

The background of the entire cover is a close-up, slightly blurred image of the United States flag, showing the stars and stripes in shades of blue, red, and white.

The National Law Library

Volume Six

Legal Relations

Part I

Contracts, Torts and Trusts

by Nathan Isaacs

Professor of Business Law, Harvard University

Part II

The Common Law of the Family

By Max Radin

Professor of Law, University of California

**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. 6

Creator, Proprietor &
Christian Publisher
Alfred Adask

<http://www.suspicious.info>

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

*"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*

Introduction

Anglo-American law works predominantly in terms of relations. Its traditional headings include Domestic Relations in such brackets as Parent and Child, Husband and Wife, Guardian and Ward, and even Master and Servant, and such consensual relations as Principal and Agent, Buyer and Seller, Landlord and Tenant, Employer and Employee, Trustee and "*Cestui que trust*" (popularly called the beneficiary), Carrier and Passenger, Mortgagor and Mortgagee, Insurer and Insured, Attorney and Client, Surety and Principal, Bailor and Bailee, Debtor and Creditor, and in general Obligor (Promisor) and Obligee (Promisee). There is something more than mere convenience in favor of this way of presenting the data of any mature system of law, particularly Anglo-American law, for the duties of each of the persons mentioned in each of the brackets are increasingly viewed as duties to the other person in the bracket rather than abstract duties to the state, or to a court or to people in general. The distinction is, to be sure, one of degree. The state has a clearer interest, for example, in the performance of a parent's duties to a child or a husband's to a wife, than it has in the duty of an ordinary debtor to pay his creditor. At times the state's interest in a great many of these relations becomes intense. It may concentrate its attention upon remodeling the relations of employer and employee, as in the recent Wagner Act, or even that of Buyer and Seller, as in the Robinson-Patman Act, or Carrier and Passenger, as in the Interstate Commerce Acts.

Thus, there are two types of sources of duties in legally recognized relations: the dictates of law and the assent of the parties. Each of these is subject to further classification and qualification. Some of the duties dictated by law exist independently of any initial consent on the part of the persons involved. There are duties, mostly negative, that all persons owe to all others, including strangers, such as the duty not to molest them, malign them, injure them, defraud them, or take or damage their belongings. Then there are duties dictated by law for certain classes of persons—Classes which we may join or not as we see *fit*; but once we have entered a class, we owe special duties to various persons or groups. We are now subject to those dictates of the law which are aimed not only at all persons, but at all "property owners," or all "operators of vehicles," or all "owners of animals," all persons engaged in particular trades, industries, or professions, all employers of labor, all husbands or wives, all parents, all trustees, all directors of

corporations, and so forth.

If we add, as the law once did more readily than it does now, duties dictated to all landlords and all tenants, all employers as well as all employees, all bailees of a certain type, and so on, we come very near to the hazy border line that marks off our second great division of duties in these relations: those based on the assent of the parties. On this side of the border line we have the tremendous field of contractual relations. Many of the relations we have mentioned are predominantly contractual, or have been thought of in that way in the nineteenth century. The classical law of that period had no difficulty in including debtor and creditor, bailor and bailee, insurer and insured, landlord and tenant, and even employer and employee, wholeheartedly within the category of consensual, that is, contractual, relations. Two limitations, however, became important before the end of the century. In the first place, by a series of processes that might be called collectively the "standardization of contracts," the actual stipulation of details was taken out of the hands of the contracting parties. Under the combined influence of the printing press and other mechanisms of mass production, of the accelerating tempo of modern life, of trade association suggestions and of statutory forms, we have formed the habit of buying standard insurance policies, standard bills of lading, standard sales agreements, leases, travel tickets, repair jobs and banking arrangements. Theoretically we are free to make our own arrangements. Actually we are bound by convention, ignorance, fear and inertia.

Most of all are we bound by the fact that life is too short and the average sense of humor and proportion too good to permit us

to draw a ten page agreement every time we buy a collar button or a pair of shoes or even a steamship ticket or an automobile. We make our agreement so sketchy that if anything goes wrong the numerous blanks must be filled out by reference to customs and usages and general understandings of businessmen amplified here and there by a presumption of law based upon court tradition or statute. The "intent" thus ascertained and the assent predicated upon it may be pretty thin or wholly fictitious at any time. Yet it is a useful concept.

By a series of small steps we pass to the other limitation on freedom of contract, a limitation in law as well as in fact. Instead of saying that "in the absence of specification to the contrary" the contract shall contain such a stipulation, the law says "any contract to the contrary notwithstanding." This type of limitation was long resisted in the nineteenth century as unconstitutional, but the twentieth century, in an increasing number of situations, has made room for it under the police power. Of course, when the law commands that certain clauses be written or read into contracts or peremptorily stricken from them, we are dealing with contract only in name. In fact, we have a phase of a relation dictated by law.

Strictly speaking, the common law has not developed by an enumeration of duties. It has been concerned rather with claims growing out of the breach of duties—that is, with what might be called secondary duties rather than primary ones. Case law has been built up on the basis of breaches of contracts, torts (*i.e.*, breaches of non-contractual duties imposed by law) and violations of trusts and other specific relations. Attempts, there-

fore, to describe primary duties, whether under contracts, trusts or other special relations, or in the absence of any special relation, are likely to be overstated or at least oversimplified deductions of the text writers. Thus, out of fragmentary lists of rights of action they construct a general right to protection of one's reputation, his person, his property, his right to privacy, his right to have contractual promises enforced. These generalizations, though inaccurate to begin with, have actually been useful in the history of the law. Coupled with the maxim which says "no wrong without a remedy," they have led to a broader conception of rights than the precedents alone would have promised.

The tendency has been to fuse the traditional law of specific torts—such as trespass, nuisance, libel, slander, conversion of goods—into a comprehensive law protective of general rights, and to shape the law of specific contracts—such as those covered in the old actions of debt, detinue, covenant, assumpsit—into a comprehensive law protective of those special rights which are based on promises. Our emphasis thus shifts from the secondary rights acquired through breaches of primary rights, the subject of the lawyer's study when he gets "down to cases," to the primary rights which rights of action for breaches are supposed to protect.

In this volume we are concerned with rights and duties in the commonest and hence the most important of our daily relations. These will be treated under the headings "Contracts," "Torts," "Trusteeship," constituting together Part I, and "The Common Law of the Family," constituting Part II.

■

Contents

2 Introduction

Part I

Contracts, Torts and Trusts

by Nathan Isaacs

8 Chapter I. Contracts

1. Nature of a Contract
2. Legal Interpretation of Contract
3. Enforcement of Contract
4. Damages for Breach of Contract
 - (1) Decrees Instead of Damages
 - (2) Damages Calculated in Contract Itself
 - (3) Mitigation of Damages in Anticipatory Breach
5. Essential Elements in Contract-making
6. Government or Public Contracts
7. External Formalities in Concluding Agreements.
8. Doctrine of Consideration in Contracts
 - (1) Rules of Consideration
 - (2) Bailments As Contracts
 - (3) Difficulties in the Theory of Consideration
 - (4) Wording of Contract
 - (5) Substitutes for Doctrine of Consideration
 - (6) Negotiable Instruments
9. Informalities in Contract-making—Verbal Contracts
10. Contracts in Writing—Statute of Frauds
 - (1) New Interpretations and Applications of Statute of Frauds
 - (2) Ignoring OF Statute in Business
 - (3) Requirement of Writing in Negotiable Instruments
11. Offer and Acceptance in Contracts
 - (1) Expression of Intention
 - (2) Rules Governing Offer and Acceptance in Contracts
 - (3) Defects in Offer and Acceptance
12. Contracts of an Infant
13. Contracts of Persons Mentally Incompetent
14. Other Questions Regarding Capacity
15. Objects Accomplished by Contracts
16. Necessary Limits of Contract
17. Standardized Categories
18. Rules of Interpretation of Contracts
19. Significance for “Third Persons”

20. Status of Beneficiaries
21. Termination of Contract
 - (1) Complete Performance
 - (2) Breach of Conditions
 - (3) Other Causes of Termination

21 Chapter II. Torts

1. Protected Non-contractual Rights
2. Bodily Security and Welfare
 - (1) Fault and Liability
 - (2) Negligence
3. Interests in Personality
 - (1) History
 - (2) Slander and Libel
 - (3) Mitigating Aspects of Defamation
 - (4) Malicious Prosecution, False Arrest, Abuse of Process
4. Protection of Human Relationships
5. Protection of Property
6. Intangible Interests
7. Equitable Remedies
8. New Rights Enforceable by Tort Action

27 Chapter III. Trusteeship

1. Development of Trusteeship
 - (1) Statute of Uses
 - (2) Modern Trusts
2. Reasons for the Use of Trusteeship
3. Limitations of Trusteeship
 - (1) General and Procedural
 - (2) Rights of Strangers
 - (3) Purposes of Trusteeship
 - (4) Control of Particular Clauses
 - (5) Clauses Inconsistent with Trust Idea
4. External and Internal Relations
 - (1) Operation of Trusteeship As to Outsiders
 - (2) Rights and Duties of Trustees
5. Termination of Trusteeship

Part II

The Common Law of the Family

By Max Radin

34 Introduction

36 Chapter I.

General Consideration

1. The Legal Concept of the Family
2. History
3. Consanguinity and Affinity
4. The List of Family Relationships

42 Chapter II.

Parent and Child

1. Custody of Child
2. Discipline
3. Services
4. Education
5. Care and Support
6. Special Position of the Child
 - (1) Personal Status
 - (2) Property Interests
 - (3) The State as "Parens Patriae"
 - (4) Juvenile Courts
7. Responsibility of Parents
 - (1) Contracts
 - (2) Torts
8. Emancipation
9. Termination of Certain Legal Relations

54 Chapter III.

Illegitimate and Foster Children

I. Illegitimate Children

1. History
2. The Common-Law Attitude
3. The American Attitude
4. Presumption of Legitimacy
5. Filiation Proceedings

II. Adoption

58 Chapter IV.

Husband and Wife

I. Introductory

II. Marriage

1. Engagements to Marry
2. Contract of Marriage
3. License
4. Eugenics
5. Evidence

III. Relations of Husband and Wife

1. Personal Relations
 - (1) Cohabitation
 - (2) Sexual Access
 - (3) Sexual Fidelity
 - (4) Conjugal Kindness
 - (5) Duty of Support by Husband
 - (6) Duty of Household Management by Wife
 - (7) Interference of a Third Person
 - (8) Competence of Husband and Wife in Criminal Action
2. Property Relations
 - (1) Feudal Position of Husband and Wife
 - (a) Wife's Disabilities of Coverture
 - (b) Liabilities of the Husband
 - (2) Husband and Wife in Common Law

3. The Dowry

4. Dower
5. Curtesy
6. Estates by Entireties
7. Family Settlements
8. Community Property



74 Chapter V.

Dissolution of the Marriage

I. Annulment

1. Capacity .
2. Reality of Consent
3. Impotence
4. Effect of Annulment

II. Void Marriages

III. Divorce

1. History
 2. Nature of Divorce
 3. Jurisdiction
 4. Granting of Divorce
 - (1) Acts Tending to Set Aside Judgment
 - (a) Recrimination
 - (b) Collusion
 - (c) Forgiveness or Condonation
 - (2) Interlocutory Judgment
 - (3) Specific Grounds for Divorce
 - (a) Adultery
 - (b) Desertion
 - (c) Cruelty
 - (4) Breakdown of Family Unit
 5. Alimony
- #### **IV. Separation and Separate Maintenance**
- #### **V. Alienation of Affection and Criminal Conversation**

91 Chapter VI.

Guardian and Ward

92 Chapter VII.

Courts of Domestic Relations

Part I

Contracts, Torts and Trusts

by Nathan Isaacs

Contracts

I. Nature of a Contract

For practical purposes we may define a contract as a legally enforceable promise. Upon closer inspection, however, we are compelled to whittle down this definition a good deal. In the first place the noun “contract” is used in ordinary parlance, as well as in the law books, to describe the process of making the promise or promises involved, or the resulting relation or some phase of that relation, or a document embodying the terms of the promises or a description of the relation, or certain purely legal consequences, as the right of action in court for a breach, or the procedure itself in case of breach. All of these uses of the term are legitimate, and ordinarily the context in which the term is used serves to eliminate the possibility of misunderstanding. Occasionally, however, a business man is badly misled and suffers heavy losses as a result of the confusion inherent in the possibility of using such a keyword in so many senses. There is the case, for example, of the fruit-dealer, who, after reaching a detailed understanding on a shipment of fruit, re-

fused to sign the “contract” unless

certain new conditions were inserted. He learned to his chagrin that the contract was something distinct from the writing and that he was bound to go through with the arrangement or pay damage in spite of his refusal to sign.¹

2. Legal Interpretation of Contract

Even more serious difficulties may be encountered when we are forced to put a definite interpretation on the word “contract” as used in a constitution, in a statute or in a private document. Thus the Constitution of the United States prevents states from impairing the obligation of contracts. There can be little doubt that judicial definition has deviated from the original sense in which this expression was used. To the men who made the Constitution a law did not seem necessary to give a contract validity. On the contrary, the Constitution represents an effort to give law validity on the basis of the more fundamental validity of contracts. The *sanctity of contracts* was a principle based upon what they would unhesitatingly have called “natural law,” and this sanctity was precisely the idea that no state was to interfere with. In course

of time the whole concept of natural law fell into disrepute, and we have long indulged in the presumption that no amount of effort or agreement on the part of individuals can result in a contract unless there is a law ready to give that effect to the acts of the parties. Hence we must argue in a circle: the law will recognize and enforce as contracts such agreements as it chooses to recognize and enforce. In other words, if our definition is to serve the purpose of identifying and distinguishing contracts from all other types of arrangements it must come at the end of a study of what the law will enforce, rather than the beginning.

3. Enforcement of Contract

A further limitation of our definition results from our study of the idea of *enforcement*. The law has many ways of enforcing its requirements, including penalties, damages, specific decrees, nullification and preventive measures. Any one of these may happen to concern promises, express or implied. Yet neither the punishment of the embezzler, nor the decree of a divorce court nor the holding of a director, trustee or guardian to a strict

accounting, nor the disbarment of a lawyer or removal of an officer or the revoking of a license constitute the type of enforcement that our definition contemplates. Yet obviously there are situations in which these modes of enforcement may be more potent means of making persons live up to promises, contractual or non-contractual, than the ordinary remedy of awarding damages in a court of law for a breach of contract or the extraordinary additional one of decreeing specific performance of a contract in a court of equity.

4. Damages for Breach of Contract

Perverse as it may seem to make the question of the existence of a contract turn on the question whether the law will give a certain remedy in a specific case, this order of procedure is historically true. It will, therefore, shorten and facilitate our talk of identifying contracts if we reverse the ordinary procedure and devote our attention to remedies first, and then, after understanding what can be protected, examine the interests that are actually so protected under the name of contracts. Strictly speaking, contracts are not enforced in the ordinary procedure of Anglo-American law. It is ordinarily entirely within the power of a man to fail or refuse to carry out his contractual promise. What we ask for in a court of law in such a case is damages in money for the breach of the contract. This money, assuming it is finally collected, is a very different thing from the goods or services or even the money we had been led to expect under different conditions on a certain day in the course of performance.

The law, of course, recognizes this difference in measuring the damage inflicted, but not always adequately. For delays in payments it usually allows inter-

est at six per cent. For delays in delivery of goods it assesses the difference between the market price at the time when delivery was promised and the time of actual delivery. If peculiar circumstances make the consequence of a breach particularly burdensome to the victim, the law still gives only general damages measured according to these rules unless the special circumstances were brought to the attention of the party guilty of the breach at the time of making the contract and thus virtually incorporated into the contract. Thus, in a leading case, a carter wrongfully delayed the delivery of a broken iron shaft. The pieces were in themselves worthless and the cost of carrying small. But they were being sent to a manufacturer to enable him to replace the shaft for a mill which was shut down pending the arrival of the new shaft. The delay made the mill lose valuable time and contributed to its failure to carry out contracts on time. In the absence of a special understanding on the subject the carrier could be held only to such liability as would ordinarily flow from the delay in the delivery of bits of scrap iron.² It is always the loss to the plaintiff that is considered, not the benefit, if any, reaped by the defendant. Nor can speculative damages, such as loss of probable profits be taken into consideration, nor unmeasurable damages, nor actual but unforeseeable damages.

(1) DECREES INSTEAD OF DAMAGES. The inadequacy of the law of damages in some cases of breach of contract, as in some cases of tort to be discussed later, has led courts of equity to step in hesitatingly with specific decrees in a limited variety of cases. In the case of an agreement to sell a "unique" chattel, such as shares of stock not available on the open market, or real

estate, equity is ready to render such decrees. In contracts for services of a unique character, an interesting compromise has been effected. Let us assume the case of an artist—whether a painter, singer, actor, or baseball player—whose ability and reputation are such that they cannot be duplicated in the open market. On principle it would be reasonable to treat their agreements to give service very much as we treat the sale of a unique chattel. Yet, for practical reasons it would be ridiculous to command the artist to paint, or sing or perform. On the other hand, if the agreement includes a stipulation not to compete or not to work for a competitor, the negative clause may be easily specifically enforced in the hope that such enforcement may lead the parties to a solution of their principal problem outside of court. Specific performance in such cases is never a matter of strict right. Doubts or difficulties will readily cause courts to relegate parties to their remedies at law, however inadequate a remedy money damages may be. Some courts, particularly those in states like Pennsylvania, where the development of Equity has been arrested at one time or another, have resorted to the assessment of huge damage awards in extreme cases, suspended so as to give the guilty party an opportunity to perform his promise specifically or come as near to doing so as possible after the original breach and a lapse of time.

(2) DAMAGES CALCULATED IN CONTRACT ITSELF. The inadequacy of damages and other uncertainties of the law have led, particularly in business transactions, to attempts to improve enforcement by the terms of the contract itself. Only one of these attempts need be repeated here: the liquidation of damages, that

is to say, the calculation in advance and as part of the agreement of the amount of damages to be paid in the case of certain breaches. Where such calculations are made in good faith and are likely to be helpful in the administration of justice, the law upholds them. Otherwise it dubs them “penalties” and excludes them.³

(3) MITIGATION OF DAMAGES IN ANTICIPATORY BREACH. One other rule of damages in relation to contracts will be helpful in characterizing the whole philosophy of the law of contract enforcement. It is that which orders the victim to take reasonable steps to mitigate the damages he suffers even when the other party is manifestly in the wrong. Thus where there is an “anticipatory” breach, that is to say, a clear indication that a party to the contract is unable or unwilling to go on with it, the other party should not go ahead with his preparations for performance and thus pile up damages to be assessed; at least, he should not do so if he has a reasonable choice in the matter. This doctrine is sometimes laconically stated in terms which indicate that one has a lawful choice of performing his contracts or paying for their violation, or more laconically still: a common-law contract is made in contemplation of breach rather than performance. In any event, it must be understood that the enforcement which the law provides for a simple contract does not carry with it the penalties of the criminal law, or even of tort law (where punitive damages or “smart money” are sometimes allowed), or even the extraordinary answerability of equity except in those rare cases in which specific performance is granted. One is not “punished” for failure to carry out his contracts.

5. Essential Elements in Contract-making

From this concept of enforcement there has grown up a series of formal requirements, which are primarily prerequisites for enforceability but which immediately become, for practical purposes, essential elements in the making of contracts. Theoretically it is, of course, possible to think of a contractual relation which may not be enforced but which the law still recognizes. Thus the law may say that no action may be brought upon a particular type of contract (say a contract to be responsible for the debt of another) unless the agreement or a memorandum thereof is in writing and signed by the party to be charged. If we stand by our definition “enforceable promise,” there is no contract in such a case. Yet there is something in the relations between the parties that the law may recognize. Thus if the oral promise is made good by the promisor, the law will not order the money returned as if paid under a mistake. Furthermore, if the written memorandum comes into existence quite independently of the main transaction, as in an acknowledgement of the whole state of facts in a letter by the promisor or in a document prepared for another case in court, the defect is cured and what was unenforceable becomes enforceable without any further need of “contracting” by the parties.

A similar problem is raised where, after a good contract has come into existence, some legal barrier is raised against the use of the courts for its enforcement. Thus a debt may be “outlawed” by lapse of time under the so-called “statute of limitations”; or the debtor may be or become exempt from legal process, as governments and their accredited representatives generally were at common law; or the

claimant may lose his standing in court temporarily or permanently as an alien enemy, for example; or finally, the debt may be discharged through bankruptcy proceedings. In all of these cases the enforcement test yields the result, “no contract.” Yet the law cannot ignore these situations, and it treats each in an appropriate manner quite regardless of the logical dictates of definitions.

In general, where a genuine debt has been in existence and has been barred by operation of law rather than by agreement of the parties, it can be revived by a simple promise. Courts have rationalized this result by speaking of the lapsed debt as constituting a “moral consideration,” and in other equally clumsy ways, but what we are concerned with here is the common-sense result rather than the logical or illogical explanation given in support of it. In those cases in which the difficulty of enforcement may be attributed to peculiar standing or lack of standing of parties, the law satisfies its conscience by distinguishing between pleas in abatement of a specific action and pleas in bar that go to the merits of the whole claim.

6. Government or Public Contracts

A gradual but effective reversal of conditions in regard to government contractual obligations has taken place in the last hundred years. America had inherited from Europe the doctrine that the King could do no wrong and related notions that still theoretically give sovereign states immunity from practically all actions in tort and actions in contract to which they do not assent. By general statutes, special statutes and other pronouncements they do assent, or are taken to assent, to answerability in court on their contracts. Thus the Federal Government

has established a Court of Claims and many administrative tribunals to pass on claims of a contractual nature against the United States. There is always, however, in the background the power of the United States to repudiate its contracts. Reminders of this power in recent years came in the decisions under the withdrawal of gold from circulation and the changing of the theoretic gold-value of the dollar so far as Government obligations were concerned,⁴ and also in the plight of the companies when the air-mail contracts of an earlier administration were summarily canceled.⁵ Direct state repudiation of contracts is prohibited by the Constitution of the United States as interpreted, for example, in the Dartmouth College case.⁶ On

the other hand, the machinery for actual enforcement of claims against states and their agencies, cities and counties, has been found, in recent years, to be very inadequate. It has nevertheless, been found convenient and in the long run conducive to good results to classify these Government obligations as contracts, regardless of qualifications as to their enforceability, and regardless of the further fact that the process of entering into contracts with governmental agencies is subject to many formalities non-existent in the case of the private contracts with which we are here primarily concerned.

7. External Formalities in Concluding Agreements

In ordinary situations, to say that the law will not enforce an agreement is tantamount to saying it is no contract. Hence, the importance of external tests imposed by the law, whether they be tests of the seriousness of the purpose of the parties, or tests of clarity or of evidential matter or of public interest in a transac-

tion. External formalities have in various systems of law differed widely: the shaking of hands over a bargain, the payment of a "God's-penny," the administering of an oath, the Roman ceremony with scales and an ancient copper coin, the pronouncement of a solemn rigmarole such as "*spondesne, spondeo*," the cutting of notches in a stick, the keeping of public records, the establishment of a reasonable background for a promise (*causa* in Continental law), writing, sealing, signing or the adjustment of *quid pro quo* (that is, something for something, the doctrine of a consideration required to support a promise). To say that it makes no difference what formalities the law chooses would be going too far: one must consider tastes, prejudices, traditions, convenience. On the other hand, it is futile to justify whatever formalities happen to be required in any system under study as dictated by the law of nature or intrinsically good.

8. Doctrine of Consideration in Contracts

Anglo-American law today leans heavily on the doctrine of consideration to make a reasonable separation of agreements that should be enforced by courts and those that are too trivial or indefinite or otherwise beneath or beyond the notice of a public tribunal. A promise to make a gift is thus unenforceable, not a contract. A promise to sell or to employ coupled with the respective counter promise to pay or to work is enforceable, because for the promise there is a consideration. Considerations are usually benefits flowing to the promisor, but they need not be. A detriment assumed by the promisee is sufficient regardless of whether it is or is not a benefit to the promisor. Thus, if I promise a dealer to reimburse him if he gives credit to a pro-

spective customer and is unable to collect, there is a perfectly good consideration to make my promise contractual, even though it may be demonstrated that I received no benefit whatever from the transaction. Promises of gifts for charitable purposes may be brought under the law of contracts quite readily, in view either of detriments assumed by other promisors or the burdens assumed by the charitable institutions either expressly or impliedly in view of the promise or promises.

(1) RULES OF CONSIDERATION The doctrine of consideration has received a great deal of attention at the hands of text-writers and has been rendered exceedingly technical by hard fought battles in the courts, where it is the first resort of the lawyer who resists any claim based on an alleged contract. Some of the rules developed in the cases are: (1) a past consideration is no consideration; (2) to support a contract a consideration must be valuable; (3) mere love and affection or a feeling of moral obligation will not support a promise to make it enforceable; (4) if a consideration has any value, the courts will not concern themselves about the question of the adequacy of this value to support the particular promise; (5) an exception is made in the case of money measured against money—hence a promise to pay a larger sum or discharge a larger debt for a stated amount is not contractual; (6) an illusory consideration, such as a promise to act when, as and if the promisor decides to act, is of no value; (7) a promise to do what one is already bound to do (by law or by contract) is no consideration; (8) a mere condition involving no act or promise on the part of the other party is to be carefully distinguished from a consideration;

(9) a consideration as well as a promise must be sufficiently definite to permit a jury to say whether it has been fulfilled or not; (10) a single consideration may simultaneously serve to support several promises by the same or by different persons.

(2) BAILMENTS AS CONTRACTS. Simple and sensible as these rules are, they have been submitted to heavy strains in the nineteenth century as a result of the process of bringing vast sections of the law under the single head of contracts. Thus, a law of bailments had developed under the impetus given by Lord Holt at the beginning of the eighteenth century,⁷ and was pretty well established when Jones "On Bailments" appeared toward the end of the century. No one thought then of bringing the duties of a gratuitous bailee under the law of contracts. Yet that is precisely how the nineteenth century thought of the matter, and in order to define the duties of the neighbor who, out of the goodness of his heart, takes care of your family silver during your absence, it becomes necessary to see in your act of parting with your possessions, even under such conditions, a detriment capable of serving as a consideration for his promises.

(3) DIFFICULTIES IN THE THEORY OF CONSIDERATION. Such stretchings have twisted the theory of consideration, while many business realities have necessitated a bending of the practices connected with the doctrine as well. Thus, business persisted in accepting so many shillings to the pound or cents to the dollar in satisfaction of a debt. Gradually the law finds ways of accepting the arrangement as conclusive, always, to be sure, with a pretense that there is something in the case to distinguish it from the case for which the rule was

made. It may be that several creditors are involved, and contracts among them may be sustained, though none exists with the debtor, on the subject of discharge. It may be that the debtor is agreeing not only to pay something but to forego a right, such as the right to go through bankruptcy. It may be that he is paying in a different way, at a different time or in a different kind of money—even a negotiable instrument has been treated as such—and therefore is really giving something other than the money which measures itself automatically against a money obligation.

A more important difficulty has arisen in many American jurisdictions where building contractors encountered quicksands or other unforeseen difficulties. A frank facing of the situation meant that they could not go on with their contracts. Many have been ruined in an attempt to do so. The owner of a site in such a case is generally eager to have his work finished by the contractor and is willing to bear at least a part of the unforeseen expense. Yet his promise to do so, unless considerable ingenuity is exercised in injecting new features into the situation, is theoretically supported by no consideration, as the contractor is agreeing to do only what he is already bound to do. On one pretext or another the courts have side-stepped the difficulty and upheld the new bargain. The principal refuge has been the gratuitous assumption that the parties actually have released each other from the first contract and then as a separate step have made a new contract on a clean slate.⁸

(4) WORDING OF CONTRACT. Careless draftsmanship constantly brings the courts face-to-face with similar difficulties, but the courts are not always

able or willing to resolve them in favor of a contract. Thus, if an agreement by a manufacturer to assign territory to a dealer fails to specify that the dealer agrees to do anything, or specifies only vaguely that the dealer will handle the manufacturer's product or even "push" it in the territory assigned, the court may be forced to throw out the agreement as a *nudum pactum*, a bare undertaking by one side and not a contract.

Quite naturally the skill of draftsmen has been turned to supplying terms that would satisfy the doctrine of consideration. "In consideration of one dollar and other valuable considerations," "in consideration of the premises," "each in consideration for the acts and promises of the other party," and similar phrases, though they contain no magic in themselves, do open the door to let in points that may help the contract over this difficulty. In fact, the skill of draftsmen, by invariably dragging in something that will serve as a consideration, has virtually destroyed the whole doctrine. Yet in doing so these men have really fulfilled the purpose of the law, which is to distinguish between trivial situations and those in which the parties mean business and wish to put the force of the law behind their promises. If care in inserting a consideration has become one way of demonstrating such intent, it is no worse (and perhaps no better) than the clasping of hands or the Roman verbal formula or the ceremony *per aes et librum* (with the bronze and the scale).

(5) SUBSTITUTES FOR DOCTRINE OF CONSIDERATION. We have presented the doctrine of consideration as the dominant formal requirement in contract law. There are, however, substitutes for it and additions to it provided for limited types of con-

tract. Long before the idea of consideration developed, the seal was recognized as an ample basis for making a promise worthy of court enforcement. Statutes have almost universally taken away this force of the private seal. In some states it “imports consideration” or raises a rebuttable presumption that there was an adequate consideration for the contract. In some states it prolongs the period for the running of the statute of limitations, and in some it clarifies and in others it complicates procedure. In general, however, as a means of distinguishing between enforceable and unenforceable agreements it has been superseded by the doctrine of consideration as a unified law of contracts emerged in the nineteenth century. What is left of the seal must be studied in the statute law of the several states.

(6) **NEGOTIABLE INSTRUMENTS.** One type of legal instrument which required no consideration in Blackstone’s day has been very curiously made to square with the nineteenth century view of consideration. Negotiable instruments, such as promissory notes, now require consideration to support the promises in them—they are a kind of contract and as such subject to the general law. Still their form carries with it a presumption that there has been an adequate consideration, and the burden of alleging and proving the contrary falls on the man who raises the question. After negotiation, however, the presumption becomes irrebuttable. In other words, the doctrine of consideration has no bearing on the case of a negotiable instrument that has been duly negotiated.

9. Informalities in Contract-making—Verbal Contracts

If we except the formal requirement of consideration, the

Anglo-American law of contracts is exceedingly careless of formalities. Ordinary contracts, in the absence of a special statute such as the Statute of Fraud; require no writing or signature, no witnesses, no formal words, in fact no words at all, though obviously the more careless we permit ourselves to become in the making of contracts, the more difficult are we likely to find our task of setting them up in court. Examples of contracts made with few or no words are the daily purchases of little things such as newspapers or magazines from a rack, groceries in a self-service store. We board street cars without a word of stipulation; we signal a taxi and merely mention our destination; we buy theater tickets by simply calling out how many. Even if we do a great deal of talking, as in being measured for a suit of clothes, when we tell the tailor about our idiosyncrasies as to pockets, poses and gestures, an analysis of the conversation may fail to reveal the whole contract with all its warranties, conditions and other terms. In fact the formal document that purports to contain “the whole agreement” is comparatively rare, and as we shall soon see it really doesn’t. The law has resources for filling the ordinary gaps we leave in contracts and thus saves infinite time and labor for us.

10. Contracts in Writing—Statute of Frauds

What then, are the exceptional cases in which the law insists on writing, and what are the reasons for requiring additional formalities in such cases? The English Statute of Frauds which has been adopted in whole or in part in all of our states enumerates six types of contracts for which a signed memorandum is required as a condition precedent to bringing an action. The purpose of the statute was to

prevent frauds and perjuries in court, and the cases singled out were those which under the procedure of those days, when parties could not testify in their own behalf, were the most tempting to schemers or misleading to honest persons who looked back on vague general promises through rose-colored glasses. The agreements requiring writing and signatures were: (1) any special promise by any executor or administrator to answer damages out of his own estate; (2) any special promise to answer for the debt, default, or miscarriage of another person; (3) any agreement made in consideration of a marriage; (4) any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; (5) any agreement that was not to be performed within the space of one year from the making thereof; and (6) any contract for the sale of any goods, wares, or merchandises for the price of ten pounds sterling or upwards.

(1) **NEW INTERPRETATIONS AND APPLICATIONS OF STATUTE OF FRAUDS.** The disappearance of the social background as well as the legal limitations that suggested this law in England in the seventeenth century has subjected this statute to the strain of interpretation and application to new situations to a greater degree than any other statute in history, and the learning on the subject has become “filthily technical.” Thus mutual promises to marry are not promises “made in consideration of a marriage”; a life-contract of employment is not “a contract that is not to be performed within the space of one year”; and whether a particular promise made to help a prospective debtor get credit is a special promise to answer for the debt of another or one’s own debt depends upon finespun distinctions. Most troublesome of

all are the requirements as to interests in real estate and large purchases of personal property. Ten pounds was a large amount in seventeenth century England and it is not surprising to find most states substituting larger sums in their version of the statute. The amounts actually range from ten to twenty-five hundred dollars. Writing is not required in the case of the sale of goods if payment or a part payment or delivery or even a part delivery is made to bind the bargain. Some courts have tried, to work out without the aid of statute a parallel rule for real estate when possession is transferred. There is, however, no basis for the widely held belief that a down payment on a real estate transaction is either effective without writing or necessary to the contract when writing exists, however important it may be from a business point of view.

(2) **IGNORING OF STATUTE IN BUSINESS.** Business men very generally ignore the Statute of Frauds and transact thousands of dollars' worth of business over the telephone or even by mere signals on Exchanges. Repudiation of such agreements and defense under the Statute of Frauds is considered so dishonorable and is consequently so unusual that little risk is run when the statute is ignored in business circles. On the other hand, where business men deal with the outsider, as in the sale of automobiles or other objects exceeding in value the amount set by the local Statute of Frauds, now incorporated by most states in Section of the Sales Act, they generally take the precaution of satisfying the requirements of the statute.

(3) **REQUIREMENT OF WRITING IN NEGOTIABLE INSTRUMENTS.** Scattered through our statute books are many miscel-

laneous provisions requiring writing. To be negotiable, bills and notes must be in writing. Acceptances and other contracts pertaining to such documents must also be written in many jurisdictions. The purchaser of insurance may demand a written policy, but the contract is valid even though no written policy was asked for or delivered. Stockholders may likewise demand written certificates. The object of the law in such cases, as in demanding written notices in certain situations, or written wills, or highly formal deeds, or powers of attorney to make deeds, is rather to create lasting records or to clothe certain proceedings with due solemnity than to avoid frauds and perjuries but whenever the consequence of failing to comply with the form is a nullification of contractual rights in court, we have in effect a formal requirement in contract making.

11. Offer and Acceptance in Contracts

(1) **EXPRESSION OF INTENTION.** Passing from formal requirements to the substance of a contract, we encounter the expression meeting of the minds" of the parties. The expression is an apt figure of speech that must not be taken too literally. After all, the law cannot base its awards on the unascertainable proposition that two minds have at a particular moment contemplated with favor exactly the same plan. Much as we should like to think of such a coincidence as a -normal reality, we can do no more than observe and interpret imperfect external manifestations of the state of mind of the parties.

(2) **RULES GOVERNING OFFER AND ACCEPTANCE IN CONTRACTS.** In Anglo-American law we ignore the real intent, if that is ever ascertainable, and hold parties to the apparent intent

expressed in their offers and acceptances. Though no particular form of either offer or acceptance is required, the courts have, in course of time, developed some rules governing each and their relations to each other that may be summarized here.

(1) The offeror is lord of his offer. He can indicate precisely when and how acceptance must be made if a contract is to result, and unless his stipulations are complied with no contract results.

(2) He is not, however, lord of the offeree. Hence his stipulation that unless the offeree does some act a contract will result, is without force. He cannot by sending unsolicited goods or in any other way, impose a duty to speak or act or be bound by a contract on a stranger. Of course a preliminary understanding or invitation or past dealings between the parties may change their situation.

(3) He may stipulate that acceptance must be in writing, by the hand of his own messenger, by return mail, by telegraph, or by some act. If an act is indicated it may be the beginning of performance or even complete performances and in addition to the acts required notice may be called for. A great deal of difficulty arises in ascertaining just what kind of acceptance a particular offer calls for. The law helps us with a few simple presumptions. In general, the same medium as that used by the offeror is called for or at least an equally clear and expeditious one. Thus an offer made by mail is acceptable by mail. Where performance is to be by act no notice is generally called for, but exceptions are made in some jurisdictions in such cases as an offer of guaranty if credit is extended. In such case an unsolicited notice that one intends to do the act requested is not an acceptance. Nor does an unsus-

cessful or partially successful attempt to fulfill

the requirements laid down in the offer, whatever they may be, give the would-be acceptor any rights.

(4) An offer must be carefully distinguished from a preliminary negotiation, such as an invitation to do business, a request for a bid or even a bid or an ordinary advertisement. Occasionally a letter telling of goods that one has for sale creates judicial difficulties because it is impossible to determine from the words alone whether an offer or a solicitation of an offer is the more reasonable interpretation. In the one case an "acceptance" would create a contract; in the other, the so-called acceptance would be only an offer.⁹

(5) Offers are short-lived. Unless they are specifically timed, it is dangerous to assume that they live on beyond the first real opportunity to accept them. When disputes arise as to whether an offer was still subsisting at the moment it was accepted the odds are against the acceptor, although of course a reasonable interpretation of the offer on this point must take into consideration the kind of commodity or service offered, business customs, the occupations and habits of the persons, the presence or absence of a fluctuating market, the past dealings of the parties and in fact anything else that can throw light on the question whether an answer was expected instantly, within an hour, within twenty-four hours or at the offeree's leisure.

(6) Offers are easily killed. They may be revoked by the offeror, or rejected by the offeree, either expressly or by implication. Thus it is generally true that a counter offer or qualified acceptance terminates an offer. Whether a revocation operates from the moment it is uttered or

the moment it reaches the attention of the offeree depends on the reservations made by the offeror. If he has not made his offer revocable by previous sale or otherwise without notice, he may find his offer accepted during its normal life and a contract resulting against his wish, because in such a case the offeree is entitled to act on an offer unless and until a revocation actually reaches his attention.

(7) An acceptance must follow the terms of the offer. It must be unqualified; otherwise it constitutes both a rejection of the offer and a new offer. Doubts occasionally arise as to whether a clause appended to an acceptance is to be read as a qualification or a mere specification of something already implicitly covered in the offer. For example: "All materials and workmanship to be warranted first-class" or "no seconds" or "Union label to be attached" or a thousand other afterthoughts may be new qualifications or none—it is a question of fact in each case.

(8) An offer can be made irrevocable only by a collateral binding contract. Where the seal is still recognized an offer under seal is as good as a paid-for option. Merely stating in the offer that it will be held open to a certain moment or that it is irrevocable will not make it so.

(9) An acceptance can be made only by an offeree who has knowledge of the offer. If A's willingness to sell his property at a certain figure is stated in a letter which crosses B's statement of his willingness to buy at the same figure no contract results. Each has an offer and the first to do a further act of acceptance concludes a contract.

(10) By handing an acceptance to the offeror's duly constituted messenger for its receipt one may complete a contract. Whether the mails should be considered such a duly con-

stituted messenger merely because an offer was mailed is a question that some states have undertaken to handle as a question of law, with the result that an acceptance-on-mailing doctrine has found its way into the books. Massachusetts, going to the other extreme, once laid down an acceptance-on-delivery doctrine. As modes of communication increase and improve it is wiser to permit each generation to interpret the average reasonable expectations of its offerors where they fail to designate messengers than to lay down arbitrary rules of law as to when an acceptance is complete.

(11) Standardized acceptances have come to be adopted in various trades such as the fall of the hammer or the word "Gone" or "Sold" in an auction.

Furthermore, by means of specific notices or customs of a trade the final act of acceptance is deliberately postponed so as to take place at a certain time or in a certain place. For example, the stipulation in an insurance application that the contract shall not become effective until signed at the home office, or the general understanding that drummers in the dry-goods business can solicit orders but not accept the offers in them. Among other objects such stipulations bring about the localization of a contract in a place where the law is known, or at least a place with reference to whose law the contract has been carefully drawn. The time and place of acceptance are the crucial time and place of the making of the contract.

(3) DEFECTS IN OFFER AND ACCEPTANCE. It is frequently said that the offer and acceptance must be genuine. It is at least true that if the words of offer and acceptance are uttered in jest or by way of rehearsal or illustration or in a play, there is no magic in them to constitute a

contract. In systems of law where a wedding is assimilated to a civil contract the same rule applies. In other systems, where marriage is considered a non-contractual ceremony or a sacrament, everything depends on whether the right words were uttered by the authorized person, and a jest may result in a technical marriage. In the common law a somewhat similar result is reached in the first instance where the contract-making words are uttered or signed under the influence of fraud, duress or undue influence, and even certain types of error for which no one is to blame. All of these defects are alike in that they vitiate the consent element. Fraud, duress and undue influence are alike in that they result momentarily in good contracts, which can, however, be avoided by the victim provided he acts promptly and unequivocally and provided further that innocent strangers' interests have not become involved.

Mistake, however, operates differently. Either it goes to the heart of the matter in which case there is no contract *ab initio* or it is deemed purely collateral and the misfortune remains where it falls, the contract remaining unimpaired. Of course, if the mistake is merely in calculation or *in* reduction to writing, equity can order corrections made so as to express the true intent of the contract. Equity can also in appropriate cases order a document canceled or surrendered or a new document made to avoid the effect of fraud, duress, undue influence or mistake. But equity cannot make a new contract for the parties on the basis of the information that has come to light since they made their own arrangement.

It is hardly wise to lay down rigid definitions of fraud, duress, undue influence or essential or collateral mistake. A definition of legal fraud is merely an indica-

tion to the trickster of how far he may safely go in actual fraud. Nevertheless, in the course of ages legal decisions have indicated certain earmarks if not essentials of fraud and its analogues. *Fraud* consists of misrepresentation of past or present fact, made knowingly or with reckless disregard of truth or falsity, with the natural and probable tendency to deceive, and actually deceiving a victim so that he suffers damage. The saving grace of this awkward description is its flexibility. What tends to deceive in one environment may deceive no one in another. And courts are not bound to stop at the trickster's ingenious words such as "Don't take my word for it; I invite you to make your own investigation." Such words may be a deliberate device calculated to throw the victim off his guard. There are new schemes hatched each year and courts must be left free to deal with them as they arise. A word may be said about the difference between *duress* and *undue influence*. The former is based on brute force; the latter is subtle. In fact, undue influence if it is successful tends to produce an actual meeting of the minds. Modern law treats both processes alike, except that it recognizes the tendency of undue influence to last after it accomplishes its end, whereas duress is likely to be suddenly applied and as suddenly removed. Consequently, delay or particular acts are more likely to constitute a ratification of a contract made under duress than of a similar contract made under undue influence.

12. Contracts of an Infant

Closely akin to these unstable contracts is the contract of an infant. Like the victim of fraud, duress or undue influence, he is free to avoid his contract, but he may do so regardless of

the intervention of the interests of innocent persons and he cannot ratify his contract until he comes of age. One is an infant until he reaches the age of maturity set by state law, usually twenty-one years in this country. An exception is made in the case of necessary goods and services furnished to an infant. For these he must pay fair value. What are necessities, is a vexed question. Note the answer of the Uniform Sales Act: "Necessaries in this section means goods suitable to the condition in life of such infant . . . and to his actual requirements at the time of delivery." This definition does not go so far as some of the cases in which an infant engaged in business was held liable for the value of goods necessary for the conduct of his business.¹⁰

13. Contracts of Persons Mentally Incompetent

The Uniform Sales Act groups together infants and persons who by reason of mental incapacity or drunkenness are incompetent to contract, and treats them all alike. The point of view is not quite orthodox but the result comports fairly well with legal traditions. By no means are all persons under the influence of liquor or suffering from mental diseases incapable of making contracts. Some persons in both groups are capable of driving shrewd bargains. There is no point in affording these any special protection. Others, or the same people at other times or in view of other subject matters, are in fact incapable of making a contract. It is as if they have no minds to meet. Even if the fact is not so clear, they may be legally withdrawn from the contracting world by the appointment of a committee or guardian or by confinement to an asylum or other public declaration. As to such persons, we should not speak of voidable

contracts. They can make no contracts. In between these extremes lie most ordinary cases. The parties know what they are doing well enough to make agreements, but the law is suspicious that persons who have dealt with them may have subjected them to undue influence. Outside of the operation of the Sales Act, which, of course, has no bearing on employment or real estate transactions, banking or a hundred other daily activities, drunkenness and weakmindedness are hardly distinct categories like infancy, but merely bases for raising questions of fact as to whether parties actually took part in a transaction that may seem to be evidenced by signatures, and if they did whether undue influence was used or advantage was taken of their condition.

14. Other Questions Regarding Capacity

There are some persons whose capacity to contract the law has at one time or another absolutely or conditionally denied. A few generations ago married women could not enter into contracts. Today with minor exceptions here and there, they can. The capacity of a corporation to enter into various kinds of contracts depends in the first instance on its charter, but as we have seen elsewhere the law has become increasingly liberal in giving ordinary effects to its *ultra vires* acts. Public contracts are under stricter surveillance. It is dangerous to rely on one without a specific study of both the capacity of the agency and the formalities required by law for the making of the contract in question.

15. Objects Accomplished by Contracts

With the formal and substantial requisites for contractmaking satisfied, we have still to ask

whether the object is one of those approved by the law. So many variant objects are today accomplished by the contractual form, both in business and private life, that it is far easier to enumerate the prohibited uses of contract than its authorized purposes. But as we are interested in normal law rather than the abnormal law of doubtful cases revealed in the digests, let us devote our first thought to the legal, normal objects accomplished by contracts. At this point we may pass over lightly the fact emphasized elsewhere that the contract idea is the warp and woof of modern business, the basis of the relation between buyer and seller, between employer and employee, between lender and borrower, between investor and corporation, between owner and manager, between carrier and passenger, between carrier and shipper or consignee, between landlord and tenant, between insurer and insured, between guarantor and creditor, between partners in business and even between the state and its creature, the corporation. When the business man goes home from his work he finds the same nexus of contracts surrounding him, not only in his still businesslike relations with tradespeople, landlords, employees about the house, public utilities (gas, electric, water and telephone companies) but even in his relations with his neighbors. Fences, party-walls, common driveways, settlements of disputes over life's little collisions, and big ones, too, community activities, clubs, churches, improvement associations, benefit associations, politics, schools (whether public or private), amusements—it is impossible to turn around without encountering contracts. They have even penetrated into domestic relations, for though husband and wife cannot sue each

other on contracts they can be parties to prenuptial agreements and even postnuptial agreements respecting property. They can even be partners in business and pay each other rent or interest or wages.

16. Necessary Limits of Contract

What, then, are the limits that confine this almost universal pattern of life? There are generally speaking two: a contract must not be illegal nor against public policy. An example of the first type is an agreement to commit murder or any other crime, to compound a felony, to aid and abet a violation of law by being an accessory before or after the fact. The principle is sound and simple, but its application is fraught with difficulties. The immediate victims of theft and kidnapping are more directly concerned about having their property or their kin returned than they are about the enforcement of the law. How far may they go in their dealings with the underworld without being guilty of compounding a felony? Or, assuming that it is unlawful to recruit or equip troops in this country for an expedition against a friendly country, to what point is it lawful to manufacture and sell munitions and uniforms that may be used for such a purpose? Arbitrary lines crisscross this whole field of law, though rationalizations emerge under such words as “direct” or “necessary connection,” “foreseeability” and “good faith.”

The second limitation on the use of the contract principle is even more vague: it is the principle of public policy. Many acts or omissions that are not illegal are against public policy. It is not illegal, for example, to remain a bachelor. Yet a contract never to marry is against public policy and void. Agreements calculated to interfere with the state's busi-

ness, particularly with the administration of justice, are likewise against public policy. Agreements to aid in the violation of foreign revenue acts may not be against local laws, but they are against public policy. Wagering contracts are void because against public policy. Nevertheless, insurance contracts in which the purchaser of the insurance has an "insurable interest," however small that interest may be, are unobjectionable. Thus, if I attempt to insure the life of a stranger of prominence chosen at random or the property of another against destruction by fire, I am merely making a bet with the insurance company. But if the person whose life I insure is a relative or business associate or even a debtor, the contract ceases to be merely "aleatory" and stands. So with property, my insurable interest may be that of owner, lessee, pledgee, mortgagee or simply one who has incurred responsibilities for it under a contract as carrier, custodian, warehouseman, borrower or repairman. Under wagering contracts undoubtedly some stock-gambling in which there is no thought of dealing in actual stock, and also some dealings in futures, are and should be beyond the protection of contract law. On the other hand, from a practical point of view it is sometimes found easier to regulate the betting evil by permitting certain kinds of lotteries or horse-race wagers under regulation than simply prohibiting all kinds. Where such steps are taken, lawful betting is the subject of contracts. The list of purposes contrary to public policy is an open one and it must remain capable of indefinite expansion. Contracts in restraint of trade, discussed more fully elsewhere, are the most colorful, if not the most important part of the list today. Indeed, by a series of legislative *flats*, such con-

tracts are being lifted from the list of matters against public policy and transferred to the list of illegal, that is, criminal, transactions.

17. Standardized Categories

Though the range of subjects left open for contract is thus almost as vast as life itself, our ordinary everyday contracts fall into comparatively few standardized categories. We don't have to block traffic while we negotiate our business at the teller's window in the bank, at the railway ticket office, at the post office, express office, department store or grocery or even at the landlord's office, or so far as contract making is concerned at the doctor's or dentist's, or the insurance or employment agency. Even when chance brings us to the lawyer's office, we spend little or no time discussing our contract *with* the lawyer. These relations are not necessarily simple, but they are standardized to such a degree that, when nothing is said, the law is able to supply the necessary details. It is only when one uses the method of silence in such odd and outlandish relations as hiring a personal publicity man, campaign manager, travel-companion or ghost writer, that the whole scheme breaks down because the law has no guide for filling in the blanks.

It should not be assumed, however, that a detailed analysis of the rights and duties of the more ordinary relations is without interest or value. If we could make an analysis and build up a composite picture of topics in many of the ordinary contracts of everyday life, we should have a check-list for the guidance of lawyers and laymen for the drawing of better contracts, for the guidance of legislators, and for the better social understanding of such relations, whether these be memberships in clubs, or do-

mestic employment, or relations with professional advisers. The study is, however, primarily one of social fact rather than of legal pronouncements. Nevertheless the law must make pronouncements on these social facts when disputes arise, and it derives them from a close scrutiny of words used, from past dealings of parties, from their practical interpretation of their contract, from evidence of usage and custom and frequently from the court's own imagination of what the parties would have said had they been articulate on the point in question.

18. Rules of Interpretation of Contracts

The law has laid down some practical rules for the interpretation of contract, all of which must be taken subject to two limitations. In the first place they are valid, if at all, only as rules of common sense. In the second place they should not be resorted to at all except in case of doubt; they do not override clearly expressed intentions. The most important of these rules are: (1) the ordinary meaning of words is presumed to be the meaning intended, except that technical terms are to be technically construed; (2) a contract is to be construed as a whole and where negotiations that preceded its making are expressly or impliedly integrated into it, these are part of the contract for purposes of interpretation; (3) a reasonable, lawful, effective and consistent explanation of the meaning of the parties is to be favored over an unreasonable, unlawful, nugatory or vacillating one, and the principal apparent purpose whether stated in a preamble or not is to be given great weight; (4) where general and specific provisions conflict, the specific provisions prevail; (5) where writing and printing are inconsistent, writing prevails; (6) where words

and figures are inconsistent, words prevail; (7) where a public interest is involved, an interpretation which favors the public is to be preferred; (8) ambiguous expressions are to be construed against the side from which they proceed; (9) rules of grammar and punctuation should not be given a weight inconsistent with the general tone, style, education, intelligence or practice of the parties as reflected in the contract.

19. Significance for “Third Persons”

A contract relation, being based upon a voluntary agreement between parties or groups of parties has, at first glance, no significance for “third persons,” strangers to the pact. Yet volumes have been filled with the exceptions to this rule. There is, first of all, the whole law of assignments or transfers of interests in contracts, including assignments for the benefit of creditors. There is next the law of garnishment which enables a creditor of a creditor to interfere for his own benefit with certain contract performances. Then there is the law of beneficiaries of various kinds, persons other than the makers who have a real interest in its performance, the beneficiaries named in insurance policies for example. So much for the possible rights of third parties. They also may have duties, a duty for example of non-interference with existing contracts and even with prospective contracts. All of these exceptions are only apparent, because strictly speaking they do not involve actions for the enforcement of the contract by or against strangers, but actions of another nature in the establishment of which the fact of the contract’s existence is vital. Unwarranted interference with one’s business including his contract relations is a tort. One’s interest in his

contract relations is a kind of property and as such is the subject of a limited amount of trafficking and, under proper restrictions, of execution to satisfy judgments or attachment while a proper action is pending. The sale of one’s interest in a contract has been greatly simplified as a matter of procedure in modern times. Of course, one cannot sell his contractual position if he has a duty under it that the other party has not expressly or impliedly consented to accept from the assignee. Leases and other contracts are frequently made non-assignable or assignable only with the written consent of the other party. But if all that is left of a contract is an obligation to pay a sum certain in money at a given time, the right to collect this money may be readily transferred. The assignee takes the right subject to all the defects, defenses, equities and counterclaims that could have been set up against the original claimant unless the debt is represented by a negotiable instrument which has been duly negotiated.

20. Status of Beneficiaries

The standing of beneficiaries of contracts in court has been worked out in devious ways. In many instances it is possible to view them as the real contracting parties with one of the nominal contracting parties relegated to the position of agent. In other cases we may forget the contract and demand property or money that has been deposited with a person, earmarked as ours. In extreme situations we may look to the recipient of property or funds as having constituted himself a trustee. In some states where simplified codes of pleading had been adopted with no thought of changing the substantive law, the clause bidding “the real party in interest” to bring an action has led to decisions giving some beneficiaries

of contracts a substantive as well as a procedural advantage.¹¹ Nevertheless, we must bear in mind that there are many beneficiaries of contracts who have no legal interest that ought to be protected by court action. They are *incidental beneficiaries*. Thus, a building plan that will improve my part of town or bring business to it may benefit me materially. Yet if I am not a party to the agreement, however much I may be disturbed by the threat of one of the parties not to go ahead, there is no reason for permitting me to call him to account in court. A difficulty arises when the vital question is whether a beneficiary of a contract is to be classed as an intended beneficiary or an incidental one. Thus, if my town contracts with a water company for a supply of water at a pressure adequate to fight fires, and it fails to carry out the contract to my damage, may I sue the water company? There are holdings both ways in the courts, with identical discussions of law.¹²

21. Termination of Contract

(1) COMPLETE PERFORMANCE. A contract expires with *complete performance*. One should not, however, jump to the conclusion that performance is complete before it really is. Thus, if I buy a fountain pen, pay cash for it and take it along with me, there are still warranties outstanding involving promises on the part of the seller. The pen may come back. But eventually there will be no unfulfilled promises left or at least none on the basis of which action may be brought.

(2) BREACH OF CONDITIONS. A contract may, however, be *terminated by a breach* instead of performance. More accurately certain breaches are of such a serious nature that the aggrieved party may put an end to the con-

tractual relation. The point may be illustrated by examining an ordinary lease of an apartment or a house. The printed form probably recites that if the rent is not paid for so many days or if certain other breaches occur, the landlord may reenter and thereupon the lease shall cease, determine and be utterly void. Minor breaches not listed may give rise to other proceedings, but the lease continues. Where the contract is silent on the point, how shall we determine whether a breach entitles us to call off the whole thing? Suppose you are the tenant and the landlord on several occasions has failed to maintain a reasonable temperature in your quarters. Or suppose the goods you have ordered from the mail order house have come late, or that some object among them was broken or was not as ordered. Or suppose your employee has made one, two or a dozen mistakes. The ultimate criterion is the "intent" of the parties which the law gathers in the usual way from the words and surrounding circumstances. They may make time of the essence of the contract; they may make any detail they choose to single out a condition precedent to the obligation of one of the parties beginning or a condition subsequent which will release him from an obligation that has already begun.

(3) OTHER CAUSES OF TERMINATION. Other means of termination may be classed, as (a) by act of the parties or (b) by operation of law. *Acts of the parties* include agreements either in the original contract or made subsequently as to the time when, or the event upon which, termination shall take place. The law operates to conclude contractual relations subject to exceptions upon the death of a party, bankruptcy, certain types of impossibility of performance,

destruction of subject matter and supervening illegality. It must be borne in mind, however, that mere change of circumstances producing hardship or impossibility of performance, or even a so-called "act of God," does not necessarily terminate a contract. It may lay open the unfortunate person who cannot perform to an action for damages for his unavoidable breach of contract. The courts have attempted to lay down a workable distinction: where an obligation is dictated by law, impossibility is an excuse, as the law does not require the impossible; but where a duty is assumed specifically by a party to a contract he may be assumed to be taking on himself the risk of difficulties. Where impossibility is created during the normal life of the contract by the law itself, the situation is clearer.

In recent years thousands of contracts were affected by the *declaration of war*, by the adoption of the *prohibition amendment*, since repealed, and by the *impounding of gold*. If such legal impossibility does not go to the whole of the contract, courts will try to uphold the rest so far as consistent with public policy. For example, an agreement to pay in gold coin will not be nullified; the word "gold" will simply be ignored pending the prohibition, unless a careful reading of the contract yields the clear "intent" of either this or nothing.

Death and even *incapacity* through sickness during life and likewise destruction of subject matter may be taken to end contracts of a personal nature, rather because that is a reasonable interpretation of the intent of the parties than because such an incidence of the mishap is required by law. But death does not end impersonal contracts. One's debts bind his estate, and so do his agreements to sell, particularly if it is specified that

the contract is made on behalf of the party, his "executors, administrators and assigns." *Bankruptcy* closely imitates death; it crystallizes an estate at a given moment and transfers claims to it and away from the person, whether that estate be adequate to pay claims in full or not.

¹ *Sanders v. Pottlitzer*, 144 Y. 209 (1894).

² *Hadley v. Baxendale Exch.* 341 (1854).

³ "Contractual Control over Adjective Law," 9 *W. Va. Law Rev.* 1; 83 *U. of Pa. Law Rev.* 157

⁴ *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240 (1935)

⁵ *Boeing Air Transport, Inc., v. Farley*, 75 F. 2d 765 (1935)

⁶ *Dartmouth College v. Woodward*, Wheaton 518 (1819)

⁷ *Coggs v. Bernard*, 2 Lord Raymond 909 (1703).

⁸ *Linz v. Schuck*, 106 Md. 220 (1907)

⁹ *Moulton v. Kershaw*, 59 Wis. 316 (1884).

¹⁰ *Hall v. Butterfield*, N. H. 354 (1879).

¹¹ *Lawrence v. Fox*, 20 N. Y. 268 (1859).

¹² *Cf. Blunk v. Dennison*, 71 Oh. St. 250 (1905).



Torts

I. Protected Non-contractual Rights

As in the case of contracts, it would be historically more accurate to learn the extent of our protected non-contractual rights from a study of the scope of existing remedies, than to classify rights and assume that remedies enough can be found if they are violated. This procedure would involve us in a study of such technical matters as the action of trespass to real estate (*quare clausam fregit*), trespass as to goods (*de bonis asportatis*), trespass to the person (*vi et armis*), trover or conversion of goods without any unlawful taking, actions for various types of wrongful detention of goods (detinue and replevin) and finally actions on the case, so-called, for nuisance, libel, slander, malicious prosecution, false imprisonment, slander of title, deceit, interfering with certain relations (*per quod servitium amisit*), and a host of statutory rights of action such as infringement of copyright, trademark or patent, unfair competition. This method would have much to recommend it. It would emphasize, for example, the haphazard nature of the choice of interests to be protected, and show that while some are doubly and trebly protected, others (like the so-called right to privacy) are inadequately covered and still others (such as the right to organize without molestation)

left entirely to the experimentation of recent legislatures. This method would furthermore make it clear that Anglo-American law has no general law of Tort; it has only laws of particular torts; and that the effort of text writers to enumerate the elements of a tort as such or even their effort to find behind every tort a definable general right is based on optimistic assumptions, and that the results are likely to be as different as the assumptions. Finally this method would indicate clearly what must be alleged to make out a *prima facie* case for each tort, what may be taken for granted, and what may be pleaded in defense, or in mitigation of damages in each case. Having called attention to some of the points that this method would emphasize, we shall turn to another method of procedure that is more manageable for our immediate purposes.

Without making any assumptions as to the evenness or adequacy of our laws governing torts, or of the amenability of all torts to a uniform plan of analysis, or of the existence of definable general rights or the common sense of the logic of pleadings and burdens of proof, we can ask what the law does to protect a comprehensive series of human interests which we can easily enumerate. These are interests in bodily security and welfare, interests in one's own

personality, similar interest applied to one's family, dependents, associates, and one's interest in his relations with them, interests in property from real estate down through personal property to the most intangible and subtle interests that can be compared with property, including interests in freedom and opportunities to live one's life as one deems best.

2. Bodily Security and Welfare

The protection of life and limb against aggression was among the first concerns of the law. It was provided for in the recognition and regulation of feuds between clans and eventually in the criminal law which was inextricably interwoven with early tort law. Self-help in the form of self-defense was not only recognized but expected, and failure to exercise it might result in the loss of some rights. The early law of duress, for example, protected only the courageous man, later the man of average firmness, and only recently has it been extended to those most in need of its protection. The earliest written English laws that have come down to us, those of King Alfred, include a catalogue of hurts and compensations suggestive of the fine print in a modern accident insurance policy. It is interesting to note in this catalogue the relatively high price set

on the parts of the body useful in fighting. The resemblance to an insurance policy list extends to another point that has led to a great deal of speculation; nothing is said about fault, whether wicked intent or negligence, as an element in this liability. It has been argued accordingly that primitive law is not concerned with morals. The argument is elaborated by reference to instances of punishing animals and even inanimate objects that cause death or injury to human beings. What looks like a maxim is found in the Anglo-Saxon laws declaring that one who wounds "ungewealdes" must pay "gewealdes."¹

We must bear in mind, however, certain peculiarities of the thought of those days. In the first place, people believed that their battles and ordeals would "show the right" and incidentally take care of all moral questions. Again they were quite ready to personify and endow with moral qualities the animals and objects they punished, or at least the devils that they imagined in them. Furthermore, they did distinguish even in Alfred's code between damage done by a spear properly carried and one perched at the wrong angle. A little later King Gnut condemned those laws which made no distinction between the innocent and the guilty. What was lacking was not a rough and ready moral notion that associated fault and liability, but rather an adequate fact finding means, in the absence of which the rough presumption was indulged in that he who inflicts harm is pretty generally somehow or other blameworthy.

(1) FAULT AND LIABILITY. Whatever view we may hold of Anglo-Saxon law it is obvious that, in course of time, in the *law of personal injuries*, pure accident became distinguishable from both intentional and negli-

gent personal injuries. For a long time if the injury was alleged the innocence of the defendant had to be specially pleaded and proved under some such formula as "*molliter manus imposait*," but eventually it became established that fault of some kind was part of the *prima facie* case to be made out by the injured plaintiff. In the nineteenth century it was widely assumed that there could be no liability for personal injuries without fault. In fact, this assumption was sometimes put forward for tort law in general. To maintain the doctrine it was found necessary to invent various kinds of imputed or fictitious or conclusively presumed fault, or to set up side by side with the law of tort a law of quasi-tort to take care of undoubted cases of absolute liability. The man who keeps a lion on his premises or who sets up any dangerous agency such as an artificial reservoir, does so, according to highly respectable authority, at his own peril if in spite of all his care the public is injured when his dangerous agency gets beyond his control.² At common law the owner of a dog or other domestic animal was not liable for the damage it did unless fault could be imputed to him because of his knowledge that the animal was vicious. Hence the curious doctrine that every dog was entitled to one bite and every ox to one gore. So far as the dog is concerned sheepowners have had statutes passed to take away the privileged bite, and thus owners are, in many jurisdictions, regardless of fault, liable for injuries inflicted on human beings by their dogs.

The toning down or elimination in some states of the only practical defenses of assumption of risk, contributory negligence and fellow-servant's fault, tends to put employers' liability for workmen's injuries on an insurance basis in fact, though in

theory freedom from all fault of omission or commission, in other words a denial of all connection with the accident, is still a defense. Cases of this kind which used to fill our lower courts are now handled very largely on an insurance basis by Workmen's Compensation Commissions. Their place, however, is more than filled with automobile personal injury cases. There is a tendency for juries as well as injured persons to forget that fault is a necessary element in such a case, particularly in a state where compulsory liability insurance is carried. Suggestions have been put forward in several state legislatures to handle these cases as workmen's compensation cases are now handled, but so far this is one of the unsolved problems of contemporary law.

In Massachusetts and a few other states the unlicensed driver or the driver of an unlicensed car is a "trespasser on the highway" and as such not only rightless but defenseless to a degree that makes him virtually an insurer of the public with no further fault than his original one of being on the highway. Other cases in which fault is conclusively presumed or reduced to a standardized concept creep into our statutes and ordinances regarding foods and drugs, poisons and dangerous instrumentalities. Where precautions are prescribed and ignored as in a few other flagrant cases, "*res ipsa loquitur*," the thing itself speaks, and it says "Negligence."

(2) NEGLIGENCE. Since the concept "negligence" figures so largely in personal injury cases and since it will run through the law of torts with many different shades of meaning, we may pause to examine it here. Negligence is a negative term. It is the *absence* of due care under any given set of circumstances. Obviously what is due care where

human life and welfare are involved may be far beyond the reasonable requirements of due care where only inanimate objects are involved, and different degrees of care are called for under various conditions for the handling of different types of objects. But whatever the proper degree of care may be, failure to live up to it is negligence, and negligence is a source of liability. It is misleading to speak of degrees of negligence as we speak of degrees of care. "Gross negligence" as courts have often said, "is nothing but negligence described with a vituperative epithet." "Criminal negligence" if the term has any meaning in law, is merely the omission of a precautionary measure required by law and enforced by a penalty. To us it may seem odd that while the common law provided so carefully against any injury, even such a technical injury as touching a person, it should have left the greatest of all offenses to the person, killing, beyond the realm of tort law. But as any action must be on behalf of survivors the gap in the law is rather in the field of relational interests, where the law has been notoriously slow in developing. In the middle of the nineteenth century a series of so-called Lord Campbell's acts, named for the Chancellor under whose sponsorship the first of these had been passed in England, spread over America. They differ greatly in detail: some give the right of action to the next of kin, some to the estate of the deceased generally or for the benefit of the next of kin; some limit the amount; some have treated the cause of action as penal in its nature and hence not recognizable in other jurisdictions or applicable if death occurs elsewhere; others treat it as a true tort action. Today the elliptically described "action for wrongful death" is an established part of Anglo-American tort law.

It must not be confused with the revival of actions brought for injuries during the life of the person whose injuries resulted in death, in the name of his estate.

3. Interests in Personality

Next to one's interest in his physical well-being is his interest in his *personality*. It is a mistake to suppose that early law neglected entirely this natural human interest. In early Germanic law, for example, there was no greater offense than calling a man a wolf. We may assume that such names were at least as great a threat to the peace of the community as the word "scab" today in a bitter labor war.

(1) HISTORY. The criminal law of most countries has taken care of common scolds and tale-bearers, sometimes with a touch of sardonic humor. But the current Anglo-American law of defamation can trace its sources to church law and this in turn to the commandment not to bear false witness against one's neighbor. Until Cromwell's day defamation was still in the hands of church authorities as it was three centuries earlier when Chaucer wrote of his archdeacon of high degree. That the church was having a hard time of it may be gathered from the same poet's "House of Fame," "fame" meaning gossip. A good deal of church jurisdiction was unceremoniously taken over by the ordinary courts during the Commonwealth and some of it, including defamation cases, was retained.

(2) SLANDER AND LIBEL. Two branches of the law, spoken and written defamation, called respectively *slander* and *libel*, have received such different developments that they suggest entirely different models. There is, to be sure, an intrinsic difference between the lasting, widely-carried damage of writing and more par-

ticularly of printing, and the ephemeral injury of a disparaging remark. Early Roman law made a similar distinction between merely talking about a man and reducing one's uncomplimentary remarks to the easily memorized form of a poem or a song. But the difference in Anglo-American law goes deeper: libel is a crime as well as a tort, slander is not a crime; in libel no specific damage need be alleged or proved, in slander it must be, except in a few cases where it can be taken for granted, as where a loathsome disease or a crime or incompetence in his business is imputed to a man; and, subject to modern statutory changes, the defenses operate differently.

(3) MITIGATING ASPECTS OF DEFAMATION. Of these let us consider the defensive or mitigating aspects of "privilege," "truth" and "fair comment" and "apology" After all, what the law sets out to protect is the enjoyment of a man's reputation—"character" was the word used in the old cases—and it was primarily the reputation he had, rather than one to which he may have been morally entitled. The law was not blind to the fact that maliciously digging out and circulating old stories, even if they were true, could constitute an unfair and anti-social act of a kind that ought to be discouraged. It could ask, "Why bring that up now?" and in effect it did. Hence the defense that the disparaging statements were true has been curiously handled. In the crime of publishing libelous matter, as distinguished from the tort, some jurisdictions do not consider it a defense at all. In others it is one only by virtue of a statute or constitutional clause. In tort cases it must be specially pleaded and the burden of proving it falls on the defendant. On the other hand, if the statement were made in the pro-

cess of giving a “character” to a former servant, a justification sometimes referred to as a qualified privilege could be made out. True privilege is based on the fact that society has some interests which override the interest of the individual in maintaining a reputation. Such interests are free debate in legislature assemblies, free investigation in court and a liberal discussion of public affairs and public men. Honest belief, or, better, reasonable grounds of belief and proper apologies and public retractions may be considered in negating malice, but malicious intent in law is not exactly a state of mind; it is the natural and probable consequences of one’s act, and these are not materially affected by one’s benevolent attitude. Of course, a jury may take such matters into consideration when it decides to give or withhold punitive damages, “smart money,” in addition to measurable damages suffered.

A practical difficulty in defamation cases, particularly in slander, arises from the different meanings that words convey when uttered in various tones, in various contexts and various levels of society. In slander words are likely to be used in a special slang sense not necessarily in the dictionary or known to the judge. Thus to apply the names of such animals as cat, rat, bat, fox or rabbit to a person may be quit innocent banter or exceedingly serious reflections on their honesty, chastity, competence or personality. In fact, a person may be held up to the hatred, contempt and ridicule of his associates by a statement which on the face of it is laudatory, as in the case of the rival undertakers, where one bombarded the relatives of sick people with cards purporting to come from the other and praising his services.³ In such cases it is necessary to lay an *innuendo*, that is, provide

an explanation of the meaning carried by the words under the circumstances. There is a tendency today to assimilate the law of libel and slander; hence for tort law, at least, it may be unnecessary to determine whether putting words on a graphophone record or broadcasting them over the radio should not be treated as libel rather than slander.

In view of the growth of the power of propaganda since the world war the question has been raised whether the defamation of whole groups, nations or races, cannot be brought within the terms of the traditional law of libel and slander. The technical difficulties of so extending the law seem insuperable without the aid of statute.

(4) MALICIOUS PROSECUTION, FALSE ARREST, ABUSE OF PROCESS. The law of defamation may be regarded as including malicious prosecution, because that is essentially an attack on one’s reputation. Here society’s interest in keeping its courts open clashes with the interest of the innocent person in being saved from the indignity of even the fairest trial. A compromise results in which the key thought is “reasonable cause.” False arrest is a closely allied offense. The common law makes arrest without a warrant practically as precarious an undertaking for an officer as it is for an ordinary citizen. Unless the culprit is caught in the very act for which he is put under arrest, two facts must concur and at least one of these cannot be checked on at the spur of the moment: first, that a felony has been committed and, second, that there is reasonable ground for suspecting the person apprehended of having committed it. In practice police officers are helped by the multiplication of petty city ordinances under which they can generally

make an arrest, such as “loitering,” and hold their prisoner until their investigation is completed.

Offenses against reputation are so personal that generally they die with the person and cannot be revived. Nor can one’s kin do much to protect his reputation after death—When a certain Captain Wright made disparaging statements in a book about Gladstone, that gentleman’s son found no better way of having the matter aired in court than to call the author a liar and a coward in public and thereby invite an action on his part. When a society for befriending stray cats saw fit to “honor” a deceased benefactress by placing her statue in front of their premises to the great annoyance of her family, there was nothing they could do about it. If, however, there is even a minor technical ground for going to court, humiliation may very well be used to raise nominal damages to a substantial amount.

4. Protection of Human Relationships

Interests in human relationships have not been well protected nor has the law, in spite of learned essays to the contrary, developed adequate protection to the interest of the modern man and woman in what has been inaccurately called the right to privacy. Remarkable ingenuity has been applied to using actions clearly shaped for other purposes to effectuate these modern ends, pending the coming of legislation. Thus out of an old action calculated to prevent interference with one’s servants at their work there has developed a right of action for a parent whose daughter has been seduced, however grotesque it may seem to make such an action turn on the alleged loss of services. Out of the same ancient concept, the nineteenth century had to develop a pro-

tection for employers against those who would try to induce employees to break contracts, and for dealers against those who would not only try to induce customers to violate their contracts but to cease to deal with them under a “secondary boycott.” The connection was rather tenuous, but once it became established, contractual rights and goodwill blossomed forth as a kind of property to be protected if not under some named tort-action, at least in extreme cases by an injunction in equity. It is interesting to note that in the only field in which much progress had been made in tort law affecting relations, namely alienation of affections, juries have made such a notoriously bad job of their work that statutes are being passed for the abolition of all actions of this kind. The right of privacy so far as one’s photograph was concerned was occasionally maintained through reading implications into the photographer’s contract or into whatever license existed in the first place for the taking of the picture. But that was before the days of the quick “candid camera.”

5. Protection of Property

When we move from the field of personality to that of property we are for a moment on surer ground. The protection of interests in land and tangible personal property from trespassers and other aggressors is treated elsewhere in this work. Leaving out of account the extraordinary use of possessory actions for the difficult purpose of trying title to land, a practice growing out of the cumbersomeness of the mediaeval “real actions,” we have remarkably complete protection against physical interference with our possession or use of land or other physical things. Even if there has been no trespass or wrongful taking in the first place, wrongful detention or

use after a demand, express or implied, entitles us to appropriate remedies in tort. Some question was raised in the early days of aviation, whether flying over one’s land constituted trespass. Courts had unfortunately been indulging in a generality that had little meaning when it was coined *Cujus est solum, ejus est usque ad coelum*. (Whoever owns the soil owns up to heaven.) The maxim could not be taken literally and the law set about reasonably adjusting the interests of all parties by developing aviation laws calculated to insure the safety of the flyer and the minimum of interference and danger to the property and persons at the ground level. These laws are still in the process of development.

We reach more serious difficulties as we approach interferences with our property short of touching it, that is, nuisances as distinguished from trespasses. The law so considered smoke and smells and noises and interference with free access of light and air to our lands (provided such rights had not been lost or bartered away) and also injuries that might be inflicted on us in the use of our land because of our dependence on what existed or could be done on a neighbor’s land, such as blocking or polluting a stream, taking away lateral support, cutting off a right of way. Such private nuisances could be abated by a legitimate use of self help or as time went on more and more by court action. The subtle processes by which in a crowding world one might lose his right to complain of what his neighbor did, have of course given rise to many disputes and much legal learning. Obviously one cannot expect all the advantages of crowding together in urban communities with none of the disadvantages.

6. Intangible Interests

As we approach even less tangible interests the law tries to associate them with tangible things or use the analogy of tangible property in dealing with them. Thus it long maintained that goodwill was a kind to appendage to real estate, a beaten track to one’s door. It attempted to define trademark and trade name values in terms of the shop or place of origin. To this day neither goodwill nor a trade name or trade-mark can be sold in gross, that is to say all by itself, any more than an easement of right of way can be sold in gross. We have seen, however, a great deal of progress in the law towards analyzing these business assets in a more realistic manner. When we call such interests as these and also copyrights, patents, franchises (in the business sense of the right to represent a manufacturer in a locality) and even valuable documents, “property” we are using a figure of speech to be sure, but it is an apt one. Such assets may be bought and sold, subject to limitations; they are taxed; they can be levied on to satisfy judgments; the law finds it necessary to give them a situs for these and other purposes, and increasingly it protects them from those who would take them from us or destroy their value by improper means. So far as they can be represented by a symbol, such as a negotiable document, it tends to deal with that document as a physical thing. Sometimes the mode of protection by tort action is created by the statute that establishes the right, as in patent and copyright. In more doubtful cases only an indirect or equitable remedy may be possible at the present stage of the law. Some interests such as those of the inventor of ideas and the designer of styles not patentable are still unsuccessfully clamoring for legal recognition. One impor-

tant interest, the maintenance of the character of one's neighborhood is now represented chiefly in city zoning ordinances.

7. Equitable Remedies

Equitable remedies, the *injunction* and occasionally the *positive decree* to restore a status quo, are available in tort cases on the same theory as in contract cases, to give a remedy where damages alone would be inadequate. As in the case of contracts, the inadequacy thought of is a rather technical kind. It does not refer to the danger of finding a judgment unsatisfied because of the poverty of the defendant, or his likelihood of removing his goods from the state or concealing them. Nor is it an open question for the opinion of the court whether on the whole it is fair to make a plaintiff accept judgment for damages, when what he really wants is peaceful enjoyment of his simple rights.

A long tradition has classified in a group certain cases in which it is conceded that damages are not an adequate remedy. One is the case of the bill of peace to avoid a multiplicity of suits where many adverse claimants or a persistent antagonist threatens daily trespass. Another is the bill to quiet title where an overhanging threat cannot be dealt with in any other way until the antagonist is ready to try his case. This branch of equity jurisdiction, sometimes referred to as *quia timet* (because one fears) leads also to bills for perpetuating testimony, and to interpleader. The latter is the escape of the stakeholder who, through no fault of his own is confronted by two claimants, both of whom cannot possibly be right.

Finally there is the general jurisdiction in tort cases where irreparable injury is threatened, such as the destruction of an expensive structure that may

take years to duplicate.

8. New Rights Enforceable by Tort Action

The possibility of creating new rights enforceable by tort 'action is illustrated in the Anti-Trust laws which give treble damages for persons injured by their violation. There are, however, throughout our statute books, prohibitions which do not specify whether the only remedy intended is a penalty recited or whether money paid can be demanded back by the victim with or without other damages. For example, if a man practices a profession or engages in business transactions without a license is he committing a tort against persons adversely affected? The question calls for careful statutory interpretation, or better still for clearer statutory draftsmanship. We must remember that tort law is only one of several means that the law has of effecting its purposes, that it sometimes exists alone, but more often in conjunction with alternate remedies in contract, equity, criminal or preventive law, and that occasionally one or several of these methods exist with no corresponding action in torts. In general it may be assumed that when a statute imposes a duty on persons engaged in a business such as that of carrier or public utilities, persons directly aggrieved by a neglect of such duty may proceed in an action in the nature of tort.

The right of action growing out of a tort is in many respects different from that growing out of the making of a contact or even out of the breach of a contract. There does not seem to be the same reason for making it assignable or regarding it as part of the estate of a deceased person or an insolvent estate. On the other hand there may be no justification for discharging such claims if the one liable goes

through bankruptcy. For a long time the law treated these points consistently with this view of the personal nature of relations resulting from the commission of torts, up to the point of reduction to judgment. Judgment obligations have been treated like contracts (quasi-contracts). Many concessions, however, have been made to the injured party in the direction of assimilating tort liability to contract liability. Claims based on property rights both survive after the death of one or both of the parties, and may be revived if a party dies after action is commenced. The purely personal torts are generally not so treated. Usually the period during which a tort action may be brought is shorter than the period of limitations for contracts.

Joint tort-feasors are in the eyes of the law merely tort-feasors. They cannot insist on being pursued together, nor have they the rights among themselves of court-aid in adjusting their duties to each other. Action against one is no bar to action against the other, but only one satisfaction is allowed if the tort complained of is actually a single one.

¹The words have been loosely translated "unwittingly," and "wittingly"; "without force" and "with force" would be more literal while "negligently" and "with full attention" would come very near to the sense *in* which the words were used.

² *Rylands v. Fletcher*, L. R 3 H. L. 330 (1868) *Cf. Isaacs*, "Fault and Liability," 35 *Harv. L. Rev.* 954.

³ *Hughes v. Samuel Bros.* 179 Iowa 1077 (1916)



Trusteeship

1. Development of Trusteeship

The central idea of trusteeship is the separation of the legal title to property from the equitable interest in it, giving the legal title to one person or group of persons called the trustees, and the equitable interest to another or others, called in the language of the law *cestuis que trustent* or, in common parlance, beneficiaries. The idea is by no means limited to Anglo-American jurisprudence, but its peculiar development in that system has been denominated by no less an authority than Frederic William Maitland the most remarkable achievement in the history of English law. Introduced in the form of holding land to uses by the Franciscan and Dominican friars in the thirteenth century to circumvent their religious and legal difficulties in holding land in their own names, the practice eventually spread to others who found in every century new advantages in the scheme. In the Middle Ages they found it useful in dodging feudal burdens, in avoiding forfeiture of property during civil wars, in creating testamentary succession when there was no statute of wills, in

avoiding statutes of mortmain which forbade the alienation of property to religious houses and for so many other purposes, that when Henry VIII undertook to confiscate the land of the religious houses he found practically all the land in England held under the formula, "by A to the use of B."

(1) STATUTE OF USES. To clarify the situation he caused the *Statute of Uses* to be passed. This statute declared that where property was so held the use would be automatically executed and the *cestui que use* would become the legal owner. If the statute was intended to eradicate the whole system of uses, it was curiously unsuccessful. On the contrary, lawyers discovered in the statute an instrumentality that they had long been looking for, a simple substitute for the cumbersome machinery of the Middle Ages for the passing of titles. A bargain and sale of a use without any feudal formalities would carry with it legal title. But it was not long before lawyers learned that the statute did not execute all uses. One exception was an active trust where the legal title holder had duties to perform. Once more they turned to

this device with modern purposes in view; to carve out new kinds of future interests in property; to organize family estates; to emancipate married women from the effect of the power over their property which the common law gave their husbands; to permit the organization of churches particularly for dissentient sects; to organize charities.

(2) MODERN TRUSTS. In recent years the same device has been pressed into service for purposes of more doubtful legality: to organize supercorporations or at least bring about cooperation that might prove to be in restraint of trade; to combine voting power within a corporation; to establish business units with limited liability without incorporation; to protect spendthrifts against their debtors; to create secret liens or creditor preference without complying with recording acts; to split up estates for tax purposes while keeping them intact for management and control. In these and many similar undertakings the trust idea has generally served in the first experiments, and though it has generally been superseded by some other device, either under an enabling statute or clarifying

decision, the name “trust” has in almost every instance been inaccurately carried over to the new scheme. Thus we have monopolistic trusts which probably do not use trusteeship at all, but seek to accomplish their purpose by contracts, incorporation, exchange of stock, or buying in of competitors; we have investment trusts which are nothing but corporations whose business is investing; we have voting trusts which may be partnerships, corporations, irrevocable agencies or simply contracts rather than trusts; we have Massachusetts or business trusts, which under modern statutes are virtually a kind of partnership association; we have trust receipts, which upon analysis may turn out to be bailment receipts in which no title passes to the receptor, and hence no trust is created. We have charitable trusts—colleges, for instance, in which the noun is no more inapplicable than the adjective.¹

2. Reasons for the Use of Trusteeship

What is the reason for the use of trusteeship in the initial stages of these experiments? The answer is to be found in its wonderful flexibility. When a trust deed is being drawn there opens up a tremendous scope for the draftsman’s powers to shape the rights and duties of the parties according to their peculiar needs and wishes. He can state roundly precisely what the trustees may or may not do in the investment of the funds or the management of the property, what they shall do with the principal and income. Very complicated sets of conditions may be provided for with shifts back and forth in the duties to correspond to changed situations. Corpus and income may be defined according to the understanding of the creators of the trust. Risks may be shifted. Directions may

be laid down in general or specific terms and the ultimate purpose to be accomplished may be defined beyond the possibility of error, very much as in the case of a contract.

3. Limitations of Trusteeship

There are, however, some limits to the freedom of the creator of a trust, a study of which will give us a better idea of the place of this important instrumentality in modern life and an understanding of the relations of the persons involved in its creation and workings. These limitations may be listed under the following heads: (1) General and procedural; (2) Rights of strangers; (3) Purposes, including time limits; (4) Control of particular clauses; (5) Provisions Inconsistent with the trust idea.

(1) GENERAL AND PROCEDURAL. In general it is impossible to create a trust without the elements mentioned in our opening definition. There must be a trust fund or trust property

—in the language of the law a “trust *res*.” A document may lay down the plan under which a trust will come into operation when the *res* is available, as in an insurance fund trust, but until that *res* is actually the legal property of a trustee there is no trust. There must be at least two parties, the trustee and the person for whose benefit the trust property is administered. If the two parties (or groups of parties) are the same, the trust is extinguished by merger of the legal and equitable estates.

An exception to the requirement of a distinct beneficiary exists in the case of charitable trusts, perhaps because the public is the real beneficiary even though the actual recipient of the benefits is unascertainable in advance. Odd attempts to make animals, tombstones or monuments beneficiaries have some-

times been upheld as charitable trusts. The creator of the trust (settler, trustor, donor) may be a different person from the trustee and *cestui que trust* or he may be one of them. If the trust is created by will he is, of course, dead before it comes into effect. He may name still a fourth party, a “visitor,” with special rights and duties, perhaps a veto power.

It is more common today to make this fourth type of party a co-trustee. Thus a man may appoint a professional trustee or a trust company, to get the benefit of its organization, skill and experience in investment matters, and a personal friend or relative in order to get the advantage of his intimate personal knowledge of the needs of the persons whom he wishes to benefit and also keep the trust from becoming too impersonal and mechanical in its operations. Of course, a living donor may include himself among the trustees for that very purpose. A trust may fail for lack of beneficiaries or lack of a *res*, but it will not be allowed to lapse for lack of a trustee.

Courts of equity will take it upon themselves to appoint trustees. Even the impossibility of carrying out the purpose of the trust in the exact manner planned will not terminate a charitable trust. Courts of equity may in their discretion authorize necessary deviations under the doctrine of *cy pres*, which bids them carry out the instructions as nearly as possible.

Trusteeship is a favorite of equity jurisdiction, and it is always easy for the trustee to ask for a court’s instructions or for persons interested to call a trustee to account in court. At times this power of the court becomes embarrassing, but though efforts can be made to anticipate court action by clear statement, the power of visitation of the courts cannot be destroyed by

the draftsman. A timid or indifferent trustee can make a court case at the expense of the trust whenever a question is raised as to his rights or duties; and one need not be very timid to weigh carefully the chance of accountability in court before deviating from a routine course where to the ordinary business man a different course might seem to be highly desirable.

We have assumed in our discussion that the trustee might be a corporation as well as a natural person. Prior to the nineteenth century there had been a few instances in which municipalities had acted as trustees in trusts of a public nature. It was not until 1816 that American corporations, at first under special charters, but eventually under general laws, began to act as trust companies. Their business has grown to be one of the largest and most important in the country. They have gone through a century of great activity and great change with remarkably little readjustment of a system of law that contemplated natural persons with "consciences" answerable to the disciplinary power of the court. It is true that they have been assimilated to banks and have had to apply for licenses and certificates of convenience and necessity

and have had to meet the requirements of bank inspectors. They have also had to maintain capital and surplus cushions of safety.

No such qualifications have been required of private trustees. Furthermore they have built up large and efficient organizations, have equipped themselves with valuable files of data and have subscribed to financial "services." These facts they have advertised, as well as some other advantages of more doubtful significance, such as that the trust company never dies, is never sick and never goes away on a vacation.

While a good deal of advertising of this sort is idle boasting to which neither the law nor the man on the street pays much attention, its cumulative effect has, at least in one very important court, been to demand a higher degree of care, skill and attention to business from the trust company than that expected from a private or at least from a non-professional trustee, regardless of the common use by such companies of the exculpatory clauses which we shall presently consider.²

(2) RIGHTS OF STRANGERS.

In the eyes of the law (as distinguished from equity), a trustee is merely the owner of property who contracts with reference to it as does any other owner. Logically this situation makes him personally liable on trust contracts, with an opportunity for recourse to the trust fund for reimbursement in the course of his accounting. Logically, too, he can in the ordinary course of business sell or encumber the trust property by means of leases, mortgages, or pledges; he can vote the stock that stands in his name as trustee and exercise all incidental privileges connected with its ownership. Strangers dealing with him should be safe when they satisfy themselves as to his legal title without concerning themselves about his personal answerability for the funds that pass through his hands. The tendency in recent times to merge the legal and equitable aspects of cases has operated, however, to increase the responsibility of the stranger who knowingly deals with a trustee, without releasing the trustee from his personal liability. The theory is that one who aids a trustee in improperly disposing of a trust *res* can be sued with him when an accounting is sought. He becomes, so to speak, a co-trustee *de son tort*

(by reason of his wrongful act).

This theory makes an important inroad into the older doctrine that equity operates only against the person and that the beneficiary of a trust can therefore not follow the property of the trust into the hands of strangers. Invented for extreme cases it is likely to prove troublesome in ordinary situations because of the hesitation and delay that such a burden on the stranger imposes on business. Hence a common clause in the authorization of the trustee seeks to eliminate this burden. Query: whether such a clause can or should be effective to permit the stranger to close his eyes to suspicious circumstances. Of course, no clause can condone active participation in improper conduct on the part of a trustee. Nor can any clause in the trust deed exempt the trustee from answerability to the outsider for tort or contract. Where contracts are made with all parties satisfied to eliminate such personal responsibility, the contracts themselves recite the point.

(3) PURPOSES OF TRUSTEESHIP. An unlawful purpose or one against public policy is none the less objectionable when trusteeship is interjected in the scheme. This battle was fought out a generation ago when the trust was misused to create combinations in restraint of trade. The only momentary advantage that the trust had over the contractual restraint of trade, was that the contract could not be enforced in court, whereas the trust was self-enforcing. The trustees *owned* the stock which they voted according to a plan, and the undoing of the mischief involved something more than noninterference by the courts. Whatever doubts of such powers existed prior to 1890 were removed by the Sherman Antitrust Act of that year. Likewise the rule against

perpetuities and analogous rules against indefinite postponement of the vesting of title to property in definite hands, against piling up income for very long periods without distribution, and against insulating property from the general market beyond the period during which any sensible purpose can be served, have been transferred by equity or at least imitated by it in the handling of trust estates. In fact, the whole duration of a trust has been treated roughly as a period of contingency and the end of a private trust, rather than the end of mere contingencies under it, has been generally demanded not later than a life (or series of lives) in being plus twenty-one years.

The rule against undue restraints on alienation has found its severest test in modern times in the so-called spendthrift trust, though theoretically the same end might have been attempted without trusteeship. It seemed manifestly unfair to permit a spendthrift to live in luxury and enjoy his property while his creditors were kept at bay by any kind of rigmorole that made it impossible for title to pass from him with or without his consent. Trusteeship permits the injection of another element into the case, namely the actual limitation of access to the property or the termination of rights in certain contingencies on the part of the spendthrift, by providing for more or less discriminatory power in the hands of the trustees. In some states the spendthrift trust is upheld; in a few it is unqualifiedly condemned; in most the result depends on the reality and extent of the discretion rested in the trustees. In general, one may not use trusteeship to evade the requirements of the law. Yet where taxes or regulations specifically apply in one way to one kind of set-up and in another way or not at all to

the trust, it is legitimate to adopt the trust form.

Such a condition of the law is not likely to continue on the books if no justification can be found for the preferential treatment of the trust. There is always an intermediate question of interpretation whether the regulatory statute does not embrace the trust device. Thus filing or recording statutes passed as to secret liens have sometimes been found broad enough to include trust receipts as well as chattel mortgages and conditional sales. In tax matters the chief help rendered by trusteeship is in clearly and irrevocably setting a fund beyond one's ownership and control so that it may be treated as a unit and not a part of one's general estate, while the integrity of the investment or the productive fund of which it is a part is not impaired. If the separation of the fund is for a legitimate object the trust method is as effective as any other. If it is a subterfuge, if strings are attached that make the fund in fact revocable, or if a man puts his yacht or summer home in trust merely to avoid taxes, he is in no better position than he would have been had he used incorporation or any other device for the improper end.

Of appropriate, legitimate ends that are served in the modern business world it is possible only to give a few examples to indicate the fact that the usefulness of this instrumentality has not run dry. When corporate bonds are secured by a mortgage, trustees are appointed to hold that mortgage under most elaborate indentures. Rolling stock of railroads is frequently bought by trustees and by them leased to the railroads, while participation certificates are issued to those who furnish the money. The holders of larger numbers of small notes may "trustee" their

with the securities behind it to a trust company, whose certificate in turn serves as a basis for the issue of large denomination notes under favorable conditions.

A man wishing to have his life insurance money invested for his family with income and principal made available according to a plan or according to needs as they may develop may create an insurance trust. A long lease is made with provision for the accumulation of a fund to be used from time to time for repairs and renewal. Instead of leaving the fund in the hands of either landlord or tenant it may be desirable to allow the fund to accumulate in the hands of a trust company to be administered by it in accordance with the terms of the agreement. All of these statements have, of course, been greatly over-simplified. In fact, one of the great advantages of the trust is that there is no limit to the expansion possible to take care of complicated factors and contingencies.

(4) CONTROL OF PARTICULAR CLAUSES. It is only when the side drawing the trust plan for signature on the dotted line takes advantage of its position and makes the agreement one-sided in its own favor that the law must be looked to for the protection of the public. As in the case of such contracts as insurance policies and bills of lading this development may be looked for in several stages. The first is merely a tendency to read the doubtful phrases of the document most strictly against the side that drew it. Trust indentures, however, are by no means universally suggested by the trustee. Trust companies and security holder protective committees (which are not necessarily trustees) are perhaps exceptions. It is in documents of this sort that exculpatory clauses oc-

cur and call for careful scrutiny. A second stage may be reached with statutes providing presumptive or average forms for some of the provisions of trusts comparable to the standard insurance policies and bills of lading of the statutes. For trusts a beginning in this direction has been made in statutory provisions as to investments and perhaps in the proposed Uniform Principal and Income Act which has come out too recently to have been adopted in any of the states.

A third stage may be reached by declaring certain drastic exculpatory clauses void. A typical exculpatory clause is that which gives the trustee the final power of deciding what is principal and what is income and also of allocating costs to the one account or the other without answerability to any one for its decision. The signer of the document may be told honestly that such a clause may save the estate a great deal of money which might otherwise have to be spent in litigation over such points or in seeking the directions of a court before acting. What he probably does not realize is that this type of clause coupled with a liberal discretion in the choice of investments may leave the trustee free to favor life tenant or remaindermen under the trust almost if not quite to the point of extinguishing the rights of the other.

Furthermore, when we examine the basis for calculating the reimbursement of the trustee he may be found to be an interested party in the point of dispute on which he is made the final arbiter. Here, then, is an illustration of a type of clause as to which court interpretation (saying perhaps that the clause is applicable only in doubtful cases), statutory standardization and possibly nullifying so much of the provision as makes a party a final judge in his own case, may all be

called upon to insure equitable results. A thinly disguised exculpatory clause may be included in the description of the trustee's discretion in the choice of investments, for "discretion" melts rather readily into freedom from responsibility. True exculpatory clauses, however, pronounce boldly that in no case shall the trustee be answerable for this or that, perhaps for mistakes of judgment, or perhaps for not changing an investment under any conditions, or loss from leaving money uninvested or failure to do the very things that he undertakes to do in another part of the document. It is with reference to clauses of this nature, particularly those which look like contracting against liability for negligence, that the question of public policy is being raised.

(5) CLAUSES INCONSISTENT WITH TRUST IDEA. There is another type of clause that is so inconsistent with the central idea of trusteeship that its inclusion may spoil the trust or change it into something else. The point is illustrated best in those Massachusetts trusts in which control over the

trustee's acts was directly or indirectly reserved in the certificate holders. Such power of control has been held to make them partners and the whole venture a partnership.³ In like manner a living trust may be ignored by the taxing authorities when they find that the trustor has reserved a power of revocation. In like manner if the title that is given is handled too gingerly an intended trust may result in a mere bailment or a lease or an agency. On the other hand the mere pronouncement that it is not intended to create a trust, as in deposit agreements, is not binding on the courts. In fact where a title is passed under conditions that in equity and good conscience should charge the title holder

with a high degree of answerability to the original owner or to the person whose money was used in acquiring the property, it is a question of degree whether equity will speak of a mere equitable "charge" or an implied trust.

Such trusts are to be distinguished from constructive or quasi-trusts, which are closely akin to quasi-contracts. The Latin word *quasi* (as if) has come to be used in law as synonymous with "constructive" or "fictitious" to indicate that the thing named really does not exist in the case in question, but that for practical purposes the ends of justice are served by treating the parties as if the relation or thing actually did exist. Usually there is no effective way of objecting to the untruth in the fiction, for the one party is asking for the remedy it affords while the other is being treated better than he deserves under the strict letter of the law. A man who meddles with my property or wrongfully takes advantage of my mistake in paying a bill twice or who takes the rent money he has collected for me and gambles on the stock market with it, has little cause for complaint if I choose to treat him as if he had been authorized to do what he did, let bygones be bygones and merely ask him for an accounting of the results. Quasi-trust then is merely a procedural device in a court of equity as quasi-contract is in a court of law. The latter is used where the remedy calls for money only, the former where an accounting for the management or mismanagement of property is required.

4. External and Internal Relations

(1) OPERATION OF TRUSTEESHIP AS TO OUTSIDERS. In general, the beneficiary is both shielded against attacks from the outside and shut off from claims

against strangers with reference to the subject matter of the trust. If an action ought to be brought by the trustee, he might be brought into court by the beneficiary and commanded to proceed. Nowadays these two procedures might be telescoped so that in effect it appears that the beneficiary brings the stranger into court as one of two defendants. Likewise a Stranger may be found to be improperly cooperating with a trustee to defeat the rights of a beneficiary, and such a stranger may be more clearly brought in as a party defendant. The ordinary rules of property, torts and contracts prevail between the trustee as property owner and the outside world. Personal immunity from liability on the contracts made on behalf of the trust can be acquired only by stipulation in the contracts themselves. On the other hand the trustee and the trust fund are free of liability for the acts of the beneficiary. Yet his assignable interest in a trust can be reached and applied to the satisfaction of judgments against him. What this interest is depends in the final analysis on the terms of the trust. When it is made clear that the beneficiary has no enforceable claim against the fund but must rely wholly on the discretion of the trustees for whatever he gets, the attachable interest will be nothing. In general, however, the equitable interests of a beneficiary are transferable under the same general principles as those which govern legal interests. Equity follows the law.

(2) RIGHTS AND DUTIES OF TRUSTEES. The duties of the trustee to his beneficiary and his rights against the beneficiary operate on very different planes. Like an agent, the trustee owes absolute loyalty and fidelity and the utmost good faith in the execution of his functions. He is

answerable for his stewardship in a court of Equity where a strict accounting is exacted. He must not make any personal profit out of trust transactions other than his compensation as trustee; he must not assume any capacity inconsistent with the interests of his beneficiary, nor conceal nor use to his own advantage information that comes to him in his capacity as trustee. Such duties as the beneficiary owes him are more like the ordinary duties of a party contracting at arm's length, though of course they may be enforced in Equity as an incident to the accountability of the trustee, for he that asks Equity must do Equity. The primary duties of both sides are those recited in the basic trust document. Yet the same words used of both sides, such as "pay" or "notify" may in the course of enforcement receive very different interpretations. Furthermore, the failure in ordinary deeds of trust to specify all duties accurately forces courts to resort to certain standards of care, diligence, skill, prudence, policy and practice for particular classes of trustees that make the relation look like a standardized one. This appearance becomes a reality where statutes are enacted to normalize the conduct of certain types of trustees.

5. Termination of Trusteeship

To wind up a trust, unless the trust *res* has ceased to exist, some act of conveyance is necessary either of the legal title or the equitable interest or both, so that the two estates will be merged again as they were originally. It may, of course, be that the purpose of a trust has been fully carried out or that it has become impossible and that a court of equity, if applied to, would order the trustee to hand over the property to those entitled to it on the termination of the trust.

But until the trustee does just this a "dry trust" still exists. In other words, a trust is not terminated by operation of law as an early English "use" was executed under the statute. The situations justifying or requiring the termination of a trust are generally to be found in the document creating the trust itself, for such a document generally orders the trustee to utilize income in a certain way until a certain event and then to pay the principal to the ultimate beneficiaries. Trusts may, however, be terminated by agreement of all the parties interested. Even if the donor is not present, if the court can be shown that the only persons benefited by continuing the trust are willing to waive their benefit and no object of the donor will be interfered with, for example, the postponing of certain payments until the recipients reach certain ages, the trust may be treated as a dry trust. Finally a trust may become ripe for dissolution by operation of law as when the purpose becomes unlawful or impossible. In any case an accounting is important, and unless this' can be made directly to the donor, it is practically necessary to make it or hold one's self ready to make it in a court of equity. It is only in this way that all persons interested may be called on to make. their claims or hold their peace forever.

¹ Cf. Isaacs. "The Uses of Trusteeship in Modern Business," 42 *Harv. L. Rev.* 1048.

² *In re Clark's Will*, 242 N. Y. S. 210 (1930). Reversed on other grounds in 177 NE 397.

³ *Frost v. Thompson* 219 Mass. 360 (1914) Cf. *Schumann Heinck v. Folsom* 328 Ill. 321 (1927).



Part II

The Common Law of the Family

By Max Radin

Introduction

“Common Law” is a short term for the law generally prevailing in England and in all of the United States except Louisiana. The dominions of the British Empire, like Australia and New Zealand and most of Canada, in which the same system exists, have rarely been referred to in collecting the material on which this presentation is based. It may be said, however, that the present family law in these sections does not notably differ from that of England.

The Common Law of the Family is peculiarly difficult to state. More than most of the other branches of the law, it has been influenced by non-English elements, derived from Hebrew, Roman and Ecclesiastical sources. As it was one of the earliest branches to be put into statutory form in part, many of its doctrines depend today on the interpretation of local statutes.

Again, it is in family law that the greatest diversity appears in the more than fifty jurisdictions which in the main have furnished us with our material. There is

scarcely a single statement that must not be qualified by the words “for the most part” or “in general.” Even a complete statistical statement of the law on any specific point in all the communities referred to, would be of little practical value, since similar rules have been given different applications in many of the states.

The diversity is caused by the yearly changes that are made in family law by almost every legislature. No branch of the law is so frequently tinkered with, and yet it is possible to say, as has been said, that in no branch of the law is the gap greater between the actual *mores* of the community and those which the law assumes to regulate. This may be owing to the fact that the family is, of all our social institutions, the one most clearly in a transitional stage, and that many of the changes that are taking place are in the nature of experiments. There is a natural reluctance to put the earlier stages of a process like this into statutory form.

Besides this fact, the con-

stant friction between the changing and the conserving groups in every community is intensified here. No movements arouse more intense passion in reformers and more bitter opposition on the part of conservatives than any concerned with family life. And it is, on the whole, from the conservative groups that most of those are drawn who interpret and enforce the law. Banks and business houses may repeal legal rules in practice by accepted customs and generally adopted conventions. The courts will be glad to follow these changes as soon as they are made aware of them, but courts are likely to resist attempted changes in family life, however widespread and well-established, and to insist that these changes must be formulated first in mandatory statutes. Such a formulation is difficult to achieve for the reason that communal feeling in regard to family life is generally a half-conscious matter, and traditional points of view are likely to be maintained in words for generations after they have ceased to describe reality.

In family law more than in other branches, a great many stages of social development are simultaneously present, some of them deriving from clearly primitive conditions. Nor is there any constancy or uniformity in the process by which any one of these stages has been modified by change of conditions. Every modification has reverberations of a most complicated sort, and the intricate interrelation at all times between forces affecting the family and those affecting property adds new elements to the complexity.

The Anglo-American family is a social institution with a special history and function. What is being attempted here, however, is not an analysis of the family,

but of the law that governs it; the traditional attitude of that law, as we shall see, does not recognize the family at all as a unit of any kind, but deals only with the persons that compose it and the relations between them. As a matter of fact, this is a thoroughly realistic attitude, although in the Common Law it is an historical accident rather than the result of scientific analysis. If, however, we think of the family, not as a mystic person with a value of its own independent of the persons composing it, which is partly the popular conception, but as a group of men and women whose personalities are profoundly affected by belonging to that group, it will be seen that the Common Law, which at-

tempted quite to ignore the fact of grouping, omitted a vital factor in determining how the mutual relations of the members of the family are to be regulated.

Some, at least, of the uncertainties and diversities of our family law came from this contradiction between a legal theory that must use a term like "family" in all discussions, and must none the less proceed on the assumption that a family controversy is exclusively a controversy between individuals. The segregation of these controversies is an important step and one that our law seems likely enough to take in the near future, whether it is done by means of a separate court or otherwise. ■

General Considerations

1. The Legal Concept of the Family

The Anglo-American family is in no legal sense a corporate or quasi-corporate unit. A deed made to a “family” would mean nothing, unless there were special indication of the individuals who are intended. A family can own nothing as a family, nor owe anything, nor be liable for any wrong, civil or criminal. General membership in a family will ordinarily confer no rights and impose no duties. While this is the legal point of view, the popular attitude recognizes the family unit. People do in fact speak of “family property” and “family duties” and have more or less clear ideas in their mind when they do so. The term is more than one of ordinary loose speech, for it gains a certain definiteness in any discussion of social relations in which a group of individuals, almost precisely specified, are dealt with as a group for the purpose of receiving and projecting social forces.

If we return to the legal aspect, the family in its narrowest extent includes (1) a husband and wife, or the survivor of them,

and (2) the minor children of this couple. A still narrower delimitation would include only those minor children who have the same dwelling as their father and mother, or either of them. In the social and popular sense, the persons included in the family are much more numerous. The term includes all those persons related in blood who live in the same house; and even, for some purposes, all persons who acknowledge a relationship of blood or marriage to each other, whether they live together or not.

In both cases, therefore, there is an assumption of community of descent and generally of community of residence, and the implications of that idea are of importance legally and socially. The legal theory assumes that a definite complex of rights and duties, as well as of disabilities, exists in the members of the family toward each other. It further assumes that the fact of this kinship and common intercourse will affect the emotional attitude of the members toward each other, and will compel the courts to interpret their transactions in a way somewhat different from

that used toward transactions of persons not so connected. The social theory of the family is based on popular traditions that vaguely derive from an ancient sense of family solidarity, and from an equally vague but ineradicable popular theory of heredity. This theory is in part a rationalization of the notion of joint and several responsibility of the family group, but it clothes itself in whatever scientific terminology is current. As we shall see, the popular and the legal attitude toward the family have much in common and were in the early stages of the law nearly identical.

ECONOMIC SIGNIFICANCE. Besides its special legal and its general social aspect, the family has an enormous economic significance. The maintenance of the livelihood of the members of our society is accomplished, apparently as a matter of course, within the family group in which one person is responsible for most of the support of the rest of the group. Economic rivalry, outside of the class struggle, takes place between family

groups. A great deal of individual economic impulse is determined by this rivalry, and a great many legal institutions assume its existence. The solution of the problems raised by the economic aspect of the family are the most pressing and urgent of the problems of family law.

Nor must the religious aspect of the family be disregarded. The family as an institution is definitely a part of our religious organization. The existence and maintenance of the family are still protected by powerful religious sanctions in our society. A real sanctity invests it and countless religious practices and ideas are associated with it. There can be no reasonable doubt that the religious feeling in this as in other respects has notably weakened in recent years, but it is still strong enough to determine a large part of social conduct and much of our family law, particularly in its public aspect.

2. History

There are at least, then, two lines of development of the modern Anglo-American family. One has its origin in the needs of the feudal organization proper, the family of the feudal land-holder in a society conceived centrifugally and based on military service as the fundamental business of the grown man. The other is far older than feudalism, and has its roots in an agricultural community of which the members are deemed to be a single enlarged family. The basis is field labor, and there is a marked and recognized interdependence among all the community members. The feudal family emphasized the individual and the agricultural family strengthened the communal idea.

The special development of feudalism in England showed certain characteristics. The most important of these was the extraordinary spread of primogeni-

ture. Inevitably, the virtual disinheritance of all but the eldest son affected the relations of the members of the family to each other and somewhat loosened the family bond. The centrifugal character of the feudal state showed itself in the constant effort to create tiny dynasties by means of entails and the like. Finally, the inevitable result of this effort, the tendency to turn the group of land-owners into a self-perpetuating and exclusive caste of nobles, produced a new need for wealth which again necessitated a certain amount of economic exploitation of family relationships, as in the case of wardships and marriages regarded as feudal incidents. All this gave the feudal family a special color.

The agricultural laborers, on the other hand, maintained a family relationship in which individual personality had much more limited scope. Headship of a family had relatively little meaning. An ancient institution was developed, just before or just after the Norman Conquest, into the system we call frank-pledge, in which mutual responsibility and consequently neighborly control was much emphasized.

As the servile tenant gained personal freedom, a formal assimilation in the eyes of the law of the peasant family and the noble family took place, but the assimilation never became identity. Neither the virtues nor the vices of the feudal family were completely taken over by the mass of non-feudal Englishmen, who retained the idea of equal partition of property among children and of free testamentary disposition. In all these matters, we must not forget that the Common Law was a feudal law and was directed to the needs of the noble land-holding classes rather than to the conditions of the ordinary free yeoman.

Over and above these two

lines of growth, there was a third stream of influence which in many respects controlled both the others. This came from the Church, the community which existed side by side with the civil community and partly interpenetrated it, and which claimed a right to exercise—and did in fact exercise—a dominant influence on family relationships. This Church community, far better organized than the civil community, had a definite set of principles and laws about these very matters of family relationships, and these principles were derived partly from the patriarchal system presented in the Bible and partly from the still living tradition of the Roman family.

The Roman family, we must remember, was of a special character, a quasi-corporate unit both in its narrower and in its wider senses. And the legal aspects of this quasi-corporate unit were exclusively centered in the *paterfamilias*, who was described in law as the owner of the family, but was limited in that ownership by a legal and popular tradition that made him a sort of representative of the family with wide but not quite absolute powers over it. Some of the notions connected with the Roman *paterfamilias* were alive in Italy when the Feudal Law was forming, and northern Italy furnished the model for the formulation of the Feudal Law as it did in part for that of the Law Merchant.

This triple line of development, the ecclesiastical, the feudal and the agricultural, must be kept in mind if we are to understand the changes that took place in the legal rules governing the Anglo-American family. The recorded experience of the Common Law lays excessive emphasis on the feudal attitude towards most property interests, because in litigation about property feudally-minded persons were the chief litigants. The

other, or personal family matters, were within the jurisdiction of the ecclesiastical courts, and the elaborate system of canon law dealing with marital relations inevitably came to be English law to a large extent.

As far as the American family is concerned, these three lines of developments received at least two additions. One—of relatively slight importance—was derived from Scotland and the Continental countries generally. Many of the colonists and the members of the colonizing companies were Scotsmen in New York, New Jersey and Delaware colonists were at first Dutch and Swedes who inevitably carried with them some of the family concepts and traditions of the countries of their origin. These concepts and traditions, it is true, are hard to discern in the final result, but that may be owing to the absence of exhaustive investigation. The other and more important element in the development of the American family is to be found in the existence of the complex of conditions known as the frontier. Among its chief characteristics are (1) the wide scattering of family units, (2) the recurrence of sudden emergencies which compelled immediate action and made it impossible to have adequate recourse to rule-making or rule-enforcing bodies and (3) the relative fluidity of the population, since the frontier was essentially movable and an abundance of new lands existed which could be occupied without much difficulty.

The Common Law, being the custom of the King's courts at Westminster, was developed with a view to the interests of the litigants in those courts, who were, as has been said, for the most part feudal landowners. When the King's courts absorbed most of the jurisdiction of England, both original and appellate, and the custom of the King's courts

became the custom of England, the burgher and the yeoman families were treated in the same way and the property emphasis of the feudal family became in law the characteristic of all families.

The ecclesiastical courts and the Chancery, however, had from the beginning dealt with family relationships which were not feudally conceived—at any rate, not exclusively conceived in that fashion. To the ecclesiastical courts, marriage had a deep religious significance and since, until the time of More, the Chancellors were with few exceptions prelates, the same religious significance was attached in the Chancery to marriage. Furthermore in both the ecclesiastical courts and the Chancery, solemn engagements had an enforceable validity, whatever their form, and engagements to marry were dealt with as an especially solemn and obligatory type of relationship.

English family law consequently was compounded of two theories, one having real relevance only to the dominant group in the social structure, and the other based on general moral considerations which tended to reinforce the biological and social instincts that created the family. These two theories were in frequent conflict, and the dual—or even triple—group of jurisdictions in which these conflicts were adjudicated gave to the English family its special character.

The medieval theory of kinship in England was based wholly on physical inheritance. Adoption was unknown. Further, despite the "Salic law," the notion of kinship was cognate and not agnate. The widespread idea of ancient Mediterranean communities that the chief factor in heredity is furnished by the male progenitor, an idea that maintained itself until Christian times

and after, was little regarded in the Middle Ages. Women were assumed to have an equal share in the transmission of the physical body, although there is nowhere any complete theory of heredity advanced. This notion of blood kinship shows itself in the development of the doctrine that an "heir" is exclusively a blood kinsman, and the inclusion of "natural" relationships in the list of f or-bidden degrees. Both of these matters are, accordingly, established in the Chancery and the ecclesiastical courts, where what was supposed to be the actual structure of human and social life was recognized and, as far as could be done, realized in practice. But the King's courts laid stress on the artificial feudal family, a family in which the eldest son was the exclusive heir, in which women were postponed and the half-blood excluded; and in which "natural," that is to say, illegitimate relationship, however demonstrable, was ignored as non-existing.

It is a striking fact, and one peculiar to English society, that the feudal and artificial family structure, which alone was recognized in the King's courts, was a larger factor in law and society than what might be called the realistic and natural family of the parallel legal tradition of the Church courts. It is possible to say that for many centuries the feudal conception of the family had greater influence in determining human lives than the canonical conception. Primogeniture and the exclusion of the half-blood tended to strain and formalize relationships which might otherwise have been intimate and close, and prevented the growth of a corporate attitude toward the family. This is somewhat the reverse of the usual order of growth. Generally, the artificial structure of a legal concept so far from reshaping actual human relationships is it-

self shaped by them, and when the divergence between the facts and the legal theory becomes too obvious to be ignored, the legal theory often degenerates into a pure matter of form, a fiction which need not be seriously considered. In England the legal concept had a direct and for the most part harmful effect on the facts of social life and actually created socially effective attitudes and conduct that were opposed to the attitudes and conduct which normal family life would produce.

This lasted to the period of the Reformation and the rationalistic centuries, when by the legalizing of wills of land and by the multiplication of trusts and settlements, sufficient control was given to the heads of families over their property to make it possible to give natural relationship and family affection a larger scope in the determination of family life, and to modify somewhat the effect of feudal family law. But that effect had been too long and thorough to be eradicated, and throughout the changing economic conditions of the seventeenth eighteenth and most of the nineteenth century, peculiarly feudal characteristics, like primogeniture, exclusion of the half-blood and the ignoring of illegitimacy, remained to give family relationship in England a color they had nowhere else. All these things must be kept in mind in the more detailed exposition of the existing law of the Anglo-American family, since they make intelligible the widely varying rate at which the various parts of family life have developed.

3. Consanguinity and Affinity

The family at the Common Law is a group of kinsmen. But this kinship is almost exclusively based on community of blood and not on relationship by marriage. The technical names for

these relationships, consanguinity and affinity, are not especially common in Common Law discussions because affinity is of slight importance. Popular speech admits that the son-in-law and the daughter-in-law are "taken into the family," but it is almost exclusively a matter of popular speech. The phrase "in law" added to the ordinary family relationship terms of father, mother, brother, sister, son, daughter, is almost equivalent to "quasi." It indicates that the persons so described are not really father, mother, etc., at all.

The contrast between the Common Law and Civil Law attitude in this respect is significant. The Civil Law has taken over a great deal of the Roman concept which made "affinity" a real source of relationship, with mutual duties and mutual rights. Sons-in-law and daughters-in-law are sufficiently members of the family to make them entitled to maintenance if not quite on an equal footing with other members of the family, at any rate on some footing. In a famous case (*De Brimont v. Penniman*, Fed. Cases #3715, 10 Blatchf. 436) the Federal court determined that the French law which created an obligation to support a son-in-law, although reduced to a judgment, was contrary to the policy of the law of the United States.

Whether the English courts would have taken the same view of a foreign judgment or not, there is no doubt that the policy of the Common Law has definitely rejected the close tie of affinity which drew the son- or daughter-in-law and, to a slighter extent, the parents and the brothers and sisters of the daughter- or son-in-law into a close bond of mutual responsibility. Such a bond derives from the special character of the Roman family concept. It may well contain a vestige of the still older

concept of family solidarity. If such solidarity ever existed in England it was rather an expression of the mutual responsibility of a group of neighbors, who, however, were likely enough to be kinsmen of various degrees both by consanguinity and affinity.

For the ordinary purposes of civil or criminal responsibility, affinity has played little part in English law. It is, therefore, to be assumed that ordinarily when terms of relationship like brother, sister, nephew, niece or cousin, are used in public or private documents, the relationship by consanguinity is meant and not that of affinity. This rule will, however, yield to cases in which the circumstances make another interpretation more reasonable, especially in wills. If the testator were himself *inops consilii* and the will was not drawn up by a person learned in the law, relationship by affinity will sometimes be understood. So when a testator speaks of his niece and it develops that he has no niece by blood, but has one by marriage, the latter will be permitted to take.

There are other situations in which relationship by affinity will give a limited right of succession on intestacy. It may be said at once that the relationship of husband and wife was not considered either at the Civil or the Common Law to be a relationship by affinity. The mutual rights *inter vivos* of a married couple, and their reciprocal rights of succession to each other, are based on considerations of a different origin. Affinity is the relationship existing between a husband or wife and the consanguineous relations of the other spouse. In California, if a surviving spouse dies intestate, without direct descendants, the community property will descend to his or her step-children, to the exclusion even of brothers and sisters and

parents. Elsewhere, such stepchildren will succeed after bloodkinsmen. This type of succession is however in every instance created by specific statutes and the object is the obvious one of avoiding escheat. Clearly no such succession could have been contemplated in the early Common Law when escheat was an important feudal incident, and a notable part of the economic productiveness of an estate.

The real importance of affinity at the Common Law is in two connections. One is derived from the canonical impediments to marriage, the forbidden degrees, in which relationship by affinity were treated on a par with relationship by consanguinity. Since these impediments depended on the degree of relationship, such degrees had to be established for affinity as for consanguinity. There is some authority for the doctrine that there are no degrees of affinity, but the better rule, and in this connection the only workable rule, is to make the degrees of affinity exactly correspond to those of consanguinity. In other words, one spouse is related by affinity to blood relations of the other in exactly the same degree in which that other is related to them by consanguinity.

The insistence on affinity as an impediment to marriage, which was so marked a characteristic of the canonical system, was in no way weakened when, under Henry VIII, the Church Courts became part of the royal system. The list of forbidden degrees derived from Leviticus, which included relationship by affinity as well as by consanguinity was restated and in a measure rendered sharper and more definite. But in the succeeding centuries, the rise of Non-Conformist church organizations, particularly among the powerful mercantile classes, reduced the authority of the Church Courts

which were associated with the Established Church, and created a movement to reduce considerably the list of forbidden degrees, especially the degrees of affinity.

A special controversy was engaged in as to the character of relationship by affinity. The accepted doctrine was that once created it was as permanent as relationship by blood. It was, therefore, not ended by the death of either spouse. This seemed so definitely counter to a growing popular feeling that a particular attack was directed against this phase of relationship by affinity. For the majority of middle-class families, the marriage of a man to his deceased wife's sister seemed not merely devoid of impropriety, but in every way desirable, since the blood relationship of the second wife to the children of the first marriage softened what had always been a traditional fear, the fear of the stepmother. Agitation for the repeal of the impediment of this particular relationship by affinity filled the middle and end of the nineteenth century in England, and was not successful till the year 1907. It had been opposed by the House of Lords, especially by the Bishops. When the repeal was finally effectuated, it was in characteristic English fashion limited to this degree. The relationship of the wife to her deceased husband's brother did not cease to be an impediment till 1921, and the impediment of the more remote relationship of husband or wife to the niece or nephew by marriage was with some difficulty removed as recently as 1933.

In the United States, frontier conditions intensified the opposition to impediments based on relationship by affinity. In a great many jurisdictions without special statutes, it was declared that relationship by affinity ceased with the dissolution of the mar-

riage on which it was based. In other jurisdictions, special statutes were necessary to effect this result.

It may be said that in America the greater prevalence of divorce made situations in which relationship by affinity might be ended much more frequent, and required an early and definite determination of the questions involved.

While affinity and consanguinity were in many respects regarded as equivalent in extent and in duration, the fundamental rule was adopted that affinity could not be based on affinity. That is to say, one spouse had relations of affinity with the consanguineous relations of the others, but not with the relations by affinity. Two persons who bore identical relationships of affinity to the same person, were not related to each other at all even by affinity.

The rule that rejected the *affinitas affinitatis* had a particular significance in the second group of situations in which affinity received attention in the law. These dealt with disabilities, imposed as a rule by statute, to be justice, juror, commissioner or arbitrator where the interests of a kinsman by affinity were involved. The reasons for the disability are apparent. These reasons, however, might well subsist in situations where a close bond of intimacy was present, but which would not come within the description of *affinitas affinitatis*. In view, however, of the fact that a disqualification of a public officer was in question, it was well, no doubt, to restrict the rule of affinity to its narrowest limits.

The fact that these questions have been raised illustrates once more the variation in the effect that social situations have on the law. In the case of the impediments to marriage, the popular attitude was opposed to extend-

ing the concept of the family by means of relationship by affinity. The exogamous character of marriage in Western society was qualified by this fact. In the case of affinity as a disqualification to act as judge or juryman, popular feeling would be inclined to extend the family concept to cover even the less obvious connections by affinity. In both instances, the popular ideas found accepted legal doctrines which ran counter to them. It is significant that where the popular opposition was based on deep-rooted social practice, the legal doctrine was ultimately forced into conformity with it. Where the matter was of relatively slight importance and was only loosely connected with social conduct, the legal doctrine has maintained itself without difficulty.

4. The List of Family Relationships

The family is, as has been stated, a descriptive term for a

series of relationships of widely differing character and importance. They may be listed as follows:

1. Parent and Child.
2. Husband and Wife.
3. Brother and Sister.
4. Grandparent and Grandchild.
5. Uncle (Aunt) & Nephew (Niece).
6. Cousins.
7. Guardian and Ward.
8. Foster-parent and Foster-child.

Historically the relationship of husband and wife, parent and child, guardian and ward are the most important. In recent times the last of these has so dwindled that it is often disregarded entirely in discussing family law. It still retains, however, a certain measure of vitality.

Of the first two, it is hard to say which has legal priority. As far as the historical Common Law was concerned it would be necessary to assign it to the second,

since all family relationship was based on a valid marriage, and no relationship at all existed if no such marriage had been entered into. And except for the recognition of "natural" consanguinity among the forbidden degrees, it may be said that neither Chancery nor the Courts Christian modified this fundamental attitude of the family.

But modern law has modified it, first by recognizing the legal as well as natural relationship of the child to the mother, without reference to marriage, and secondly by providing means of legitimation as well as by going far in some jurisdictions toward removing most of the disabilities of illegitimacy. This will be dealt with more fully later. For this reason, in the present aspects of the Common Law, it is well to deal with the parental and filial complex first and with the conjugal complex later. To do this, makes some repetition unavoidable.

■

Parent & Child

At the Common Law, the relationship of father and child and that of mother and child were not quite the same. Above all, the two were not equally important. The former was so much the more important that for many purposes, “parent and child” and “father and child” could be treated as interchangeable. It was only occasionally necessary to call attention to the fact that what was said of father and child would apply also to mother and child. Under ordinary circumstances this was not the case.

At the Common Law, the father had two groups of fights in connection with his child. One was the group most conveniently designated as the “fight of custody” and the other was the “right of discipline or punishment.”

1. Custody of Child

Custody in this sense must be restricted from other legal uses of the term, in which it designates the duty of care. In family law, it refers to the father’s fight to direct his child’s movements and to determine his physical whereabouts.

As far as the domicile of the child is concerned, that is always

the domicile of the father. For our present purposes, domicile may be defined as the complex of privileges that are conditioned by association with a more or less restricted geographic area. Under some circumstances only persons “domiciled in a certain country, state, county or city” are permitted to exercise certain privileges or enforce certain rights. As far as children are concerned, it need merely be said here that if the father has any privileges or fights dependant on a specific domicile, the child has them too—so far as a minor may have them; and if the father is denied them because he lacks a certain specific domicile, his minor children are denied them also.

But physical presence is frequently separable from domicile. The right to go from place to place is a modern but much cherished liberty. Within a given country it is usually the possession of all free men, and that is particularly the case in Anglo-Saxon countries, barring matters like vagrancy and quarantine regulation. The police surveillance of Continental countries is frowned upon, and permission to remain in a particular place is

almost never conditioned on a license. But this right guaranteed to adult citizens by the Federal Constitution of the United States, and by specific provision in most state constitutions, is not enjoyed by minor children. The movements of a child may be absolutely restricted by his father. He may even be confined against his will in a particular spot and kept in what amounts to a real imprisonment. All this, of course, is qualified by the duties imposed on the father both toward the child and toward the community in relation to the child. Indeed, in some instances, it will be seen that these duties can be recognized only by the fact that they limit and restrict the right of custody.

Just as the movements and physical presence of the child depend on the will of the father, so the right to determine what he shall do is part of the right of custody. He may require him to work, to attend school, or to refrain from both, within the legal limits of the laws regulating education and the employment of minors, to attend a particular church or to refrain from attending, to take part in certain con-

tests or to refrain from taking part. He may even order him to wear certain clothes or forbid him to wear them. And in all these cases, his commands are lawful commands and may be enforced in a number of ways.

This right of custody was at the Common Law exclusively the father's. The mother could exercise it only in his absence, or in his presence by a sort of delegation from him. The delegation, it is true, might be presumed from the fact that he did not exercise it himself. The father not only had this exclusive right, but he might delegate it and he might deliberately exclude the mother in his delegation. He could even determine by will that on his death the right of custody be exercised not by the child's mother, but by a third person. In the United States, with and without a statute, this rule has been virtually abrogated. It is usually provided that father and mother have joint custody of the child, and the exercise of this right by either is original and is not derived by delegation from the other. If there is a conflict, it may be determined by the court, either as an incident to divorce or separation proceedings or in an independent action.

In one matter only, is the father's right of custody still paramount. He may determine the actual residence both of his wife and his minor children. His wife cannot forcibly be compelled to remain there, but her failure to do so is a desertion. The children, on the other hand, can be forcibly detained, if need be, in the residence selected for them by their father, and if they leave it, can be brought back with the aid of the police. The right of custody must, of course, be exercised in a reasonable fashion, and an unreasonable exercise of it is an abuse, which may under aggravated circumstances be a ground of forfeiture.

There have often been misstatements as to this right of forfeiture. It is sometimes asserted that there is a paramount right of custody in the state—or even in the court—as *parens patriae*, and that the state may therefore override the parent's right and substitute the discretion of some official, judicial or administrative, for the discretion of the parent, whenever the best interests of the child seem to require it. There is no real justification at all for this doctrine, although in a few jurisdictions the language of the statutes has gone far toward adopting it. At the Common Law, the right of custody in the *parens patriae*, the sovereign, the chancellor, the court, the state, does not begin until the right of the parent ceases. That the right may in a given case be terminated admits of no doubt, but it cannot be done arbitrarily. Nor does it admit of any doubt that the right of custody may be exercised by persons under public authority in cases where through accident, misadventure, illness or general calamity, the parent entitled has failed to exercise or is in fact not exercising it, and that this may be done without a definite termination of the parental right. In such a case, however, the parental right may be resumed, not as a grant or favor, but upon the showing that it had never been terminated.

When a court denies to a parent the custody of a minor child, this is as definitely the deprivation of a valuable right, as the seizure of tangible property. The law establishes reasons for such a deprivation and a proper procedure. Disregard of form or substance, especially in regard to due notice, is a reversible error.

In the United States, the question is further complicated by the "due process" clause in the Bill of Rights of the Federal Constitution, and similar provisions in the state constitutions. While

the right of custody is not an indubitable property right, it is sufficiently like it to be within the protection or the constitutional inhibition. For that reason, a statute permitting courts to decide the question of custody solely from the point of view of the child, without specifically considering the right of the parent, would probably be unconstitutional.

The issue has been raised in the question of Juvenile Courts, and the acts that created these courts did in some cases permit the courts a large and apparently unfettered discretion in assuming the custody of minor children and in transferring it. In most cases, the constitutional issue has been decided in favor of these courts, but that has generally been because the courts in fact exercised their broad power constitutionally. They did not assume custody until they had specifically found that the parent had by some negligent or deliberate misconduct forfeited the custody, or was incompetent to exercise it.

The reasons for terminating parental custody are the following:

- (1) Abuse of the right of custody.
- (2) Abandonment of the child.
- (3) Excessive severity toward the child.
- (4) Neglect in furnishing food or medical attention.
- (5) Bad character of the parent.
- (6) Voluntary surrender of custody by parent.

It will be noticed that this does *not* include poverty of the parent, moroseness or imbecility of the child, incompatibility of temper between parent and child, or the fact that the child's physical and spiritual needs would be better served under some other custody. If the objections to the parent's custody cannot be shown to involve a spe-

cific charge of incompetence or misconduct against the parent, the court may not terminate the right or interfere with it, except under general police regulations applicable to all other persons of the same class.

The abuse of the right of custody which is a common ground for the court's terminating it and either assuming custody or transferring it to another person or institution, is based upon the principle that the parent's right of custody must be reasonably exercised. The particular examples of its exercise enumerated before indicate the nature of the criterion which will be adopted. The parent may determine what religious services the child may attend, but this right fails when the religious rites themselves are prohibited as immoral or treasonable. A father may decide on the residence of his child, as well as of other members of the family. But he may not insist on a residence that is demonstrably bad for the child's health or morals, if other residences are available. He may require the child to take employment, but not employment endangering his health or morals. He may prescribe certain types of physical exercise if, and only if, the child is physically able to do them.

At what point the exercise of parental custody ceases to be reasonable and so becomes an abuse, depends on the court's discretion, but, as in all cases, the exercise of the discretion is not final and is itself subject to abuse, an abuse which an appellate court may rectify.

Another frequently applied reason for terminating the parental right of custody is based on the bad character of the parent. Here the discretion of the court has an equally wide range, but here also it must be a reasonable exercise of discretion. It may not be merely a subjective disap-

proval of the character or conduct of the parent. Criminality of the parent is of course a sufficient ground for depriving the parent of custody. Obviously, conviction or incarceration of the sole parent compels the court to assume custody of the convict's minor child. But the nature of the offense must be taken into consideration, and irrespective of actual conviction, a tendency to commit serious infractions of the law, even if they are classed merely as misdemeanors, may rank as evidence of bad character.

Sexual immorality is an obvious indication of a character which justifies removal of a child from the custody of the parent. Alcoholism may be similarly dealt with, perhaps not so much as an evidence of bad character as because it prevents the care which it is the duty of the parent to exercise.

It is plain that bad character cannot be imputed to a parent for certain religious or political beliefs not prohibited by law, however much the court may disapprove of them. Nor may a court regard as evidence of bad character the refusal of the parent to conform to the usages of the community, not even the reasonable and socially desirable usages.

Harshness of disposition, miserliness, lack of public or communal spirit, bad temper, however much they may affect the welfare of the child, and however large they may loom in a psychologist's list of harmful human traits, are not sufficient indications of bad character to permit the court to deprive the parent of this fundamental personal and quasi-proprietary right.

Besides criminality and immorality, the most frequent occasion of terminating the parental right of custody is the voluntary surrender of the right by the

parent himself. It must be noted, however, that this surrender need not be express. Whenever a man or a woman voluntarily submits domestic affairs to the regulation of a court, the court as an incident may determine the question of custody. So, in an action for divorce in which no request for custody is made by either side, the court may none the less grant custody to one or the other of the parties, or to a third party or to an institution, and this over the protests of the parents. The court may assume that the submission to the court of a controversy involving the continuation of married relations in their full sense implies inevitably a power in the court to terminate the parent's custody of the minor children, and to deal with that custody as though it had been formally and expressly surrendered.

All that has been said of the parental right of custody applies primarily to the father, in those jurisdictions in which his common law precedence in this respect has been retained. In other jurisdictions, they apply to the parent who has been exercising custody or to both of them when it has been jointly exercised.

The fact that the parental right of custody has been terminated does not mean that it cannot be regained. Where the court has merely *de facto* exercised that right without officially terminating the parent's right, it can be demanded and must not be refused unless reasons like those mentioned are present. If, for example, a child is kidnapped, and abandoned in a strange place, the court will assume and exercise custody, but the parent may claim the right, if the situation in which the child is found is in no way due to his fault.

When the parental custody has been terminated for adequate reasons, it may be reac-

quired if the reason ceases to exist. Incompetence, bad character, bad habits may come to an end. Under such circumstances, the parent ousted of custody may apply to be reinstated and the fact of parentage will have great weight in the examination of the rival claims of the parent and that of any other person or institution. But if custody is restored, it is restored as a grant from the court, not as the enforcement of a constitutional right. It may be conditional, and it may be ended without any reference to any special position on the part of the father or mother.

When the court assumes custody the minor child becomes officially a ward of the court; the special rules that govern this relationship will be further considered later. The wardship is of a special character, since the court is not a corporation and ordinarily cannot act in a corporate character. The expression *parens patriae*, which is applied to a court as the successor of the English Chancery, lays stress on the public parental character of the relationship. It rarely lasts longer than the period necessary either to determine to which parent custody is to be granted or to select a new guardian.

2. Discipline

The right of the parent to coerce the child by means of punishment is general and has legal consequences.

Punishment may be of two kinds, (a) corporal chastisement and (b) confinement. Other measures, such as starvation, are no longer lawful. Both corporal chastisement and confinement are limited in range. Neither may be used to such an extent as to inflict a permanent injury on the child. Nor may either be excessively severe, even if it does not inflict such an injury. Any kind of punishment that can be regarded as immoderate, or that

involves special humiliation or is of a disgusting character, is in itself excessive and will not be permitted, so far as the law can prevent it.

The same is of course true of imprisonment. Confinement in a cellar or in a filthy place, even if proof is lacking of any actual danger to the child, is beyond the parental right of discipline.

As long as the parent remains within his right, the chastisement inflicted is not an assault or a battery and does not render the parent liable either civilly or criminally, either to the child or to any one else. The same may be said of imprisonment. A justifiable confinement does not give rise to an action for false imprisonment.

The right of discipline is limited not only in the extent to which it can be used, but in the purpose for which it may be used. Discipline must be understood in its etymological sense as a means of education. The legal rights of the parents in regard to their children's education will be later examined, but their rights in this matter are among the most important in the life of the community. Punishment of any sort may be inflicted only as a means of enforcing the right and the moral duty of education. The fact that educational psychologists disapprove of punishment as a means of educating children is irrelevant here. The general traditional attitude accepts punishment as an appropriate method, and this attitude is to some extent confirmed and sanctioned by the highest religious authority. Indeed, it is hard to see how widely accepted systems of theology could be maintained if punishment were rejected in theory, or how our police systems could function under a similar theoretical disapproval.

An educational purpose is necessary and in fact is the sole justification of punishment of

children. To punish them without such a purpose, even moderately, is an abuse, and may be a tort or a crime. But if an educational purpose is alleged, it will suffice to show reasonable connection between the punishment and the purpose sought to be achieved. If no such connection is apparent, the punishment however moderate and however much an educational purpose is asserted, remains unlawful.

Evidently the education may be—indeed it generally is—moral as well as intellectual. Disobedience, bad habits, misconduct of any sort, may justify punishment. In terms, this punishment, just as in the case of adult offenders punishable by our penal code, is often stated to be retributive. The child is whipped because he has misconducted himself. But—again as in the case of an adult offender under our penal system—a preventive or deterrent character is also ascribed to this punishment, and if no such character could be ascribed it would probably not succeed in justifying itself.

This is of importance in view of the trends of modern child-psychology. It is quite possible that the popular attitude on this question may shift completely, and that punishment will be completely disapproved of as a means of education. In that case the right of parents to inflict purely retributive punishment on children may well become an issue.

The right of punishment is one most frequently delegated. Education is today performed in part by agents of the parents, and so far as punishment is a means of education, it may go with the right to which it is attached. But it is very easily separable, and today persons engaged by parents to teach their children are almost always forbidden to punish them, or at any rate to inflict corporal punish-

ment. If there is a delegation of the right to inflict punishment, it is limited in the same way as to extent and as to purpose, and the immunity which the right creates is, of course, similarly restricted. It is important, however, to note that the right is in practice more sharply limited when it is exercised by agents than when it is exercised by parents. To the latter, a larger discretion will be granted and it will be easier to convince a court of a reasonable connection between punishment and a legitimate end, when a parent inflicts it than when an agent of the parent does.

There is this further difference between the original and the delegated right to punish. Delegation is usually for a definite purpose. Ordinarily and commonly, the delegation is to a teacher and to a teacher of a limited group of subjects. Such a teacher may not use punishment as a general means of moral training unless this right is expressly or impliedly granted.

3. Services

The two rights just mentioned are in the nature of privileges. They create immunities. If and when they are exercised, no right of action accrues to the child against whom they are exercised or to anyone on his behalf. But there are rights of another sort in parents in connection with their children, rights that are in the nature of legal claims. One of the oldest of these was the right to the child's services. This meant precisely what the term implied. The parent has a right to demand of his children what in medieval times was called *servitium*, a word capable of being used in a general sense, but also capable of being etymologically understood as the work done by a serf or slave, that is to say, domestic service of a definitely menial character.

There was a medieval writ which was predicated on the enticement of a serf, or the tampering with the loyalty of a vassal, or on an injury to the serf or to the vassal which made him incapable of performing the service which by reason of his feudal status it was his duty to perform. This writ contained the phrase "*per quod servitium amisit*," "by reason of which (the plaintiff) lost the service." It was on this writ that the action of a parent was originally—and is still to some extent—based, who sued for an analogous injury in respect of his minor child. He made the claim in so far, and no farther, as he had a right to these services. Modifications in this situation will be dealt with elsewhere.

The right of service on the part of a minor child is, therefore, a real claim. It cannot for procedural reasons be enforced by a direct action of the parent against the child, but it can be enforced indirectly, as we shall see, by definite legal process. The demand for these services is not based on the moral duty to provide some type of work for the child to prevent the development of habits of idleness and the like. It may have this purpose, but it is not essential. The right to them is a property right in the laboring power of the child, the right to use it himself and the right to profit from its use.

Evidently these services must be reasonable. The service which a medieval vassal or serf must render was either specifically and expressly described in the grant, or depended on a fairly definite custom. The services children in a family might be required to render were also to some extent describable in terms of custom—*servitia debita et consueta*. In modern times, however, such customs have become far too varied to be a valuable guide, and the character and extent of the services to be rendered by chil-

dren permit of a wide discretion in their determination. They will vary with the social and economic condition of the family and the special situation in which it finds itself. They must be reasonable, in the sense that they must not be excessive, *i.e.*, beyond the child's strength or skill to perform, or degrading; but they may be claimed and enforced even when the social and economic status of the parents would make it unreasonable for them, in most persons' eyes, to demand any services at all.

Not only may services be demanded as a claim of the parent, but the child may be required to engage in work for someone else. When this is done, the earnings of the child may be claimed by the parents—usually only by the father, if both parents are living—and may be sued for by the father just as though he and not his child had entered into the contract of employment.

Just as the parent may require his child to enter into employment with someone else, so he may permit the child to do it, at his own request. In either case the proprietary rights of the parent in the child's earnings are the same. In either case, the employer may, in the absence of a special notice, pay the wages to the child and thereby discharge his obligation. It is not necessary to assume an agency of the child to receive this payment. After all, it is the child that makes the contract, but when due notice is given, the employer's obligation is not discharged by payment to the child or to anyone except as the parent has directed.

The property interest of the father in his child's earnings was absolute at the Common Law. In recent times it has suffered a certain limitation. If the child is permitted to seek and obtain employment, and no notice is given to the employer to pay the wages to the parent, not only will

the obligation be discharged by payment to the child, but normally, unless a particular demand is made before the wages are earned, it will be assumed that a gift of these wages has been made to the child by the parent, and no subsequent demand for them is legally enforceable. Of course, a gift of these wages may be expressly made in advance by appropriate words and the gift becomes complete when and as the wages are earned, but this gift is revocable at will, even in the lifetime of a contract of employment, and unaccrued wages may be claimed as though no gift had been made.

Unqualified as the right to the child's earnings ordinarily is, the selfish exploitation of a child's laboring power by a parent will be checked as much as possible. The situation has become especially acute in recent times, when the earning power of very young children with extraordinary talents, musicians or actors for the most part, becomes not merely an economic asset but one of enormous value. The essential unfairness of permitting parents to use wholly for themselves (beyond the bare support of the child) huge sums of money earned by the child's efforts alone, has encouraged courts to invoke a kind of supervision which in ordinary circumstances would be impossible. Specific statutes have often been made to cover these cases. -

Generally, however, with or without such statutes, the exploitation of the labor of talented children is possible only if the laws requiring compulsory school attendance and prohibiting child labor, and especially prohibiting public exhibitions by children, are dispensed with in particular cases. This dispensation may be had in a proper case, but it will be granted only on terms, and these

terms usually require the establishment of a trust fund to be used for the child, either at once or on attaining majority. The statutes governing these matters generally apply only to stage or motion-picture activities of children. In the case of other talented children, the creation of such trusts is common, even when no statute governs them.

A special situation was recently presented in a much publicized Canadian case, in which a group of quintuplets were withdrawn completely from the custody of the parents and turned over to public authority. The danger of exploitation was a real one, since the survival of these children received an astounding publicity. Exhibition not merely of the children themselves, but official publication of anything concerning them was in the highest degree profitable; and commercial agencies were already being formed to carry this exploitation out. It is doubtful how far a similar drastic intervention of public authority, without a special statute, would have been possible in most of the United States.

The right to the child's services, while a property right, can be enforced directly only when the child is working for a third person. In that case the wages may, if notice has been given or if custom dispenses with notice, be sued for by the parent. Except in such cases, however, as has been said, a direct action by the father against the child based on such a right is ordinarily impossible, although special situations may be imagined in which such a right exists.

Usually, the failure by the child to render services, when demanded, justifies the father in inflicting punishment and continuing punishment till the services are performed—provided we remember the previous qualification as to character and ex-

tent of the punishment. Failure to render the services may also justify the father in surrendering custody of the child to public authority, whenever statutes permit it. Such failure may in a proper case be taken as evidence of incorrigibility or intractability.

It is often said that the duty of the child to render services and the duty of the parent to furnish support are mutually dependent correlatives. This, however, is not correct. The duty to furnish support—usually statutory—exists whether services are performed or not, even when such services are deliberately refused. On the other hand, the right of the father to the child's earnings exists even when no support has been furnished. Evidently, in the latter case, the situation will usually be that a gift of earnings will be implied or that what is called an "emancipation" has taken place. Unless the court has intervened, persistent failure to support a child will not of itself deprive the father of the right to demand the payment of earnings not yet accrued, nor automatically work any other change in the relationship of parent and child.

If the duty to support has no definite relation to the claim for services, the right of custody has. Usually, the right to the child's services exists only in the parent that has the right of custody, and is impliedly ended when that right is ended. But by special determination of the court these two may be separated. The right of custody may be granted to an institution and the earnings of the child may none the less be left or granted to the parent.

4. Education

In regard to education, the position of the parent is usually described as a duty. It is, however, expressly stated by Blackstone that the duty is merely a moral one. At the Com-

mon Law, there was no way in which this duty could be enforced, either by the child or by a "next friend." A man who chose to permit his child to be illiterate would incur at most the blame of his family, his neighbors or the community. But he had committed no offense. Neither had he forfeited his paternal right of custody nor any of his other claims in regard to his children.

In modern times, the duty of an education suitable to the child's needs has been imposed in a special way. In almost all English-speaking communities, adequate facilities are provided by the community. The statutes under which these are created generally impose on a parent the duty of permitting, indeed of requiring, his children to make use of these facilities, or to furnish a completely equivalent education himself. The duty is therefore in the alternative. It further implies—what has already been adverted to—a right on the part of the parent to determine the character of the education which he wishes his child to have. It must be noted, however, that this right is by no means unqualified. Education has itself become a highly organized profession, and authoritative pronouncements of an educational minimum are available. This minimum is physical and intellectual, and will doubtless everywhere be taken to include more than the primary skills of reading, writing and arithmetic. It must be provided either in a school or at home, and a parent will not be heard who voices personal and individual objection to that which constitutes this minimum, or substitutes for it what by authoritative opinion is not an equivalent.

Beyond the minimum which the compulsory school law provides, the selection of educative methods or matters is a definite

right of the parent. The issue is often raised as to religious training. The public schools are generally forbidden to supply religious training even at the unanimous request of all the parents of the children in the school. If a parent wishes this training for his children, he must take personal measures to secure it. On the other hand, when he wishes it, he cannot be prevented from providing for it. Nor can difficulties be put in his way. If he wishes this training to be given in close connection with the ordinary intellectual training, it would be unconstitutional in the United States to compel him to give it separately. That is ordinarily the consequence of laws which require—without an alternative—attendance in the public schools, and for this reason an Oregon statute to this effect was declared to be unconstitutional.

5. Care and Support

The right of custody is ordinarily confused with a different but related thing, the duty of support and care. The confusion is natural, since the term custody ordinarily implies this duty. The foregoing considerations, however, must serve to show that the two things are completely separable.

It is an oft-told tale that the duty of care and support of a child was, strictly speaking, unknown to the Common Law. Neither the child nor any next friend could maintain an action to compel the father to provide such support nor initiate police proceedings for that purpose. An action in *assumpsit* (common counts) was not available to anyone who had furnished such support on the parent's default. As in the case of education, public opinion alone could bring the requisite pressure. As a matter of fact, however, the English system had an indirect, although not a very effective, means of

compelling the support of a minor child. Such a child if destitute or a vagrant might fall on the parish, and if a responsible parent could be discovered, the parish authorities could proceed by penal measures to compel the parent to support the child or to contribute to its support, or to reimburse the parish for having supported it. The duty, therefore, may be said to be rather one to prevent a child from becoming a burden on the parish and it would exist only when such a burden had actually devolved on the parish. If an abandoned or neglected child were taken care of by a relative or a kindly neighbor, no duty of compensating this neighbor was created, and no forfeiture of the parent's right to enforce all his rights in respect of the child took place.

It may be said that almost everywhere at the present time, this reproach has been taken from the Common Law. By statutes in most jurisdictions, and without statutes in some, a definite duty has been imposed on parents to furnish their children the necessities of life, and these necessities include food, clothing, medical attention, and, to the extent already noted, education. To this has been added in some places adequate opportunities for recreation. The extent to which these necessities must be furnished is particularly notable. It varies with the social and economic circumstances of the family and, except within wide limits, no rules can be laid down as to what in a special case could constitute a failure of the parent to provide the requisite care and support.

Failure to provide it is often enforced by penal means. Fines or imprisonment may be imposed on the delinquent parent. Evidently a disposition to refuse such support will amply justify the court in terminating the parent's custody, and in creating

other custodians, without in any way ending the parent's duty to furnish the necessary support.

Another method of enforcing this duty exists in the right of a third person to provide the necessary care and support and to sue the responsible parent in "quasi-contract" for reimbursement. Such a right of reimbursement is limited to the reasonable value of what has been provided. It exists, however, whenever support has not been furnished by the parent, even though the failure may be due to accident or circumstances beyond the parent's control.

An additional limitation of recovery is based on the dislike of officious intermeddling. No one can recover for necessities furnished a child, (a) when adequate necessities have already been furnished by the responsible parent or by the guardian, or (b) when the parent or guardian is ready and able to furnish them and would do so if notified by the third person who has intervened. Another way of expressing this limitation is that the outsider's claim for reimbursement for necessities furnished a child must be in good faith.

Failure to furnish necessities, as has been said, is often a criminal offense. A special statute usually makes it criminal to fail to provide adequate medical care. Such a statute creates a particularly delicate situation because of the large growth of sects which make it a religious duty to refuse medical attention. Friction on this point has led to unpleasant consequences. It may be said that, in general, religious scruples are not an adequate excuse, if a failure to give necessary medical attention is proved. However, it is not likely, except where serious harm has happened or is reasonably to be apprehended, that this duty will be stringently enforced.

In some states, a direct action has been granted by statute to the child itself, appearing by a next friend—often a social worker—to enforce the duty of support and maintenance. Usually, the mere fact that such an action has to be brought justifies the court in an examination of the whole complex of parent-child relationship, which obviously needs readjustment under the conditions supposed to exist.

The right of custody and the duty of support are frequently declared to be correlative, by which statement it is generally meant that the one implies the other. But this implication is only *prima facie*. It frequently happens that, in the judicial reorganization of family relationships that is incidental to all divorces, the right of custody and the duty of support are completely or partially separated.

6. Special Position of the Child

(1) PERSONAL STATUS. It will have been noted that while a limited right of enforcement of the duties of a parent are sometimes directly granted to a child, it is extremely rare, if it occurs at all, to find an action maintainable against a child to enforce the admitted legal duties of the child. Such enforcement is left to private action supported by legal privileges and immunities.

In determining how the right of custody is to be dealt with and what provisions are to be made for support and education, both statutes and judicial decisions frequently assert that the child's interest is "paramount." It has been shown above that this statement is not to be understood as denying a real right of the parent, even if it runs counter to a supposed interest of the child. That is to say, a conflict of interest between parent and child will not be lightly found. It will not be found, for example,

in many situations where under ordinary circumstances rival commercial interests would be said to be in conflict. A dispute as to custody, between a rich relative devoted to the child and a parent of extremely limited resources who has neither been negligent nor guilty of misconduct, will always be decided in favor of the parent.

Nor will the child's own wishes be consulted except in cases of divorce and separation, when rival claims of equally entitled parents must be considered. Under such circumstances, the court within reasonable limits has sovereign powers of determining custody, and the child's interest may well be considered paramount; but the parental status must be given weight in spite of that fact, and where the father or the mother has not forfeited the right of custody, a third person may only rarely be considered.

If the child is over fourteen, the child's own wishes will receive serious but not controlling consideration. And in all cases, regard will be had to the special circumstances. Infant children will generally be left for a time at least with the mother, even though the divorce is granted against her for her fault. Boys are usually assigned to the father. But no rule can be made. The nature of the father's occupation, the physical environment, the temperament of the child, must be allowed to play a part in governing the court's determination.

(2) PROPERTY INTERESTS. No right of the parent over the property of the child is created by the mere fact of the relation of parent and child. Minor children may be donees from third persons and, if they are old enough to accept, title vests in them by gift as it would in the case of adults.

Minors can be heirs by will or by intestacy, and in such a

case the settlement of the estate vests title in them. All their property rights are subject to the same rules as the property of adults.

Minors can make valid contracts and, if it is not a contract for labor, the chose in action created by the contract and the proceeds of the contract are exclusively the child's and not the parents'.

Similarly, an injury to a child, while it creates a cause of action in the parent, *per quod servitium amisit*, creates a wholly independent one in the child. The proceeds of the right of action become wholly the child's property.

The administration of such property, however, may well be placed by the court in the hands of a guardian or trustee, and obviously it must be so placed in the case of very young children. Such guardianship will frequently be granted to one of the parents, usually to the father. While he has a certain claim to prior consideration, it is by no means a paramount claim. The court will take into account all the factors involved. One of them, of course, is the danger of friction and controversy if an outsider is made guardian of the child's property while the parent is custodian of his person. At the same time, the real danger of a dissipation of a child's property, in a real or fancied belief of a moral claim to it, is not overlooked.

A question that often arises is whether the maintenance and education of a child is a proper charge on the child's property. The question must be answered in the negative. The duty of maintenance and education devolves on the parent and the expenses must be defrayed by the parent

himself out of his own funds. If there is a special kind of maintenance and education which it might be desirable but not necessary to give, application may

be made to the court for permission to use the child's property for that purpose. If the parent's resources are inadequate for his other duties, on special application the court may authorize a partial or complete use of the child's property for his support and maintenance. Except under these circumstances the legal or *de facto* administration by a father of his child's property is subject to the same rules that any other administration would be subject to. Whether actually a trustee or not, the father would under such circumstances undoubtedly be a fiduciary and held to a strict accountability.

Contracts made between parent and child to the parent's advantage and gifts made by the child to the parent will be closely scrutinized and, if there is any reason to suppose undue influence, will be set aside.

(3) THE STATE AS "PARENS PATRIAE". The great importance of the family from almost every point of view, social, religious, economic, is frequently insisted on in almost all legal discussions. For that reason, family relationships have been regarded as more than other legal relationships subject to a control and reconstitution by persons clothed with public authority. This public authority in Common Law countries has nearly always been some form of court, regularly modeled on the English Chancery or directly derived from it. An administrative agency, a board or a division of a Ministry is less likely to be charged with such powers.

From what has been said, the intervention of a court cannot be of its own motion or based upon any presumed reason of state convenience or advantage. The rights and duties in family relationship are deemed to exist in certain persons. To end or to modify them is as definite a pro-

cedure as to end or modify property interests. It must be done either as a penalty imposed for dereliction of one sort or another, or as an incident to litigation, precisely as property interests would be ended or modified.

There is, however, the fact to be noted that when the court assumes the control of the parent-child relationship in any given family, it accepts a permanent responsibility. Even though it acts merely to reassign the custody and the incidental rights and duties to the persons who would possess them or bear them originally, it retains a supervisory capacity over the reconstituted relationship. At any time, when its attention is called to the need for doing so, the court may make whatever changes it wishes, either at the request of the parties concerned or over their protests and in so acting the court is accountable only for a reasonable exercise of discretion.

Where a family is constituted in the normal and natural way, the court cannot intervene in the relation of father and child, except under the conditions set by the Constitution and the laws. The need of improvement of the social conditions of the community, or the advantages which may accrue to parent and child are not conditions that justify intervention, nor is the inability of the parents to realize the highest ideals of parental conduct. So long as the parental incompetence does not fall below a certain standard, the family relationship will not be disturbed. And that standard involves deliberate abuse of rights, or inexcusable neglect of duties in specific cases, an abuse or a neglect that can be established almost as definitely as guilt on a criminal charge. Our courts are extremely chary of assuming functions that are so personal and delicate in their nature.

(4) JUVENILE. COURTS. The obvious impropriety of dealing with the offenses of children as though committed by adults had long provided more or less arbitrary age limits for the capacity to commit a crime, and particularly to commit a felony. But the tendency to individualize punishment showed itself early in the case of juvenile offenders. It became particularly apparent that our systems of penology were least of all adapted to the problem of reformation and that, for children, most prisons, however hidden under other names, were schools of crime. Besides the problem of juvenile delinquency, the problem of the abandoned or exploited child became an urgent and pressing one in the last years of the nineteenth century. A movement to create a special type of court, which with a minimum of judicial machinery will assume the task of dealing with children who cannot be properly dealt with by their natural guardians, succeeded first in Illinois, and the Illinois Juvenile Court Law has been widely copied. The most discussed of the courts has been that of Colorado, over which Judge Ben Lindsay presided.

The attack on the constitutionality of the laws creating these courts was unsuccessful; it was based on the parent's right over his children, the validity of which was not questioned. But, if the considerations stated above were kept in mind, the power of the court to deprive a demonstrably incompetent parent of his right of custody was equally undoubted, and this power was ultimately sustained.

Likewise, the attack on these courts on the ground that they denied due process in criminal cases was rejected. The outcome of a hearing in the Juvenile Court was not a judgment of conviction or acquittal, nor were the pro-

ceedings in any sense criminal. The court assumed the guardianship of the child, and if it committed the child to an institution, this institution was not a prison and the commitment was intended as a means of training the delinquent and not as a punishment.

Juvenile courts, while needing considerable modifications to suit conditions of time and space, have fully justified themselves. No one would seriously advocate their abolition. In fact, an extension of the idea to other domestic relations is one of the striking demonstrations of the success of the experiment.

7. Responsibility of Parents

The control of the child's movements, the right to his services, the duty of support and care, involve the parent only to a slight extent in any responsibility toward third persons for the child's actions. The Common Law is in this regard in striking opposition to the Civil Law under which tort-responsibility for children is almost universally assumed and established by statute.

(1) CONTRACTS Of responsibility for the contracts of children, there has never been trace at the Common Law. Contracts of minors are void or voidable. When they are voidable, they can be avoided only by the minor. If he chooses to assert this right, it is on his own responsibility and for his own benefit. The parent is in no way responsible and, with the exception of the labor contract, may not enforce the contract in any fashion.

In order to render the parent responsible an agency of some sort must be established. No presumption will be indulged in to prove such an agency. A minor child is not ordinarily clothed with the powers of an agent for the family and, unless in some

given case such powers have been exercised with the express approval or the acquiescence of the parent, the parent will not be responsible for unratified contracts made by the minor while assuming to act as an agent.

Evidence establishing such an agency will be as varied as the situations are in which it is claimed. A parent will not be able to shield himself behind the contracts of an irresponsible minor child if it can be shown that the contracts were in fact made for the parent's benefit, even if every care is taken to make it appear that the sole contracting party was the minor. But there is no general agency, even in cases of necessity, in the minor child for the father. In cases of necessity, at the present time, goods furnished establish a claim for their real value, but that is on general principles of equity and the agency concept does not in fact enter into it.

(2) TORTS. It is in connection with torts committed by minor children that it is most frequently sought to engage the responsibility of the father. It may be said that on this point there is once more a real conflict between popular conceptions and popular practice and the law as enforced by the courts.

The common impression is that parents are responsible for injuries committed by their children, and in many communities such responsibility is in fact accepted by parents if the injury is of slight consequence. In more serious matters, however, the claim is likely to be resisted and from the point of view of the Common Law may be successfully resisted.

Minor children—even infants in arms—were held at Common Law to be capable of committing torts and were held responsible for them to the extent of their property. It has been supposed

that, in view of this responsibility, it was unnecessary to establish a vicarious responsibility of the parent for the willful or negligent injuries committed by children. The general rule certainly is that there is no such vicarious responsibility.

Even the fact that there has been negligence of some sort on the part of the parent is not enough to create it. So, for example, the fact that the parent has permitted an unruly child to be at large, where common sense would have required him to keep him under restraint, does not render the parent responsible for the child's wrongs, unless there is a direct connection between the parent's negligence and the harm done.

If the parent has permitted the child to be in possession of a dangerous instrumentality and knows or ought to know of the likelihood that it will be used to effect harm, a connection between the negligence and the injury may be said to exist and responsibility for the damage will in all likelihood be enforced. A tendency has been noted in recent cases to extend the vicarious liability of children actually under their parents' custody, but it is done rather by developing the doctrine of proximate cause than by any attempt at an agency. There is no likelihood that the Civil Law responsibility based on the mere fact of the relationship will be established in the Common Law countries.

8. Emancipation

The term "emancipation," like many others that have become current in discussions of family law, has been taken over from the Roman Law or the Civil Law derived from it. It is used, however, in a sense so different from that of the Roman Law that a careful contrast must be drawn to avoid the danger of false inferences. It was used in the Ro-

man Law to describe the process whereby a slave or a son is completely freed from the previously existing control of his master or father, and becomes a free man in every respect. In the case of a slave, the freedom attained was somewhat qualified. In the case of a son, it was complete. The emancipated son became *sui iuris*, a *paterfamilias* himself instead of a *filius familiar*, the owner of his own property, responsible for his own contracts and delicts. The term has gained some currency at the Common Law, particularly in the United States. Parents have been declared in some cases to have the power to emancipate their minor children, and thereby end the various duties and rights which have been discussed above as the constituents of the parent-child relationship.

The specific situation in view is usually that of a son or daughter nearing majority who accepts employment in a place different from that of the father's residence, and lives in that place a life necessarily independent and self-directed. Under the circumstances, an active right of custody can scarcely be exercised, and the permission of the father to accept the employment can readily be construed as implying a renunciation of his property rights to the child's earnings.

Under the circumstances the child is said to be emancipated. And this term seems all the more applicable when the parent has himself used it or has used words to that effect. Often the departure of the child from the parental residence is the result of a definite quarrel. Sometimes it may be the consideration of a specific contract. In any case, however, it is an emancipation quite different from the Roman institution of that name. It really amounts to no more than a surrender of the right of custody, and a gift by anticipation to the

son of the earnings he may obtain. It is sometimes said that the child at the same time surrenders any claim for support, but it is plainly evident that this claim cannot be actually surrendered. It was established not wholly in the interest of the child, but in part at least in the interest of the community. If under the circumstances the parent is in fact relieved from the duty of furnishing the necessities of life to his emancipated child, that can only be on the assumption that the gift of earnings will supply these necessities. If as a matter of fact they do not, the attempted emancipation will be of no effect, and the parent will remain subject to whatever means of enforcement the law has created for the parental duty of support.

Not only can the duty imposed by law not be renounced by the father, but the right of custody cannot be renounced, so far as the right implies a duty to take care. If the interests of the child demand restraint and supervision an abandonment of custody that involves a disregard of these duties of restraint and supervision is a failure of parental responsibility which the courts may treat as a reason for intervention.

Again, emancipation in its proper sense is not as irrevocable as legitimation and adoption. Even where emancipation is recognized under that name in Common Law countries, it is essentially revocable in character. Whenever, the parent wishes, he may resume his custody, regain his claim to unaccrued earnings and all the other rights that have been temporarily suspended. If the emancipation indicates a disposition to evade parental responsibility, the court may find in it a reason for terminating the parent's right of custody. But this termination will not be effected by the emancipation itself.

9. Termination

In the foregoing, the term parent-child has been used generally. It is evident, however, that in all the discussion the relationship referred to is that between the parent and the minor child. Upon attaining majority, the legal relations between parent and child, as far as the rights of custody, education, or punishment and the duties of support and care are concerned, are automatically terminated. In these matters the relation is precisely the same as though no kinship existed.

On the other hand, the law does not ignore the fact that blood relationship still subsists. The relationship clearly subsists in regard to the canonical impediments to marriage and in regard to succession on intestacy. Nor will it be ignored in equity. Contracts between parent and child, transactions between them advantageous to one or the other, will be scrutinized with the fact of relationship in mind, and sometimes be avoided because of that relationship. Similarly the relationship will enter into the interpretation of other transactions and determine whether an act does or does not constitute

a resulting trust, or whether an implied promise to pay for services can be construed from the facts.

Although in general the interest of the parent in his child's earning power and his duty to support his child are ended at maturity, there have been imposed in recent times reciprocal duties to support on parent and child. These duties are wholly statutory. They are part of a general plan to provide for the relief of incapacitated or destitute persons. A destitute parent, who cannot support himself by his own exertions or property, must be supported by his adult children to the extent of their power, and some public authority is clothed with the power of enforcing this support, if necessary, by penal measures. A destitute adult child has a corresponding claim on a parent.

Just as the relationship of parent and child is terminated, to the extent indicated, by majority, so it is terminated by the marriage of the child. The age at which a valid marriage can be entered into, usually called the age of consent, is generally lower

than the age of majority for women, and in many states for men as well. Upon marriage, so many new duties and responsibilities are assumed that it would be highly undesirable and impracticable if they were complicated by the continued existence of the duties and rights of the parent-child relationship. The age of consent usually implies that a marriage can be entered into without the parent's consent. There usually is, however, another and a lower age limit in which marriage with the parent's consent is also valid. Such a marriage has exactly the same effect, even though the new couple will remain for an appreciable time minors in regard to their property interests. The new relationship of husband and wife, established during minority, does not terminate the parent-child relationship, but is paramount to it whenever the duties and rights created by the two conflict. If either of the young persons becomes widowed while still a minor, the parent-child relationship need not be resumed, for, strictly speaking, it was never abrogated.

■

Illegitimate & Foster Children

I. ILLEGITIMATE CHILDREN

1. History

The position of illegitimate children in most of the feudal countries was complicated by questions of equal marriages and the tendency to caste-feeling which a stratified society creates. A counterforce was present in the ordinary emotions of parental affection, and even in the ancient and deep-rooted popular theory of heredity which ascribes to the father the greater—in fact the sole—influence in the transmission of hereditary qualities. These forces are, as is obvious, in contradiction with the feudal emphasis on rank of both parents, but no attempt at reconciliation was made, nor did such an attempt seem necessary.

To the Canon Law, for the purpose of computing degrees of kinship as impediments to marriage, legitimacy was irrelevant. The fact of birth or procreation was enough. The Canon Law did, however, recognize illegitimacy in regard to inheritance which was also within the jurisdiction of the Ecclesiastical Courts. And since illegitimacy implied illicit or

at any rate irregular sexual connection, it involved immorality in the parents, and consequently it implied a moral taint of some sort that could not be ignored even in regard to the offspring.

For the Feudal Law on the other hand, legitimacy was a matter of first-rate importance. Tenure of land always retained something of the nature of the Roman *Precairium*, the tenancy by sufferance, which played a large part in creating the institution of feudalism. This ancient situation was perpetuated in some of the feudal incidents, such as relief, *primer seisin* and the like. Besides, by feudal theory, the right of controlling marriage and devolution was of practical importance in view of the personal bond which was assumed to exist between every lord, and every vassal.

There was also the attitude of the feudal *curia* to be considered. All the persons there who held by equal tenure from the same lord and were each other's "peers," *pares*, rated their dignity highly and resented the presence of a man who had married below his rank,

disparagium. Provisions against "disparagement" loom large in Magna Carta. Children of such disparaging marriages did not succeed to the fief in most parts of feudal Europe, even when the marriage was canonically valid, as, for example, the "morganatic marriage." *A fortiori* children of a wholly uncanonical union would be quite excluded.

Because of the fact that in feudal theory a man's position in the community depended on his tenure, the status of illegitimacy was a source of revenue to the lord of the estate. Not being an heir actual or expectant of a tenant, he was merely a tolerated sojourner like a foreigner, and could be made to pay a tax for the privilege of remaining there.

The Church, however, in the interests of morality, strongly encouraged the late Roman institution of legitimation by subsequent marriage. The feudal courts fought against it, but on the Continent in general the institution was widely accepted for all but the highest grades of the feudal system. Not only morality, but the desire to place illegitimates under proper care,

contributed to this effort to facilitate legitimation. A special ceremony, such as placing a cloak over the illegitimate child, on the marriage of the parents, was common and gave rise to the name of “mantle-children” for those so legitimated.

In England, however, the Church was unable to effect this result. In a famous council at Merton in the great men specifically repudiated legitimation against the pressure both of the King and the prelates, and the words in which they rejected it “*nolumus leges Angliae mutari*” became historic, and controlled English law until the most recent times. The other feudal institution, the limitation of the rights of children born of an unequal marriage, was never adopted. A disparaging marriage might be a wrong done by those who were responsible for it, and a cause for justified complaint, but it was a valid marriage in every way, both in the Church courts and in those of the Common Law.

2. The Common-Law Attitude

The Common Law, therefore, in general made no distinctions among the two groups of children. A child was either legitimate or illegitimate and he was one or the other completely. And whatever status he had at birth he retained permanently. There was no way in which—except later by Act of Parliament—a bastard could be legitimated. The status depended wholly on the validity of the marriage of the parents. If at the moment of birth, the parents were lawfully married, the offspring was legitimate. The time of conception was irrelevant. The lawfulness of the marriage was the issue. What constituted a lawful marriage was one of the sharp controversies of the time, and will be discussed later. Here it is merely necessary to state that if in fact the marriage was unlawful,

whether because of a canonical impediment known or unknown, or because of the absence of ceremony when a ceremony was essential, the child of the marriage was illegitimate. The putative marriage was not recognized, and good faith was quite irrelevant.

Again, if the marriage though valid when made was subsequently annulled for what was called a “diriment” impediment, *i.e.*, force or fraud, the annulment went to its inception and the children born during the marriage were retrospectively rendered illegitimate. No change was made in this harsh rule until modern times.

The position of the bastard at Common Law was particularly difficult. The Roman Law and most of the other systems had recognized at least the relationship of parent and child, between the bastard and his mother. The Common Law did not. The bastard was *filius nullius*. He had no family relations whatever by right of birth, neither father nor mother, neither brother nor sister nor collateral kinsmen. The only family relationships he would possibly have were those he created himself by a valid marriage and the birth of children in such a marriage.

It was not, however, any part of the law’s purpose to discourage proper provision for an illegitimate. When the “*rationabilis pars*” existed in the English law of inheritance, such provision was a little difficult, but when complete liberty of testation was established, no restriction was made as to persons capable of receiving devises or legacies, and parents desiring to create trusts or make gifts to illegitimates were in no danger of having the transactions avoided. It must be pointed out, however, that despite the legal disabilities just mentioned the position of an illegitimate son of

a man in the upper ranks of the feudal system was not as degraded as the legal restrictions would seem to indicate. The bastard of a king or a great noble, while obviously below the rank of his legitimate brothers, did not lose altogether the prestige of his father’s rank. He was entitled to bear his father’s arms with a “bend sinister,” and he frequently received a definite grant of lands which gave him a full position in the feudal community.

3. The American Attitude

The conditions under which the American colonies were settled made it quite impossible for the English legal attitude in regard to illegitimate children to be completely transferred. Neither the insistence on prescribed rules for valid marriages nor the emphasis on the feudal position of a bastard was practicable where frontier conditions prevailed.

When Common Law doctrines became the ruling principle of colonial courts, the Common Law rule as to the disabilities of bastards and the impossibility of legitimation were frequently asserted in books. Whether they were actually applied in practice is more doubtful. At all events, after the Revolution, statutes mitigating the disabilities appear very often. Almost everywhere the natural relationship between the bastard and his mother was fully recognized.

By this fact alone the bastard ceased to be *filius nullius*, since this relationship carried with it the complete group of consanguineous kinsmen on his mother’s side. Full rights to support and inheritance on intestacy went with the recognition.

Similarly, the power of legitimation was early accorded by statute. Legitimation by subsequent marriage of the parents

has been adopted in most jurisdictions, as fully as at the Canon Law. Again, legitimation by formal recognition of the father is facilitated in many states. In some, a written statement of recognition is required. In a great many, all that is necessary is a statement to that effect, accompanied by conduct toward the child that is the same as towards a legitimate child. Taking the child into the family is generally enough to establish its legitimacy. Such a recognition differs materially, as we shall see, from the mere adoption of a stranger.

It may be noted that a recognition of legitimacy cannot be revoked. It is not the grant of a status by the father. It is a manifestation of a relationship which, in the absence of fraud, he will not be allowed to contradict.

A very few states have taken the radical step of abolishing the status of illegitimacy altogether. By these statutes, an illegitimate child is in every respect as fully the son of his father as of his mother and is so for every purpose, including that of inheritance. The only situation in which an illegitimate is placed at a disadvantage is the case in which the father is married to a woman, other than the child's mother. The illegitimate child does not in that case possess the right of residence with the father, if the latter's wife does not consent, but in regard to support he may make precisely the same claims as his legitimate brothers and sisters and they will be enforced as fully, directly and indirectly, as if he had been legitimate.

These statutes are too recent to enable us to determine their effect on the social life of the communities in which they were passed.

A right of support is granted illegitimates in many jurisdictions, whether or not they are acknowledged and legitimated. An action to enforce a claim to

support may be brought by the illegitimate himself, and compensation for necessities furnished him may be demanded. Again, without a full recognition of legitimacy, an acknowledgment of the relationship—usually in writing—will sometimes give rights of inheritance or intestacy, even if it gives no more.

4. Presumption of Legitimacy

The consequences of illegitimacy were so serious at the Common Law that the courts indulged every presumption in favor of legitimacy, and rarely excepted on the strongest evidence reached a conclusion that would bastardize the issue of a union. The rule of the Roman Law, *pater est quem nuptiae demonstrant* was never completely adopted by the Common Law courts, but an analogous presumption was developed. It was declared that no evidence would be received in regard to a child's illegitimacy if the parents were married when the child was born and if the husband was "within the four seas," *i.e.*, within Great Britain, at any time at which conception might have taken place.

This presumption has been adopted in most of the American states rather as a rule of law, than a true presumption. It is not evidential in character, nor does it take the place of evidence. It expresses the court's distaste for controversies which are found to be disagreeable and degrading to the parties who take part in them, and in which the chief burden of an adverse decision will be inevitably borne by an innocent person. Such controversies are therefore forbidden, whenever there is even a possibility that they may be unjustified.

Usually, in the United States, the condition is not the residence of the husband at the time of conception, but the fact that at that time the parties were living together, that access was pos-

sible and that the husband was not at the time demonstrably impotent. The terms in which the statute is couched generally make it absolute under the conditions mentioned, but judicial interpretation has added one or two additional qualifications based on common sense. The birth of a mulatto child to two white or two black parents, even if not provided for as an exception to the presumption, will doubtless compel it to be disregarded.

Frequently the statutes forbid the legitimacy to be questioned, even if it is questionable in general, by the husband or wife or their privies. This again is based on a consideration of the decencies of litigation, rather than on rules of evidence.

5. Filiation Proceedings

The Common Law rule that the bastard is *filius nullius* was, as we have seen, disregarded by the Church Courts when kinship was at issue for purposes of marriage. It was also disregarded by the public authorities when the question of assuming the burden of support of a foundling was concerned.

The mother of an illegitimate child would be heard to declare who the father was, and, in such a case, the parish authorities might proceed against the putative father to require him to support the child or to give a bond which would ensure its support. Obviously, testimony of the sort mentioned is to be received with caution, and usually the proper authorities demand corroboration. But when they are satisfied that the parentage has been proved, the parish may demand protection against an unnecessary burden in this case as it can in the case of an abandoned legitimate child. These proceedings, usually called filiation proceedings, are now regularly taken before a court—often a

special court for domestic cases—and are in the full sense legal proceedings. A judgment declaring the filiation is in consequence as fully valid as any other judgment of that same court. Further the matter becomes *res judicata* and cannot be questioned *aliunde*. Once the relationship is established the child is entitled to whatever claims illegitimate children have in that particular jurisdiction.

II. ADOPTION

The Common Law knew no adoption, any more than it recognized legitimation. The Civil Law, on the other hand, had taken over from the Roman Law an elaborate scheme of adoption together with many technical rules on the subject.

Adoption must be distinguished from the mere assuming of the care of a child who is not the child of the foster-parents. Such assumptions out of sheer human kindness are common, and are particularly common in case of emergencies. Another motive might of course exist. There might be a definite wish to possess the services of a new member of the family. Whenever such an assumption of care over a minor child takes place, if there has been no real adoption, no legal rights of any kind are created, no matter how long the situation has existed and how strong an attachment has grown

up between the child and the foster parents. Any person lawfully entitled to custody of the child may at any time remove it. The foster parents may at any time eject the child, or surrender him to the proper public authority. Any control of the child's services can be justified, if at all, only on the theory of a contract in which the consideration is the care and maintenance furnished.

The loose employment of the term "adoption" to describe a situation not amounting to adoption makes it necessary sometimes to overemphasize the legal distinction. The facts of the situation will not be ignored by the court when it has resumed the custody of a child. In determining the child's future custody, it will take into account any relationship in which what amounts to parental care and filial affection have been shown between persons who have no legal claims on each other.

The relationship is merely a *de facto* one of foster parents and child even when there is a real kinship between them. Grandparents, aunts, and uncles cannot adopt a child by the mere process of permitting it to live with them, any more than can total strangers.

While the Common Law knew no rules of adoption, the American communities found it necessary to establish them. Almost everywhere, statutes have been passed permitting both married couples and unmarried persons

to adopt minor children. As a rule, special conditions must exist to enable this to take place. There usually is a maximum age limit. The assumption of the new relations must follow set forms. The court conducts an investigation both of the character of the applicants and of the conditions which impel them to make the application. If the child to be adopted has living parents, a written surrender of all claims must be made before an order for adoption will be issued.

When adoption is completed, the adoptive parents and child have fully the rights and obligations toward each other that they would have if the child had been the legitimate and natural child of the adopters. The adoptive child does not become the brother or sister of the other children of the adopters, except *de facto*, and certainly not so far as the impediments to marriage are concerned. But except in this respect, no change is made in the family relationships of the persons concerned. The adoptive child acquires no new grandparents, uncles, aunts or collaterals, but retains whatever relationship of this kind he possessed before adoption, either by consanguinity or affinity.

Adoption, like legitimation, is irrevocable. Misconduct of the child or incompetence of the parents may justify the intervention of the court, but no more than in the case of natural relationship. ■

Husband & Wife

I. INTRODUCTORY

Most of the special rules governing the relation of husband and wife were created by the ecclesiastical courts. Marriage and divorce were the most important topics of the Canon Law, and an enormous volume of literature in Latin on the subject already existed before the Common Law took shape. The relevant rules to a large extent were taken over by this law before and after the Reformation.

From the point of view of sociology and anthropology, the relation of husband and wife is first of all the fact that between these two persons of opposite sex, sexual intercourse is licit, and between any man and woman not so related it is illicit and to a greater or less degree illegal, that is, subject to penalties of one kind or another. In the occidental family, monogamy is the rule, and with certain special exceptions, the relation of husband and wife can exist only between one man and one woman at any particular time.

This basis of licit sex relations is of great legal importance, greater than the part it plays in formal discussion would indicate. Legal writers and judges are

somewhat prone to pudicity and are inclined to omit, as much as possible, reference to all matters that concern sexual intercourse. While the sexual basis of the relation ought at no time to be lost sight of, there is another sociological aspect which is perhaps of equal importance in modern communities.

In modern western communities, which in this respect differ from communities in other places and of other periods of time, it is correctly assumed that every pair of husband and wife forms the nucleus of a separate economic and social establishment. Every community is a combination of such establishments, and the fact that the center of each of them is an adult couple of husband and wife is as much the background of the law of the family as the fact of the sexual relations permitted between this couple. While frequently there may be several such couples in any one establishment, that is not the rule, and in the majority of cases one such couple only is found.

From the point of view of the law, every such couple constitutes a family, whether living in a separate establishment or not. And no other persons are mem-

bers of that family except the children born to the wife while the relationship continues, provided husband and wife are living together at the time of conception. To these must be added legitimated and adopted children, taken into the household by the husband and wife while the relationship still subsists. In both cases, of course, the children are legally members of the family only during their minority. Since, therefore, a family ordinarily cannot exist except when there are a husband and a wife and only by virtue of the relation of husband and wife, the creation, continuance and dissolution of that relation are of vast legal consequence.

It has been frequently declared that this form of family organization has a value in itself, that its legal maintenance and protection may override the individual interests of the persons that compose it and often other individual interests. Modern legislation is occupying itself to an increasing degree with social regulation, and for that reason, the nature and value of the existing family organization is more and more frequently being subjected to judicial scrutiny. The prevalence of divorce in the

United States, and to a lesser degree in England, and the consequent increase in “broken families” has given the present social structure a distinct coloring, but the assertion of the unique value of the monogamous family, and the importance of securing its continuance and preventing its disruption, is still a cardinal tenet of the law, as it is still a fundamental principle of western social economy.

II. MARRIAGE

The act or transaction by which the relation of husband and wife is created is called marriage. Vigorous controversy has at all times existed about its nature and its legal analogues. The discussion of these questions may be temporarily postponed in order to examine very briefly the contract to marry, the “espousals” or “*fiancailles*.”

1. Engagements to Marry

The actual transaction of becoming married follows, generally after an appreciable interval, a contract to marry. The situation of persons who are under obligation to be married in the future is, at Civil Law, not different from that of any other persons who have assumed mutual contractual obligations of future performance. But at the Canon Law, and in ordinary social life, the situation of persons under these obligations is of a special sort. They are in a definite status, described as being “affianced” to each other, or “engaged,” and a certain change in their relations or legal powers is effected by entering this status.

At Roman law the contract of espousal, the *sponsalia*, was the only consciously made contract in relation to marriage, because the actual marriage itself, the beginning of conjugal relations, was regarded as much more like

a delivery of a *res* than a contract. The *sponsalia* were made by the parents of the bride and groom, and while the consent of the bride and groom was in later times regarded as essential, this was certainly not so in the earlier stages, and was strictly speaking not a part of the contract in the proper sense, at any time. The young persons were “promised,” *sponsus*, *sponsa*, (from which our word “spouse” comes). They did not do the promising. This in effect was the situation in the Middle Ages as far as the upper classes of the feudal system were concerned. Marriages were contracted for by the guardian (*i.e.*, the feudal lord) or by the parent, and this contract was often made when the persons to be married were little children, so that their consent could not enter into the question at all. If the marriage did not take place when the bride and groom reached marriageable age, often as low as fourteen, the breach of contract occasioned was committed by the parents or guardians. In the case of orphans or widows, the right to determine the marriage, the *maritagium*, was a valuable feudal incident much prized by the feudal lord who owned it. It could be transferred, sold or pledged in whole or in part.

The orphan or widow at first had no legal right to refuse the proffered marriage except for the single reason of disparagement, *i.e.*, a marriage with a person of lower rank. A failure to marry was a feudal offense for which a fine might be inflicted. Indeed, this fine might represent the consideration given by the ward in order to marry according to his own choice.

In ordinary cases, when the father of the marriageable son or daughter was alive, the wishes of the persons to be married were doubtless in fact given greater consideration, but the

validity of the contract by which the marriage was disposed of was not affected by the refusal of the persons directly concerned.

Church influence modified this so that by the sixteenth century the contract was more and more thought of, in the secular law as in the Canon law, as made by the persons themselves who were to be married. An actual contract to marry between the parties had always been recognized by the church, a contract quite apart from the “*sponsalia*” which the parents or guardians entered into. This contract was particularly contrasted with the marriage itself in a way to be discussed later.

As far as the Common Law was concerned the contract creating the engagement was dealt with as a special sort. The Statute of Frauds required contracts in consideration of marriage to be proved by a written memorandum, but it excepted mutual contracts to marry. Breach of the contract was actionable on either side, and, in view of the very considerable economic advantages to the husband in many marriages, the damages to the disappointed groom were, if anything, more readily estimable than those to the bride. But in ordinary practice, actions for breach of such a contract, the “breach of promise” of common parlance, was regularly brought by the woman, and not by the man. There is even authority for holding that it could not be brought by the man.

In an action for a breach of contract to marry, an offer to carry the engagement out was usually a complete defense, even if the contract had actually been breached. On the other hand, arrest on mesne process and body execution survived in these actions when they had been abolished for other contractual suits.

Recourse to this action be-

came a great abuse throughout the nineteenth century, and became little better than a sort of blackmail. The type of evidence adduced appealed particularly to sensational journalists and morbid curiosity seekers, and the trials were often public scandals. A concerted movement to abolish them has recently been making considerable headway in the United States; many states have in fact abolished them, and the number is likely to be much increased.

The status of being affianced or engaged has certain other effects on the legal relations of the engaged couple. A gift made between them is generally taken to be conditional and to be made with a view to the coming marriage, the *donatio propter nuptias* of the Romans. If the marriage does not in fact take place, the gift becomes void and a right to demand its return is created. This is especially true of the typical engagement gift of a ring. None the less suits for this purpose are not encouraged. The tendency of the courts is to regard the duty to return as a moral rather than a legal one.

Seduction of an unmarried minor daughter was a tort which created a claim for the father on the basis of loss of services. No action would ordinarily accrue to the seduced girl. Her consent deprived her of the power to characterize the seduction as a wrong done to her. But if the seduction was effected by means of a promise to marry, a right of action was usually secured by statute for the seduction irrespective of the breach of promise, and this right of action has survived even in those jurisdictions which have abolished the breach of promise suit. Besides the civil suit, a great many jurisdictions made seduction by means of a promise to marry a criminal offense.

2. Contract of Marriage

The later Common Law on the subject of marriage inherited from the Canon Law a vast learning on the distinction between contracts of marriage *per verba de futuro* and *per verba de praesenti*. The former was the contract to marry already discussed in part on its secular side and with a view to its consequences in the secular courts. The latter was the marriage itself.

The distinction is taken from the Sentences of Peter the Lombard, Bishop of Paris in the twelfth century, a contemporary and a rival in canonical authority of Gratian himself. Peter's doctrine was not the one prevailing everywhere, and it differed in one or two important matters from the doctrine set forth in the Decretum of Gratian which became the foundation of the Canon Law itself.

The contract to marry *per verba de futuro* bound the parties, and as far as the Church went, bound them indissolubly unless they had been formally released from the obligation. In the secular courts—in late times—such a contract could be enforced only by a suit for damages sustained. But in the church courts, an approach to a specific performance was obtainable. The defaulting person was admonished, and by an appeal to his conscience pressed strongly, to fulfill his promise. In the last resort he might be threatened with excommunication, a matter of the most serious consequences both in the spiritual community and in the secular.

Persons so bound were united in fact. They were so much united that the existence of this bond rendered both persons incompetent to marry any one else canonically. It was the much discussed "impedient impediment of pre-contract." A marriage entered into while the impediment was effective was not merely

voidable. It was void. It was a situation that was notoriously of frequent occurrence and created difficulties. One of the most urgently advocated of the canonical changes, after the breach with Rome, was the abolition of pre-contract as an impediment.

The contract *per verba de futuro* did not merely create an impediment. It could be turned at once into a complete marriage by the mere fact of cohabitation, the *copula*. This apparently—although the point is disputed—did not necessarily mean sexual intercourse. It meant merely that the persons who had agreed to marry actually began living together and assuming the actual obligations, of such living together. As soon as this took place, they were husband and wife in the fullest sense, and the relationship so begun was indissoluble except by the death of either of the parties.

The other type of marriage set forth in the Sentences was the marriage *per verba de praesenti*. The contract here consisted in a mutual agreement to assume the status and the mutual relations of husband and wife at once. It was complete as soon as the agreement was reached. However, since it was exhaustively performed as soon as made, it could be likened to a mutual tradition of conjugal rights between the parties, and did in fact resemble the transaction to which it was frequently likened in discussion, the sale of a specific chattel for a definite sum of money.

As far as the Canon Law was concerned these two contracts, *per verba de futuro cum copula*, and *per verba de praesenti* created the relationship of husband and wife. No more was needed as far as the effects of marriage came. Sexual intercourse between either of the parties and anyone else was adultery. The child born to the wife was the

legitimate child of the husband. Where a *rationabilis pars* existed it fell to the wife at the husband's death. The disabilities of coverture at once accrued. While this was in general the accepted Canon Law in England, there were doubts raised. Was a church ceremony necessary, a celebration *in facie ecclesiae*? It was maintained by many authorities that it was, and that a merely consensual marriage even *per verba de praesenti* did not do more than bind the persons to each other just as a mere engagement to marry might do.

The English ecclesiastical courts in the main held that the marriage was valid by the agreement to assume conjugal duties at once, or by the assumption of such duties after a mutual engagement, but that the assumption of the status imposed on the parties a strong religious obligation to have the marriage celebrated *in facie ecclesiae*. The ceremonial, and the Mass which was celebrated on the occasion, added nothing to the legal validity of the marriage, but did invest it with the sanctity of church approval and were a means of edification for those who took part as well as for the whole community.

The relation of dower to the celebration *in facie ecclesiae* will be discussed later.

The obligation to have a marriage which had been constituted by consent celebrated by a church ceremonial, like all other religious obligations, could be enforced by ecclesiastical sanctions, effective enough in an age of faith, but less effective when the church's authority became lessened. During the seventeenth century consensual marriages which were followed by no ceremony at all were common enough, and churchmen of the Church of England found the situation highly deplorable. The situation was rendered more se-

rious by the rise of dissenting groups who in most cases regarded the ceremonial marriage as desirable but not a bounden religious duty.

In Scotland, particularly, the establishment of Presbyterianism as the state religion made the consensual marriage almost the rule. During the seventeenth century, therefore, when the American colonies were being settled, the Scottish practice must have had an additional effect on the growing English practice because of the union of the two kingdoms. One of the effects would be an examination of the question from the point of view of English Canon Law and this, as has been said, would confirm rather than weaken the tendency to treat marriage as a contract that had an effect quite analogous to other well-known contracts.

Finally the difficulties created by consensual, unrecorded and unpublicized marriages were met in England in 1753 by the passage of Lord Hardwicke's Act. This expressly exempted Quakers and Jews, and had no application whatever to Scotland, Ireland or the Colonies. The result was to make clandestine marriages difficult except for those who could escape to Scotland where Gretna Green just across the border became the haven of runaway couples. Lord Hardwicke's Act was several times amended and new conditions added, but the existence and validity of consensual marriages in England before 1753 was still a subject of frequent legal examination. The overwhelming weight of authority was that they had been valid, and it would doubtless have passed generally as an historical fact if in the long case of *Regina v. Millis* in 1843, a different determination had not been arrived at, because of the fact that the House of Lords was equally divided. The correctness

of the decision in the particular case may be admitted without accepting the in-correct historical assumption on which it was based.

Since Lord Hardwicke's Act did not apply to the Colonies, the consensual marriage was quite generally recognized there. The particular conditions of colonial life would have made insistence on a ceremonial marriage a virtual impossibility, and it was not in fact insisted on. The terms "Common-Law marriage," "Common-Law husband," "Common-Law wife" seem to have come into general use for this consensual marriage.

Not only did the requirements of a religious ceremonial not prevail in the Colonies because of physical difficulties, but there was a strong religious movement against it. The extreme Puritans, known as Brownists, to which group the Plymouth colony belonged, held to the private character of marriage—and indeed of divorce—as a religious dogma and insisted on it. Even less intense sectaries maintained that the religious ceremony was an ecclesiastical usurpation devised for purposes of profit and power. At any rate, except in Virginia, there was no strong tendency toward adopting Lord Hardwicke's Act.

None the less, many religious denominations constantly preached the desirability of a religious ceremony or at least of a religious benediction of the couple, and in many cases persons married by mutual consent also went through a religious ceremony to satisfy religious scruples. This fact undoubtedly contributed to the loose popular usage of using the expression "Common-Law marriage" as a euphemism for a wholly illicit union.

In the latter part of the nineteenth century, the abuse of the informality of the consensual or

common-law marriage became greater and greater, particularly on the death of a wealthy man reputed to be a bachelor. The statement of a woman who claimed to have been the common-law wife of the decedent was often the only testimony available, and it was difficult to refute. A great many jurisdictions therefore—and the number is increasing—abolished the common-law marriage and made a ceremony a statutory requirement. In some states the ceremonial requirement was omitted in certain cases, or a written and attested declaration was permitted in its place. Constitutional difficulties were raised and sometimes with success. In the main, however, it may be taken as a fact that these statutes are constitutional and that the common-law marriage in the United States is likely to disappear completely.

The contract of marriage, even as a consensual contract, is not treated in law as other contracts are treated. Not only it cannot be rescinded by a counter-contract as any other contract could be rescinded, but there are particular provisions by which its exceptional character is emphasized.

Since the middle of the nineteenth century it has been an actionable tort to induce a breach of any contract. But it usually involves no liability for preventing a contract from being made, except in cases of restraint of trade. Nor obviously is it a tort to induce a contract. Both acts, however, are frowned upon by the law as far as marriage is concerned. Any agreement in restraint of marriage is wholly void. Any provision in a will requiring a person not to marry as a condition of receiving a bequest is invalid, and the condition is disregarded.

In the same way, marriage brokerage contracts are void as against public policy. This is the

case when the promise of reward is made to a person who is not a professional marriage broker.

The underlying doctrine is that the public interest in the marriage contract requires that there be no inducing cause except the mutual desire of the parties to be married. Equally, it is a matter of public interest that no difficulties be created by any outside pressure or agency. The general policy of the law, now somewhat qualified by sterilization statutes and eugenic requirements for licenses, is to encourage marriage. The announced reason was formerly that of increasing the population, a reason no longer much in evidence in view of the obvious dangers of overpopulation. But it reappears in legal discussion and is a definite vestige of the former Church control of marriage which necessarily founded its doctrine on the Biblical command to increase and multiply.

3. License

The purpose of the ceremony as well as of a written declaration was to provide indisputable evidence that a marriage had taken place. Generally the statutes that make a ceremonial marriage necessary—and often where a ceremonial marriage was not necessary in law, but was in fact entered into—required a report of the fact by the officiating clergyman or public official, and provided means for recording such reports. Usually a penalty was imposed for failing to file the report, but the failure in no way affected the validity of the marriage.

But besides the formality of the ceremony and the requirement of a record, an increasing number of states have by statute required a license to be procured in advance of the ceremony by the persons intending to marry. The purpose of the requirements of the license was in

part to give public notice and enable legal impediments to the marriage to be discovered, and in part to discourage hasty marriages by requiring a period of time to elapse between the announced intention and the marriage.

This latter purpose was particularly obvious in the states which require several days to elapse between the license and the marriage. Indeed the popular name for a statute with this requirement, the “Gin-Marriage Law” is sufficiently expressive. There is little doubt that in a certain measure the statutory purpose has been accomplished although not as fully doubtless as was hoped.

If the license has been improperly granted to persons who, under the law of the state, are incapable of being married, such incapacity is not removed by the license. False statements as to residence or age or other matters which do not concern a positive legal incapacity, while they subject the declarants to penalties, do not affect the validity of the marriage. It is likely, however, not only that it is misconduct on the part of the officiating celebrant to perform a marriage without a preceding license, but that the ceremony is invalid and that persons so married do not become husband and wife.

4. Eugenics

Age, celibacy, citizenship, religion, relationship and, in feudal times, rank, were the only prerequisites to contracting a valid marriage. In modern times, the spread of a scientific study of population has created a new requisite, physical and mental fitness. To a certain extent, these things were already provided for in the power to annul a marriage for insanity or impotence or fraud existing at the time of the marriage itself. But the new principle went much farther and

based itself on a scientific study of the means of securing higher quality of population, or at any rate of eliminating the wholly or completely unfit.

Several states have passed "eugenic" statutes, which provide for a medical examination before a license is issued and deny a license to anyone who cannot present a proper certificate. Very few of these statutes have been in force long enough to permit any just estimate of their effectiveness. Although in a country organized by states, with complete freedom of movement, the law can easily be evaded by the mere process of crossing the state line, it does furnish a certain degree of security if either of the parties desires it.

The eugenic requirements, so far as they have been made statutory, are naturally merely negative. They exclude from marriage those suffering from communicable or transmissible diseases, whether mental or physical. They make no attempt at a selection determined by any standard. In the present state of scientific knowledge, no such selection is either feasible or desirable. Limited as the statutory requirements are, they are thoroughly unpopular in many parts of the country. There is a profound distrust of any official regulation of fitness for marriage, over and above the suspicions that all regimentation or supervision excites in Americans. Only the clear demonstration of both the utility and the effectiveness of these measures will make them generally acceptable. And there will be no real test of their effectiveness until they are passed in a large proportion of the states, or in a large group of contiguous states. Eugenic regulation is evidently a movement in which initial progress cannot be otherwise than slow.

5. Evidence

Where the consensual marriage is valid, evidence of the consent is essentially the same as evidence of any other contractual consent. If there is direct testimony available, either written or oral, by which the agreement to enter at once into conjugal relations is manifested by both sides, this testimony will, of course, have great weight. But such testimony is only rarely available. This contract is one more likely than others to have been entered into without the knowledge of anybody else. Indeed, the fact that a consensual marriage rather than a ceremonial one was entered into is itself some indication of a wish for concealment, since almost everywhere ceremonial marriages constitute the customary form of wedlock.

While, therefore, direct testimony of the actual contract of marriage is rarely available in cases of consensual marriage, evidence of the result of that contract is necessarily common. The chief result is, as has been said, to create the relation of husband and wife between the parties, and externally that relation is evidenced by the fact that conjugal relations have been assumed and that the parties live together in such a way that reasonable persons would regard them as husband and wife. This is, of course, strongly confirmed if they refer to each other publicly as husband and wife, and if children born to the wife during cohabitation are treated by both of them as their children, are christened with the family name of the father, or bear that name generally. All these facts would justify persons who know them in assuming that persons who conduct themselves in this way are husband and wife. If this inference is made, an additional inference is implied that at some given time before this conduct

was exhibited they entered into a contract to be husband and wife.

Evidence of this character is so frequently used where the fact of the marriage is in issue, that the evidence itself has received a half-technical designation. It is called "habit and repute." Frequently the term "cohabitation" is improperly substituted for "habit," and it is made to appear that actual sexual relations are essential. There is no justification for this view nor for the common practice of speaking of a "marriage by habit and repute." "Habit and repute" in no sense whatever create the marriage relation. They constitute evidence from which a contract of marriage may be inferred, evidence which may be met with other evidence showing that no marriage had in fact been entered into.

Some of the kinds of evidential matter which will be taken as habit and repute have already been indicated. They will vary in kind as well as in weight, but in general they must involve a public holding out by a man and woman that they are man and wife. Neither the actual living together, nor a general belief in the marriage will suffice of itself. If there is direct evidence that persons have engaged themselves to marry by a contract to be performed in the future, and they are thereafter found to be conducting themselves as married persons, the evidence created by habit and repute will be all the stronger because of the demonstrable contract *per verba de futuro*. But even the fact of such a contract does not turn habit and repute into the *copula* of the Canon Law. It remains a group of evidential facts to be weighed and considered together with other evidential facts.

The use of habit and repute to establish a marriage, when it is in issue, becomes of particular importance when one or both

parties to the marriage are dead and the question of marriage must be determined in order to determine the devolution of property or the legitimacy of issue. The tendency of the court has always been to assume moral conduct rather than immoral and the court is likewise much disinclined to declare children illegitimate. For that reason, the evidence of 'habit and repute' is likely to receive a more favorable hearing when a marriage is sought to be established, than similar evidence would be in the case of ordinary contracts.

The courts accordingly often speak of a "presumption" of a marriage created by habit and repute, and in some states of the United States such a presumption is statutorily established. But the character of habit and repute as evidence is not really changed by calling it a presumption. The presumption in this case is never a conclusive, but merely a disputable presumption. If the evidence of habit and repute is unequivocal and uncontradicted, and the court is therefore justified in finding that habit and repute have been proved; or if, whether contradicted or not, the court finds as a fact that there have been habit and repute, the existence of a presumption is sufficient to compel the court to infer that a marriage had taken place, in the absence of other evidence showing that it had not. That is to say, habit and repute even if proved will yield to stronger evidence that no marriage had in fact been entered into. This evidence may be found in admissions made at other places and times, in the existence of impediments preventing marriage, in the fact that either of the parties was at that time married to someone else, and other evidence of equal cogency.

In fact, a counter-presumption may overcome the presump-

tion created by habit and repute. If evidence

is presented that a man and woman had been living together illicitly, and further evidence is produced that they had later conducted themselves as married persons and were so reputed, "habit and repute" lose their effect because of the presumption that what is illicitly begun has continued in the same way. Since the presumption created in habit and repute is based on the assumption that men act morally rather than immorally, the evidence of an initial illicit relation destroys the basis on which habit and repute have been accepted as evidence of a prior marriage.

Evidently the real value of habit and repute, whether considered as a presumption which dispenses with evidence to establish a *prima facie* case or as evidence itself, is to be found in jurisdictions that recognize the consensual marriage. Where a ceremonial marriage is obligatory, habit and repute are admissible, but their evidential value must be determined by judge or jury on their own merits. They can create no presumption and their value will depend on an adequate explanation of why the record of the marriage, which would be conclusive evidence, is not presented. Such an explanation is ready to hand when both the persons whose marriage is in issue are dead and cannot be questioned, especially when they had come into the place of their last residence from some distant or unknown place outside of the jurisdiction of the court.

III. RELATIONS OF HUSBAND AND WIFE

1. Personal Relations

Husband and wife reciprocally owe each other (1) cohabitation, (2) sexual access, (3) sexual fidelity, (4) conjugal kind-

ness. In addition, (5) the husband owes the wife maintenance and support and (6) the wife owes the husband the duty of household management.

These duties, bilateral and unilateral, are created by the status of being husband and wife. The contract of marriage does not establish them. That merely creates the status.

Of these duties the first four are so inseparably connected with the status of husband and wife that they cannot be altered by any agreement between the parties nor waived by non-insistence or disuse. The duties of support and household management, however, may be regulated to a limited extent by agreement. Such agreement, however, is subject to the ordinary contractual rules. There must be consideration. There must be no fraud, duress or undue influences. And, finally, the waiver or modification of these two duties by the agreement of the parties is conditional, the condition being that the purposes for which these duties were imposed can be adequately fulfilled without any excessive and unreasonable burden on either of the parties.

(1) COHABITATION. The duty of cohabitation implies that husband and wife are to a certain extent required to live together. The absenting by either of the two from the matrimonial domicile without the consent of the other constitutes desertion. And desertion in most jurisdictions is a matrimonial offense justifying redress in any court that has succeeded to the jurisdiction of the former ecclesiastical court of England. What redress is asked will depend on the circumstances—usually fixed by statute. In some instances, the aggrieved party has an option in the matter. The redress is usually in the form of an application for divorce, separate mainte-

nance or separation. If the husband has deserted the matrimonial domicile and has likewise failed in his duty of support, that is generally made a criminal offense as well. But the essence of the offense is not the desertion, but the failure to furnish support.

The domicile itself is selected by the husband. It is the only effective element left of what was formerly the conceded headship of the family. The right to select a domicile, however, is subject to the test of reasonableness. If it is for any reason unsuitable, given the circumstances of the family, the health of the wife or children, or certain special needs that can be shown to be controlling, the wife need not accept the domicile selected, and her absence from it does not constitute desertion. Indeed, in such a case, a continued refusal by the husband to select a proper domicile, coupled with his refusal to live with his wife in the place she has selected, would probably constitute desertion on his part.

(2) **SEXUAL ACCESS.** Failure to fulfill the duty of permitting sexual access constitutes a desertion, ordinarily called constructive desertion. It is obviously more difficult to prove, if it is denied, than the other type of desertion, and regard is had to the difference of conventional rules in this matter between the sexes. Ordinarily "constructive" desertion permits the same legal action as actual desertion. But occasionally it may rank as cruelty, *i.e.*, a violation of the duty of conjugal kindness.

(3) **SEXUAL FIDELITY** Sexual intercourse of either part with a third person is adultery, the most serious of matrimonial offenses. The ecclesiastical courts did not discriminate between the sexes. Adultery on the part of the husband was neither less nor more serious than on the part of the

wife but later, in English law, a distinction was made an adultery of the husband was rarely a ground for divorce unless accompanied by cruel treatment, while adultery of the wife was a ground. In the United States, and recently in England as well, this distinction has been abandoned.

Besides being a matrimonial offense justifying action for divorce, separation or separate maintenance, adultery in some parts of the United States is a criminal offense. Sometime the offense exists only where the adultery is open and notorious, but as a rule this is not a necessary condition.

(4) **CONJUGAL KINDNESS.** The duty of conjugal kindness means, in the main, abstention from any acts that could be described as physical or mental cruelty. Obviously corporal assault is such cruelty, but personal abuse, willful disregard of the feelings, comfort and convenience of the other, openly expressed contempt and dislike are equally acts of cruelty under the special situation of the marital relation, and may amount to a sufficient degree of cruelty to justify redress in the courts. But the definition of conjugal kindness probably does not go beyond the statement of these negative duties. That, there is a positive duty to entertain and express conjugal affection will probably not be insisted upon, if for no other reason than the extreme difficulty of enforcing it.

(5) **DUTY TO SUPPORT BY HUSBAND.** The duty of support on the part of the husband is unconditional. The misconduct, misbehavior or cruelty of his wife does not excuse failure in this regard. Her desertion of the matrimonial domicile, however, is such an excuse. He is under no obligation to furnish support except in the place he has se-

lected, or in the place in which his family actually live, if he has not made a specific selection. It is this duty which most frequently involves reference to third persons. In most jurisdictions non-support of a wife or child, unless adequately excused, is a criminal offense, and generally it is extraditable between the various states of the Union.

Further failure of the husband to make adequate provision will justify the wife in making contracts for this purpose and charging the husband. This is generally spoken of as an agency of the wife created by necessity. It is, however, unnecessary to force the situation into the category of agency, an attempt that creates difficulties of another sort. It is sufficient to say that the husband's failure vests the wife with power to impose this liability on him. The contracts so made will be tested merely by the good faith of the parties and will be enforced as contractual obligations.

An alternative method is to permit those who supply the wants of the family, if the husband has failed to do so, to maintain action for the reasonable value of what they have furnished on principles of equity or quasi-contract. Here the test is the actual need of the family and as in most situations of the sort, the agreed price is the maximum that can be recovered.

(6) **DUTY OF HOUSEHOLD MANAGEMENT BY WIFE.** There is no corresponding right of action—except under a valid and subsisting contract between the spouses—on the husband's part, against a wife who has failed to perform her matrimonial duty of household management. The only redress is to treat her neglect as a matrimonial offense to the extent that the courts have recognized it as one.

(7) INTERFERENCE OF A THIRD PERSON. Interference by any third person with the personal relations between husband and wife is a tort for which action lies by the party aggrieved. Any inducement or solicitation offered by a third person to either spouse to violate the personal duties of the conjugal relationship is an interference which the courts will treat as such a tort, even though the disposition of the solicited spouse is primarily to blame for the wrong committed.

Detailed account of the type of action permitted here will be discussed later.

(8) COMPETENCE OF HUSBAND AND WIFE IN CRIMINAL ACTION. The law of evidence creates another limitation arising out of the status of husband and wife. Neither is a competent witness against the other in a criminal action, nor generally in a civil procedure, except in matrimonial actions. This incompetence, however, in civil actions is a privilege of the spouse who might be adversely affected. If the objection is waived, the testimony is admissible. Similarly, communications between husband and wife are confidential in their nature, and a husband or wife may not be questioned in a way that compels disclosure of such communications.

This again is a privilege that may be waived by both parties. It is clear that these restrictions are not the logical results of the theory that husband and wife are a single person.

They derive rather from the fact that the personal relations of husband and wife can scarcely be satisfactory unless the complete protection of their privacy is secured by law. There seems little doubt that the restrictions are necessary.

2. Property Relations

The property relations of husband and wife have a long and complicated history and have occupied the attention of European and American courts to an extent out of all proportion to the monetary value of the interests involved.

(1) FEUDAL POSITION OF HUSBAND AND WIFE. The feudal position of the married woman depended on her rank and on the terms of the tenure which her husband held. It frequently depended as well on what was in effect an actual treaty between the family she had quitted and the family of which she became a part of as wife. Frequently, she had and retained a very considerable degree of control of the estates which had come to her from her own family by gift or inheritance. She might even be a feudal noblewoman and her husband a morganatic consort of lower rank, who was to all intents and purposes her subject.

Ordinarily, however, feudal conditions assumed that whatever powers over property a woman had, especially over land, would be suspended during marriage. Under feudal law, control and management was almost always without account and subject at most to return the corpus at the end of the period of control. This became especially characteristic of the control by the husband of his wife's property.

The feudal relations of husband and wife became general in England, just as feudal concepts were extended to all land, not merely land held by the property feudal tenure, knight's service. The special situation of dower-right and dotal property will be discussed below.

(a) *Wife's Disabilities of Coverture.* In its most developed form, the principal property effect of the married status was to

subject the wife to a number of disabilities of coverture. They were rationalized as a means of protection to the wife and, while they served somewhat for that purpose, they undoubtedly left her quite without protection against a grasping or ill-willed husband.

As far as the property of a married woman was concerned, her disabilities were four in number:

(1) Her husband had exclusive control and management of her lands, and owed her no account for the rents and profits of them. But he could not alienate them.

(2) Her leasehold interests he managed in the same way. These, however, he might alienate and, if he did so, the proceeds became his absolutely.

(3) All her chattels of every description became his absolutely, both those she had at the time of marriage and those she later acquired.

(4) Her choses in action he and only he could reduce to possession, and, if he did so, he might retain the proceeds. If the marriage terminated before he had done so, they reverted to her.

There were further procedural difficulties. She could sue and be sued only when joined with her husband.

(b) *Liabilities of the Husband.* Besides these disabilities of the wife, coverture—i.e., the status of the married woman—imposed burdens on her husband. He was absolutely liable for all the contracts she had made before marriage and all the torts she had committed. He was also liable, almost as a matter of course, for all the torts she committed while married. He was not liable for the contracts she made while married because she was under a complete incapacity to make con-

tracts with any one. All such contracts were wholly void, not merely voidable.

The only exception, of course, would be contracts made definitely by her as his agent. But this *agency* must be a real one. It could not be implied from the mere fact of marriage. It must be found either in the actual statements of the husband or inferred from particular conduct on his part. Acquiescence with knowledge, no doubt constituted such conduct.

If the wife had *earning capacity*, she might, with her husband's consent, actual or implied, enter into arrangements involving her labor, but the wages or salary could be collected by him, and if the proceeds were collected by her, she could be forced to pay them over.

It follows that *gifts of chattels* by the husband to the wife were ineffective, and equally that gifts of chattels from her to him were similarly ineffective because she had no title to convey. Likewise, contracts between the two were void. *Conveyances of land*, however, could be made, but when made would be sharply scrutinized in order to prevent overreaching or undue influence.

In addition to these private disabilities and burdens, there was an extraordinary public one. A man was subject to indictment for a *crime* committed by his wife in his presence, without any evidence of any complicity or knowledge on his part. A hard and fast rule was that all such crimes had been committed by his orders.

(2) HUSBAND AND WIFE IN COMMON LAW. All these situations—except the last, in part—were rationalized on what was said to be the theological theory that husband and wife constituted but one person in law. This theory was particularly ill adapted to explain the result, because it was precisely in the

ecclesiastical courts, where one should suppose theological consideration to be strongest, that the husband and wife were permitted to sue each other in matrimonial causes and that the separate character of the two was most emphasized. The real basis for the extraordinary position of the married woman at Common Law is to be found in the character of feudal tenures, the chief duties of which, suit and service, were by their nature not readily performed except by men. Whatever lands a woman held, the feudal implications made it normal to assume that it would be a man and not a woman who appeared to represent the tenant, whoever it was, and representation was a familiar concept to the feudal system.

This formidable complex of disabilities was not really compensated for by any economic advantage gained by the wife, in spite of the earnest efforts of rationalists in the seventeenth and eighteenth century to find such a moral compensation. It was unsuited even to the feudal system in its later development, and had long ceased to have any real relation to the economic and social factors in the community, when the most characteristic elements in the feudal system the incidents of military tenure, were abolished. But by that time it had become a part of a rigidly maintained tradition and no effective movement to remedy the situation arose.

There was the less urgent necessity for such a movement, because the economic class who would be most hampered by the disabilities, the rising mercantile class, frequently were legally exempt from them. These disabilities did not exist by mercantile custom and the "custom of London" particularly was free of them.

Although the disabilities of coverture have been abolished in most of the Common Law juris-

dictions, it is necessary to have them in mind, since the present condition of married woman's property is the result of a gradual removal of the disabilities, and the degree to which they have been removed in reality and in theory varies in different places.

The attempt to remove these disabilities has suffered more than other attempts at reforming the Common Law, from the rule that statutes in derogation of the Common Law must be strictly construed. Many of these statutes—usually called Married Women's Property Acts—disclosed their general intention at once, and used words which it would be reasonable to interpret as an effort to put married women on a par with their unmarried sisters in the matter of property. In most jurisdictions, however, a process of restrictive interpretation has made them cover only the situations obviously and unqualifiedly enumerated, and has allowed a large number of vestiges of the former Common Law rules to remain.

It is curious that one of the disabilities that frequently persists is one that is not derived from the Common Law at all but from the Roman *Senatus-consultum Velleianum*, the incapacity of a married woman to be surety for her husband.

At the present time, however, it may be said that the process of reform has been pretty nearly completed, and a married woman does not change her powers or rights or duties in regard to property she had or may acquire by being married. The rule, of course, persists that any transaction between her and her husband to his advantage will be examined with care. The unjustified boast of Blackstone that in property matters women were always the favorite of the Common Law is undoubtedly realized at the present day.

3. The Dowry

The Roman law of family property was based on the institution of the dowry, *dos*. It was in theory the property which the wife brought with her when she married and its purpose was to make a contribution to the expenses of the joint household. One of its practical purposes was to make divorces difficult, since a duty existed to restore the dotal property on divorce.

During the continuance of the marital relation the husband had the complete control and management of the dotal property. This at first included an unrestricted power of disposition. This power of disposition was later modified, and at all times the husband's rights were far short of a real title.

The dotal property was frequently given, not by the wife herself, but by members of her family, especially by her father. The ancient theory seems to have been that in such a case it was her share of the family inheritance. Whatever its source, it had to be returned to the donor when the marriage was dissolved, unless by the terms of the gift it went to the wife's heirs after her death.

The law dealing with dotal property was of vast extent and extreme complexity. When the feudal law was being established, a renewed knowledge of Roman law was likewise being acquired. The term and the institution of the dowry became well known in the newer system, and as such was widely exemplified in feudal practice. The Angevin empire came into existence largely by reason of the dowry which Eleanor of Aquitaine brought to her husband, Henry II of England, and the aggregation of principalities that made up the Austro-Hungarian empire was notoriously acquired by marriage rather than by conquest.

The English Feudal Law

which in part became the Common Law dealt with dowries in a special way. The *dos profecticia*—*i.e.*, the dowry that did not come from the wife herself—took the form of the gift of land in frank-marriage, *liberum maritagium*. It was a conditional gift, the condition being that it was to pass to children of the wife and, in default of such children, it reverted to the grantor. Besides this, however, actual gifts of money and chattels made to the husband by the wife's family, as one of the conditions of marriage, were common and became a general practice, especially in the upper classes of society. At the Common Law, these gifts though called a dowry, were not really like the Roman *dos* at all. They were outright transfers of title. No duty of restitution and no accountability for the use of the money was placed upon the husband. If the property was squandered or misused there was no redress.

The occasion for restitution, of course, scarcely existed in medieval England. At Roman Law, such an occasion was furnished by the frequency of divorce. In medieval society what was called divorce *a vinculo* was really an annulment, *i.e.*, it declared that there never had been a marriage. Under these circumstances, it followed that all transactions based upon the supposed marriage were likewise avoided. Such divorces were relatively few, although they did occur.

The dowry as an institution played a very small part at the Common Law. Promises to give a dowry on consideration of marriage were actionable. One such action is notable in literary history because it furnishes one of the few documented transactions in which Shakespeare was concerned—in this one case as a material witness. Promises of this nature were expressly included in the Statute of Frauds of 1677.

In the United States, the dowry was even less important as a social or legal institution. It may be that the relative scarcity of women in the early years strongly militated against any institution that either hindered marriage or seemed to discourage it by imposing an economic condition. When dowries are mentioned in American cases, it is generally in connection with marriages among foreign-born citizens who have retained some of the social customs of the countries of their origin.

4. Dower

The most characteristic element of the Common Law in regard to marital property was the institution of the dower. This; as a name and system, was derived from the *douaire* of French customary law. Unfortunately, in Latin texts of the Common Law this word was translated by *dos* which is the word for dowry, from which the dower was fundamentally different. The dower-right, briefly stated, is the right of a widow to have a part of her husband's landed property set aside for her support during her life. Under the conditions of medieval society, such property could scarcely be anything except land.

The *origin of the dower* is somewhat obscure. It has definite connection with the Germanic institution of the *Morgengabe*, the property which the bridegroom bestows upon his wife on the day of the wedding or the morning after it. The purpose of such a gift is the express and avowed one of securing the wife, if her husband died. The social need for such a system was evident in a society which scarcely possessed a law of testamentary succession, and in which the basis of living—the land—might well pass to a stranger or a remote kinsman on the death of the last holder.

Custom fixed the amount of dower in many of the “lands of customary law” of Northern France, including Normandy, Brittany, Anjou, Maine, all of which were in more or less close relation with England. In many places the rule of the “third part” prevailed and this ultimately was fixed in England as the customary rule of dower.

In view of the purpose of the dower interest, it is clear that only a life interest and not a tenancy in fee was necessary. Furthermore, it terminated on the remarriage of the widow and could be forfeited for her misconduct.

The association of the dower with feudal land permitted the royal courts to impose conditions which ordinarily were beyond their jurisdiction. The question of the validity of a marriage was a matter determinable only in the ecclesiastical courts, but the royal courts could and did require that dower should not attach unless the marriage was celebrated *in facie ecclesiae*. Failure to do so did not, as we have seen, affect the validity of a marriage before 1753, but it did prevent the widow of such a marriage from claiming dower.

The belief that dower was the result of a formal transaction made *ad ostium ecclesiae*, i.e., at the church door, when the ceremony had been completed, is erroneous. An endowment took place at the church door originally only when the parties preferred to make their own arrangements about dower in lieu of the customary third. It might well be a means of depriving the wife of the security created thereby by inducing her to accept a smaller interest or a specific piece of land. If the dower *ad ostium ecclesiae* was the same as the wife would receive by custom, the transaction merely publicly confirmed what would have been the law without it.

The rule in some of the customary lands that dower did not attach unless the marriage had been consummated, did not exist in England. On the other hand, anything that impaired the validity of the marriage, prevented dower from attaching, and the question of the validity of the marriage could be raised when the widow presented her claim.

The *purpose of the dower* implied that no act of the husband either *inter vivos* or *mortis causa* should be permitted to defeat the widow’s right. A transfer of the land could, therefore, only mean that the transferee took, subject to the widow’s right of dower. The same was true of a mortgagee. When wills of land were permitted, the devisees of the husband similarly were subject to the widow’s claim to have her dower assigned to her.

In many of the great English estates, the dower lands and the dower house were traditional, and the widow retired to them on her husband’s death. But at all times she could insist that her interest equal the legal one-third, and if for any reason it did not, she might ask for the full amount to be made up to her.

After the *Statute of Wills* in 1540, land might be devised, but, if the dower was not mentioned, the widow took her dower as well as anything actually left to her in the will. If the devise was declared to be in lieu of dower, she was put to her election whether she would take the devise or her customary right.

Dower was inchoate during the husband’s life. It was not, while in this condition, an estate subject to disposition of the wife and no valid transfer could be made of it. It became a vested interest immediately upon the husband’s death, but it did not attach to any particular piece of property till it was admeasured. Writs for admeasurement of

dower play a large part in Common Law procedure. The wife could always, in her husband’s lifetime, bar her dower interest by formally waiving it in a particular case, especially by joining her husband in a conveyance or mortgage. Purchasers would consequently insist on the wife’s signature. Since, however, the existence of an inchoate dower interest might be unknown, titles were to that extent made a little uncertain.

The English Dower Act of 1834 settled the matter by making dower barrable by any conveyance or devise by the husband, with or without the wife’s joinder. The result has been that dower now exists in England only in such land as the husband had at the time of death, provided he dies intestate. But shortly after the Dower Act, the disabilities of coverture—or most of them—were abolished in England so that there was less need of securing the widow’s protection by an unbarrable dower. In great estates, family settlements likewise had been for some time directed to this end. No attempt was made to introduce the Continental and older English system of limiting the testamentary power of the husband in order to provide for his family, the *legitim*, or *rationabilis pars*.

Dower in the United States. Dower existed in nearly all the United States and survived long after Married Women’s Property Acts had wiped out most of the disabilities of coverture. The attempt to remove it by a Dower Act, as in England, met with active resistance. The absence of any tradition of family settlements may account for the attachment American law has felt for this institution. Perhaps a general vague feeling for the protection of women was active here. Dower was even held non-forfeitable when the widow was accused and convicted of mur-

dering her husband, but it was not a vested interest to the extent that it was protected from legislative abolition by the due process clause of the Fourteenth Amendment.

In many of the American states, dower has been either abolished or modified. In some cases it has been extended to half of the husband's property and changed from a life interest to one in fee. In most places, however, where dower has been abolished or made barrable by conveyance, it has in effect been replaced by a *legitim*, i.e., by a portion of the estate of a predeceased husband which was withdrawn from his power of testamentary disposition. This has notably been the case in New York. Dower, however, survives in many jurisdictions, and, since landed property is even more than in England a commodity of commerce, it has the same effect of rendering titles dubious. The difficulty, however, has in a great measure been met by the almost universal practice of title insurance.

5. Curtesy

A very special and highly characteristic incident of feudal tenure as it developed in northern France was "curtesy." It is found in a number of jurisdictions, but maintained itself ultimately only in England. The "curtesy of England" was both less extensive and more extensive than the customary law of other lands. In England curtesy consisted of the life interest on the part of the husband in all the lands of his wife. The conditions, as in the case of dower, were a valid marriage and public celebration of it. An additional condition was the birth of issue capable of inheriting. There was no curtesy in estates in fee tail made if there was only female issue of the marriage. It was not necessary that the child survived. If it

was born alive, even if it lived only a moment, curtesy attached.

Curtesy existed both in England and the United States, and still survives in some Common Law jurisdictions. It became easily barrable as soon as women were permitted to make wills of lands, which was somewhat later than the granting of that privilege to men. In the United States, it became ineffective early in the nineteenth century by the fact of its barrability, since wills of land were quite common and married women with landed property were fairly certain to make wills.

6. Estates by Entireties

A man and his wife could of course be co-tenants of land. If they did, they might hold it by any of the existing forms of joint ownership, either tenancy in common or joint tenancy proper. All the incidents of such tenancy would then exist. If the holding was by joint tenancy the right of survivorship applied, and the tenancy was turned into a tenancy in common by a transfer of the interest of either, or by a suit in equity for that purpose. In case of a tenancy in common, no survivorship existed and a suit in partition would divide the land into two quite distinct lots. If, however, a deed were made to husband and wife together, without specifying the nature of the tenure, the resulting tenancy was neither joint nor in common, but a tenancy by the entireties. In that case, survivorship existed, but unlike joint tenancy this incident was indestructible. No transfer of the separate interest of husband or wife and no incumbrance of it was possible, and no agreement—even when contracts between husband and wife were permitted—to change the nature of the tenancy was valid.

The purpose of the estate by entirety was clearly to provide a property interest for the widow in the nature of a protective

trust, which would come to her undiminished by improvident conduct even on her own part and was not available to the creditors of either herself or her husband. This purpose the estate by the entireties undoubtedly accomplished. It had, however, the defect that land so held was not an asset of commercial value, and in a highly commercialized community the estate by the entireties was of doubtful social value. It has accordingly been abolished in many places and has become practically obsolete in most jurisdictions.

7. Family Settlements

The disabilities of coverture placed the wife in a position of almost complete economic dependence on her husband, even when she had considerable property interests derived from her own family. When the basis of the feudal system disappeared under the rationalizing movements of the seventeenth century and a new economically powerful class shared with the landholding aristocracy the government of England, unions between families became more definitely than before a matter of contractual arrangements. The families of heiresses were naturally disinclined to surrender large interests to the almost unrestricted disposition of the husband, with the real risk that the wife and her issue would be left quite destitute.

The institution of the trust was excellently adapted to this end. A certain part of the wife's property was, at the marriage and as a condition of it, transferred to trustees who were directed to pay the income to the husband—rarely, to accumulate it—and on the husband's death to transfer the corpus to the wife or her issue. Evidently the exact terms of the trust varied greatly. The purpose to be fulfilled determined the conditions.

Frequently the settlement in

whole or in part came from the husband's estate, and recalled therefore the ancient *Morgengabe* which influenced the creation of the dower-right. In any case the expressive popular phrase of "tying-up" described the situation precisely. Settlements of this sort were often extremely elaborate, and when the authority of Chancery was revived under Nottingham, Chancery lawyers found ample occupation for their ingenuity in these devices. By their nature, however, they were hardly suited to any group of interests except the great landed families. For the ordinary run of family law, they represent a special and limited attempt to obviate the difficulties created by the peculiar Common-Law attitude toward the property of the wife during coverture.

8. Community Property

A very special type of customary family law grew up in France and from France was taken at a very early period into more or less feudalized countries like Spain and Germany. It later spread into most parts of the Continent of Europe. This is the system of the "community."

The historical and economic conditions under which it developed are by no means clear. Nor can we be sure of the stages of its growth. When we find it in relatively recent times, *i.e.*, the later Middle Ages and the Renaissance, it is a complete system of marital property rights of which the chief characteristics are two: first, that the husband and wife are regarded as having an equal claim to all the property possessed by either; and second, that the wife's interest becomes an active one only on the husband's death.

This general scheme was, of course, subject to many modifications. Instead of a complete "community," there might be a community merely of "acquests,"

i.e., a community only in the property acquired during the marriage. Again, the "acquests" might be limited to the property acquired for services, the property actually earned.

In view of the second characteristic of the system, to wit, that during the continuance of the marriage, the husband has the complete power of disposition and management of the community property, one inference was necessarily drawn. The property was dealt with by the husband precisely as though it was his own, and the claims of his creditors could therefore be satisfied out of the community property as well as any other property. But the fact that the wife had an interest in it permitted her to ask redress when the community property was obviously being squandered, and this was *a fortiori* the case when it was deliberately dissipated in fraud of her rights. She on her side might forfeit her interest by such gross misconduct as adultery, even when no action for divorce on this ground was brought.

This, in outline, was the system of community property as it prevailed both in France and Spain. The notion of the unity of husband and wife which played such a part in legal discussion in England was here displaced by the *notion of a partnership*, and indeed it is from the Roman law of partnership (*societas omnium bonorum, societas bonorum quae ex quaestu veniunt*) that some of the terminology and terms of the institution were derived, although the community as such is unknown to the Roman Law. But it is a partnership that has a great deal of corporate character about it, and it was in the rationalistic period that it grew, especially since it seemed to fit in with the idea of a marriage based on the joint efforts of several persons to provide for the units into which the state was

obviously divided, and from the aggregations or which it was generally supposed the state had been formed. The "community system" as a framework of marital relationship seems never to have entered England at all and was therefore ignored at the Common Law, even as a local custom. It was recognized in Scotland as to movables, but cases dealing with it were few and it seems to have exercised very little influence on the family even in Scotland.

Community property has been established in a certain number of the United States. The two states in which it is found earliest are Louisiana and Texas. In Louisiana, although based on Code provisions that came from the French Civil Law, it was a Spanish rather than a French model that was followed, and in Texas it survived as a part of the system generally prevalent when Texas had been a part of a Spanish-American country, to wit, Mexico.

The next important community to adopt it was California, which like Texas had been a part of Mexico. It was of course in existence there among the extremely few settlers in that state before the annexation by the United States. It was, therefore, protected, as far as the original population was concerned, by the treaty of Guadalupe Hidalgo by which California was ceded to the United States. But its adoption for the American population was a deliberate act of the first Constitutional convention, and the debates of that convention give as the express reason for the adoption the desire to attract women to the new state by an institution which was generally believed to be more favorable to the wife than the dowry system generally prevalent in 1849.

Besides Louisiana, Texas and California, the community property system is now found in

Washington, Arizona, New Mexico, Idaho and Montana. In all of them, marked differences are to be found. Quite generally, the community is one merely of acquests and not of all the property. And in determining acquests, in accordance with Common Law but not with Civil Law principles, the profits and issues of property have been dealt with as of the nature of the property from which they sprang.

We may say, therefore, that in any marital group under this system, the following property is the separate property of either spouse and does not form part of the community: (a) all property possessed by either spouse at the time of marriage; (b) the increase, rents and profits of this property, even though the increase was caused by the acts and services of both spouses or of the spouse who did not own it; (c) all property obtained by either spouse by gift, bequest or devise; (d) the increase, rents and profits of this property. All other property of every description and all the forms into which it may be transformed, as well as all the increase, rents and profits of such property, are community property.

In most cases, in practice, community property is much the largest and most important part of the property that husband and wife possess, and in most cases again, it is derived from the husband's earnings. The difficulty has always been to define and describe the exact interest of the wife in the community. The rationalization of giving her a half-interest in her husband's earnings is that her maintenance of the household makes it possible for the husband to engage in his business, and so justifies the law in regarding her as equally responsible for the creation of the community property.

In the same way, the needs of commerce were used to ratio-

nalize the almost unqualified power of the husband to deal sovereignly with the community property. Even the right to prevent improvident squandering was not granted the wife unless fraud was present. For that reason, the right of the wife in the property was in California declared to be a mere expectancy and not a vested interest.

Legislation in recent times has been framed to protect the wife's interest, and has generally taken the form of requiring the wife's consent to gifts of property and to any alienation of realty. But it was only in Washington that the terminology of partnership has been directly applied to the community interests.

The situation was rendered somewhat acute by the general development of graduated income tax laws in which it was desirable in large incomes to make separate returns for husband and wife. This was often refused in those states in which the older community theory prevailed, on the ground that the husband's power of disposition was indistinguishable from an effective title. It has, however, been generally allowed since the power of the wife over the community property has notably increased.

Usually the community system is merely, as in France, the system that will be presumed to exist in the absence of special evidence to the contrary. If a definite agreement can be proved, the property will have whatever character this agreement gives it. Community property can by such an agreement be made the separate property of husband and wife, and separate property can become community and this may be done by a general agreement in advance.

Not only the earnings of the husband, but those of the wife constitute community property. In the United States and espe-

cially in the Western states where the community system is most commonly found, separate earning of the wife is frequent enough. Theoretically, therefore, the husband has the same power of collecting and disposing of his wife's earnings as he had under the most extreme application of the Common Law view of a married woman's property. In practice, however, a gift of the wife's earnings to her as her separate property can easily be made, even in advance of the actual acquisition of the earnings. It will be implied from any conduct that indicates his consent that she might keep her earnings for herself, and even from a course of conduct in relation to previous earnings wholly unconnected with her present labor.

Again, if the wife lives separately from her husband, with or without a legal separation of domicile, her earnings are her separate property and not community. This separation, however, in no way affects the character of the property acquired by the husband. This remains community property. On the husband's death, if the marriage still subsists, she may claim her community share, just as if no separation had ever taken place. This is the case even if an interlocutory decree has been entered, dissolving the marriage but making no particular division of the property. If the husband dies before a divorce is made final, the wife takes her community interest, even if the divorce has been obtained for her misconduct.

No community attaches if the marriage is annulled. If a divorce is granted, the community property is equally divided as a rule. The court, however, possesses the power to make a different division of the property in any proportion that seems equitable, if the reason for the divorce is some gross misconduct such as adultery or cruelty on the part of

either wife or husband.

As in all other property relations of husband and wife, a valid marriage is a requisite condition for the establishment of the community system. If the marriage is void *ab initio*, as in the case of a bigamous marriage, the lawful wife and she alone is entitled to the whole community, no matter how long the bigamous relationship had continued and despite the fact that all the property had been acquired during the continuance of that relationship. In this situation as well as in the case of a separation, the rationalization of the wife's interest which took place upon her assistance in acquiring the property is completely lost sight of.

In two states, however, Texas and California principally, the Spanish doctrine of a "putative marriage" is adopted. If the wife in good faith believes herself married and has gone through a ceremony which might make her suppose herself married, she will be recognized as a putative wife and be permitted to share in the community property, at least in that part of it which was acquired while the putative marriage

lasted. The community, however, cannot last any longer than the good faith does.

It is evident that this doctrine might lead to conflict when the claims of a lawful but deserted wife and that of a bigamous but putative wife are simultaneously presented. When such a situation arises, the court will doubtless order an equitable distribution of the community estate.

The community is, of course, subject to the claims of creditors. The husband has a testamentary power over one-half of it only. If he assumes in his will to dispose of the entire estate, the wife's interest will be admeasured and assigned to her just as in the case of dower. And, if he sets apart a certain part expressly in satisfaction of his wife's community interest, she may disregard that and ask the court to assign her community interest to her without reference to the terms of the will.

The wife in most states where community obtains has a testamentary power over her half even if she predeceases her husband. The distribution of this estate, however, is subject to the prior

claims of her husband's creditors.

The frequent changes of domicile in the United States have produced many difficult questions in the conflict of laws on the subject of community property. This has been complicated by serious problems arising out of the fiscal needs of the states in many of which portions of the community property may be located.

On the whole, the community system, although it has been adopted by states often of wholly American population, such as Washington and present-day California, has not commended itself to most American jurisdictions. It affords the wife more protection than the dower system of the Common Law, but its complications and attendant difficulties are almost as great as in the dower system. The solution of limiting the power of testation by a *legitim* in favor of the wife is likely to be a more desirable alternative for states that are attempting to reform their system of marital property rights.

■

Dissolution of the Marriage

I. Annulment

The contractual character of marriage subjects the marriage contract to the same scrutiny that any other contract would receive, and to the conditions demanded for every contract, adds certain conditions that are peculiar to this one. The first requisite is capacity.

1. Capacity

In order to make a contract both parties must be (1) of sound mind, and (2) of requisite age. The rules as to insanity are not quite the same as in ordinary contracts. In such contracts, if one of the parties was a congenital idiot, incapable of any thought at all, the contract is wholly void. If one of the contracting parties was insane, *i.e.*, suffering from some form of mental disease, the contract is merely voidable by the insane person during a lucid interval or by the guardian of the insane person.

In the case of a marriage contract, however, any form of mental incompetence renders the marriage merely voidable, if the incompetence existed at the time of the marriage. Either party may bring the action, except the party

that knowingly entered into a marriage with an insane person.

The same difference exists in relation to non-age. In ordinary cases with certain exceptions, all contracts of minors are voidable. Some however are wholly void. Others are voidable only if the consideration can be returned. In England and a few other jurisdictions, contracts of infants, *i.e.*, minors are wholly void. Where they are voidable they can be set aside only by the minor. The other party if of full age, is bound by them.

As far as marriage is concerned, the age limit—the age of consent—is fixed by statute. For men it is generally the same as majority; for women it is often less than that. In some cases, a lower limit is possible with the consent of the parents.

If a marriage has been entered into by a man or woman below the age of consent, it may be annulled either by the minor or by the minor's parents—if we understand by "minor" a person below the statutory age. Estoppel will lie against the adult who has knowingly entered into such a marriage, or against the parents who permitted it and subsequently seek to withdraw their consent. The right to avoid such

a marriage exists only if it is exercised before the age of consent is reached. If the marriage is knowingly continued after that time, it cannot be avoided. Similarly the right to avoid a marriage because of insanity may be lost by ladies, especially if property rights have intervened or children been born in such a marriage.

2. Reality of Consent

Force or fraud are grounds of annulment of the marriage contract as of other contracts. Evidently, FORCE may consist of threats as well as physical compulsion, but in all cases, it must be dread of bodily violence. Threats directed against property interests will ordinarily not be an adequate reason for annulment.

Here, too, laches may destroy the right of action; laches cannot be present so long as the cause of fear persists. If, however, this is removed, very prompt action would be demanded to establish the good faith of the person who seeks to set aside the marriage for duress.

FRAUD in relation to marriage is a highly complicated matter. In ordinary contracts, any deliberately false statement or

willfully misleading conduct may constitute fraud. In marriage, the types of fraud that will annul the consent and make the marriage voidable are much more restricted.

Fraud plays a particular part in the Canon Law of marriage, in which, as we shall see, absolute divorce is unknown. The doctrine of fraud is much more extensive at Canon Law than at either the Common or the Civil Law and includes fraud in intention, *i.e.*, mental reservation, as well as promissory fraud, *i.e.*, a promise made without the intent of keeping it. In most Common Law jurisdictions—not in all—neither type of fraud could be pleaded either in ordinary contracts or in contracts of marriage.

The fraud sufficient to render a marriage voidable must not be merely a false statement which if known to be false would have prevented the agreement from being made. It must be, it is declared, a false statement about some matter that goes to the basis of the marital relationship.

This has been very strictly construed by the English courts. A false allegation of previous chastity, even in reply to specific questions, is not enough. Somewhat grudgingly the courts permitted concealed pregnancy by another man to be a ground of avoidance, and not even then, if the husband had also had premarital intercourse with his wife. With what sounds almost like brutal cynicism, courts have sometimes in set terms applied the rule of *caveat emptor*. This attitude is to some extent justified by the fact that marriages, particularly in England, usually take place between persons who either know each other well or have abundant opportunity for information; none the less it represents the extreme, conservative view as to maintaining intact the marital relation. The marked

change, however, in the public attitude toward divorce, even in England, has made such an attitude seem a somewhat irrational survival, as it undoubtedly is. Even in conservative jurisdictions, a fraud that unqualifiedly affects the marital relation will be permitted to become the basis of a suit for annulment. If either party is suffering from an infectious sexual disease and has concealed the fact, this will clearly constitute a fraud of the most serious sort. It would be idle to speak of the duties of permitting sexual access and of absolute sexual fidelity and then to make the fulfillment of these duties a matter of grave physical danger.

The tendency in the United States has been to increase substantially the situations in which fraud may be used as the basis of an action for annulment. Not merely concealed pregnancy by another man, but concealed unchastity, especially the careful simulation of a reputation for chastity, is to an increasing extent allowed as a reason for avoiding a marriage. Somewhat less frequently, the deliberate concealment of other types of immorality, especially the concealment of a criminal record, have been accepted as a sufficient basis for fraud. The same may be said in regard to diseases of any sort or an hereditary taint of insanity.

In all these cases the fraud is more likely to consist in willful concealment than in direct misrepresentation. Concealment consequently plays a larger part here than it would in ordinary commercial contracts. Indeed in direct opposition to the situation in England, the opportunities for investigation and acquiring information in respect of prospective husbands and wives are less ample in the United States than they would be for most commercial transactions. The more complete the separation between the

two types of contracts, the more fully will the law correspond to social realities.

A more dubious step has been taken by courts in permitting willful misrepresentation as to economic or social standing to avoid a marriage. This has been frequently attempted and is to an increasing extent allowed. Clearly there are many situations in which both common sense and reason justify the courts in treating this type of fraud as serious enough to avoid a marriage. There is, however, a large measure of truth in the half-jesting statement that large pretensions as to social and economic standing are part of the ordinary current coin of courtship and are not, or should not be, taken seriously. It would be hard to draw the line between such misrepresentations and those that affect the character, the ability or the personal charm of the parties.

In those situations in which misrepresentations as to wealth or social standing are the sole inducing causes for the contract of marriage, the court might well assume that the parties have by their own admission treated this highly significant relationship as a commodity of sale and ought not to complain if the rules of sale are applied.

It must be remembered that a wide extension of the grounds for annulment is likely to work even more mischief than extreme freedom of divorce. In cases of divorce, custody of the children and the support of the family are anxiously considered by the court. Furthermore, the practice of interlocutory and final decrees gives a certain assurance that due deliberation is had. In the case of an annulment there can be no alimony, no division of the community property, and the issue is bastardized unless special statutes provide against it. Particularly is it a serious matter that

the decree is final at once.

Under these circumstances, collusion, which is so common and so difficult to prevent in divorce cases, can evade even the slight precautions with which the law properly enough surrounds actions of divorce. It may happen—apparently it has happened—that ignorant and inexperienced women are induced to consent to what is an action for annulment, although represented to them as an action for divorce. While this may amount to a fraud on the court, it is rarely the case that this fact is easily susceptible of proof. Such machinations are most easily effected on the basis of a charge of fraud. And the extension of the doctrine of fraud in marriage contracts to each and every misrepresentation that might have induced consent is hardly a movement to be encouraged.

3. Impotence

A special ground of annulment—which resembles a charge of fraud—is the sexual impotence of either of the parties. The sexual basis of marital relations is so plainly an essential fact, that if these relations are impossible one of the most important reasons for the marriage ceases to exist. As in the case of fraud, the impotence must exist at the time of the marriage, and must be unknown to the other side. But impotence is, after all, not quite the same as fraud, since it is not necessary to prove *scienter*. The good faith of the party who turns out to be impotent is quite irrelevant. As in all cases of annulment, action must be promptly taken. If after discovery of the spouse's impotence, an excessive time elapses before the action is brought, the objection is deemed to be waived.

4. Effect of Annulment

In all these cases, insanity, non-age, fraud, force or im-

potence, the marriage is merely voidable, not void. It cannot be too often insisted upon that a voidable transaction of any sort is perfectly valid, until and unless it is avoided in proper form. When this happens, the marriage is said to be void *ab initio* and treated "as if" no marriage has ever been entered into.

The first and most disastrous result of this theory is that children born of such a marriage are at once made illegitimate. When we recall the profound effects of the status of illegitimacy in England, and that among other things it severed even the legal bonds between the child and its natural mother, it will be seen that this result needed remedy. In many American jurisdictions, accordingly, statutes have particularly and emphatically declared the full legitimacy of children born or conceived during the continuance of a valid marriage subsequently avoided.

In fact, despite the terms "annulment," "avoidance," "void *ab initio*," the setting aside of the effects created while the marital relations subsisted never gets beyond the approximation indicated in the "as if." The effects can never be completely avoided. As far as is practicable, restitution of property transferred, the removal of burdens assumed and of obligations incurred on the basis of the no longer valid marriage, will be attempted. The attempt must necessarily be fragmentary and insufficient.

II. VOID MARRIAGES

There are, besides the voidable marriages, a certain number of marriages which are completely void and need no action at law to avoid them or set them aside. Properly, of course, they are not marriages at all, but just as it is necessary to speak of void contracts which are really not

contracts, so "void marriage" is an intelligible expression. It means a union in which, on one side or both, an attempt to enter into a marriage has been made and in which the attempt failed for other reasons than the absence of form.

Of the causes that render a marriage void the most important are bigamy and incest. An additional one in the United States is miscegenation.

A marriage is void if at the time of entering into it, either party has a wife or husband living who has never been validly divorced. To enter knowingly into such a marriage constitutes the serious felony of bigamy, punished capitally in England until the first third of the nineteenth century.

Such a marriage may well be bigamous and void without involving criminal intent on either side. The bigamous spouse may have had what seemed sufficient reason to believe that the first marriage was wholly void. Or else in the case of a voidable marriage or a divorce, an action may have been prosecuted apparently to completion, but was ineffective for some unknown failure of jurisdiction or other similar defect. The good faith of the bigamous spouse will not validate the marriage, but it will—or ought to—be taken into consideration in case of a prosecution.

Another instance of good faith which has not always prevented prosecution is the case in which the bigamous spouse had reasonable ground for assuming that the first wife or husband was dead. Mistaken identification of a corpse may have been the cause of the mistake, or a credible report of a death in some general disaster. It is clear that the same rule should prevail here as in any other circumstances of good faith.

Mere absence is not considered in this class of cases. It has,

however, been the custom from time almost immemorial to deal with long-continued absence as though it were equivalent to death. Our modern statutes express this as a presumption of death by reason of absence, and demand as a condition, as a rule, the relatively long period of seven years and the absence of any communication through the channels by which communication would normally be had.

Of course, even after seven years of absence and silence, the other spouse may reappear. When this happens—for which the romantic figure of Enoch Arden has become the permanent symbol—the intervening marriage, if one had been entered into, is of course wholly void. Special provision is made in these statutes for the legitimacy of children and the validity of transactions entered into during the continuance of the union. Generally no social discredit of any sort is involved, if good faith is demonstrable. The entire situation caused by the reappearance of the absent spouse, closely resembles the Roman institution of *postliminium*.

In some jurisdictions the general statutory provision concerning legitimacy includes children of bigamous marriages, unless perhaps there was a complete lack of good faith on both sides, in which the union is clearly completely illicit and scarcely even a “void marriage.”

The next most general group of void marriages are those within the forbidden degrees. These have been discussed before. In England, since the time of Henry VIII they have roughly corresponded to the “Levitical” degrees and have notoriously included relationship by affinity as well as by consanguinity. Many of these former disabilities have been removed in recent times.

In the United States, al-

though the entire group of forbidden degrees seem never to have been adopted in any one jurisdiction, there is still a formidable list of relationships within which any form of sexual connection, with or without marriage, constitutes incest. In general they may be said to cover (1) ascendants and descendants in any degree, including relationship by affinity; (2) brother and sister by consanguinity only; (3) uncle (aunt) and niece (nephew) by consanguinity only. It comes somewhat as a surprise to discover that in the greater part of the United States—especially in the Middle West—first cousins are included; and in many States a large number of other relationships, both by blood and marriage, are also within the forbidden degrees.

All sexual relations between persons in these classes and degrees makes them guilty of incest, generally a serious felony. Marriage between them is wholly void, but the legitimacy of offspring probably comes within the legitimating effect of the statute, particularly if at least one party has acted in good faith. Whether that would be the case in marriages that grossly shock the social sense, between ascendant and descendant for example, has never been specifically adjudicated.

The barrier of race has created another type of void marriage in the United States. Fully two-thirds of the states—by no means wholly in the South—absolutely avoid marriages between full whites and Negroes. Generally “Negro” is made to include persons with as little as one-sixteenth or one-thirty-second part of Negro blood. In some states, sexual intercourse between such persons, with or without the pretence of marriage, is a criminal offense, a penal law flagrantly disregarded, since in many of these places Negro

brothels scarcely attempt concealment.

But the law is stringently enforced in the case of miscegenous marriages. Here, as a matter of fact, courts have hinted that the declared public policy of the rule may take the children of such marriages out of the generally legitimating statute. In many states, the same public policy prevents recognition of such marriages even if valid where contracted. That, however, is not the universal rule.

An almost equally general barrier is that established in about half the states—not only those of the West Coast—between whites and the race vaguely classed as Mongolian, which includes Chinese and Japanese, certainly, and sometimes Malayans. The general qualifications which have been mentioned in regard to marriages between whites and Negroes, apply here as well.

In a minority of states, the intermarriage between whites and Indians is equally forbidden. This, in view of colonial social history, may be regarded as an astounding result, particularly since the relatively small number of Indians in the prohibiting states renders the enactment hardly a matter of real present-day importance. A rather distressing light is thrown upon the entire situation by the curious state of the law in Oklahoma, where Indians by reason of the discovery of oil have often large property interests. There whites may marry Indians, but may not marry Negroes. The latter again may not marry Indians.

The statutes of miscegenation have been attacked as a violation of constitutionally guaranteed rights. They have usually been upheld on the ground that the prohibition is directed against both races equally and that there is a real scientific objection to miscegenation.

Whether we do or do not accept the latter—it is at best a quite unproved hypothesis—the former rationalization must be characterized as slightly disingenuous. The prohibition is clearly based on the doctrine of the superiority of the white race, and it would be better to make an honest admission of that fact.

In all these cases, the marriages are wholly void. Those who enter into them may disregard them completely, and without legal penalty enter into valid marriages with other persons. In most cases, however, it is specially provided that an action may be brought to have their invalidity declared. The purpose of this action is rather to have the fact made a matter of record and remove doubts. It is, strictly speaking, an early example of the declaratory judgment which has been recently so widely adopted.

The general state of the law in regard to annulments and void marriages is somewhat marked by the unfortunate in-directness that afflicts our courts when these so-called “delicate” questions confront them. All that can be said is that the courts are more honest and direct in these cases than they are in the case of divorce.

III. DIVORCE

1. History

The history of divorce in the modern Anglo-American legal system is of the highest complexity. The term is an inheritance from the Roman law, in which divorces were readily obtained for a number of set reasons by either party and without reasons by mutual consent. The acquisition of exclusive control over divorce by the Church courts in the early Middle Ages completely changed the fundamental ideas in regard to it.

Divorce had agitated theo-

logians and canonists from very early times. The early Christian communities avoided the secular Roman courts and submitted all their difficulties, personal as well as legal, to the heads of their own “*ecclesiae*,” their bishops. At the time of the decay of imperial authority in the West this episcopal jurisdiction had developed a considerable body of legal rules on several subjects, notably that of divorce.

The attitude of the Christian churches was in conscious opposition to the Roman system of divorce. Whether the sacramental theory of marriage was completely developed or not, the secular freedom of divorce was stigmatized as pagan incontinence, and a definite opposition to re-marriage after divorce was cited from the New Testament. The matter was not so clear in the case of divorce for adultery as to preclude theological controversy, but long before even the pre-Gratian canonists, it had become the prevailing opinion that divorce as the Romans understood it, *i.e.*, a complete termination of a marriage previously valid, was wholly unchristian and would not be granted, unless for great emergencies by special dispensation by the supreme ecclesiastical authority.

The term “divorce,” however, was retained and divided into divorce *a vinculo matrimonii* and those *a mensa et thoro*. An additional confusion has been introduced into most discussions by the fact that the latter expression has been adopted for the absolute divorce in the sense we now understand it, when it was reintroduced in modern times. The Canon Law however used the phrase *divortium a vinculo matrimonii* to describe what we now call an annulment and even a declaratory judgment of a void marriage. The Canon Law recognized a large number of impedi-

ments to marriage, some of them “diriment,” *i.e.*, those that prevent a marriage from being entered into at all, and others “impedient,” *i.e.*, those that do not invalidate the marriage but subject the couple to discipline. Besides the impediments certain types of mistake and duress render a marriage void.

The second type of divorce, that *a mensa et thoro*, “from bed and board,” is the modern “limited” divorce, or separation. It terminates the duties of cohabitation and permitting sexual access. It does not terminate the duties of support or of sexual fidelity. It was, to be sure, often granted because of sexual infidelity, but that fact did not justify similar misconduct in the aggrieved spouse. Since these matters were being adjudicated by an ecclesiastical court, spiritual censure could be and was administered to parties committing adultery even after separation, and in the Middle Ages, spiritual censure might result in extremely practical consequences. Excommunication might follow and the secular courts would aid the spiritual courts in enforcing it.

A certain amount of theological authority had always been available for the support of divorce in the proper sense, when the ground was adultery, but only on that ground. As the authority of the Church and the Canon Law waned in the fifteenth century, an increasing demand to introduce this type of divorce—more or less on the Roman model—became evident, especially in the Reformed churches. In England, however, even after the separation of the Anglican and Roman churches, no concession was made in this matter. The Church courts, though now royal courts, retained their exclusive jurisdiction in such cases and continued to apply the Canon Law in a somewhat modi-

fied form, but still one that rigidly excluded divorce proper.

Such divorces, *i.e.*, the termination of an unquestionably valid marriage, re-entered England by way of private bills in Parliament. They did not become common till the eighteenth century. Indeed, the very first seems to have been passed in 1669. The power of the King in Parliament, as the highest authority in the Church as well as state, to dissolve an existing marriage could hardly be denied. It was not till 1857 that a special court was created to have jurisdiction over divorce with the power to grant absolute divorces.

The controversies that had existed in England on the subject of divorce and the right to provide for it were continued in the United States. Courts of general jurisdiction—especially Chancery courts—assumed the powers of the English ecclesiastical courts, but it needed specific statutes to bestow on these courts the power to grant real divorces.

The American development of divorce is one of the most striking elements in the social history of the United States. The vast extent of territory, the conditions of the frontier, the mobility of the population, produced frequent occasions for desertion and even more frequent desire to end incompatible marriages. In most of the states of the eastern seaboard, grounds for divorce were few and sharply restricted. In one of them, South Carolina, divorce is still prohibited altogether. In most of these states, adultery or long-continued desertion are the only grounds permitted.

In the newer communities of the West and in some of the Middle West, facility of divorce, or relative facility, was a real social demand, and in them a much longer list of grounds for divorce was statutorily established. This

at once created serious and delicate problems in the conflict of laws, since jurisdictions with widely differing policies in this matter were often contiguous.

For a long while the general feeling in regard to divorce was colored by the traditional repugnance of all classes of Anglo-American society toward it. Divorced persons lost caste to a marked degree, and divorce was therefore frequent only in social groups popularly stigmatized as loose-living or “fast,” artists and actors and the younger set among the wealthy classes. In the last decades of the nineteenth century, however, divorces have become prevalent in all social classes, and one or two states even undertook a rather discreditable rivalry in inviting persons who wished to be divorced to come to them for that purpose. One may say that the most successful bid of this kind has been made by the state of Nevada, which not only has a larger and more flexible list of reasons for which divorce may be granted than most of the other states, but has also the shortest residence requirement, six weeks. The city of Reno in Nevada has an unenviable notoriety throughout the world as a place of refuge for persons seeking to be divorced.

It is probable that every social circle in the large cities of the United States includes at least some divorced persons. The profound effect of this fact on the family life of the country is obvious.

There is probably no situation in which one of the least pleasant traits of a legal system, conscious hypocrisy, is more in evidence than in the manner in which courts and legislatures have dealt with the problem of divorce. Although in the forty-eight different American states, the statutory grounds on which divorce may be granted are ex-

tremely numerous, the most rational of all of them, the mutual desire of the spouses to be divorced, is not among them. It is, however, common knowledge that in the overwhelming number of applications for divorce, the reason assigned is pure pretence and the real reason is mutual consent. The inevitable result is that collusion and perjury are fostered without any additional safeguard to the persons who suffer most under divorce, the children of the union.

It must be said, however, that the moral dualism which this condition presents, is not entirely the creation of the courts and the legislature. Efforts to bring the legal doctrines in accord with the practice of the community have met with determined resistance and have usually been abandoned. It is likely that in the same states in which an extraordinarily large proportion of the citizens have been divorced, a referendum on divorces by mutual consent would be decisively rejected. The legal instrumentalities, *i.e.*, the courts and the legislatures, are required to enforce an older moral attitude which the community itself has rejected in practice though it is still maintained in theory. Nothing is better calculated to strengthen the hostility of the lay public to the law, yet it is plain that the remedy lies almost wholly with the lay public.

One of the incidental evil effects of a divorce system in which serious matrimonial offenses must be alleged and publicly proved in order to obtain a divorce is that a great deal of more or less concealed blackmail is effected against those who shrink from the publicity involved. Another incidental evil is the publicity itself, and the transforming of courtrooms and newspapers into means of gratifying pruriency. In England, a recent and drastic statute has much

mitigated the scandal of newspaper exploitation of the sex elements in divorce actions, but the essential scandal or officially countenanced hypocrisy remains, in spite of frequent exposure and earnest attempts at reform.

2. Nature of Divorce

Formally, an action for divorce is a petition to a court which is clothed with the powers both of an ecclesiastical court and a court of chancery, to change the status of two persons from that of husband and wife to that of single persons. The duties, privileges and rights that attach to the status of husband and wife have been mentioned above. If a decree or judgment of divorce is granted, this complex of duties and rights ceases from the date on which the judgment takes effect.

A divorce is really much more than that. The persons who have the status of husband and wife with respect to each other are the nucleus of a family. A decree of divorce is, therefore, the readjustment of all the family relations, which involve, first of all, the relations of minor children and, secondly, a large number of property interests. The social unit of the highest importance—indeed, in accepted theory of supreme importance—is either to be partly dissolved, or reconstituted in a different way, or, it may be, salvaged. And in doing so, the courts consciously deal not only with the whole complex of family relationships as something of a unit, but endeavor to give some weight to the communal interests which form the background of this complex and give its constituents a special value.

The initiative in these proceedings is left to husband or wife who appears in what is assumed to be a controversial issue to ask for redress for a wrong

committed. The model for these actions is accordingly the ordinary lawsuit, with its atmosphere of attack and defense and its suggestion of the metaphors of a duel or a tourney. This was inevitable under the historical conditions under which divorce grew up in all the Western systems of law, but it is unfortunate that a different model was not employed, that of suits in partition or suits for the liquidation of partnership or corporations. If the present prevalence of divorce is not merely a temporary symptom of social and economic maladjustment, but indicates a shift in the character of the Western family, this other model will prove of distinct value in registering this change. But since the divorce is still and is likely to remain in form a controversy between two adverse and hostile parties, the rules developed in such controversies must apply. The court must have jurisdiction, at any rate over the plaintiff, a cause of action must be stated, evidence must be offered in accordance with the rules of evidence, and the time limits assigned in the procedural statutes and rules of court must be kept.

In all these matters the nature of divorce creates difficulties and complications. It has been declared to be an action "*quasi in rem*," a cryptic term that has at best a symbolic meaning. The *res* is assumed to be the status, and the real and obvious reason for dealing with actions at law affecting a status differently from other actions, is that the legal consequences of transactions differ with the status of the persons who enter into them and that therefore there ought to be some unequivocal way of knowing what the status is. Unfortunately, the methods in use in divorce actions are not those which justify the expression, "*in rem*." That is to say, there is no easily accessible way of learning

the legal situation of the *res* in dispute, in this case, the status.

A more solid reason for dealing with divorce actions as we deal with other actions which determine and record the interests of parties in land, or in a tangible object, is the social situation created by a shifting population and the need of granting relief to deserted spouses. Unless the jurisdiction assumed is to be more than merely the personal one, no adequate relief can be granted. For that reason the problem of jurisdiction is the first one that presents itself.

3. Jurisdiction

In ordinary actions, as far as courts of general jurisdiction are concerned, the problem of jurisdiction is a simple one. If the court has jurisdiction over the defendant, the case may go on, because the plaintiff has by his own act voluntarily submitted himself to the court. But that is not so in matters involving land, which for the most part must be brought in the place in which the land is situated. Since the relation of husband and wife is a matter dealing with a family complex, and the action for divorce asks for a readjustment of this complex, the normal requirement would be that the action should be brought only where all the members of the family are to be found.

If we deal with law as merely a game of mathematically arranged counters, the problem offers no difficulty. The domicile of the wife is the domicile of the husband. So is the domicile of the minor children. All the members of the family group are, therefore, domiciled where the husband is, and in that place consequently, and there only, a court may entertain an action for divorce, which involves the rearrangement of the family group.

This has in fact been the legal view in a number of cases.

Its unreality is apparent from the fact that in just these cases where divorces are most completely justified, *viz.*, when a wife has been deserted or when a husband by his conduct makes it impossible or improper for his wife and family to live with him, the husband's domicile may be either unknown or for practical reasons very difficult to utilize. On the other hand, the deserting or delinquent husband may bring his action where he likes, often under conditions that make an effective defense on his wife's part extremely difficult.

For that reason, courts have in the main discarded the strict rules of domicile in the matter and have based their jurisdiction primarily on the domicile of the plaintiff, whether wife or husband. This domicile is not the one of international law, but a purely statutory residence requirement. In most places it is one year. In Nevada, as has been said, it has been reduced to six weeks.

Other courts have attempted to create a new domicile, the "matrimonial domicile," different from the domicile of either husband or wife. The obvious analogy is that of the situs of real property. But this analogy breaks down almost at once, since the status is a relationship and a relationship cannot be severed from the persons or things related.

The matter might well have been arranged without invoking new categories or doubtful analogies. A person physically present in a state, who has given evidence of an intention in good faith to remain there, might well call upon the courts in a proper case and with proper safeguards to terminate or modify his rights and duties, without any reference to the fact that a certain number of these rights and duties are frequently combined in a definite complex and called a status. If

precaution is taken against fraud on the court, it is hard to see why anything else is relevant.

A very real difficulty is created by a special aspect of the conflict of laws which is peculiar to the United States. In most jurisdictions, the extent to which foreign laws will be given effect depends on comity alone. They may deal sovereignly with situations that seem offensive or troublesome to them, however warranted by the laws of another jurisdiction. But in the United States, a constitutional provision requires a state to give "full faith and credit" to the "public acts, records and proceedings" of every other state. Does that require a state to recognize a divorce between persons who were once its citizens, when one of them has changed his domicile to another state for the very purpose of bringing this action, and when the grounds for divorce and the methods used in obtaining it are completely opposed to the public policy of the state in question?

The disinclination to accept such divorces has not always been the result of any hypocritical self-righteousness on the part of the state whose laws have been evaded, but has frequently expressed a real social policy and ideal and a real repugnance for the social consequences of excessive freedom and informality in divorce actions. The indignation expressed at the change of domicile for the purpose of "evading" the local law is somewhat less justified. There is an unquestionable constitutional right to change domicile for

any reason, and the preference of a jurisdiction that has a freer or more "liberal" divorce laws for one that has more stringent ones, is as reasonable as preferring one state to another because of greater economic opportunities or milder climate.

There is, however, ample justification for insisting that a

change of domicile be in good faith, and good faith is obviously more than dubious when a change of domicile to obtain a divorce is followed almost immediately after the divorce by another change back to the state of original citizenship. Strictly speaking, the fact that domicile is found to be a fact is a judicial determination like any other and not subject to question in another jurisdiction. It is encouraging to find that many courts are sufficiently concerned with reality to examine this fact before they feel constrained to accept as final a divorce granted in another jurisdiction.

The insecurity of marital status which the conflict of laws causes is made more acute in the United States by the mobility of the population and the frequent *bona fide* changes of domicile which Americans make. Evidently some interstate agreement, with or without a uniform statute in each state, will be the only satisfactory way of avoiding the evils of the present situation.

Under some theories of the conflict of laws, the rules governing jurisdiction in divorce are quite different from those governing jurisdiction in the case of annulment. Cases of annulment, it is argued, can be brought only in the jurisdiction in which the marriage was entered into. The reasons assigned are those of mathematical logic. Marriages are valid only if they conform to the law of the state in which

they are contracted. Unless a strong public policy is at work—as in miscegenation—the validity of the marriage cannot be questioned if valid where contracted. Similarly, it is argued, no other state may properly determine over again what, by implication, has been determined in the affirmative in the state of the marriage, to wit, that the persons were competent to marry, that no impediment existed.

The theory cannot be easily defended despite the learning and acumen which have been employed to defend it. It is a complete nonsequitur for all those impediments that are regarded as "diriment" by the Church, *i.e.*, force, mistake and impotence. Even if the doctrine were logically unassailable, considerations of policy and common sense oppose it. It depends, for one thing, on assuming that divorce and annulment are fundamentally different in their effect.

As a matter of fact, the difference has been much exaggerated. In both divorce and annulment, the parties, from the date on which the judgment becomes final, change their status. They no longer are husband and wife, but single persons. The judgment for annulment offers in addition restitution, necessarily an incomplete and a qualified restitution, for all transactions entered into on the basis of the status of husband and wife in which it is reasonable to ask restitution. Certainly no sound reason can be adduced why any court cannot in a proper case determine both that its citizens shall change their status and that one or both may have such restitution as the court can help them to. The mere fact that these citizens married in another state does not seem an adequate reason for refusing relief if it is otherwise justified, or in sending them to a distant place to get it.

The rules governing the conflict of laws in regard to annulment may well be wholly assimilated to those governing divorce. If the court has jurisdiction of the plaintiff or defendant, if precaution is taken against fraud or surprise, there is no reason for classifying those who petition for annulment into two arbitrary categories, those who were married in the state and those who were married out of it.

4. Granting of Divorce

The multiplicity and variety of the grounds for divorce in the various jurisdictions have already been mentioned, as well as the absence among them of the one ground that seems most natural and reasonable, mutual consent. That such a list of tabulated grounds is in practice quite futile is also a matter of common observation. Indeed, one of the most commonly assigned of grounds, "mental cruelty" is so elastic a term, even when it is alleged in good faith, that it amounts to little more than a submission to the judge's discretion of whether the parties should be legally compelled to live together.

The grounds for divorce most frequently listed in statutes are adultery, desertion and cruelty. These, if actually committed, are wrongful acts, and are properly enough called matrimonial torts. It is important to remember this fact in attempting to determine the character of alimony and in justifying the consciously penal character of parts of the judgment for divorce. The divorce itself, the destruction of the status, can scarcely be regarded as a punishment for the delinquent spouse since the status is necessarily destroyed for both the guilty party and the innocent one. A penal character can be given it by continuing some of the burdens of the status for the guilty party and relieving the innocent party of all of them. If the wife successfully maintains the action, she may still claim support from her husband, but owes him none of the duties of marriage. She may likewise receive custody of the minor children. If the husband obtains the divorce, he is relieved from all the duties of the marriage, the wife may be deprived of all or most of her interest in his property or in the community property, and may also be de-

prived of custody of her children.

An additional penalty that was at one time quite general and is still maintained in form in some jurisdictions is to prohibit the guilty party from remarrying in the lifetime of the other. This has proved quite unenforceable because of the ease by which it could be evaded. Few states demand domicile for the purpose of marriage and, if the party prohibited marries in another state, the state granting the divorce is powerless to prevent it or punish it. Indeed, if the prohibition had been effective, it would have inevitably encouraged illicit connections.

(1) ACTS TENDING TO SET ASIDE JUDGMENT (a) *Recrimination*. So long as divorce is based in theory on the commission of a punishable offense by the defendant in the action, the effect of recrimination, a doctrine which has always elicited the jibes of social critics, is logically defensible. Recrimination if proved is a complete defense and requires a dismissal of the divorce action. It is the assertion against the plaintiff of the same matrimonial tort as that for which a divorce is asked or, at any rate, the assertion of a matrimonial tort sufficient to base an action for divorce. Since these actions partake of the nature of actions in equity, the rule of "clean hands" is available. A court of equity will not act on behalf of a petitioner who is as guilty as the party against whom he claims redress.

Nevertheless, however logically defensible in theory, the doctrine contradicts the reality of the situation presented. The divorce action is, in fact, a petition to have the family relations completely readjusted by a court and this is the view that the court formally takes of the matter. In such cases, it is a manifest absurdity to sever the relationship

when one of the two parties has shown himself unfit to perform its duties and bear its responsibilities, and to refuse to sever it when both parties have shown themselves unfit.

The elimination of this absurdity would be easy enough. That no serious attempt has been made to do so is probably due to the relative disuse into which this defense has fallen. It is plausibly asserted that in nearly every divorce recrimination would probably lie, and in view of the fact that an action for divorce is generally the last of a long-continued series of unhappy incidents and is itself a symptom of a domestic breakdown, it is inherently probable that both parties are to some degree responsible FOR the result. The possibility of recrimination in practice is likely enough to be merely a means of negotiating the collusive bargains which are unfortunately—and under the present state of the law, almost inevitably—the basis of most modern divorces.

(b) *Collusion*. Collusion is in theory a complete defense to a divorce action, if the defendant has the effrontery to raise an issue equally discreditable to both parties. To be sure, the defendant might plead repentance or ignorance or even duress to explain participation in such a scheme. But collusion can be noticed by the court itself of its own motion, and when so noticed will result in dismissal of the action and perhaps in punishment of the parties for contempt of court, or for perjury when perjury has been involved.

Collusion may consist not merely in alleging a matrimonial offense which has not in fact been committed, but equally in omitting to recriminate such an offense when it has been committed. Both kinds are extremely common. The former is particu-

larly in vogue in jurisdictions which have adhered to the doctrine that only adultery is an adequate ground of divorce. In these places, the tradition that a chivalrous husband will permit his adulterous wife to divorce him rather than use her offense to divorce her, has created scandals of its own and has even made possible a commercial exploitation of these scandals. It is difficult to believe that the condition can long continue to be ignored by legislatures or other reforming agencies.

A particular type of collusion involves connivance. In this case the matrimonial offense is not merely alleged and admitted by default, but is actually true. The commission, however, has been either acquiesced in by the plaintiff or has been actually made possible by the plaintiff's assistance.

It may well be that perjury is thereby avoided, but the fraud on the court is equally great and since the offense is commonly that of adultery, the moral grounds on which our divorce system is still defended lose even more of their cogency.

(c) *Forgiveness or Condonation*. Since these offenses are wrongs clone by one spouse to the other, they may be forgiven by the injured party. The Christian ethical system that animated the ecclesiastical courts not only permitted forgiveness or condonation, but necessarily encouraged it as a moral duty. This was in direct contrast with the Roman system as formulated in the legislation of Augustus (*Lex Papia-Poppaea*), which imposed a duty on the husband to divorce his wife if she committed adultery, and even subjected him to criminal and other penalties if he did not. It applied only to the husband, since his extra-marital intercourse was not adultery.

The Canonical rule equalized

the sexes in this matter and the court urged condonation wherever possible. The secular courts adopted the same principle, in theory at least, and some of the rules in divorce procedure are particularly addressed to the possibility of permitting reconciliation, which usually implies condonation by one or both parties of offenses committed.

The forgiveness if actually granted is in one sense final. It may not be arbitrarily withdrawn. It may be manifested by an express statement or indicated by conduct and the conduct most frequently taken to show forgiveness is the resumption of conjugal relations—especially sexual relations—with knowledge that the offense had been committed.

If, however, forgiveness is final in the sense that it cannot unreasonably be retracted, it is also essentially conditional. The condition is of course that the offense forgiven must not be repeated or an equally grave one committed. That is what is usually meant when it is declared that the forgiven spouse must treat the other with "conjugal kindness." It does not quite mean that the person forgiven must be in every respect a devoted and exemplary spouse, but it does mean that the major and fundamental duties of the married status must be performed. If the condition is not fulfilled, if the forgiven spouse does not treat the other with "conjugal kindness," the forgiveness itself ceases to be effective and the original misconduct may be used to base an action for divorce just as though no condonation had taken place.

(2) *INTERLOCUTORY JUDGMENT* The policy of the law that encourages condonation is in part the basis of the fact that a judgment of divorce does not become final until an appreciable time has elapsed after it has been

rendered. It is at first merely “interlocutory,” and the length of time necessary to turn it into a final judgment is determined by statute. In England it is six months. In some American states, it is one year.

The interlocutory judgment of divorce is a real judgment, not merely an announcement that a judgment will be rendered in the future. It determines finally that a cause of action for divorce exists at the time the judgment is rendered, and if there are property settlements included in the judgment these are as final as they would be if they were included in the final judgment of divorce. In both cases, the judgment is subject to attack for fraud or for any other reason which makes a judgment vulnerable. The interlocutory judgment does not sever the relationship of husband and wife and make the two parties single once more. Only the final judgment does that. In the interval, the parties are as fully married as though no judgment had been rendered at all. If either marries, the felony of bigamy has been committed. Extra-marital intercourse in this period is adultery. If either dies intestate during this period, the other succeeds as though no divorce had ever been contemplated.

If an interlocutory divorce has been obtained, upon expiration of the statutory period petition may be filed—usually by either party—to have the divorce made final. The granting of this petition is not a matter of judicial discretion. Unless there is a definite and cogent reason against it, the court must make the judgment final and a refusal to do so is reversible error.

The purpose in part, as has been said, of requiring an interval to elapse between the interlocutory and the final judgment, is to give an additional opportunity for a *reconciliation* between

husband and wife, which under the circumstances can mean only a condonation of the matrimonial offense that the interlocutory judgment found existing. Only an application by either husband or wife can make the judgment final. The court cannot do so. If neither of the two parties chooses to take any steps in the matter, the marriage remains intact and both parties may resume full connubial relations when and as they please.

If the purpose of reconciliation were as nearly controlling as it is sometimes said to be, every attempt at resumption of marital relations would be encouraged even if it turned out to be unsuccessful. That is, if the parties were to live together as husband and wife on several occasions for a shorter or a longer time within the statutory period, that would not deprive them of the right to make the judgment final, if after these attempts it was still apparent that they could not maintain a successful family life. But some courts, sometimes without legal warrant, have treated any attempt at reconciliation as a condonation, and have taken any resumption of connubial relations, as a ground for refusing to make the judgment final. There is no adequate reason why this should be. Continued cohabitation within the statutory period may be evidence—and should be so considered—of bad faith or collusion, and as such may justify the court in setting the judgment aside, but it has no real relevance to the right to have an interlocutory judgment made final. Some justification may perhaps be found in those jurisdictions in which the declared policy against divorce is very strong. The practice mentioned may be assumed to reduce the number of final divorce judgments rendered, though the fact is more than dubious.

The special occasion, however, for establishing interlocutory judgments lay in the public scandal produced by the fact that, when divorces were immediately final, remarriage of the divorced party to another person took place almost at once, and often on the same day. Frequently, the unpleasant spectacle of what was little more than an exchange of wives was presented. It seemed scarcely fitting that the courts should lend themselves to facilitating the coarseness and immorality which these situations usually implied.

There is another somewhat related purpose in the establishment of interlocutory judgments in divorce actions. There is a constant *danger of fraud* on the court in the form of collusion or connivance or direct intimidation of the defendant. The statutory interval makes an investigation possible, or at any rate allows a longer period within which evidence of this type of fraud may become apparent. In England, these matters are within the jurisdiction of a special officer, the King’s Proctor. There is no corresponding official in the United States, but the court has plenary jurisdiction and may of its own motion summon the party or the parties for a fuller investigation.

Collusion is most commonly practiced by the simple process of inducing the defendant not to appear. That, also, would be the result when advantage is sought to be taken by reason of the defendant’s absence or ignorance. The law attempts to meet both possibilities by requiring an examination of the plaintiff, and often corroboration as well, even when the defendant has defaulted. Unfortunately, these examinations and corroborations are frequently mere formalities and do not present any adequate evidence of the facts on the basis of which divorce is asked.

The history of divorce makes it plain that a jury should normally be absent. The cases were originally cognizable in the Ecclesiastical courts and in Chancery, where juries were at most advisory bodies. But in some jurisdictions a jury has been introduced, not to give a general verdict but to answer a series of questions of fact, which determine the issues as far as they are issues of fact. The judgment of divorce is still rendered by the court, which must take a number of circumstances into account that cannot well be submitted to a jury.

(3) SPECIFIC GROUNDS FOR DIVORCE. This is the situation which all actions for divorce present in Anglo-American law. It remains to examine briefly the specific grounds for which divorce may be asked.

(a) *Adultery*. Adultery is the one reason for which, by a famous passage in the New Testament (Matt. 19, 3-12), divorce was permitted by the teaching of Jesus. This exception in the general prohibition of divorce is not found in the parallel passages of Mark and Luke, and a violent controversy has arisen on the subject. The Roman Catholic church interpreted divorce here in the sense of "*a mensa et thoro*." In any case, however, all Christian churches were agreed on regarding adultery as the gravest of matrimonial offenses as well as a mortal sin. In the Old Testament it is a serious crime as well, as is natural in a polygamous and patriarchal society, but only where a married woman is concerned. In this respect the rule was the same among Greeks and Romans as well.

The ecclesiastical rule made the offense as grave when committed by a married man with an unmarried woman, as when committed by a married woman. Fol-

lowing the usual interpretation of Matthew, divorce *a mensa et thoro* was allowed in either case. But social custom continued to regard the adultery of the wife as far the worse of the two. On feudal principles, it would inevitably be so, since the wife's adultery put in question the purity of blood of the heir while the husband's adultery would have no such effect. For that reason, the effort to secure condonation was likely to be more effective in the case of a husband's misconduct than of a wife's. Even before the Church courts, divorce would rarely be allowed to the wife for the husband's adultery alone, unless it was persistent and notorious or accompanied by harsh treatment.

Under the later English law, when the secular courts had cognizance of divorce, and in practice when a private bill for divorce was before Parliament, this differentiation of the sexes was the legal as well as popular rule, and was rationalized by reference to the danger of bastardizing the issue. When divorce was introduced into the United States, however, both sexes were dealt with alike and this has very recently become the law in England also.

Adultery has also been made a penal offense in a number of states, even a felony in some. Prosecution, however, for obvious reasons is extremely rare, since the degree of proof required at the Common Law for conviction of a crime is rarely obtainable in this case.

When adultery is alleged as a ground for divorce, the evidence necessary is obviously much less than would be necessary in criminal cases. Any evidence sufficient to convince a reasonable person that adultery had probably been committed would be sufficient, whether the issue is tried by a judge or by a jury. None the less, the matter is

not one of pure discretion and the insufficiency of the evidence to establish adultery may be raised on appeal.

In the states which recognize only adultery as a ground for divorce, no form of marital misconduct or provocation would be accepted in justification. At any rate, that is the theoretical rule. In practice, continued cruelty or denial of sexual access, is doubtless considered, even when it is expressly ruled that it is irrelevant. It is rare that on appeal a finding that no adultery has taken place will be reviewed as contrary to the weight of evidence.

While, as has been said, condonation of adultery like all other condonation is conditional, implying the expectation that the offense will not be repeated, it is possible that continued condonation by either spouse of habitual adultery of the other, may prevent it from being used as a reason for applying for divorce. This is not a waiver of the marital duty of sexual fidelity, nor an agreement by which the duty is abrogated. The duty is an essential one, implicit in the status, and cannot be modified or abrogated. But continual condonation of the offense can raise a qualified estoppel, since the forgiven spouse might be justified in supposing that no petition for divorce will be filed.

Evidently, what really takes place is that the court feels disinclined to assist a petitioner whose own feeling is so lax. It amounts to a punishment inflicted for excessive complaisance, since despite legal rules the social disapproval of such complaisance is still strong. The Roman who condoned his wife's adultery, it will be remembered, was guilty of an offense. The medieval feudal system has transmitted to modern times, a feeling that honor is engaged here more than elsewhere. The

cuckold was ridiculous even when he maintained his honor. The wittol, *i.e.*, the complaisant husband, was nothing less than contemptible.

(b) *Desertion*. Desertion as a ground for divorce needs no particular comment except that, since it is usually statutory, the precise conditions of the statute must be complied with. To constitute desertion the withdrawal of the deserting spouse from the matrimonial residence must not be provoked or compelled by the other party. In this respect desertion is quite different from adultery as a cause of divorce.

Desertion, furthermore, must be continuous. If cohabitation is resumed after desertion and desertion again takes place, it is a new desertion even if the cohabitation is of the briefest and the previous period of desertion was very long. Again, the desertion ends when the deserting spouse within the period of the statute makes a bona fide offer to return or bona fide invites the other to return. Evidently these offers will be ineffective if the statutory period has elapsed and a cause of action has already accrued. Even in such a case, courts will sometimes urge an acceptance of the offer, on the general principle that reconciliation is desirable and to urge reconciliation is a moral duty of the court.

Where the desertion is "constructive," *i.e.*, consists of a refusal to have sexual intercourse, a differentiation between the sexes is made. The wife is deserted when as a matter of fact no sexual intercourse has taken place, without any express refusal on her part. The husband is deserted only when he can show that he has solicited sexual intercourse and has been refused. The difference is more apparent than real and is mentioned merely as a particular example of the court's attitude to

questions of sex. There is no constructive desertion when failure to have sexual intercourse is based on health or legitimate fear of sexual infection. The kind of evidence necessary to establish this reason for divorce is as unpleasant as can be imagined and indicates an insensitiveness of feeling which may well make a court prone to dismiss the entire proceeding on any legitimate ground.

(c) *Cruelty*. The unfortunate legend, based on a misunderstanding of a statement in Blackstone, that the Common Law permitted a man to beat his wife provided he used a stick "no bigger than a man's thumb," has seemed to confirm an equally baseless bit of popular psychology that a touch of sadism is not objectionable in marital affection.

In any case, the law has long repudiated the doctrine in all its forms. *Corporal beating* of a wife is neither more nor less than assault and battery. It is punishable criminally. It constitutes cruelty and is always a proper ground for asking for a separation, or for an absolute divorce in states where cruelty is listed as a ground for the latter.

Evidently, provocation is an element to consider here, even if it would not be in an indictment for battery. Cruelty consists not in the actual physical attack, but in the indication of a disposition which makes cohabitation dangerous. If the blow was one which in all likelihood will not be repeated, it is probable that a charge of cruelty will not be regarded as sustained.

But physical cruelty is rarely alleged. Its place has been taken by what is called "*mental*" *cruelty*, a charge that has been made so flexible as to include any expression of opinion or feeling which could humiliate or mortify the person to whom it is

addressed or about whom it is used. If "mental cruelty" were taken seriously, its frequent employment in actions for divorce would long ago have received definition and precision from adjudicated cases. It is common knowledge that it is rarely serious, even if the specific acts cited are true enough. It is, as a rule, a cover for the fact that the parties do not desire to live together as man and wife, and the acts declared to constitute cruelty are often nothing less than ludicrous and trivial.

A great deal is necessarily left to the attitude of the court. In jurisdictions that are thought of as liberal, there are always several judges whose views on these matters are likely to be more severe than those of others, and who will decline to regard acts as constituting mental cruelty which other courts have accepted. A great deal of "shopping" for favorably inclined judges takes place that does not increase the authority of the law or of its instrumentalities.

However rigidly conservative some courts may be in the matter, it is hardly open to question that where real mental cruelty is shown, it is likely to be a better justification for divorce than sheer brutality. It is therefore unfortunate that mental cruelty, which in its proper sense destroys the foundation of married life more readily and more nearly completely than any other form of marital misconduct, should be degraded into a pretext to cover a mutual agreement to end the marriage.

(4) **BREAKDOWN OF FAMILY UNIT**. Evidently the application for a divorce is a symptom of a breakdown of the marital community as a social unit. If one of the spouses is willing to air openly all the grievances that arise in family life, and is willing to bring charges of immorality or

cruelty, that is an indication that the family—this particular family—is hardly worth maintaining. When the ground of divorce is desertion, it may be said that the marital community has already ended in fact.

In a number of new communities, like Russia and some of the Mexican states, not mutual consent but merely the application of either side is sufficient to end the marriage. This carries the notion of the marriage contract still further, and puts the situation completely on a par with partnerships and similar associations in which either side may ask for a dissolution, due regard being had to an equitable partition of the interests involved.

Such a situation is, of course, completely repugnant to a social theory which regards even mutual assent as an inadequate and improper basis for a divorce, and the Russian procedure has been presented as the logical outcome of admitting mutual assent as such a basis. Whether it is so or not, there is some justification for the belief that with all its hypocrisies and incongruities and its admitted harshness in special cases, a legal system that puts serious difficulties in the process of divorce serves a real social purpose and prevents slight friction and temporary and slight maladjustments from resulting in destruction of family life.

Something intermediate between a divorce which is as simple in its process as the recording of a land-title and a divorce which requires an elaborate machinery of perjury and an accumulation of hostility and malice, might well be sought for as a solution for the real legal and moral problem presented by the present unsatisfactory condition of things.

5. Alimony

The final judgment for di-

vorce severs the marriage bond and changes the status of the parties. It also provides for the custody of children, either by affirming what the interlocutory judgment has already established or by making a new determination on the subject. It further affirms any distribution of property that has been made by the interlocutory decree or makes a new one. It is also likely to provide that as long as the wife lives, and remains unmarried, the husband must pay to her a specified sum for her support in stated installments. This provision is called alimony.

The nature of alimony has been differently stated. It is possible to regard it as a division of the matrimonial property) that is, as compensation for the property which the wife brought to the union, most of which is unrecoverable in fact, even if the title reverted. Or else, it might be regarded as an attempt to estimate her interest in the property acquired by her husband with her assistance, if somewhat indirectly furnished.

Second, alimony may be thought of as compensatory or penal damages for the matrimonial tort which was the basis for the divorce.

Third, alimony may be treated as an obligation imposed upon the husband in the interests of public policy, to prevent his wife from becoming a public charge. The equitable basis for placing this obligation on him is to be found in the fact that it is his misconduct that has compelled a dissolution of the marriage and with it ended the husband's normal duty of supporting his wife.

In the judgment for alimony, the court acts as a court of chancery and issues a positive order. This order is not secured by a lien special or general on any property of the husband, but is a personal obligation. Failure to obey

the order is a contempt of court, and unless adequately explained, will result in imprisonment until payment is made or in some way rendered certain.

Because it is an order addressed personally to the husband, it cannot be enforced except by the court making it. The federal organization of the United States has in consequence made it relatively easy to evade. Many of the large cities of the United States, notably New York, are situated close to the borders of other states, and a New Yorker under order to pay alimony may remain in New Jersey without leaving the metropolitan area but still be beyond the reach of the New York courts to punish him for contempt. Modern methods of communication have increased the opportunities for openly disregarding the duty to pay alimony, so far as that duty is established by a court order. Difficulties of this kind create a strong pressure on the wife to accept a definite sum or definite property in lieu of alimony. If this arrangement is freely made and is carried out by the husband in good faith, it will be enforced by the court, and will be treated as ending any other claim to alimony.

The obligation to pay alimony, whether created by court order or reduced to a binding agreement, cannot be discharged in bankruptcy, and this rather as a matter of public policy than because of the difficulty in estimating the period during which alimony would be due. This fact and a number of other situations give additional support to the theory of alimony which makes it wholly a creature of the law, and neither a distribution of matrimonial property nor compensation for a wrong done.

Alimony is payable only by the husband to the wife when she successfully maintains an

action for divorce. There are a few jurisdictions in which a wife is under an obligation to maintain her destitute husband, if she has means, but even in these jurisdictions, it is hardly likely that the husband would be entitled to alimony, if he succeeded in obtaining a divorce.

Although these regulations fit most readily with the theory of alimony as a duty imposed in the public interest, other rules lend some support to the other theory which makes of alimony damages granted to an injured wife. If the husband obtains the divorce, no alimony is granted; and if, after divorce, the wife grossly misconducts herself, alimony may be discontinued. These two facts, however, do not really qualify the doctrine that alimony is a public duty, since they merely indicate that the duty will not be imposed when it is inequitable to do so.

Alimony, of course, must be distinguished from the provision for the support of children, which has no necessary connection with the good or ill conduct of the spouses to each other. Alimony is equally distinguishable from the division of the community property in the community property states. It is true that the community property may be divided into unequal portions and the larger portion given to the spouse found not to be at fault, but the rule is to divide it equally, even where grave dereliction is found.

The economic opportunities of women are still far less than those of men, and become increasingly less at slight increases of age. This makes dissolution of a marriage a far more serious economic burden for the woman than for the man and justifies—even when the divorce is to all intents and purposes a voluntary separation—the continuation of the duty to support on the part of the husband. If alimony, how-

ever, is to remain a permanent incident of divorce, it will need far more careful regulation to make it effective and prevent its being an additional stone of offense in the attempt at legally controlling the status of husband and wife.

IV. SEPARATION AND SEPARATE MAINTENANCE

The duty of cohabitation and the reciprocal duties of sexual access, although essential elements of the married status, may be mutually waived by an agreement—generally required to be in writing—and a separate residence allowed the wife. Such agreements will give rise to no action at law, but the failure to live together cannot constitute desertion as long as the agreement is in force. These agreements are revocable by either party. They will be effective only so long as the mutual consent on which they are based lasts. If there has been a rearrangement of property rights as part of the consideration for this agreement, some effort will be made to provide for restitution, with the incompleteness inherent in all efforts at restitution.

Separation is more frequently and more securely obtained by a judicial proceeding than by private agreement. This is the canonical divorce *a mensa et thoro*. It ends the duties of cohabitation and sexual access. It has no effect on the duty of sexual fidelity nor usually on the duty of the husband to support his wife. Since it is a legal judgment, it cannot be rescinded by one of the two parties acting alone. But if both desire to rescind it, they can do so by resuming conjugal life, and if they do so the judgment loses its effect. If thereafter the parties once more change their minds and once more desire to be separated

legally, they must do so by a new action for that purpose.

Members of the Roman Catholic Church are required by their religion to treat all divorces as merely a *mensa et thoro*. If, therefore, two Roman Catholics are divorced by a final judgment in an ordinary procedure, their status in the eyes of the church is not changed thereby. They are still man and wife, and may contract no canonically valid marriage with anybody else. Further, sexual intercourse with anyone else is adultery, a mortal sin in the eyes of the Church, and does not cease to be adultery because a marriage valid by secular law has been entered into by the parties who commit it.

The reasons for applying for a separation are usually not specified as a list of nominate offenses in the statute. Any reason which will justify a divorce will also justify a petition for separation. Besides these reasons, however, a large field is left for judicial discretion. Evidently, if the situation is such that no satisfactory life can be looked for, the courts will not compel the parties to cohabit, or impose a duty on them to do so.

The court has no power to grant a divorce, if an application is made merely for separation, even though the offense proved would justify a divorce and even though the accepted doctrine is that the court has plenary power over all forms of the marriage relationship, the moment a matrimonial controversy is submitted it.

V. ALIENATION OF AFFECTIONS & CRIMINAL CONVERSATION

It has been shown that the status of husband and wife constitutes a legal value, something that in German is called *ein Rechtsgut*; consequently, it is

something which the law will protect. Any deliberate act of a third person seeking to destroy or impair it has long been an actionable wrong.

Injury done to the parent-child relation by enticing the child from the parental domicile or in seducing a daughter, permitted an action on the basis of the loss of services, *per quod servitium amisit*. In the case of the wife, the services rendered were not of the same sort nor in medieval conception were they in any real sense the property of the husband. But he had a claim on her society in the fullest sense and on her cooperation in maintaining the household and the dignity of his rank. The collective term for this was the *consortium* and the action by which it was vindicated was characterized as a claim for a wrong *per quod consortium amisit*.

Enticement of a wife to elope caused a loss of *consortium*. An equal loss was assumed to be inflicted in the case of seduction. It will be remembered, that at strict Canon Law, the wife's adultery was at most a ground for divorce *a mensa et thoro*. Consequently, the wife's paramour was very reasonably subjected to some sort of judicial punishment, for it was his wrongful conduct that caused the husband to remain married to an adulteress, humiliated him and imposed serious burdens upon him.

The Feudal Law made adultery with the superior's wife a felony on the part of the vassal. It was, as a matter of fact, one of the original forms of felony listed in the *Libri Feudorum* (I, 5) and bore the special name of *cucurbitare*. The declared reason was that it threw doubt on the legitimacy of the offspring and so raised questions of proper succession to the feudal benefice. Those forms of the feudal notion of felony which became treason in England included this

offense as a very serious treason, so far as the King was concerned. Two queens of Henry VIII and their lovers were executed for it, and in listing treasons, Coke especially assigns the feudal rationalization to it.

This same rationalization was applied to actions for "criminal conversation," as the action by the husband against his wife's paramour came to be called. Strictly speaking, there was no danger of bastardization in law, if the husband was "within the four seas," but the doubt as to physical paternity was sufficiently disgraceful to make the intimate association involved in the *consortium* difficult or impossible, even if the husband were willing to condone the adultery. Accordingly, criminal conversation was treated as a serious tort and heavy damages allowed.

As a matter of fact, however, the danger, real or professed, of bastardizing the issue was not always in the minds of judges when actions were allowed for criminal conversation. There seems to be at bottom some obscure recollection of the early attitude which made of the wife a property interest of the husband, and which therefore made adultery with her an obvious violation of that property right. There is undoubtedly more than a vestige of this point of view in the popular attitude. Whether or not this played a part in determining the legal view, there is little doubt that the gravity of the offense was the injury done to the *consortium*. The bastardization of the issue was not the exclusive consideration. Evidence even of the strongest character, for example, that no children had been born during the continuance of the adulterous relations, would not be received.

The rationalization mentioned is often used to explain the fact that no action for criminal conversation lay by the wife

against the mistress of her husband. But it may be doubted whether this rationalization was the real ground of the rule. In spite of the Church rule, adultery on the husband's part was always regarded as a venial offense as compared with the wife's misconduct and, as has been shown, this has expressed itself in the English law of divorce.

Indeed, if the *mores* of the community treated such occasional lapses of married men with marked indulgence, as they demonstrably did, it cannot reasonably be declared that the injury done to the *consortium* by the husband's adultery was in fact as serious as in the case of the wife's. The *mores* of American communities, however, tended strongly to an equality in the treatment of the sexes. This equality showed itself in permitting actions for criminal conversation when brought by the wife as well as by the husband, without reference to the bastardization of the issue.

It may be said at once that actions for criminal conversation have been extremely rare in the United States, whether brought by husband or wife. A much commoner type of action, open of course to either party, has been suit for alienation of affections. This action has no necessary relation to adultery. It does, however, rest on the integrity of the *consortium*. Alienation of affections will lie when either spouse deserts the other because of the persuasion or inducement of a third person, or when the confidence or love between the spouses has been undermined by the words or conduct of a third person. It is frequently brought by a wife sued for divorce, against members of her husband's family. And it may also be used when either husband or wife leaves the marital domicile to live adulterously with someone else. Technically, there-

fore, it does not lie because of single or sporadic acts of misconduct that are not accompanied by desertion, but, as a matter of fact; such actions have been sustained even when the husband and wife continued to live together.

That the action for alienation of affections serves any valuable social purpose is not apparent. It has, as a matter of fact, been made an instrument of blackmail, or at any rate of improper pressure, as fully as the action for breach of promise. With this latter action, it has been discountenanced in the movement to reform the law of matrimony. although in some jurisdictions actions for breach of promise have been abolished, while actions for alienation of affections have been retained.

There can be no question that the destruction of satisfactory relations between husband and wife is a serious injury that has, or may have, widespread consequences. It may be doubted, however, whether any system of legal redress will pro-

vide either reparation for the injured party or act as a deterrent on the wrongdoer. The valuation of the damage in these cases has peculiar difficulties. Furthermore, it is rarely indeed that outside instigation has been the exclusive cause of the loss of affection which is the basis of the action. If the *consortium* had not been already weakened by other factors, there is little likelihood that it would have been destroyed by the machinations of third persons. When we add to these circumstances the almost inevitable misuse of the action for purposes of pressure of direct blackmail, its accelerated abolition must be welcomed as an encouraging sign.

The ecclesiastical courts attempted to enforce some of the duties of the *consortium*, by an action for what was called restitution of conjugal rights. Except as a duty imposed on the conscience of the erring spouse, there could obviously be no real means of enforcing a judgment of this kind. A truant wife might be compelled under criminal pen-

alties to remain in her husband's home, but she could not be compelled by any penalties to treat him with respect or affection. An extraordinary use of the injunctive process, in this case against the third party charged with alienation of affections or with an attempt at this offense, can hardly be said to afford a happy solution. Such injunctions—usually against a reputed paramour of the wife—have been granted and they have taken the form of forbidding the person enjoined from communicating with the wife or from soliciting or in any way approaching her improperly. There is something slightly ludicrous in the picture of an endangered honor being vindicated by injunction. The punishment threatened would, of course, be imprisonment for contempt of court. No case in which this has been carried out has been recorded. Under all circumstances process of this sort could easily enough be evaded, even if it was seriously expected that it would be effective in the jurisdiction in which it was issued. ■

Guardian & Ward

In Feudal Law and, therefore, in the medieval Common Law, the relation of guardian and ward was almost as important as that of parent and child. It was one of the most valued of feudal incidents and it was the undoubted and extremely lucrative property of the feudal lord or the person to whom he had transferred the right in whole or in part.

Under the term *custodia* it is minutely regulated in all the revisions of the Great Charter. There was no occasion to speak of the relationship while the father was alive, but if he died leaving minor children, they fell at once both as to their persons and property under the control of the feudal lord. The guardianship over the person was exercised by determining where the ward should reside; that over the property, by the immediate entry of the lord into complete possession of the ward's property. Both forms of guardianship were seriously abused. It was the duty of the guardian to provide adequate accommodation, adequate food and dress and education for his ward, and adequacy was measured by the ward's rank. Magna Carta is itself evidence of the extent to which this duty was neglected.

A later abuse, signaled by historians rather than lawyers,

came into existence when wardships were freely alienated and got into the possession of persons of lower rank anxious to ally themselves with the nobility. A ward would be taken into the home of the owner of the right in the hope that, through the intimacy of living together, a marriage would result between a child of the family and the noble ward.

The guardianship over the property was even more subject to abuse. Evidently the guardian was required to use it reasonably, but, as he owed no real accounting to anybody, it would need the grossest kind of abuse to render him amenable to punishment.

All these rules applied to feudal property held by knight's service. In tenure by socage and other non-military tenures, the guardianship went not to the feudal lord but to the kinsmen. Care was taken that these kinsmen had no interest in the inheritance. Paternal property was administered by the maternal kinsmen, maternal by the paternal kinsmen. Otherwise, said Fortescue in the fifteenth century, the lambs would be committed to the wolves who would devour them.

When feudal incidents were abolished in 1660, minor wards

were placed under the special care of the Chancellor as *parens patriae*. The position of "wards in Chancery" became a favorite subject of literary treatment. Dickens's novel "Bleak House" is a particular example. Under normal circumstances, however, there are few questions relating to the rights of guardians of property that are substantially different from the law dealing with fiduciaries in general. The appointment of guardians is the province of a court of equity, and the supervision of their actions is undertaken much as the supervision of trustees is carried on.

In the United States, a duly appointed guardian of the person of a minor is *in loco parentis* and has nearly the same rights and duties as a parent. For purposes of litigation, a minor may be represented by a special representative, the guardian *ad litem*, who however has extremely limited authority and restricted functions. The general guardian, however, is in no sense like an adoptive father. He is under no obligation of having his ward live with him, if other adequate provision can be made, and there is of course no claim of inheritance on intestacy.

Courts of Domestic Relations

The establishment of a special Court of Domestic Relations has been one of the growths of the movement that first created the Juvenile Court. In practice, the jurisdiction of such a court has been limited to matrimonial disputes rather than to the whole complex of domestic relations.

The movement in this direction is based on a sound principle. There are profound differences between controversies concerning property and obligations and those which affect family relationship. The former are determined by balancing measurable interests. It is an advantage over the defendant that the plaintiff is claiming, either as a right obtained in due legal fashion or as compensation for a specific wrong done him. The controversy shows a certain type situation as a background and rarely leaves the atmosphere of economic interest. When, however, family affairs are submitted to a court, the question is not one of balancing economic interests at all. The chief issue is whether a status shall be maintained in regard to two people whose presence before the court indicates that it is difficult to maintain. The measure

of value is social and psychological rather than economic, and those whose training has been confined to the application of values of the latter sort are not particularly well fitted to apply the former.

It is, therefore, quite rational to consider the advisability of a court system of which the personnel and the procedure should be particularly adapted to the subject matter which will come before it. Obviously, fixed time limits, precision of form, a technical rule of evidence, the exclusive reliance on question and answer, are peculiarly unsuited to actions in domestic difficulties. The unsuitability increases when the litigants are persons without much education and no social discipline, above all when they are foreigners whose problems are in part caused by their sudden transplantation into alien surroundings. To compel such persons to adjust their difficulties under a procedure designed originally to secure feudal tenants every jot of their strict rights to land, is nothing less than gratuitously oppressive.

Courts of Domestic Relations have functioned with apparent

success in several of our large urban communities, but it is somewhat doubtful how widely their jurisdiction can be increased either in range of subjects or in geographical extent. Both these courts, and all other courts that deal with domestic difficulties or with the care of children, have frequently called upon the assistance of what is in effect a new profession, that of social service. It is evident that a special group of courts dealing exclusively with family relations will need the active cooperation of skilled workers in this field. The fact that such a specialized group has been developed from the more generalized fields of sociology and economics, makes it permissible to expect a similar specialization in part in law.

It is curious to note that the need which is making itself felt for courts particularly dealing with family relations and no others, bids fair to recreate on a different basis tribunals with a function not unlike that of the medieval Courts Christian. The historical movement which amalgamated all special courts into courts of general jurisdiction has by a natural enough stage developed

a new process of differentiation on the basis, not of the claims of a particular community or of the practical need of administration, but of subject matter, considered realistically. It is possible to ignore human personality to a great extent in transactions of contracts or land. It is quite impossible to do so in situations which, like those of the family, are fundamentally constituted by the frictions and interrelations of personalities.

The relation of such courts to the general judicial system will present a problem similar to that found in fitting the rapidly increasing groups of administrative courts into that system. It will be unfortunate if such courts are kept in personnel and in dignity on a par with police courts. They deserve the most highly developed capacity and will not be adequately administered without it.



*Volume VI.
Legal Relations*

Finis