) after a fee simple, e.g., a devise to A and his heirs upon A's reaching the age of twenty-one, but if A dies before reaching the age of twenty-five, then to B and his heirs.

Both statutes are common law in America. But the Statute of Uses is now of importance only for its effect upon the modes of conveying land.

7. Co-ownership

At common law property may be owned in severalty, *i.e.,* by one person as the owner, or in one of three forms of co-ownership (ownership by a number of persons who as an aggregate are the owner), namely, joint tenancy, coparcenary, and tenancy in common.

If an estate in land, in fee simple, in tail, for years or at will, is given to two or more persons, without specifying how they shall take, they are at common law joint tenants, that is, they are treated as one tenant. In such case there are said to be four unities — of interest, title, time and possession. They have, says Blackstone, "one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession." Hence follows what is called survivorship. In case of joint tenancy, upon the death of any joint tenant the entire property remains in the survivors and so comes to the last survivor, who takes the whole. Because of this incident, which is not in accord with modern ideas, joint tenancies are no longer favored. Co-ownership will be interpreted as tenancy in common where possible, and has often been turned into tenancy in common by statute, except as to trustees. In the case of trustees it is still important to have a number, holding the legal title as joint tenants with survivorship, so as to insure against death of one or more during the term of duration of the trust.

Where a tenant in fee simple or in tail died, if his heirs were females, e.g., if he left no son but three daughters, or daughters and the representatives of other daughters, these co-heirs are at common law co-parceners. They are treated as one heir, having one estate between them. But there is no survivorship in case of co-parceners. Each is seised of her undivided share, which will pass to her heirs. Down to the time of Henry VIII, there was no writ of partition except in case of co-parceners.

Tenants in common have a unity of possession, *i.e.,* the possession of one is the possession of all. But they hold each his undivided share in the property in severalty. Tenancy in common may arise from the terms of a deed or gift, providing that the grantees or donees shall so hold, or from the destruction of a joint tenancy or co-parcenary, as where the joint tenants destroy the unity of title by each conveying his share to a different person, each of the two now claiming by a different conveyance. There is no survivorship in a tenancy in common. Also by the statute of Henry VIII, and one of William III, tenants in common and joint tenants are compellable to

make partition. But equity took over partition as far back as the end of the sixteenth century, and either equity or modern statutory partition has superseded the common law writ.

In case of chattels, important incidents of ownership in common are that one co-owner cannot maintain an action against another to recover possession of the property, though if one converts or destroys it, the other or others may recover for the tort; that the undivided interest of one may be taken in execution, but if the sheriff or other officer sells the whole, not merely the interest of the judgment debtor, the other co-owner or co-owners may sue the officer for his or their undivided shares; and that if request is made by one co-owner to another to join in necessary repairs or expenditures and the request is not complied with, there may be a recovery of money spent on the common property beyond the party's due proportion. In case the property is of the same quality and in its nature severable, as for example, so many bushels of wheat in a bin, either may sever and appropriate his share, if it can be ascertained by measurement or weight. If not, there must be a partition by a court, either in equity or under a statute.

8. Incidents of Ownership

In general ownership carries with it a right of possessing the thing owned (although one may part with this right and yet keep the ownership); a liberty of using and enjoying it (but the owner may dispose of this or restrict it by granting or suffering acquisition of a profit or an easement); a liberty of abusing or destroying it so far as does not involve danger to the general safety or contravention of public morals (but this liberty is coming to be much restricted where exercised out of spite to a neighbor); a power of disposition, *i.e.,* of transfer of the ownership to another or others (but there are coming to be statutory limitations on disposing of the family home or of household furniture, and on assignment of wages, where the interest of a wife or of other dependents may be affected); and a right of exclusion of others from the property, subject, however, at common law to some privileges such as that of deviation where the highway is impassable (heretofore explained), that of recaption of logs floating down a navigable stream and lodged on the bank, and that of tying up boats along public streams.

Ownership of land is said to extend not only to the surface but above the surface *usque ad coelum* (up to heaven) and below the surface *usque ad centrum* (down to the center). In other words, it includes control of the air space above the land and the right to take out what is below the surface. But the development of aviation has led to recognition of a public right of using the air above the surface of privately owned lands as a highway and the growing recognition of a social interest in the conservation of natural resources has led to restrictions upon the taking out of percolating water, natural gas, and oil from under privately owned lands. Also at common law mines of gold and silver, although on private land, belonged to the crown. This doctrine has been declared by statute in Michigan and was followed by an early decision in California, afterward overruled. But in disposing of the public domain, the United States and those states which had a public domain of their own, have made certain reservations of minerals from private ownership and regulations as to how they may be mined.

A chattel which is permanently affixed to the land becomes a part of it, losing its separate existence, and is said to be a *fixture.* This takes place if there is actual annexation to the land or something appurtenant to the land *(i.e.,* belonging to it as a part of it), an application to the use or purpose to which that part of the land to which it is connected is appropriated, and intention on the part of the one who made the annexation to make the chattel a permanent accession to the freehold. 'When once a chattel has become a part of the land in this way it can only be severed and made to resume its independent existence by the owner of the inheritance, *i.e.,* tenant in fee simple in possession or reversioner or remainderman in fee. But the law came to be relaxed as to trade fixtures, articles annexed to buildings or to the soil by a tenant for years, in order to carry on a trade or business on the land, which the tenant may remove at any time during his term.

Where one is in possession of land by virtue of an estate of uncertain termination, *i.e.,* for life, for the life of another, or at will, and has planted crops but the estate comes to an end before harvest *(e.g.,* tenant for life or *cestui que vie* dies or the landlord terminates the tenancy at will), the representative of the tenant for life, in case of a life estate, and the tenant himself in the other two cases, at common law are entitled to the *emblements* or profits of the crop. This extends to annual crops sown or planted, but not to fruit trees and the like which are permanent accessions to the land. The right to the emblements is an incident of such estates.

Other incidents of ownership are at common law an exclusive right of the owner of land to catch, kill and appropriate wild game upon his land, a right of support, that is, to have his land, in its natural condition, sup-

ported by the adjoining lands, so that the owners of those lands are not to do anything thereon to allow his land to slip or subside, and riparian rights, that is, where land adjoins a running stream the owner may make a reasonable use of the water consistent with a like use by all other riparian owners. This rule was taken over by the common-law courts from the French civil code in the nineteenth century. A like doctrine has grown up as to percolating water in recent times. The owner of the surface may make a reasonable use of the water by taking it out for use upon his land, but may not take it out for purposes not connected with the beneficial use of his land *(e.g.,* sale off the land) so as to interfere with the like use of percolating waters by his neighbors. As to surface water, the land owner at common law could appropriate it if it came on his land or could keep it off his land, but could not gather it up and discharge it in a body on another's land. There is a tendency in legislation, and to some extent in judicial decision, to limit the liberty of a land owner as to his dealing with surface water to what is reasonable, the same as in case of running water and percolating water.

9. Rights in the Property of Others

There are certain rights, known in the civil law as *jura in re aliena* (rights in another's property) or by recent writers on the civil law as "limited real rights," which are regarded not as estates in the property but as burdens upon it. In the common law these may be classified as servitudes and securities.

(1) SERVITUDES. Servitudes is a general term, taken from the civil law, to describe a burden upon some particular piece of property for the benefit of a person other than the owner (when it is said to be personal or in gross) or of another piece of property (when it is said to be praedial or to be appurtenant to the latter). The Romans thought of the one piece of property as serving the other. Where the servitude is praedial or appurtenant, the property for the benefit of which it exists is called the dominant property or tenement. In either kind of servitude, the property upon which it is a burden is called the servient property or tenement. At common law all servitudes are appurtenant except profits, which may be either in gross or appurtenant, although there is some question in the United States as to easements in gross.

The servitudes known to the common law system are profits, easements, covenants running with the land, and equitable servitudes. Where there is a *profit,* the servitude binds the owner of the servient property to permit the owner of the servitude or of the dominant property to take something from the servient property, *e.g.,* to cut wood or cut hay or pasture cattle, or take out oil or gas or mine and take out minerals. An *easement* binds the owner of the servient property to permit the owner of the dominant property to do something upon the former's property, or restricts the use of the servient for the benefit of the dominant property. Thus, a right of way, a right of driving cattle, or of maintaining a ditch or dam over another's land, and a right to use another's wall in building on one's land adjoining, are easements. Easements and profits are created by grant (i.e. deed) or are acquired by adverse use for the period of prescription (twenty years) after which a grant is said to be presumed. The period is variously fixed by statute in the several states.

Where there were *covenants, i.e.,* promises under seal, in leases for life or for years, it was held at common law that the assignee of the term was bound by them. The reversioner could enforce them against the assignee and so they were said to run with the land. They imposed a burden upon the term for the benefit of the reversion. But the benefit of such covenants did not run. That is, the assignee of the reversion could not enforce them. This was remedied by a statute of Henry VIII (1540), providing that the benefit of such covenants should run with the reversion. The statute only covered cases where there was tenure, so that covenants would not run where contained in a conveyance of a fee simple. In the United States, however, the analogy of tenure was thought to exist in case of a covenant in aid of an easement on conveyance of a fee simple, and in one way and another the sphere of this type of servitude has been much extended. Equity went much further in enforcing restrictions on the use of land created by contract, not requiring them to be in or in connection with conveyances and granting specific performance against third parties who took the land restricted with notice of the restrictions. Later it came to be recognized that the effect was to create a category of *equitable servitudes,* cognizable only in equity, and enforced against all who take the servient property unless for value and without notice. There has been much controversy whether and how far equitable servitudes can be imposed upon personal property. The policy of the law as to free trade in chattels stands in the way of them.

Servitudes give a privilege, or in the case of restrictions, a right of prohibiting some exercise of an owner's liberty. Securities give a privilege of holding another's property as security for

a debt or for performance of a promise, but also a power of appropriating the property or the proceeds of sale of it in satisfaction of the claim secured.

(2) SECURITIES. The securities known to the common-law system are pledges, mortgages, common-law liens, statutory liens, and equitable charges or liens. A *pledge* is a bailment by way of security. In case of default there is a power in the pledgee to sell the property, after notice to the pledgor, and apply the proceeds to the satisfaction of the claim secured. Pledge is an older idea in the law than contract. Apparently originally, before the days of credit, a buyer gave something in exchange with an option of substituting payment later. Out of this developed, in one direction, a formal contract by turning over something which created an obligation to pay, and, in another direction, security for payment. In the gage of land as security, as it was at first, the creditor was put in possession as a tenant for years, the debt to be paid at the end of the term with or without a covenant releasing the reversion to the creditor in case of default. If there was no such covenant the creditor had to obtain a judgment in order to complete his title in case of default. If the profits of the land were not to be applied on the debt but were to be by way of interest, it was said to be a dead pledge *(mortgage).* Later a term of years was sold with a condition that the lessee should hold in fee simple in case of default. By the fifteenth century the *mortgage* as it has been practised ever since had developed. It is a conveyance of land or of chattels upon condition subsequent that if a debt is paid or some act is done at a time and in the manner provided, the conveyance shall become void, otherwise to remain in full force and effect. If the condition is performed, the mortgagee's title comes to an end. If it is not performed, the conveyance becomes absolute and the mortgagee's title is complete. But from the beginning of the seventeenth century equity allowed the mortgagor to redeem, that is, to pay the debt and obtain a reconveyance unless and until the right (called the equity of redemption) was cut off by foreclosure. Foreclosure might be strict, by cutting off the right to redeem, leaving title in the mortgagee, or by sale, *i.e.,* directing sale of the property and application of the proceeds upon the debt. Thus equity treated the mortgagor as in substance the owner, and the mortgagee as having only a security. In the United States many jurisdictions adopt the equitable view by statute and make the mortgagor legal owner, giving the mortgagee only a power to have the property sold for satisfaction of the debt in case of default.

Common-law liens have been spoken of in connection with bailment. In addition, statutory liens are sometimes given to persons not m possession, *e.g.,* mechanics' and laborers' liens. Such liens are enforceable by sale in the case of chattels or by judicial foreclosure in the case of land.

Equitable liens are imposed by a court of equity in specifically enforcing contracts to give security, and in cases where the substance of a transaction, as distinguished from its form, amounts to security; also in many cases to prevent unjust enrichment of one at another's expense. For example, where one co-owner expends money upon the property owned in common under necessity of preserving it, equity may subject the share of the other co-owner to an equitable charge to secure reimbursement of the proper proportion. Likewise in England, and in many of the United States, where land has been conveyed to a purchaser who has not paid the purchase money, or where some part of the money remains unpaid, equity subjects the land to a lien to secure the vendor. Equitable liens are not enforced against purchasers of the property for value without notice.

10. Acquisition of Property

Acquisition of property may be original or derivative. It is original if the title of the one who acquires does not rest upon the right of another, either because the thing acquired was not owned by any one else at the time of the acquisition or because, although some one had owned previously, the person acquiring gets a wholly independent title. It is derivative if the ownership of the one who acquires is based upon that of a previous owner so that no more can be acquired than the previous owner had.

(1) MODES OF ORIGINAL ACQUISITION. Important modes of original acquisition are *(a)* occupancy, *(b)* alluvion, *(c)* sale for taxes, *(d)* sale under judgment *in rem, (e)* adverse possession and *(f)* prescription, *(g)* confusion and (A) accession.

(a) Title by Occupancy. Title by occupancy is acquired by taking possession of something capable of acquisition with the intention of making it one's own. The type is discovery and appropriation of ownerless things, to which category the common law referred goods of an alien enemy, abandoned chattels, and wild animals. The alien enemy was looked on as outside of the protection of the laws so that his chattels might be seized by the first taker. Such was also the Roman law. But even when Blackstone wrote international

law was superseding this doctrine. The theory of warfare as a contest between sovereigns, not a feud between races, is incompatible with the older rule. The rule of international law has now become part of the common law in this connection. To this category belong also abandoned chattels, *i.e.,* those of which the owner has given up possession with the intention of relinquishing all claim to them. But the common law excepted waifs *(i.e.,* articles thrown away by a thief in his flight), estrays (domestic animals wandering at large, the owner being unknown), wreck (goods cast upon land by the sea after a shipwreck), and hidden treasure (gold and silver coin, plate, and bullion). Waifs, if not seized first by the person from whom stolen, belonged to the crown whenever someone other than the owner found them. The common law on this point was not received in America. Estrays went to the king also, but in the United States the matter is governed by statutes. As to wreck, it passed to the king unless claimed by the owner or his representative within a year and a day. But if any one or any animal came off the ship alive the law as to wreck did not apply, and in Blackstone's time this exception had been extended to cases where proof could be made of any of the cargo which came ashore. In the United States this subject also is commonly governed by statutes. Hidden treasure (treasure trove), if the owner is unknown, likewise goes to the crown, and in many states, by statutes, passes to the state. But in others it is put in the same category with lost property generally: the finder, at least if lawfully in the place where he finds it, may take possession and hold against all the world, except the owner. Acquisition of title to wild animals has been spoken of in another connection.

(b) Alluvion. Alluvion is an addition made to land by deposits from a stream or the washing of the sea, where the increase is so gradual that it cannot be perceived at any one moment. If, where boundaries go to the middle of a stream, the stream suddenly alters its course so as to cut off a perceptible piece of land, there is avulsion, not alluvion. If the sea gradually recedes below the usual water mark and adds to land in that way, there is said to be dereliction. -In case of alluvion or dereliction the new land belongs to him to whose land it is added. In case of avulsion there is no change of boundary. The middle of the stream as it was before remains the line. These rules and the terms used are taken from the Roman law.

(c) Sale of property for taxes is statutory. Statutes confer a special power of sale upon some official, to sell land for taxes charged against it, prescribing the formalities of its exercise. All the proceedings must be in strict compliance with the statute, since the common law scrutinizes jealously all proceedings whereby an owner's property is taken from him involuntarily. Such a sale, if all the proceedings are regular, creates a new and perfect title independent of all preceding claims.

(d) Sale under a Judgment in Rem. So, also, where property is sold under a judgment *in rem, i.e.,* against the property itself, *e.g.,* in case of forfeiture for violation of revenue laws, or condemnation of enemy property captured in time of war, or in proceedings against a ship in admiralty.

(e) Adverse Possession. The common law was slow in recognizing acquisition of property by adverse possession. Where one was disseised, the disseisor was in possession and the disseisee was said to have a mere right. The statute of limitations (1623) barred his right of entry after twenty years. But it was not till after thirty years that the right of possession of the disseisee was gone and the disseisor or his heir could maintain ejectment, and only after sixty years that disseisee's right of property was gone, so far at least that he no longer had any legal remedy, for Blackstone was loth to admit that the right was gone with the remedy. An English statute of William IV provided for extinguishment of all remedy after twenty years, and such is the general period of limitation in American statutes, although some states have reduced it to ten years. Also either by statute or by judicial deduction from the effect of the statute, the title of disseisee is extinguished. Thus adverse possession for the statutory period has become a mode of original acquisition. Open, notorious, continuous and exclusive adverse possession of land for the statutory period gives a new and independent title. As to chattels, for a time there was the same reluctance to hold the title extinguished where the legal remedy was barred. But it became settled in this case also that when the action for conversion was barred one who had held adverse possession for the statutory period acquired an original tide. Where there is adverse possession those who succeed to it and continue it may, as the phrase is, "tack" the successive possessions derived one from another. Likewise, following the original English statute, the statutes provide that in case of disabilities, such as coverture, infancy, and lunacy, the period of limitation shall not begin to run until the disability is removed. When, however, the period has begun to run, it will not be suspended for any supervening dis-

ability. It is only where all access to the courts is barred, *e.g.,* in time of war, that the running of the statute will be suspended.

(f) Prescription. Things acquired by grant, such as easements and profits, could be gained by prescription, that is, by showing user from beyond the time of memory *(i.e.,* as far back as memory could trace it) so that its origin could not be shown. But if its origin could be shown since the be-ginning of legal memory *(i.e.,* the first year of Richard I), after twenty years' adverse user the courts instructed juries to presume a grant and that the deed of grant had been lost. An English statute of William IV provided for acquisition of title to easements and profits by adverse user for certain periods, and American statutes usually have like provisions, or the statutes of limitation are sometimes construed as having that effect.

(g) Confusion. Roman law distinguishes confusion, where the result of mixing the goods of one with those of another is something the same as the contributing elements of the mixture; accession, where the result is the same as one of the contributing elements, the other element being merged in it; and specification, where the result is a new species, different from any of the contributing elements. Bracton (in the thirteenth century) stating the Roman law on this subject so that it passed into the common law, treated accession and specification together under the term accession, and this became established in the common-law books.

If there is confusion by consent, the parties become owners in common of the mass according to their respective shares. If it is accidental or negligent, either may claim his aliquot part or may bring trover for it. If there is a willfully wrongful confusion it used to be said that property in the whole mass passed to the innocent party. But that doctrine was based on misinterpretation of a seventeenth-century decision. The present tendency is to treat the case on the same basis as accidental or negligent confusion unless the original shares are unascertainable, when the wrongdoer will fail in his burden of proving his share.

(h) Accession. As to accession, the principle is that one of the things gives identity to the result; the other is merged in and has become part of it. Thus if one builds a house on another's land or builds A's beam into B's house, the building or the beam is an accession to the land. Where one takes his own materials and another's and makes something new out of them or expends labor on another's materials, thus making something new, the case is treated on the analogy of accession. The question is what is the principal thing to which the other constituents are accessory, or whether the new thing is so much more valuable than the constituent material that the material has become, as it were, lost in it. If the maker of the new thing is not an intentional wrongdoer, American decisions apply a criterion of relative values. If the value of the new thing is greatly in excess of the value of the material of another which was innocently used, the property is held to pass to the maker.

(2) DERIVATIVE ACQUISITION. In the common-law system derivative acquisition may be (a) by judgment, *(b)* by marriage, *(c)* by bankruptcy, *(d)* by succession (in a corporation, or on intestacy, or by will), *(e)* by gift, *(f)* by sale, or (g) by conveyance.

(a) By Judgment. Title by judgment is acquired where one obtains a judgment against another in an action of trover or of trespass *de bonis* and the other satisfies the judgment. The title to the thing converted or taken then passes to the other by operation of law. There has been some dispute whether it is the judgment or satisfaction of the judgment that passes the title, but the better view is that it does not pass until the judgment is satisfied.

(b) By Marriage. At common law, as has been set forth in another connection, on marriage the husband acquired title to the wife's chattels.

(c) By Bankruptcy. Also when one has been adjudged a bankrupt, the title to his property (to everything which he could have transferred) passes to the trustee or assignee by virtue of the provisions of the statute.

(d) By Succession. In strict common-law usage the term "succession" is applicable only in case of *corporations* having "perpetual succession," *i.e.,* where one set of men, by succeeding another set, acquire a property in the goods and chattels of the corporation. In England, the dean and chapter of a cathedral, or the master and fellows of a college, are examples. But the term is convenient also for cases where persons succeed to the property of a deceased owner, and is used in that sense in the civil law.

At common law, *in the absence of a will,* the real property of a decedent passes to his heir, while his personal property passes to his personal representative, *i.e.,* his administrator. As to real property, the heir is seised of the decedent's estate on the latter's death whether he knows of it or not. Originally, gifts of land by a lord were for life only

and a remnant of this survived in the relief payable by the heir after lands became inheritable. After the conquest it was for a time not clear how far the heir took without a re-grant. But by the beginning of the twelfth century, it was settled as between the king and his tenants in chief *(i.e.,* those holding of him immediately) that fees were heritable, and the doctrine spread to subtenants and became generally recognized as to military tenure. Just how land held otherwise became heritable is not clear. Glanvill in the twelfth century cannot say with assurance what the law on this point is. By the beginning of the thirteenth century it becomes established that the eldest son will take as heir and the unifying effect of the jurisdiction of the king's court led to extension of primogeniture to socage as well. From this the common law developed seven canons of descent for real property which governed until after the Revolution in America, and until recent legislation in England, where they still obtain in the case of peerages. These are: (I) Inheritances descend lineally *in infinitum* to the issue of the person who last died actually seised, but never ascend lineally. (II) The mate issue is admitted to the inheritance before the female. (III) Where there are two or more males in equal degree, only the eldest inherits, but females in equal degree inherit together as co-parceners. (IV) Lineal descendants of a deceased represent their ancestor, that is, stand in his place and take what he would have taken if living. (V) If there are no lineal descendants of the person last seised, the inheritance will descend to his collateral relations (if of the blood of the first taker of the estate otherwise than by inheritance) subject to canons two, three, and four. (VI) Consequently the collateral heir of the person last seised is his next collateral kinsman of the whole blood *(i.e.,* not only descended from the same ancestor but from the same couple of ancestors). (VII) In collateral inheritance the male stocks are preferred to the female except where the lands have descended from a female. Colonial New England sought to do away with this scheme of inheritance of land, but for the most part it prevailed till after the Revolution when a great variety of statutory alteration began, leading to a general body of legislation assimilating descent of real property to that of personal property.

As to personal property, administration of a decedent's estate was in the jurisdiction of the ecclesiastical courts. At common law the title to personal property passed to the executor or administrator of the deceased, as the latter's personal representative. The personal representative was required to make and deliver to the ecclesiastical court an inventory of the personal estate. It was then his duty to collect the property inventoried and, as he had legal title to it, he had legal power to release debts due the estate, to convert credits and securities into money, and generally to deal with the property as an owner. Next, it was his duty to pay the debts of the deceased, in doing which he was bound to observe certain rules of priority whereby funeral expenses, debts due the crown, judgments and recognizances, debts upon specialty, and simple contract debts were ranked in the order named. If he paid a debt out of its order, he made himself liable for an unpaid debt of a higher class, even if the assets were exhausted. But he could pay any one creditor m a class his whole claim, unless other creditors had sued him, even though nothing was left for the rest. After debts were paid he was to pay legacies, that is, gifts of money or of specific chattels in a will. In case of insufficiency of assets, the legacies of money gave way to legacies of specific things, and were paid out of the assets in proportion. Any residue was to be paid to the residuary legatee, if any.

If there was no gift of the residue or no will, the surplus at common law went to the personal representative's own use. The ecclesiastical courts sought to compel the administrator to distribute the surplus among the next of kin by requiring the giving of a bond to do so. These bonds, however, were held void by the common-law courts, but afterwards were made valid by the Statute of Distributions (1670). That statute provided also that after the expiration of a year from the death of the intestate the estate should be distributed thus: One third to the widow and the rest in equal proportions to his children, or if any were dead, to their lineal descendants; failing children or representatives of children, half to the widow and half to the next of kin in equal degree and their representatives; if no widow, all to the children; if neither widow nor children, the whole to be distributed among the next of kin of equal degree, but no representatives to be admitted among collaterals beyond children of brothers and sisters of the deceased. This order of distribution is taken from the civil law and follows Justinian's 118th Novel (*i.e.,* new statute after the Code). It puts children first, then parents, then brothers, grandfathers, uncles or nephews (and the females equally in each class) and lastly cousins. The half blood are admitted in each class along with the whole blood.

The common law as to administration operated so in-equitably that the court of chancery took the matter over, on the ground that executors and ad-

ministrators were fiduciaries, and that the remedies at law afforded creditors and legatees were inadequate and uncertain. Equity could in one proceeding require an accounting of assets, determine the rights of every one interested, and decree an equitable distribution among creditors, legatees and the distributees under the statute.

There is legislation in every state governing distribution of the personal estate, mostly, until very recently, following rather closely the order of Justinian's Novel, which goes on the basis of nearness of blood relationship. A different tendency, however, has begun to appear in which duty of the deceased to support the person in question replaces consanguinity as the basis.

Wills of personalty (testaments) were recognized and given effect by the ecclesiastical courts. But gifts of realty by will were not permitted until the Statute of Wills (1540). After uses were enforced in equity, it was possible to make a conveyance to uses to be named in a will. The statute made this unnecessary, giving a direct power of devising all manner of inheritable property. The Statute of Frauds (1677), required wills devising lands or tenements to be in writing, signed by the devisor or some other person in his presence and by his express direction, and attested and subscribed in the devisor's presence by "three or four credible witnesses." It further provided that no devise or any clause of one should be revocable except by some other will or codicil in writing signed and attested as above, or by "burning, cancelling, tearing or obliterating the same by the testator himself or in his presence by his directions and consent." The Statute of Wills and Statute of Frauds are the foundation of the present law on the subject, but there is detailed legislation in all of the states, largely following the English Wills Act of 1836.

(e) By Gift. A gift is a gratuitous transfer of the property in a chattel. Gifts are either *inter vivos, i.e.,* from one living person to another to take effect at once, or *causa mortis,* that is, upon condition, in expectation of death, so that if the donor escapes the anticipated peril or survives the illness, the gift fails. At common law either form of gift requires delivery to the donee of the thing given or else a deed of grant.

(f) By Sale. A sale as distinguished from a contract to sell, is an agreement by which the seller agrees to transfer the property in goods for a price in money. When the agreement is complete and the parties so intend, the buyer acquires the property in the thing sold. The seller may retain the title as security for the price until paid or although title has passed, if he has possession, unless the sale is on credit, or if the credit has expired, or if the buyer becomes insolvent, may retain possession until the price has been paid or tendered. Also if the goods have been delivered to a carrier consigned to the buyer, the seller has a right to stop them in transit.

Where one sells something in his possession, there is an implied warranty of title (that is, such a warranty is an incident of the transaction itself) but none of quality if the buyer has an opportunity to inspect and determine the quality for himself. In a sale by sample there is an implied warranty that the goods shall be up to the sample. And if the buyer has no opportunity to inspect the goods or a sample, there is a warranty that they will correspond to any positive and definite description by the seller. Also if bought for a particular purpose or use, to the knowledge of the seller, there is an implied warranty that they are fit for that purpose or use. The details of the law on this subject are now governed in England by the Sale of Goods Act (1893), and in most of the United States by the Uniform Sales Act, recommended by the National Conference of Commissioners on Uniform State Laws in 1906.

(g) By Conveyance. Freehold estates were conveyed at common law by feoffment and livery, fine, or recovery. Feoffment was by deed, delivery of which, however, without the further ceremony of livery of seisin, gave only an estate at will. Livery of seisin was a formal delivery of seisin of the land to the feoffee in the presence of witnesses, reciting the contents of the feoffment or lease and then, feoffor and feoffee being alone on the land, handing over a clod of turf or twig, saying: "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed:' Where there were freehold remainders, livery was made to the tenant of the particular estate. A fine was a fictitious action of covenant, in which the person to whom conveyance was to be made sued the person who was to convey setting up a contract duty to convey the estate to him. The defendant asked leave of the court to compromise. An agreement of compromise, wherein defendant acknowledged the right of the plaintiff, and this acknowledgment before the court or a judge thereof, or certain commissioners appointed for that purpose, were reduced to an abstract which was recorded (under a statute of Henry IV). Then in-dentures *(i.e.,* counterparts) of a note reciting the whole matter were delivered to the respective parties. A common recovery, likewise, was a fictitious action by the person who was to take

against the one who was to convey. It was in form a real action in which the record recited that the tenant, that is, the one making the conveyance, called upon some fictitious person, from whom he had purchased the land with warranty, to come in and defend the title; that this person (called the vouchee) appeared and defended; that thereupon the demandant got leave of court to imparl *(i.e.,* confer with the vouchee with a view to settlement); and that thereafter the vouchee defaulted. There was then judgment that the demandant recover the land and that the tenant have from the vouchee lands of equal value, in accordance with the warranty. The sheriff then delivered seisin of the land to the demandant, now recoverer, who now had title by the judgment of the court. It was usual, in barring an entail, to convey to some third person, who when sued vouched the tenant in tail, who then vouched the court crier. In this way, the tenant in tail being vouched and having to set up his whole tide, it was conceived that every kind of right and interest he might have was cut off. Fines were used to cut off remainders and reversions, since those who had such interests were given five years in which to make claim, and under a statute of Anne, one year after claim to bring a legal proceeding, or they were barred. The recovery was used to cut off the reversion and remainders expectant on an estate tail, a result usually regarded as established by a decision in 1472.

Great changes in the mode of conveying land resulted from the Statute of Uses. As the statute executed the use whenever there was one which the Court of Chancery would have enforced, it was needful only to "raise a use" (as the legal phrase was) and the statute would do the rest. One method was a covenant to stand seised to uses. The person who was to convey covenanted under seal to hold his seisin, *i.e.,* his estate of which he was seised, to the use of the one to whom he was to convey. This raised a use in the latter which the statute executed and so made him the owner. Another method was a deed of bargain and sale. Equity would specifically enforce a bargain for sale of land, and if a consideration had passed that, too, was a reason for treating the vendor as holding for vendee. If, then, one recited under seal that for a consideration in hand he had bargained and sold a tract to another, he could not contradict what he had acknowledged under his seal. Hence there was an enforceable use which the statute executed. A third form of conveyance under the statute was lease and release. The tenant of a freehold estate made a bargain and sale upon a recited money consideration for a term of one year. The statute executed the use and the bargainee became tenant for years without having to take possession. Being in possession by virtue of the statute, a release of the reversion to him was effected by deed and he had acquired the estate. Thus feoffment and livery ceased to be necessary- In England, during the legislative reform movement, conveyance of land was much simplified and modernized.

In America, recoveries were in use in Pennsylvania, Delaware, Maryland and North Carolina, until they became obsolete with the passing of estates tail. Fines and recoveries were abolished in New Jersey in 1799 and in New York in 1830. Fines were regarded as in force in Virginia in 1803. For the most part, the conveyances under the Statute of Uses, deed of bargain and sale and lease and release, were made use of. Some states enacted that such deeds should have the same operation as feoffment and livery at common law. In others, the form of a bargain and sale deed was retained and the Statute of Uses, as part of the common law of the state, effected transfer of the title. Many others provided for statutory deeds on the model of a deed of grant. Maryland provided that record of the deed should be the equivalent of livery of seisin.

Recording of deeds of conveyance is governed entirely by statute. In general, the deed transfers title, but until it is recorded, the grantor has a power to transfer the title to a purchaser for value without notice so as to cut off the legal title of the prior transferee. The importance of recording is therefore to prevent exercise of this power, to give notice to the world of the title under the deed, and to furnish a convenient mode of proving the deed if it is lost or destroyed.

There are no implied warranties in conveyance of a fee simple as in sale of a chattel. In the feudal polity, the relation of lord and man involved a duty of protecting the man, so where there was a gift of an estate the tenant could vouch his lord who was to defend the title and if it failed provide an equivalent. This warranty implied in the word *dedi* (I have given) bound his heirs. With the abolition of mesne tenancies this feudal warranty passed. The warranty implied by the verb to give bound the feoffor only. But in a lease (there being tenure) there is an implied covenant for quiet enjoyment. Express covenants of warranty are necessary in other cases. However, statutes often provide that the one word "warrant" shall have the effect of the six covenants (for seisin, for right to convey, against incumbrances, for quiet enjoyment, for further assurance, and of warranty) usual at common law.

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