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# JUSTICE AND THE MODERN LAW

BY EVERETT V. ABBOT

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# JUSTICE AND THE MODERN LAW



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**JUSTICE AND THE  
MODERN LAW**

**BY**

**EVERETT V. ABBOT**

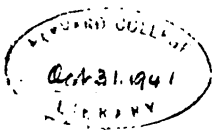
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## INTRODUCTION

If, in any jurisdiction of the United States, the law were suddenly to be *administered* as it actually *is*, the people would receive justice — but they would be shocked. They would enter upon the enjoyment of unaccustomed rights, and would find themselves relieved from long-accustomed burdens, — but, until habited to their new privileges, they would believe that the foundations of the government were being unsettled.

Modern civilization has grown out of the continuous effort of man to achieve, among other things, an ideal of justice. The principles of that ideal have long since been discovered and applied. Man's right of freedom, his duty to aid his fellow man, his voluntarily assumed obligations arising out of his social relations — these three underlying principles of justice have been understood more or less vaguely for many centuries. The growth of civilization has been marked by the constantly increasing skill with which they have been applied, and by the constantly increasing perception of their essential character and ultimate dominion.

The actual approximation to the ideal is much

closer than many of us suppose. A modern civilized state applies the entire group of underlying ethical principles with a degree of practical success which is surprising. Our fundamental rights of liberty and property, our fundamental duties of charity and cooperation, our freely created social and business obligations are enforced to a degree which is truly remarkable. There still remains, however, a margin between the achieved and the ideal, where the moral law is not yet applied and where injustice reigns. In any community in which that margin exceeds a certain factor of safety, in which more than a certain tolerable degree of injustice enters into the social constitution of the state, the state begins to retrograde and disintegrate. Either it decays from within, or it is conquered from without.

It is to be observed, however, that this margin of safety narrows with the progress of the race. When we first emerged from that stage of evolution in which we were merely apes standing upright and entered upon the lowest stage of savagery, the natural order was largely founded on brute force, and consequently there prevailed a degree of injustice which would be fatal at the present time, but which did not then seriously imperil the future. With the passing years this order has changed, injustice has diminished, and to-day we have reached a point at

which the framework of society is frankly rested, not upon the superior might of a governing minority, but upon the suffrage of the people as a whole, and the administration of justice between man and man is recognized as the most vital and important of all the functions of the organized state. In our civilized communities the onward movement is no longer marked by the elemental struggle to establish law in the place of force: it has been converted into the effort to improve the administration of the law after it is established, to make the law approximate more nearly day by day to the ideal of justice. In any civilized community, therefore, the question whether the margin of safety is sufficiently preserved depends upon the good faith and judicial spirit in which justice is administered, and departures from the ideal which would have been pardonable and comparatively innocuous in a barbarous age become unpardonable and in the highest degree dangerous in the twentieth century.

In our country the factor of ethical safety is amply preserved. We have no hereditary or privileged classes, and the molecular movement of individuals in the mass permits the rail-splitter to become president, and, more than that, permits him to become an educated gentleman. Consequently, while there may be, and there

are, grave evils and injustices, the basic constitution is so sound that, in spite of well-meaning fears to the contrary, they do not imperil the continued existence of the body politic. Moreover, we have a system of law which contains within itself the principles of its own reform. We have constitutional provisions which protect us against unjust legislation, and we have a device in the overruling of erroneous decisions which allows the common, or unwritten, law to be continually corrected and to approach continually closer to the ethical ideal. There is no reason in the nature of things, therefore, why we should not have a system of jurisprudence which should declare the moral law in its plenitude and should administer it as accurately as any human institution can ever hope to administer it.

It becomes pertinent to inquire why we do not actually attain this degree of justice, and the answer is simple. The intelligent opinion of the community does, indeed, tend to approximate the ethical ideal, but we are the heirs of ancient views and customs which must first be corrected, and we have not yet learned how to correct them. We do not know how to apply known principles in unaccustomed ways or to unaccustomed exigencies. We shrink at the prospect of change in the established order, and, therefore,

in order to quiet the still small voice of conscience, we invent specious reasons for not doing what we ought to do. These reasons are supposed to be founded on expediency, or practical considerations, or proper compromises of theory to meet existing conditions. In reality they are wholly unsound in point of expediency and utterly false and sophistical in point of morality.

Let us consider the most tragic of all the instances of this sophistical self-indulgence.

Our forefathers proclaimed their own inherent right to freedom in the Declaration of Independence, but they refused to proclaim that right in the same instrument for the negroes. They secured freedom for themselves and their posterity in the Constitution of the United States, but in the same instrument they perpetuated negro slavery. The explanation is that some of them were enriched by the institution itself and the rest of them dreaded the upheaval involved in its abolition. Consequently they indulged in all sorts of pretexts for not remedying the wrong. Of these supposed reasons, some were honest and some were dishonest, but all were necessarily false, because in the nature of things there can never be a sound or a true reason for perpetuating an injustice. As a matter of fact, although intelligent men did believe in slavery, there has never been, in modern times, at any rate, an in-



telligent reason for it. Ninety years and a civil war were required, however, to demonstrate the falsity and the cruelty of the reasons which were actually proffered in its support.

Now the strange fact of human psychology is, — and this is the point in which we are now interested, — that during all the years that slavery was in existence as a social institution in this country, the men who upheld it were entirely capable of understanding and exposing the fallacies of their own reasoning. They understood the blessings of liberty, they understood the evils which follow upon its denial, they understood the relevant principles of the moral law; in a word, they had that complete rational equipment which abundantly enabled them to understand the truth, and yet they persisted in the wrong and in their sophistical excuses for the wrong. It is a sorry reflection that only the shedding of human blood could enlighten them.

The history of slavery in this country differs from the history of the wrongs which we still perpetuate only in the magnitude of its evil consequences. We still buttress wrongs with fallacies which we are entirely capable of exposing. Upon one pretext or another, we refuse to apply principles of morality which we have long ago accepted as sound to cases in which their application will interfere with our customary practices,

and, in order to ease our consciences, we allege any reason that happens to suggest itself, without much regard for its validity, but with a very tender regard for established customs.

Let us declare the truth frankly and without evasion : we do not have an ideal system of justice in this country merely because we fall into sophistry whenever we approach a point at which the application of accepted principles develops unexpected or undesired results. As between a justice which would overturn many existing institutions, and a sophistry which preserves them, we choose the sophistry. Through this choice our sensibilities remain unruffled and we are not shocked, — but we do not have justice.

The following pages are intended to help in the eternal conflict between established custom and justice. The first chapter is intended to exhibit the ultimate principles of justice as actually existent in the law, illustrated by cases in which they can be readily applied in the present, although they have never been so applied in the past. The second and third chapters are intended to exhibit something of the obstacles by which the progress of justice is impeded. They exhibit both the ignorance and the disingenuousness which enter into the administration of the law and which are still to be overcome. The last chapter is intended to suggest practical methods

of avoiding error and detecting sophistries in the actual treatment of legal problems. All four chapters are intended to show that justice, that is to say, a real equality in opportunity and a real brotherhood in effort, is much nearer to us as the feasible reality of a hard and work-a-day world than any man dreams.

# **JUSTICE AND THE MODERN LAW**



# JUSTICE AND THE MODERN LAW

## CHAPTER I

### THE ETHICAL PRINCIPLES OF THE LAW

THAT in the last analysis legal obligation rests upon ethical obligation has not been, and cannot be, successfully denied. All men, including even those who try to deny it, instinctively demand that the law be "just," and in the insistent demand for "justice" lies an explicit and constant repudiation of the notion that the law can be divorced from ethics: justice is only the application of ethics to human affairs.

It is perhaps worth while to pause long enough to analyze the error into which they have fallen who believe that law can be separated from ethics. Austin defines the law as the command of a political superior, that is, the sovereign, to a political inferior, that is, the subject;<sup>1</sup> and his definition embodies that usual conception which forbids us to seek any reason for the law behind the law itself. This theory, however, resembles the somewhat similar theory of an original state

<sup>1</sup> Austin on Jurisprudence (5 ed.), 83, 86.

of nature propounded by the French Encyclopædists in that, however attractive it may be as theory, it is not justified as history, because, except in a comparatively small number of instances, the requirements of the law are ascertained and declared long before any command issues from the sovereign.

Let us assume a case of first impression, that is to say, a case for which there is no precedent and no statute, arising at common law. How is the law ascertained and applied? In the first place, we have argument by interested advocates about the principles involved. In the next place, we have a determination by disinterested judges of the principles as to which the advocates have been arguing. In the third place, and finally, we have a command by the sovereign in the form of a judgment directed to the litigants personally and requiring them to obey the principles so ascertained. Chronologically, therefore, the only command of the sovereign which enters into the entire process of adjudicating a case of first impression follows the determination of the law, and does not precede it. What is true in a case of first impression is true always in cases arising under the common, or unwritten, law. The command of the sovereign does not issue until the principles have been determined by an investigation in which commands by the sovereign find

no place whatever. It is only when the law has changed its character and, having ceased to be unwritten, has become statutory, that is to say, has been embodied in an enactment by the legislative branch of the government, that we ever find a command of the sovereign which determines the law, or which declares legal obligations. What is true in English jurisprudence is true in every other jurisprudence. Until the civilization of the community has advanced to a point at which a legislative power, be it king, or parliament, or the people at large, reduces the unwritten law to writing and promulgates it as a rule of conduct to be obeyed by the people generally, the adjudication of rights is fully accomplished without any command from the sovereign whatsoever. The power of the sovereign is, indeed, invoked to make the adjudication effective, and then commands are issued to the parties to the litigation; but the command which is embodied in an adjudication affects only the rights of the particular parties to the suit and their successors in interest, and is not the kind of command which declares the law for a community. It is a special, and not a general, rule of conduct. As a matter of history, the exercise of legislative power in the enactment of laws, that is to say, the actual promulgation of general rules of conduct by the political sovereign,



comes late in the life of any people and marks an already high development in their juristic perceptions.

Even after a people have arrived at the exercise of legislative power, they seldom try to include the whole domain of the law in their statutory enactments. Perhaps the Romans are the only race who have made such an effort. Certainly the Anglo-Saxons have not made it, and to-day the great majority of judgments in English-speaking countries turn upon principles which have never received the sanction of legislative enactment and do not therefore rest upon any command of any political superior. We have, indeed, in the common law a doctrine of *stare decisis*; but it is not in any sense the equivalent of a legislative command. The final judgment in a given litigation is conclusive upon the parties and their successors in interest, but upon nobody else, and in subsequent litigations other parties are entitled to an independent consideration of the entire issue. The court itself, while paying great respect to its former decisions, refuses to regard itself as absolutely bound to follow them. Hence arise the phenomenon in the common law of overruled cases and the familiar process of the development of the law, in which ancient principles are abandoned and newer and more enlightened principles take their place. A

legislative command, however, differs fundamentally from this judgment of the court, because it imposes an obligation upon the people generally and is conclusive upon even the courts. Precedent, therefore, is by no means equivalent to statutory enactment, and investigation into the chronologic sequence of events shows, as we have said before, that in the great majority of cases throughout the world the rights of litigants have been determined according to principles which even to-day have not received their form, or derived their validity, from any sovereign command.

Whence come these principles?

The answers to this vital question are nearly as numerous as the writers on jurisprudence, and it is manifestly impossible to consider them all. There is, however, one dominant characteristic of the modern views which will enable us to treat them as a group and will therefore justify a brief discussion of them. These views generally hold, in one form or another, that the law is a social institution which declares and administers in any community a standard of conduct which that community has devised or has discovered through its own experience to be best adapted to its needs. They hold, therefore, in one form or another, that the principles of the non-statutory law are to be sought in the experience and habits of the

community. Inasmuch as communities differ greatly among themselves in stages of development, there are corresponding differences in the character of the various systems of jurisprudence which they have formulated. It is a common view, therefore, that there is such a thing as a science of comparative jurisprudence, and that it is to be prosecuted through the study and comparison of the legal principles which are in vogue in the different countries and states of the world, not merely of those which are now extant, but also of those which have passed away but have left records from which their legal institutions can be reconstructed, and that out of this science a new and truer system is still to be established. It is a further characteristic of modern theories that they usually regard the law as in general lagging behind the social development of the community, so that effort is necessary in order to bring the law, both in form and administration, up to the most enlightened standards. These theories of jurisprudence have been aptly described as sociological, and the description is just, because, whatever may be their minor divergencies, in fundamentals they agree in finding the principles of the law in social experience.<sup>1</sup>

<sup>1</sup> See an article by Professor Roscoe Pound, entitled "The Scope and Purpose of Sociological Jurisprudence," published in 24 *Harvard Law Review*, 591 ; 25 *ibid.* 140, 489.

The sociological theory of jurisprudence is a manifest advance upon the Austinian conception of the command of the sovereign. In the place of that command, which, as we have seen, does not exist as a matter of fact except in the form of actual legislation, it substitutes human experience as the origin of legal principles, and regards the unwritten law as but the judicial formulation of that experience in more or less definite rules of conduct. With all this advance, however, it does not escape the underlying error of the Austinian theory. For the definite command of the sovereign it merely substitutes an indefinite command of the community as a whole, because, while society does not prescribe its non-statutory legal principles by the voice of any definite organ in which its sovereignty is supposed to reside, such as a king or a legislature, it does, in that view, prescribe them by its own multitudinous voice. It is not true, as a matter of historical fact, however, that in the actual process of declaring and administering the non-statutory law as to the rights and duties of individuals to each other, our jurists have regarded human experience as furnishing the principles by which judgment is to be rendered, and, therefore, when we return to the judicial process, — as we always must when we would think aright on these topics, — we shall find that the socio-

logical jurisprudence is just as much at war with the facts of history as the Austinian jurisprudence. We may search the records of juridical investigation in all countries and in all times, and we shall not find that they follow the rational procedure which the sociological theory of jurisprudence would require. That juridical reasoning which has ended in judgments, as distinguished from that which has ended in theories, discloses no study of the experience of the community, no investigation into its customs, no comparison of its present with its past, or its past with its future, and yet some or all of these would be necessary if the principles which are used in the rendition of judgment were to be found in the experience of the people.

It must be remembered that we are discussing now the judicial and not the legislative process, the process, that is to say, by which the unwritten law is ascertained and applied in the determination of disputes between definite individuals. What has actually happened in that field of the law is that every jurist, whether he has been some savage leader of savages at the dawn of civilization, or a modern judge sitting in a court of last resort, has sought for the principles which should determine his judgment in something apart from and above the experience of the race; in something which is objective, not merely to each in-

dividual, but to the race as a whole; in an ideal of justice which both he and his people have cherished in their hearts and the principles of which they have endeavored to apprehend and apply as the standard of their daily conduct. The difference may be illustrated by a simple example of what takes place in another sphere of investigation. The judicial process in ascertaining and applying the unwritten law is essentially similar to the learning process by which we acquire our knowledge of geometry. The Pythagorean theorem is that the square erected upon the hypotenuse of a right-angled triangle is equal to the sum of the squares erected upon the other two sides, and it is so named because it is supposed to have been discovered by Pythagoras. This mathematical law, however, was understood, so it is said, by the Egyptians as a matter of practical experience long before the theoretical proof of it was discovered by the Greek mathematician, and the truth of it has of course been confirmed by uniform human experience in all the ages. In other words, reason and experience, theory and practice, are here in agreement. Nevertheless, when we teach geometry we do not appeal to experience, nor are we content with practice: we appeal to reason and we demand the theory. We do not ask the boy to believe it to be true either because Pythagoras discovered it, which

is the principle of authority, or because it has always been found to be true, which is the principle of experience. On the contrary, we set the triangle before him, we make him study its inherent properties, we require him to ascertain for himself that they *necessarily* involve the truth of the theorem. So, too, when he has apprehended the demonstration, he believes it and accepts it as true for the rest of his life, and it never occurs to him to test its truth by practical use. Let us compare this process with the judicial process in ascertaining the principles to be applied to some question of human conduct when there is no statute which is applicable. Suppose a landlord were to attempt to break a lease and seek to put the tenant out of possession upon the ground of some violation of the covenants of the lease, and suppose further that even in the act of maintaining judicial proceedings to oust the tenant from possession, he should exact the rent as it accrued from month to month. We are, of course, continuing our assumption that it is the first instance of the kind, so that no precedent for it is to be found in the books. What is the intellectual process of the judge who undertakes to ascertain the law and apply it to the landlord's attempt? He does not examine the records of the community to find out what the community has done in similar

cases, or what the general belief of the community may be as to the propriety of such an attitude on the part of the landlord, or what solution of the problem is best adapted to the stage of development which the community has attained. On the contrary, he turns to the transaction itself. Like the boy studying the Pythagorean theorem, he dissects it into its ultimate elements and bases his conclusion upon the principles which he thus discovers. He decides that the landlord ought not to be allowed to blow hot and cold, to disaffirm the lease and oust the tenant from possession at the very time that he affirms the lease and accepts payment for possession in the form of rent, and he reaches his conclusion, not at all because it is the experience of the community, but because it is inherently and *necessarily* just.

It is not to be supposed that there are no exceptions to this rational process. On the contrary, there have undoubtedly been occasions in which there have been both tacit and express appeals to experience as warranting judgments of the court; but they have been, and from the nature of the case necessarily must be, extremely rare in comparison with the great mass of judgments, and they do not in the least degree disturb the conclusion which we are compelled to reach as to the nature of the judicial process in general. If



anybody is interested to learn just how rare are these exceptions, let him examine the historical records of juridical investigation in administering the law, as distinguished from juridical investigation in determining its theory. He will then find, perhaps to his amazement, how few are the cases in which an appeal to experience is even possible.

Of course, at this late date in legal history, it is difficult, if not impossible, to find a case in which a really new principle of the law is to be applied, and consequently it is not always easy to strip from the juridical process its accidental features and arrive at those which are fundamental and necessary. It is difficult, for example, to distinguish between precedent and custom. The great body of modern jurisprudence, however, whether in the common law or in the law of Rome, has grown up in historic times, so that we can trace most of our present juridical doctrines to their origin, and thus ascertain what has actually happened when a new principle has been introduced into the law. The rise of the chancery system in England and of the prætorian system in Rome furnishes a striking illustration of the process in each case. These systems, which marked the emergence of the law of England and Rome from the status of elaborated tribal usage into the status of real juris-

prudence, were based upon what the jurists of either system believed to be equity and good conscience, and were not, consciously or otherwise, related to the special stage of development of the community. In other words, whatever may be the theory of philosophers in their closets, the history of the law shows that those who have actually made it have been animated by a belief in moral principles, and that the legal principles which they have formulated have been the product of those moral principles. Indeed, in many cases, the rules of conduct thus prescribed were far in advance of the standards of the community in which they were established, so that each community was compelled to grow up to the principles which its jurists enunciated. Of course, not even the wisest jurist has always found the true rule to be applied in any given case; but as civilization has advanced, our juristic views have tended to a continually closer approximation to the ideal, and always and everywhere, by tacit assumption or open reference, the ideal has been regarded as the ultimate goal of juristic effort. Thus it will be seen that the underlying error of the sociological jurists is precisely that which has been rendered immortal through the stubborn assertion in the nineteenth century that "the sun do move." Both the sociological jurists and the Rev. Mr. Jasper have made the mistake, as be-

tween two bodies which have been changing their relative positions, of not knowing which was moving. It is the views of the community which advance toward a moral standard: it is not the moral standard which advances with the views of the community.

The facts of history, then, lead us to reject alike the theory of a definite command by a definite organ of the body politic prescribing a rule of conduct to the people generally, and the theory of an indefinite command of the people themselves through the vague facts of their social organization. They go further. They lead us to the conclusion that what for untold years the human race has been trying to prescribe to itself as its rule of conduct is something which it has sought outside of its own experience, which it has held up to itself as an ideal of justice, and which, through doubt and error, through weakness and sin and suffering, it has sought to make as real as human fallibility will permit. It is true, of course, that with the progress of the years this ideal of justice is more clearly appreciated and is therefore seen to be confirmed by human experience: but it is nevertheless to the ideal, and not to the experience, that we make our appeal. If, therefore, we are to understand the law at all, we must realize that it is based upon that ineradicable and invincible instinct of the race which

leads it to believe in a law which is not man-made, is not dependent upon human sanctions, and is, in fact, a moral law, and that at any given point of time the man-made law of any community is the expression of what it believes that moral law to be. In other words, the law is only the promulgation of ethical principles as they are understood and applied by the community, and, therefore, if we would find the true principles of the law, we must look to the principles of ethics.

What is true of the unwritten law is true, though with a difference, of the written law as well: it derives its ultimate sanction from the fact that the people believe it to have its foundations, not in their experience, but in ultimate principles of ethics.

There has never been a satisfactory philosophical determination of the scope or character of the fundamental moral principles, or of the grounds upon which they rest. Fortunately for the race, however, the principles themselves are comparatively simple and obvious, and we have had a rough, but approximately accurate, conception of them for a period of time which long precedes the records of history. Indeed our evolutionary progress may be justly measured by the increasing accuracy with which we have been able to understand them. The learning process has been largely intuitional and woefully illogical, but sur-

prisingly good in its results. Through purely empirical methods we have achieved canons of applied ethics which need only to be rationalized, to have their natural errors eliminated, their excrescences pruned and their deficiencies supplied, to be substantially correct. The two leading races, for example, the Latin and the Germanic, have developed, side by side and with comparatively little intercommunication, two systems of jurisprudence which embody identical ethical principles and which in fundamentals are ethically just. Even the less enlightened nations in their customs and habits apply the same basic principles, and it may be said generally that while the administration of justice varies all the way from the tyranny of an Eastern despot to the constitutional guaranties of a modern republic, the legal structure of society in all parts of the world is substantially uniform, just as the skeletal structure of the human body is substantially uniform in all races and in all climes.

What, then, are the fundamental principles of ethics?

One of the early internecine quarrels of Rome was averted, so it is said, by the fable of the belly and the members.<sup>1</sup> By means of that fable, Menenius Agrippa made it clear to the dissatisfied

<sup>1</sup> Livy, *History of Rome*, vol. 1, sec. 32. See Shakespeare's *Coriolanus*, Act 1, Sc. 1.

commons that plebeians and patricians were alike dependent upon each other, precisely as the belly and the members are dependent upon each other in the human body, and that only by means of a frank and full acceptance of their mutual dependence could either hope to survive the perils which encompassed them. The fable of the belly and the members is one of the earliest statements of the mutuality of the relation which exists between man and man to be found in European literature, and, so far as it goes, it is an accurate statement of that relation. Certainly it served its purpose. It did not, however, attain to a complete analysis because it omitted one element of vital importance. It proclaimed the mutual dependence of the members of the community, but there it stopped. Mutual dependence, however, is a relation of material interest merely, and not of ethical obligation. Because it was for the obvious material advantage of the plebeians to sink their quarrels with the patricians and act in a general spirit of harmony, it does not follow that such an advantage involved any moral duty. Interest is not the same thing as obligation, and until the gap between interest and obligation can be rationally bridged, therefore, so that we find rational grounds for the conclusion that man's community of interest involves also a mutuality of moral obligation, have we achieved

any really ethical results. We have, indeed, by means of that fable, reached the stage of enlightened selfishness, or that peculiarly British Philistinism, the greatest good of the greatest number; but we do not learn from it the meaning, or the scope, or even the existence, of a moral duty. In the course of time we have changed our terminology. From the fable of the belly and the members, we have passed to utilitarianism, from utilitarianism we have passed to the organic relation of man to man, and from the organic relation of man to man we have passed to universal human brotherhood. In this advance in modes of expression, there has, indeed, been a broadened vision, but even the theory of human brotherhood does not by itself bridge the gap and does not furnish a satisfactory transition from material interest to moral obligation.

It is no part of our task to discuss philosophy, and we need not attempt to bridge the gap. On the contrary, we may content ourselves with the universal human perception that moral obligation does exist, and we may take it for granted that a philosophic justification for our belief in it will sometime be discovered. Let us venture, therefore, to assume without proof that the gap can be bridged, to believe that there are grounds for the affirmation that the mutual relations between man and man are more than material, that

they are ethical as well, and to believe that these grounds will satisfy our insistent hunger for sufficient reasons. This, after all, is no great draft upon our credulity, because precisely that conclusion has dominated the ethical thought and the actual conduct of mankind from time immemorial. We have always believed in an objective justice even if we have been unable to define it or discover whence it springs, and the conception that the form of that justice is to be found in the organic constitution of society has long since passed from a truth into a truism. Let us assume, then, as a frankly unproved, but plausible and working, hypothesis, that the material relation of mutual dependence which exists between the organs of the organism has its analogue in an ethical relation of mutual obligation which exists between the freely acting members of a community. On this assumption we can readily segregate and define three great ethical principles.

In the first place, the integrity of the organism and the integrity of the community alike involve the integrity of the component organs and individuals. In each case the subordinate unit must achieve its fullest possible development and its action must be free and untrammelled by the other units. This is an organic interest in the organism. In terms of ethical obligation



to the community, it means that each individual ought to be free to use his natural powers without molestation. The ethical principle therefore is that each individual has a right, as against every other individual, to be unrestrained in the exercise of his natural powers. Here, then, is the first ethical principle, the right of freedom.

In the second place, the integrity of the organism and the integrity of the community alike involve the direction by the subordinate units of their several activities to the common end, and, according to their several positions in the whole, to the service of the other units in helping them to fulfill their tasks. Again, therefore, we find an organic interest of mutual help, and this interest, translated as before into terms of ethical obligation, means that each man rests under a duty to cooperate with his fellow men in the achievement of the common end and to render service to them in that activity. Here, then, is the second ethical principle, the duty to help.

The organism differs profoundly from the community in the physical dependence of its component parts. The belly cannot exist in separation from the other members of the body, whereas one man can exist, for a time, at any rate, in total separation from his fellow men. This physical independence of the man, combined with an

intellectual capacity which is denied to the organ, gives rise to an ethical phenomenon in the community for which the organism furnishes no analogue, that is to say, the ability of the individual to create voluntary rights and obligations. Men agree to do, or refrain from doing, specific acts as to which the two natural moral principles already ascertained involve no specific right or obligation. Here then is a third ethical principle, the reciprocating rights and duties of contract, which are, of course, solely defined by the terms of the contract itself.

These three principles, the egoistic right of freedom, the altruistic duty to help, and the voluntary reciprocating rights and duties of contract, constitute the fundamental principles of ethics, and each of them is firmly wrought into the structure of all human jurisprudence, be it Roman, English, or any other. It is not a difficult matter, if we are attentive, to trace them in any existing system. In the following pages, therefore, we shall try to follow them in the structure of our common law, though we can only attempt this in the broadest of outlines and to a great degree inadequately.

First, then, of the right of freedom.

The most obvious instance in which the ethical right of freedom becomes a legal right is to be found in the protection accorded by the law

to man's corporal safety. Battery of the person is forbidden, and even a threatened battery, that is, an assault, may become illegal. A more subtle application of the right lies in the protection accorded to the relations which man establishes between himself on the one hand and inanimate things and the lower order of animal life on the other. One of the first steps by which he effected his egress from a purely animal existence was taken in the more or less permanent appropriation for his personal use of the hitherto unappropriated natural opportunities which surrounded him, first, in the construction of implements for war, hunting and the household, later, in the domestication of animals, and, last of all, in the permanent settlement upon land. The act of appropriation of that which has not been hitherto appropriated establishes at once a purely physical relation between the man and the thing, a power of dominion or control, which the law of all ages has recognized, more or less adequately, as a proper object of its protection. Property, ownership, title, — these are merely synonyms in our law expressing the legal perception of a man's natural right to be untrammelled in the physical control which he establishes over inanimate things and the lower animals. We are accustomed to regard these terms as denoting a bundle of rights. Accurately understood, however, they

indicate merely a single right, and that the right of freedom.

There has been a considerable effort to distinguish the property right in things movable from the property right in land, but the effort has ignored essential principles of morality. In both cases the right rests upon the simple duty of every man to refrain from interfering with the physical dominion which his fellow man has established over those material things which have not been made the subject of any prior physical dominion. The settler who first plants corn in the wilderness acquires thereby a natural right to be let alone in the enjoyment of his new acquisition which is precisely identical with the right of a man who converts the skins of wild beasts into clothing. The entire superstructure of modern civilization rests upon the more or less complete perception of that identity. The principles of men like Henry George and the socialists which deny that identity, and therefore dispute the essential justice of private property in land, are themselves essentially unjust, and, if put into application, would defeat the real rights of mankind. Their teachings can never become serious factors in our civilization, however, because they run counter to the most deeply grounded instincts of our race. Indeed, it is a noteworthy fact that those nations which have most effect-

ively guarded the dominion of the individual over inanimate things, and in particular have most effectively protected the private appropriation of land, have been the most advanced in their civilization. Their citizens have achieved the fullest measure of individual liberty and have obeyed the highest standards of personal morality.

The dominion over things includes the power to transfer dominion from one man to another, and transactions of this character have given rise to our complicated laws relating to the transfer of title. One form of this transfer may engage our attention at this time, — I mean the transfer which takes place at the instant of death. When a man dies, he must perforce lose his dominion over his property; but, if he chooses to accept the inevitable, he can transfer his property to his children or other objects of his affection. Indeed, there is a certain obligation resting upon him to do this which the law of all nations enforces through its provisions to meet the case of his failure to designate beneficiaries. The intestate regulations of even savage races declare the right of children to inherit the property of their deceased parents. When, however, the transfer takes place by the voluntary act of the deceased before his death, it is essentially a transaction *inter vivos*, though it is usually effected by a written instrument which is not intended or

allowed to become operative until its due execution can be proved after death. The act of transfer lies in the execution of this instrument, and the circumstance that it only becomes operative at some later period of time is immaterial to its essential nature. Precisely the same result can be accomplished by means of a deed delivered to a third party and held by him in escrow until the death of the grantor shall permit its final delivery to the ultimate recipient.<sup>1</sup> In fact there are cases in which it has been difficult, if not impossible, to draw a line of distinction between wills and deeds.<sup>2</sup>

In spite of these rather obvious considerations, however, there has grown up a doctrine that a transfer which takes place at the time of death is dependent for its validity upon the grace of the sovereign, which could, were it so disposed, impound the entire property of its deceased subjects. No state has ever ventured to push this claim to its logical conclusion, however, and it is well that this is so, for if in any state the sons were forever debarred from the accumulations of their fathers, the days of that state would be numbered. Both the material and the moral progress of the community largely depend upon the

<sup>1</sup> *Hathaway v. Payne*, 34 N. Y. 92, 113, per Denio, C. J.

<sup>2</sup> *Sharpe v. Matthews*, 51 S. E. Rep. 706; *Robinson v. Brewster*, 30 N. E. Rep. 683; *Diefendorf v. Diefendorf*, 132 N. Y. 100.

orderly transmission of accumulated savings from generation to generation, and it would have been impossible to attain our present standards of civilization if the individual owner had not been universally permitted to control in countless ways the use of his property after his death. Nevertheless the doctrine that the transfer at the moment of death must be sanctioned by the sovereign has been made the basis of a claim, under the name of the "Succession Tax," or "Death Duty," by virtue of which the state ventures to impound, not indeed the whole, but oftentimes a considerable fraction, of the property of its deceased citizens, at the moment of the transfer to the living descendants.<sup>1</sup> In any country where there is no written constitution limiting the powers of the legislature, there is considerable difficulty in preventing this particular mode of confiscation; but in a country where a written constitution contains the usual Anglo-Saxon bill of rights, there exists an essential repugnancy between the constitution and such legislation. Private property is taken for a public use without compensation, and both the testator and the living beneficiaries of his bounty are denied the equal protection of the laws. It is not creditable to the American bar that it has allowed this repugnancy to remain unchallenged, and has per-

<sup>1</sup> See *Knowlton v. Moore*, 178 U. S. 41, 54-56, and cases cited.

mitted its clients' property to be seized upon the flimsy pretext that a man has no right to execute a transfer of his property to take effect at his death without the consent of the state.

A form of the right of freedom which is even more subtle than the right of security in person and property is to be found in the right of freedom in intercourse with other men. We deal with each other of necessity upon the basis of our personal character, and anything which creates suspicion of a man's character inevitably limits the scope of his transactions with his neighbors. When, therefore, one man speaks ill of another, he seriously infringes upon that other's personal liberty. Our common law recognizes the fact of this infringement, and has therefore established its various doctrines of libel and slander. It has fallen short in one particular, however. It has as yet failed to recognize the injury which may be inflicted by merely telling the truth and to redress the serious wrong which may be committed by telling a defamatory truth without excuse. We know only too well, for example, how difficult it is for a convict to escape the blight which his conviction has cast upon all his efforts at reform. His story passes from lip to lip until he finds it almost impossible to enter into the simplest business relations with other men. Many journals print all the sensational stories which



their reporters can find, and thus fill their pages with nauseous stuff which has no justification in itself and only injures the unfortunate individuals whom it names. It is time for lawyers to understand that the publication of derogatory statements about their clients is not justified merely because they are true. When the courts are made to see it, too, we shall have established a most potent means of remedying a grave evil. Even a yellow journal could hardly survive the financial drain of adverse verdicts rendered for printing stories which may be true, but which, being derogatory to private citizens, should not be published. This reform can be accomplished with the greatest ease. All that is essential is the framing of a complaint for circulating defamatory statements in which the words "falsely and maliciously" are omitted. Civilization will take a long step forward when it is judicially acknowledged that such a complaint is not demurrable.

One more instance, and we shall complete our survey of the right of freedom.

We have heard a great deal lately of the right of privacy, largely because it has been twice upheld by the lower courts of New York and twice rejected in its Court of Appeals. In one case that court refused to enjoin the erection of a statue to a deceased relative of the plaintiff, and in the other it refused to enjoin the public-

ation of the plaintiff's own photograph. In the first of these cases there was an elaborate discussion of the nature of the plaintiff's claim to legal protection, and it was decided that, inasmuch as he was only a relative of the deceased, the injury which he suffered was too remote to receive the protection of the law.<sup>1</sup> In the second case, there was no discussion of the plaintiff's rights, but, on the contrary, the court confined itself to a laborious expression of the view that the relief which the plaintiff sought had never been granted before, and that, if it were granted now, the courts would be overburdened with litigation,—two obviously insufficient reasons.<sup>2</sup>

It is to be noted that in both of these cases an element is lacking which has usually been present when the law has extended its protection to the personal right of freedom. The acts of the defendant did not apparently tend in either case to interfere with, or limit, the plaintiff's freedom of action. In both cases the injury was substantially confined to the plaintiff's personal feelings. In this respect they differ from the cases of injury to property or to reputation. They are analogous, however, to the cases of assault in which the plaintiff is frightened, but not necessarily injured or restrained of his freedom. Both de-

<sup>1</sup> *Schuyler v. Curtis*, 147 N. Y. 434.

<sup>2</sup> *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538.

cisions, nevertheless, were regrettable. As a matter of fact, the second was received with an outburst of popular and professional disapproval and was immediately overruled by statute.<sup>1</sup>

There is no reason in the nature of things why equity should not interfere to prevent injury to feelings. Pecuniary damages cannot be proved, and the temptation to purely speculative litigation is therefore absent. Such being the case, if a plaintiff feels himself so much aggrieved by threatened or continued acts of the defendant as to lead him to incur the expense and annoyance of an actual litigation, we may be certain that he regards the injury as substantial. If, under those circumstances, he can in fact prove that continued injury to his feelings is threatened or continued, and the defendant can offer no rational excuse for continuing it, equity has no rational excuse to offer for denying the easy aid of its injunctive process. It should, indeed, be a general and unquestioned principle of jurisprudence that when a court can on the facts clearly determine that the defendant owes a moral duty to the plaintiff, and it has the physical power to render either preventive or corrective aid, it should not refrain from rendering it. To refuse under such circumstances is without reason and is merely a form

<sup>1</sup> *Pavesich v. N. E. Life Ins. Co.*, 122 Ga. 190; *Laws of New York*, 1903, chap. 132.

of ill-temper: "I could, if I would; but I won't." In the particular case of which we are speaking, the protection of the individual's right to be let alone, even though he is not particularly restrained from his freedom, will do much towards limiting the deplorable tendency of modern journalism to explore the innermost recesses of a man's life and to make it impossible for the ordinary citizen to live in the peaceful retirement which is his right.

A strictly logical advance through our subject would lead us to consider next the altruistic duties which are enforced by the law, but there are certain advantages of presentation in first discussing the rights and duties that are founded upon consent.

When we speak of rights founded upon consent the mind trained to the common law turns naturally to simple contracts created by two parties and founded upon a consideration.<sup>1</sup> Such rights and obligations, however, are in reality but a small part of the numerous rights and duties which rest upon consent, and although the word contractual is in many respects the most advantageous designation of the kind of rights and duties with which we are now concerned, nevertheless, in order to avoid the natural inference arising from long usage, we shall use the word consensual to designate the large body

<sup>1</sup> 2 Bl. Comm. 442.

of rights and duties which spring from individual volition.

While there are certain inherent limitations upon the extent to which the law can enforce consensual obligations—limitations which it is not necessary to consider at the present time—nevertheless, in general, the law is that a man must perform his promises according to their terms. The judicial determination of a man's obligation created by his voluntary agreement is, therefore, nothing more or less than an interpretation of his promises.

We have much to learn in the matter of interpreting promises. Even when they are explicit, the courts have difficulty in understanding them, and courts frequently fail to do justice because of a false interpretation; but the difficulty is greatly increased when some of the terms of an agreement are implicit. Men readily fall into customs, and to a most amazing extent they allow custom to enter, silently, but none the less potently, into their consensual obligations. Moreover, they sometimes omit important terms of their obligation from the mere assumption that they will be understood. The consequence is that the courts are occasionally obliged to declare the terms of an obligation because the parties have failed to declare it for themselves. A frequent road by which our common law courts approach this

problem is to assert that the missing terms are "implied by law." Such terms are not implied by law, however, that is, they do not constitute obligations extrinsic to, or in derogation of, the contract. On the contrary, they are really integral parts of the contract by means of which the courts try, rather naïvely, to carry out the intention of the parties, and not to make new agreements for them by legal means.

As civilization progresses, consensual obligations increase rapidly in number, scope, and complexity, and much that we regard as advance in law is in reality nothing more than an advance in the art of making contracts. For example, before negotiable instruments were invented, and after they were invented, the law was the same: it was merely the requirement that a man must perform his promise according to its terms. When, therefore, the Lombards introduced negotiable instruments into the commercial customs of England, they did not change the law, nor did they make a law unto themselves: they merely brought forward a new class of promises to which the already existing law could extend its sanctions. Nevertheless, there is a current theory that they evolved somehow a new law, and this theory became so pronounced that under the title of "law merchant,"<sup>1</sup> it actually received

<sup>1</sup> See Bouvier's Law Dic., *sub nom.* "Law Merchant."

a name. As a matter of fact, it was the terms of the obligations which the Lombard merchants created for themselves, and not any custom or any law, which made negotiable instruments out of promissory notes. A promise by A to pay money to the order of B is a promise which by its terms contemplates a succession of promises. A's original promise is made to B, but it contains within itself in the words, "to the order of," a method by which B can transfer it to C, and that is by written order on the back of the instrument in which the promise was embodied. That endorsement being completed, B ceases to be the promisee, and C becomes the promisee in his place. To the English lawyers, however, the notion of a promise the obligation of which could be transferred so as to vest a cause of action in the transferee directly was new and rather startling. They regarded it as an innovation upon the law itself, and with their constitutional reluctance to admit any change in their established ideas, they greeted the new obligations with grave distrust and hostility.<sup>1</sup> It was a good many years before they received in English jurisprudence the recognition which they deserved, and even to-day the nature of a negotiable promise is not very clearly understood. Very many contracts are now made binding upon

<sup>1</sup> Daniel on Negotiable Instruments, secs. 1-5.

the "executors, administrators, and assigns" of the parties, and in all such cases, according to the terms of the contract itself, the title to them passes by an assignment, but the courts have not advanced to that point of view. It is still supposed, among other things, that in order to be negotiable, a promise must call for the payment of money at a definite time, and such, of course, is usually the case. There are promises, however, and they are constantly growing more numerous, in which the performance does not lie in the payment of money and is not definite in time or in character, and we have yet to learn that even these promises, if couched in terms which provide for their transfer, may be made negotiable. There is no reason in the nature of things, for example, why a man should not give a negotiable promise to render personal service. Such is, in fact, the obligation of a common carrier as evidenced by a ticket. The transportation corporations have endeavored to limit these contracts to the original promisee, but the effort is substantially in vain. The public regards tickets as transferable, and, except on special occasions, so do the transportation companies themselves. The consequence is that a ticket is nothing but the manual token of a promise which vests by the mutual intent of the parties in the holder of it and therefore is negotiable.



With great difficulty and after strenuous labor we have come to understand that some obligations created by consent may be unilateral—that is to say, that only one of the parties may be under any obligation at a given point of time. We have yet to learn that obligations may be not only unilateral and bilateral, but may be tri-lateral and even multi-lateral. There is in fact no assignable limit to the number of reciprocating obligations that may be created among freely volitional human beings. In the reorganization of a great railroad, for example, there may be any number of groups of interests, and each group may contain an indefinite number of individual interests. The resultant agreement may be embodied in many documents, may involve thousands of parties, and may contain numerous reciprocal obligations.

There is one form of consensual obligation which we of the common law have struggled with for many years and do not yet understand: a promise by A to B to do something for C. Has C any rights under that promise against A? When the promise is to hold property for his benefit, the English Court of Chancery had no difficulty in grasping its nature as a trust and giving to C a right to compel specific performance of it. When, however, the promise is not to hold a specific *res* for the benefit of C, but to pay him

money, the courts have sometimes given C a remedy and have sometimes denied it. If B is indebted to C, then the New York courts have allowed C a direct remedy against A,<sup>1</sup> but in other cases they have denied it.<sup>2</sup> When the promise is by an insurance company to pay money to the beneficiaries named in the policy, the courts have allowed it.<sup>3</sup> When the promise is by a bank to pay money to the order of its depositor, the courts have been in doubt about it.<sup>4</sup> When the promise has been, not to pay money, but to do a specific act, as, for example, by a telegraph company to deliver a message, the courts have been utterly at sea, and have not been able to decide whether a breach of the promise gives C an action of contract or an action of tort, or whether he has any cause of action whatever.<sup>5</sup>

One difficulty in all these cases has been our constitutional inability to think of contracts without thinking of a consideration moving from the promisee. Like Mr. Dick's Charles the First, the notion of consideration will intrude itself into all our memorials. In the cases supposed, C paid no consideration for the obligation, and therefore the courts have usually been unable to

<sup>1</sup> *Lawrence v. Fox*, 20 N. Y. 268.

<sup>2</sup> *Townsend v. Rackham*, 143 N. Y. 516.

<sup>3</sup> Richards on Insurance (3 ed.), 467.

<sup>4</sup> 5 Am. & Eng. Ency. (2 ed.) 1061, tit. "Checks."

<sup>5</sup> Gray on Communication by Telegraph, sec. 65 *et seq.*

understand how an obligation to C could exist. A great advance will be made when we learn that there are many valid obligations created by consent for which no consideration whatever exists. Particularly we should understand that formality of execution may take the place of a consideration. Before the notion of consideration had ever been suggested, obligations under seal were enforced, and nobody dreamed of searching for a ground of the obligation outside of the four corners of the instrument itself. The later dictum that the seal imports a consideration was nothing but the false theorizing of a generation which did not know its legal history. We of the present time should revive the ancient doctrine, and should permit a man to impose a valid legal obligation upon himself by simply executing a paper with a certain degree of formality. There is no adequate reason, for example, for refusing to enforce a promissory note merely because it had no consideration.

Another difficulty with these cases has been to understand how A could be under an obligation to C when he made no promise to C. It is perfectly true that he made no "contract" with C, in the technical acceptance of that term. It is also true, however, that by virtue of his promise to B he did assume a real obligation to C, and that there is no obstacle to the proper en-

forcement of it by the courts. The recognition which it has received in some cases should lead to its full recognition in all.

There are two large classes of rights and duties springing from consent which we of the common law regard as coming under the head of torts rather than under the head of contracts. The first of these which I shall consider is discussed in the books under the title of deceit. As a matter of fact, it is almost uniformly a breach of a consensual obligation to tell the truth.

There is no universal obligation to tell the truth. That this is a sound conclusion follows clearly from the fact that the duty to tell the truth on any particular occasion necessarily involves a reciprocal right in somebody to have the truth told to him on that occasion, and there are many occasions upon which nobody has any such right. Thus if a stranger, intending to rob me, presents a pistol at my head and demands to know where my money is, he has no right to an answer, and unless he has a right to it, there is no breach of duty in refusing to give it to him, and there is no wrong in giving an answer which is untrue. What, then, are the circumstances under which a man has a right to the truth? Until we know that, we cannot know when, or even whether, it is wrong to tell an untruth.

The ordinary transactions of life are carried

on upon the implicit understanding, which may be sometimes made explicit, that both parties are telling the truth. Under such circumstances both parties agree, that is, both parties impose upon themselves a voluntarily assumed obligation, to tell the truth to each other, and this voluntarily assumed obligation may be of all degrees of minuteness and complexity. It may require the individual who assumes it to disclose absolutely everything that he knows about the matter in hand, as, for example, when a client retains a lawyer. In that event it becomes the duty of the lawyer to disclose every prior retainer and every particle of knowledge which he may have with reference to the matter in hand. It may, on the other hand, call for no general disclosure, but may require that certain facts be stated and that any statement of fact which is made shall be true. Such is the obligation assumed in the usual transaction of bargain and sale. The seller is under no duty to disclose his profits, but he must make known hidden defects and must not make any statement of fact which is not true. Whatever the obligation may be, however, it usually begins and ends in a purely voluntary assumption of duty by the parties which is usually quite implicit and therefore often difficult of exact definition as to its terms. An action for deceit, therefore, which is an action for the breach of that

duty, is an action for breach of contract. It cannot in fact be distinguished from the usual action for breach of warranty, except that in the one case the promise is implicit and in the other it is explicit.

The common law has been gravely remiss in the matter of lending its sanction to this obligation. Thus it has been held that when, to the knowledge of the seller, the purchaser is deceiving himself as to the character of goods which are offered for sale, the seller is under no obligation to undeceive him. In rendering judgment in such a case, Lord Blackburn said that<sup>1</sup> "whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor." The moral obligation, however, and the legal obligation rest upon precisely the same basis, — the mutual understanding of the parties that each will disclose the truth, — and passive acquiescence by one in the self-deception of the other is just as much a violation of that understanding as is active deceit. There is, therefore, no reason for granting the sanctions of the law in one case which does not exist in the other. The two cases present no legal distinction. Again, the general doctrine of

<sup>1</sup> *Smith v. Hughes*, L. R. 6 Q. B. 597 ; see also Benjamin on Sales, sec. 481; *Laidlaw v. Organ*, 2 Wheat. 178.

*caveat emptor*, that the buyer must look out for himself, which is so marked a feature of the common law, has been little less than terrible in its effects. The entire mercantile world has greedily seized upon it, and made it the excuse for improper dealings that shade all the way from sharp practice to gross fraud. A sterner sense of moral obligation on the part of the courts would have done much to prevent this and to raise the standard of commercial honesty. Our English and American bar and judiciary must bear a heavy share of responsibility for the widespread corruption that infects our trading communities.

There is another large class of rights which really rest upon consent, but which are treated in the common law under the head of torts. I refer this time to the numerous kinds of action which are based on an allegation of negligence.

The obligation of a common carrier is to transport its passengers in safety. It is an obligation created by free volition, and when by reason of an accident a passenger is so transported as to suffer injury on the way, then the common carrier has committed a breach of its contract. Again, when the owner of an office building constructs an elevator and invites the public to use it in going to his tenants' offices, he also assumes a voluntary obligation to keep his elevator in proper order for the transport of

passengers, and a breach of that obligation gives rise to an action of contract. Still again, the obligation of the employer to the employee is determined by their free volition, though many of its terms are implicit, and an injury to the employee in the course of his employment only gives rise to a cause of action if the employer has violated that consensual obligation. Not all the actions grouped under the head of negligence are based on consent, of course, for some of them really constitute a battery, as when an automobile, or a street-car, runs over a foot passenger. It is probably true, however, that all the actions which are treated in the books and by the courts under the head of negligence are either actions for assault and battery or actions for breach of contract, and that with an accurate and understanding conception of the law the word negligence would disappear from our juristic vocabulary. It is at best only a question-begging epithet, because it tacitly assumes the existence of an obligation which we are too intellectually lazy to determine. A man cannot be negligent unless he is under a duty to do something, and the failure in given instances to define the nature and scope of the duty in question has led, and still leads, to grave errors and consequent injustice. If the nature of these actions had been clearly understood, for example, we should prob-



ably have escaped the notorious "fellow servant" rule, the absurd theories as to "assumption of risk," and the anomalous doctrine that the plaintiff must allege and prove the absence of what we call "contributory negligence."<sup>1</sup>

One further word about consensual obligations.

All obligations created by the legislature are created by consent. Each legislator is the agent of his constituents, and his act is their act in precisely the same sense that the act of any agent is the act of the principal.<sup>2</sup> Legislation, therefore, is to be interpreted, and the obligations created by it are to be enforced, upon precisely the same principles as those which govern the enforcement of contracts. In both cases the duty of the court is a duty to interpret, and, having interpreted, to apply the appropriate sanctions.

A legislator is, as we have said, the agent of his constituents, and as agent his powers are limited. He is not authorized by his constituents

<sup>1</sup> See *post*, p. 264, for a discussion of the "fellow servant" rule.

<sup>2</sup> Almost exactly this view has been recently expressed by Hon. Pliny T. Sexton, Regent of the University of New York, in an address to the students of the Albany Law School entitled "Laws as Contracts and Legal Ethics." The learned lecturer ignores the distinction, however, between the common law and statutes. The doctrine of agency, which is peculiarly applicable to legislative enactment, has no part in the determination of laws which are not legislative.

to enact legislation which is confiscatory, or oppressive, or immoral. A legislative enactment which should undertake to deprive A of his property and give it to B, as an Eastern despot confiscates the property of his subjects and bestows it upon his favorites, is beyond the authority of the legislator to enact: he is not elected for that purpose, and there is a perfectly rational ground for holding his enactment to be void. In fact, the Supreme Court of the United States has declared an act of a state legislature to be void as beyond its natural authority, although there was no constitutional limitation upon the power of the legislature which enacted it.<sup>1</sup> The usual Anglo-Saxon bill of rights, as contained in our state constitutions, is in fact nothing more or less than the written expression of a previously existing, but silent, limitation upon the power of legislators which is imposed even without the writing. Perhaps the time is not far distant when their purely representative character as agents will be recognized and a material restriction of their powers will be applied by the courts in many countries, simply for lack of a constitution to which the citizens can appeal. At any rate, if the courts refuse to protect the citizens against confiscatory or oppressive or immoral legislation, many countries will bewail the

<sup>1</sup> *Loan Ass'n v. Topeka*, 20 Wall. 655.

fact that they have not the protection which our state and federal constitutions afford to the citizens of our republic.

We have now considered the natural right of freedom and the freely created, or artificial, rights of contract. It remains to treat of the altruistic obligation.

The moral obligation to help others is coextensive with man's activities. From the day when he is capable of understanding the nature of an obligation to the day of his death he is under obligation to do what he can to ameliorate the condition of his fellow men, to be kind, cheerful, polite, generous, ready to aid in times of stress and sorrow. It is obvious, however, that no merely human tribunal can ever enforce this obligation to its full extent, and there are physical limitations upon the power of the courts which must be determined by practical experience; but in general the courts should strain their jurisdiction in these directions rather than strive to limit them. The rule should be that in any case in which the court has the physical power to enforce the obligation it should not refuse to do so. For the present, however, we must content ourselves with discussing some of the cases in which the law has already undertaken this duty.

A typical instance is to be found in the doc-

trine of subrogation. When a surety pays the debt of his principal, he is entitled by law to receive from the creditor any rights which the creditor may possess as against the debtor. If the creditor has security, he is entitled to an assignment of the security, and in any event he is entitled to an assignment of the principal claim. When there is actually existing security, an actual transfer will be compelled; but when there is no security, and it is a mere matter of assigning a claim, the courts will allow a direct remedy in favor of the surety against the debtor without requiring the formality of an assignment. This is the doctrine of subrogation proper. It does not rest upon any obligation voluntarily created by the act of the parties, because it will be applied even in the absence of any agreement.<sup>1</sup> It obviously does not rest upon the right of freedom, and its sole basis is the natural obligation which the creditor owes to the surety to help him as far as possible out of his difficulty. This is called by the courts a principle of "natural justice," or "equity and good conscience." In the broadest view it is only a particular application of the altruistic duty which every man owes to his neighbor.

It will be observed that the doctrine of subrogation involves no element of self-sacrifice.

<sup>1</sup> Sheldon on Subrogation, 2.

The creditor suffers no loss in making the assignment, because his claim is discharged, and the debtor suffers no loss, because his position is no worse after the assignment to the creditor than it was before. The obligations which he owes are the same in character, but are vested in a different individual. The surety, however, is *pro tanto* saved from loss.

The doctrine of the marshaling of assets presents still another illustration of the enforcement by the courts of an altruistic obligation. If one of two creditors has a lien upon two different funds belonging to the debtor while the other creditor has a lien upon only one of them, the first creditor will be required to satisfy his claim out of the fund which is freed from the other's lien, thus leaving the other fund for the protection of the second creditor. It is obvious that in this case no sacrifice is imposed upon the first creditor. His prior right to both funds is recognized, but he is forbidden to exercise that right to the injury of his fellow creditor.<sup>1</sup>

Again, the doctrine of contribution among sureties rests upon the altruistic obligation. If one of several sureties pays the debt, he is entitled to an assignment of all the rights of the

<sup>1</sup> For an interesting case of the marshaling of assets between two junior lienors, one with a lien against both funds and one with a lien against only one, see *Hahn v. Costello*, *N. Y. Law Journal*, Oct. 7, 1904.

creditors whom he pays, including the right against his fellow sureties. In this case, however, if he collects the claim in its entirety from one of the sureties, the second surety is also entitled to an assignment of claims, and this includes an assignment of the claim against the first surety. Thus we come to a perpetuity of actions in which the only solution is that each surety shall contribute his *pro rata* share of the total debt, and that the rights against the debtor shall be held by all of them jointly. The short cut through this perpetuity is that a surety who pays the entire debt shall be entitled to recover from his fellow sureties their proportionate share of it.

Still another illustration of the legal enforcement of the altruistic duty is furnished by the bankruptcy law. In voluntary cases it permits a man who is hopelessly insolvent to distribute what little he has equally among his creditors and begin his career anew. In involuntary cases it permits one creditor to compel the other creditors to accept a ratable scaling down of their claims. In either case it is founded upon the assumption that the creditors are getting all that they can, and simply requires them to accept a ratable division.

These cases present no element of sacrifice except that in the last two, contribution and bankruptcy, creditors are required to forego the

opportunity of securing a preference over other creditors standing *in æquali jure*. There are cases, however, in which a real duty of sacrifice is involved, and then the question will arise as to how far the courts will enforce it. Before touching upon them, however, let us consider the case in which a man makes a voluntary sacrifice. How far shall the courts protect him? It has been held in New York that a man who jumps in front of an oncoming train to save the life of a child who is in danger of being run over may maintain an action against the railroad company for the injuries which he has received.<sup>1</sup> It is obvious that no court would compel him to assume such a risk, and no court would grant an action for damages against him for failing to take it; but if he has once taken it, it is in the highest degree proper that the court should recognize the moral character of the act and should give him a right to compensation against the railroad. A limitation against such a class of actions should, however, be observed, although it was not directly mentioned in the case to which we have referred. If the railroad company was not at fault and could not be held liable to the child itself, it should not be held liable because somebody else in an effort to prevent the accident

<sup>1</sup> *Eckert v. L. I. R. R.*, 43 N. Y. 502. See also *Perpich v. Leetonia Mining Co.*, 137 N. W. Rep. 12.

suffered an injury. The right of recovery in such a case approximates in principle the right of subrogation: the rescuer derives his right to compensation through the wrong committed to the child. The railroad company should not be held responsible, therefore, for an accident which was occasioned without fault on its part, and the rescuer's sacrifice should stand as a real sacrifice.

An interesting instance of real sacrifice enforced by the courts is to be found in the case of *DePue v. Flatau*, 100 Minn. 299, in which the court sustained an action against the defendant because he refused to allow the plaintiff, his guest, who had been taken sick at his house, to remain overnight. On the contrary, he assisted the plaintiff into his carriage, threw the reins over his shoulders when he was unable to hold them, and started him on his homeward journey, with the result that he was found the next morning nearly frozen to death. The court admitted the difficulty of enforcing the general humanitarian obligation; but it cited cases to show that it would be enforced when the refusal of the defendant to obey it involved affirmative action on his part to the detriment of the plaintiff.<sup>1</sup>

Another instance of sacrifice enforced by the law is to be found in the ancient common law doctrine that a man is not guilty of trespass

<sup>1</sup> *Texas Midland R. R. v. Geraldson*, 128 S. W. Rep. 611, accord.



who in an effort to save himself from danger enters upon the plaintiff's property. In *Ploof v. Putnam*, 81 Vt. 471, the court awarded damages against the defendant for refusing to allow the plaintiff to moor his boat against the defendant's wharf in order to escape from a storm.

The sacrifice thus imposed upon the plaintiff, however, has been carried to improper lengths. If a man fleeing from attack runs across his neighbor's property, the neighbor should not be permitted to deny him a possible means of escape, and the fugitive should not be deemed guilty of a wrongful trespass. At the same time, if the fugitive damages the property, the courts should not require the neighbor to bear the burden of that injury, but should compel the fugitive to reimburse him. Such has not been the law, however. It seems to have been tacitly assumed that, because the fugitive was not liable in tort, he was not liable at all, even in an action not founded upon tort. Upon this principle it was held in *Sparhawk v. Respublica*, 1 Dallas, 357, decided in 1778, that the government was not responsible in damages for taking the property of the plaintiff in an effort to save it from the enemy and carrying it to a place where the enemy actually seized it. This case was apparently the origin of the great constitutional doctrine in this country that a taking of private property by

the government under the police power may be made without compensation. Under this doctrine it is held that property may be destroyed by the authorities without compensation in order to arrest a conflagration,<sup>1</sup> or to prevent hostile troops from using it to the damage of the community.<sup>2</sup> This is a constitutional principle which ought to be overruled.<sup>3</sup>

While the altruistic obligation has often been actually enforced, it has perhaps never been explicitly recognized as an independent and substantive principle of law, comparable to the law of contracts or of torts. Therefore, because it has been used without a clear analysis of its character, it has given rise to many raw and undisciplined notions of natural equity. Let us

<sup>1</sup> 2 Hare, Constitutional Law, 907, n. 3.

<sup>2</sup> *United States v. Pacific R. R.*, 120 U. S. 227.

<sup>3</sup> Since this paragraph was written, the precise improvement in the law which has been here suggested has been accomplished in the State of Minnesota. The Supreme Court of that state, citing *Ploof v. Putnam*, 81 Vt. 471, decided that the owner of a boat who moors at a dock in order to escape a storm is liable for the damage which his boat causes by beating against the dock under the influence of the wind and the waves. (*Vincent v. Lake Erie Navigation Co.*, 124 N. W. Rep. 221.) The law of Minnesota, therefore, is that while the owner of a dock would be responsible for damages if he refused a refuge to the owner of a boat, nevertheless the owner of the boat is at the same time responsible to the owner of the dock for the damage which he causes by using the refuge. The new decision overrules the earlier law, but it establishes justice, and furnishes an admirable illustration of the methods by which the law gradually attains the true moral standards without disturbance or upheaval.

advert to a case in which it was improperly applied.

At common law a mortgage was an outright conveyance of the legal title. It was subject, however, to be defeated if the debtor made a payment of money at a given time specified in the deed. If the debtor failed in the performance of that obligation, however, the title became absolute: the creditor owned the land discharged of any burden, and the debtor lost it. This was the contract between the parties. Under these circumstances the English court of chancery undertook to relieve the debtor from what it conceived to be a hardship by permitting him to tender to the mortgagee the amount of the debt, together with interest and costs, even after the due date, and compelling the mortgagee upon such a tender to reconvey the property to the mortgagor. The custom became so universal that it was generally recognized that the mortgagor might at any time go into equity to redeem the property, although at law the forfeiture had become complete, and this right eventually became a vested right under the name of the mortgagor's equity of redemption. Our American courts have carried the doctrine so far as to render it legally impossible for two intelligent adults, each in the full possession of his faculties, to make a contract by which the right of redemption is

surrendered, and as a practical matter it can only be cut off by a foreclosure action.<sup>1</sup> In other words, although we can agree to waive the gravest constitutional rights,<sup>2</sup> we cannot agree to waive the right to redeem, or, as it was once defined, the right of the court to appoint a referee.

It is obvious that the equity of redemption thus established has no foundation in contract. On the contrary, if it exists as a moral or legal right at all, it exists in derogation of the contract, because it compels a party to a contract who is not in default to accept something which he did not agree to accept, and that at the instance of the party who is in default. It can have as its basis only some altruistic obligation on the part of the creditor to waive rights which have been secured to him by contract. Such a waiver, however, may often involve a considerable sacrifice by the creditor, because he cannot get either the land or his money at the time they are promised him. Under these circumstances to declare, as a universal rule of law, that the creditor must be condemned to this loss in any event, without even an inquiry into the right of the debtor to ask it, is to ignore fundamental equities. No court should compel the creditor to forego a right which has been given to him by contract unless

<sup>1</sup> See *Mooney v. Byrne*, 163 N. Y. 86, and cases cited.

<sup>2</sup> *Schick v. United States*, 195 U. S. 65.

it can determine upon proper evidence that the sacrifice which it exacts from the creditor is necessary to the protection of the debtor and does not injure the one more than it benefits the other.

Even if we ignore the right of the creditor, however, the net result of the doctrine is that the courts have made a new contract for the parties, and, by insisting upon a foreclosure action before the right to redeem can be barred, have imposed upon both creditor and debtor the burden of a difficult and expensive litigation. It is more than doubtful whether, in the long run, the debtor has been benefited by this attempt to assist him. The burdens which have been imposed upon the creditor are almost invariably shifted upon the debtor, and the expense and difficulties which now attend an ordinary foreclosure are the penalty which the debtor pays for the assistance which the court has lent him in committing a breach of his contract. It would probably have been very much better for both parties if they had been left to make their own contracts instead of having them modified by the courts according to undigested notions of "natural justice."

It is, of course, too late to change the law as to the equity of redemption, because it has become a vested contract right. With our constitutional facility for standing upon both sides of a

contradiction at once, we permit our clients to execute an instrument which upon its face is an absolute deed of the land subject only to be defeated by payment of the mortgage debt on a day specified, and which therefore expressly repudiates the right of redemption, and at the same time we tell them that as a matter of law the right of redemption exists in spite of the deed. The ancient equity doctrine has therefore been incorporated as a part of the contract between the parties, and it would be quite unjust to alter the contract by taking the instrument which our clients execute as a literal and complete expression of it. It is not too late, however, for the courts to understand that when an adult human being, in the full possession of his faculties, expressly agrees to waive the equity of redemption, he should fulfill his agreement, and that they should refuse to enforce it only as they would refuse to enforce any other agreement—that is to say, upon the ground that it was obtained by fraud, duress, or mistake. So to hold does not deprive the mortgagor of any vested rights, because he has waived them and they do not exist; but it does protect the vested rights of the mortgagee because he has a vested right that any contract which he makes without fraud, duress, or mistake shall receive the sanction of the courts.

One more instance of the altruistic obligation, and we shall complete our survey of that principle as it has received recognition in the law.

If A compels B to sign a contract by violating his right of freedom, as by restraining him of his personal liberty, B can secure an annulment of that contract by a court of equity just as soon as he can escape to a place of safety. The contract was obtained by duress, that is to say, by violation of the defendant's duty to refrain from interfering with the plaintiff's freedom. So, too, if A compels B to sign a contract by violating a contractual obligation which he has assumed, B can have the contract set aside by a court of equity.<sup>1</sup> There is still a third class of cases in which the contract may be avoided for duress, and those are cases in which the defendant, being under no contract duty to assist the plaintiff, and not restraining him of his liberty, but finding him in some distressing position, takes advantage of it to extort a valuable consideration for services rendered in excess of that which he could have secured under ordinary circumstances.<sup>2</sup> This constitutes a violation of the altruistic obligation which the defendant owes to the plaintiff. It is obvious that the courts are entering upon very difficult ground when they

<sup>1</sup> See *Kilpatrick v. Germania Life Ins. Co.*, 183 N. Y. 163.

<sup>2</sup> *Van Dyke v. Wood*, 60 App. Div. 208, and cases cited.

undertake to avoid agreements made under such circumstances. The degrees of this form of duress shade readily from the extreme case of desperate emergency to the other extreme case of simple inconvenience, and the line of demarcation to be adopted by the court must depend upon complicated questions of evidence. A study of the adjudicated cases shows that the courts observe the distinction with a fair degree of justice, although they seem reluctant rather than zealous to protect the one from whom the exaction has been obtained.

The limits which the courts prescribe to themselves in these cases are not observed so carefully by the legislative branch of the government, and our legislators frequently forbid the making of contracts which the courts would not enjoin or, if actually made, would enforce. Legislation directly or indirectly regulating prices is of this character. Agreements between dealers which tend to raise prices are declared by the legislature to be illegal as in restraint of trade, although the courts would refuse to set aside or enjoin contracts to sell at the increased prices upon the ground that the customers were free agents and not restrained in the making of their contracts. Legislation of this character is of more than doubtful utility. We hear a great deal about reasonable and unreasonable prices,



but when two men are bargaining, one trying to sell and the other trying to buy, it is a wise state that can settle the bargain better than the contracting parties themselves.

The principles upon which the state can legislate in these matters are of vital import to the common weal. We have reached a period of development when the people at large are beginning to be concerned about many things to which in the past they have been indifferent. They are dissatisfied and restless. There is a stirring in the depths which has never been known before. As is natural, therefore, protests, theories, and remedies are offered on all sides in the effort to find a satisfaction for these new demands. In general the protest takes the form of a complaint as to the distribution of wealth, and the remedies vary from the extreme forms of nihilism, which would destroy all government, to the extreme forms of socialism, which would have the state take over all property and regulate all men's lives by coöperative rule. We must face the problem, because every man is entitled to know where justice lies. We need not, however, as some do, fear a general uprising, or anything approaching the horrors of the French Revolution. The time for that has passed. In most of our modern states there is no ruling class which oppresses a lower class, and the prob-

lem of the distribution of wealth is not that of order.

When we come to analyze it, we shall find that the entire problem reduces itself to the question of an altruistic obligation owed by the seller to the buyer, or by the buyer to the seller. When the Beef Trust sells beef, is it under an altruistic obligation to the public or to any individual in the community to sell its own property for less than the people are willing to pay? In employing its workmen, is it under a similar obligation to pay them higher wages than the workmen are willing to accept? If such an obligation exists, can the state enforce it?

We need not answer these questions at the present time, but when we attempt to answer them, we must remember several important considerations. In the first place, if the state undertakes to regulate, directly or indirectly, the price of a commodity or the rate of wages, we must remember that it is enforcing a purely altruistic obligation by compelling a sacrifice. It is requiring some of its citizens to sacrifice something which they could readily get from other citizens if the state did not intervene to prevent, and they could get it by transactions which a court of equity would probably regard, in any individual case, as not calling for intervention. In the second place, we must remember that there is such

a thing as a sacrifice which is made in vain, as in the case of ill-advised charity. Supervisory care exercised over an adult, whether by friends, charitable organizations, or the government, is not apt to be beneficial. On the contrary, it is apt to undermine his self-respect and initiative. Wages, for example, which a workman can exact because of his efficiency, or because by joining with others he can regulate the supply of labor, are earned by his own efforts and make a man of him; but wages which are in excess of that, which he realizes more or less clearly to be due to something else than his own manhood, are apt to be harmful. They are only a form of charity, and, like indiscriminate giving, tend to destroy his ambition and his effort to advance himself. In the third place, and finally, we must learn to distinguish in these matters between hardship and injustice. When injustice exists, there is always some individual whose rights have been violated and another individual who has violated them. If a man is unjustly poor, it is because some individual has impoverished him in violation of some duty, legal or moral, and owes him reparation for that wrong. When, however, we cannot trace his poverty directly to the door of any other man, when we cannot find any other man who is legally or morally responsible for it, either for its inception or for its continuance, *when, in*

*a word, we cannot find any man who legally or morally ought to pay him money, then we have a case, not of injustice, but of hardship.*

The great moral uprising which so nobly characterizes the twentieth century is largely concerned with the altruistic obligation. Groping, as in the dark, but pressing forward eagerly and with dauntless courage, the rare and choice spirits of our time are seeking for that which shall make actual the ideal brotherhood of man, and the search certainly calls for all the best and wisest that poor humanity can give. One thing is clear, however: we shall not find the truth or achieve a real brotherhood until we determine soberly and in the cold light of reason, just why, just how, and just when, one citizen of the community can ethically be commanded by the state to sacrifice some part of his energies or his opportunities to some other citizen of the community.

The analysis of legal rights and duties which we have just concluded suggests what is perhaps the most immediately important practical lesson to be learned in the study of jurisprudence, or, indeed, in the study of morals. The distinction between torts or delicts on the one hand and contracts on the other is easily understood, and, as a matter of fact, it found its proper place very early in the juristic history of both the English and the Latin races, although, as we have seen,

it is still possible for modern lawyers to be confused about it in particular instances. The distinction between rights which are based upon consent and those which are based upon the altruistic duty, however, is not so easily understood and has not yet found its place. The reason is that the two classes of rights bear a superficial resemblance to each other, so that the natural, but uninstructed, conceptions of justice which arise in every community and are ultimately founded upon a vague perception of the altruistic duty are apt to cloud our understanding of the consensual obligation. Under the catchwords of "equity and good conscience," "obligations implied by law," "public policy," "unjust enrichment," and the like, the courts of our country unconsciously import terms into consensual obligations which not only seriously modify the obligations themselves, but sometimes accomplish grave injustice. Probably the most effective means to modernize our jurisprudence is to overcome this particular form of confusion and to make it plain that obligations which find their source in the individual consent of the parties are fundamentally different from those which find their source in the universal duty of altruism. The instructor in morals, the teacher in the law school, the advocate before the court, and the court itself, must expect substantial failure in

their efforts unless they grasp the distinction firmly and with clear intelligence. In the technical language of the law, they must understand in any given case whether the obligation "sounds" in tort, in altruism, or in contract. As a practical matter of the immediate improvement of our moral and juristic systems, I believe that nothing compares in importance with a proper emphasis upon the distinction between consensual and non-consensual obligations.

We have seen in brief review how three ethical principles, the right of freedom, the duty to help, and the obligation to perform one's promise, have been naturally and unconsciously applied by the common law, even when commands by the sovereign have been absent. Our task would not be complete, however, if we omitted to consider for a moment the relation between these ethical principles and the usual bill of rights as contained in the constitutions of our various American commonwealths.

The Fourteenth Amendment to the Federal Constitution enacts that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. These two clauses usually accompany each other in the state constitutions, but the due process of law clause is perhaps more nearly universal

than the other. Taken together, they express with dignity and force the Anglo-Saxon ideal of the jurisprudence which should govern an Anglo-Saxon community. The one stands for order, the other stands for equality, in the administration of the law, and in their broad effect they command that the law shall be founded on justice.

A requirement that no citizen shall be deprived of his liberty or property without due process of law is dependent upon two conditions. The first is that he shall have his day in court, that is to say, an opportunity to be heard in his own behalf and to submit evidence, if necessary, before an impartial and competent tribunal. This condition is well understood and carefully guarded by our courts. The second is that a sufficient reason must exist for the judgment of the tribunal. This is not so well understood, but it is none the less necessary, and, from the point of view of the administration of justice, is even more important. If no sufficient reason can be adduced in support of a law or a judgment of a court which takes a man's property or deprives him of his liberty, then the legal process by which that result was accomplished constitutes mere confiscation, — an unreasonable taking which never attains to the dignity of a judicial process and is not in any sense a due process of

law. In this necessity for a sufficient reason lies an ultimate appeal to the moral law itself: a reason which is not morally sound is not rationally sufficient and cannot satisfy the constitutional requirement. A similar analysis holds true in the case of the equality clause. A citizen who is denied by law his right of freedom or is compelled to make a sacrifice which is not required by his moral duty is denied the equal protection of the laws. He does not stand before the law on an equality with those of his fellow citizens who are not denied their right of freedom or compelled to make a sacrifice. Both clauses, therefore, are grounded in moral, and not merely legal, principles. They are not determined by the law; but they themselves determine the law: they command it to follow the dictates of morality.

The moral effect of these provisions forces itself upon our attention from whatever point of view we may regard them. Let us examine them in one of the most striking of all the aspects in which they can be studied.

There is, most unhappily, a growing distrust of our constitutional guaranties of liberty. The various clauses of our bills of rights are historically traceable in their present form to the legal phraseology of the eighteenth century, and consequently it has become something of a fashion



to regard them as eighteenth-century obstacles to twentieth-century progress. It is perfectly true that some of them have ceased to be of present importance, and at least one of them has by judicial interpretation become a real obstruction to the administration of justice. The provision that no man shall be compelled to be a witness against himself in any criminal proceeding is contained in almost all our constitutions and was originally devised for the purpose of minimizing evils which have long since ceased to be threatening, — the evils of a time when the criminal law was characterized by an almost inhuman severity and the judges went to extremes in order to relieve against its unduly punitive rigors. For many years, however, the real evil has been, not undue severity, but a sympathy with the criminal which has tended to degenerate into sentimentality, and under its influence the constitutional provision against self-incrimination has been perverted beyond all reason. Both its literal and its intended meaning was merely that the prisoner should not be called as a witness to testify against himself in the proceeding in which he was charged with a crime; but its application has been so enlarged by the courts that in any judicial proceeding whatever, whether civil or criminal, a witness can only too often escape examination upon inconvenient

topics by merely pleading that it tends to "incriminate or degrade" him. Thus wrongly interpreted, the clause has seriously hampered the due maintenance of law and order. It has become in very truth an eighteenth-century obstacle to twentieth-century progress. In defense of the eighteenth century, however, it should be observed that this evil effect is really due to a twentieth-century interpretation. The two clauses relating to the due process of law and the equal protection of the laws, however, stand on a very different plane. Their purpose and result are to secure to every man an opportunity to be heard in his own defense and to secure him both against a curtailment of his own rights and an excess in the rights of others, both against injustice and against special privilege. They are in fact, therefore, nothing but the formulation in legal phraseology of that thing which every American so ardently desires, a "square deal," and when the courts adjudge a statute to be unconstitutional as taking property without due process of law or as denying the equal protection of the law, all that they really do is to declare their opinion, in more or less technical phraseology, that somebody is not receiving the square deal to which he is entitled.

It has sometimes happened that the courts have declared statutes to be unconstitutional which

the people have believed to be beneficent in the highest degree and to protect the weak against the strong, and, of course, it has also happened that the courts in these decisions have sometimes committed serious error. The tendency to err, however, is not in the direction of declaring too many laws unconstitutional, but in the direction of not declaring enough laws to be unconstitutional. Both our statutory and our common law offend only too often against the principle of the "square deal," and if that principle were as rigorously enforced as it ought to be, we should find that many of our legalized customs would be radically changed. In any event, however, the remedy for judicial error in the administration of these constitutional provisions is to educate the courts rather than to abolish or modify the constitution. The time to change those clauses in the bill of rights which guarantee the due process of law and the equality of the citizen before the law can never come until the "square deal" shall cease to be a thing of any moment.

A new peril threatens the peoples of the earth. It is the last great peril which they will meet in their effort to establish free and stable governments on the principle of equality before the law. They will succeed in overcoming it, but it will test the stuff of their manhood as it has never

been tested before. In the years that have passed, the struggle toward freedom has been a struggle by the many against the few, by the people at large against the autocratic power of individual rulers or of oligarchic cliques. At the present time, however, the peoples of the earth are beginning to be aware of their political power. The sleeping giant is beginning to rouse from his slumbers. The day is not far distant when the rule of the majority will become universal. The danger that impends, therefore, is not the oppression of the majority by the minority, but the oppression of the minority by the majority. We cannot meet the problem which this new condition presents unless we understand that the people desire justice and that they intend a "square deal"; but, making all due allowance for good intentions, we must also realize the grave practical difficulty in determining in any instance where justice lies and how the square deal will operate. Much that the people regard as just is really unjust, and much that they regard as unjust is really just. Consequently, when we have majority rule, the immediate danger will be that the minority will suffer.

We must remember that the square deal means equality of opportunity, and not equality of achievement, and the difference between them is of radical importance. So long as men differ in

courage, in industry, and in intelligence, so long will equality of opportunity necessarily lead to inequality of achievement, and the material success of the minority will necessarily be more pronounced than that of the majority. It is not always easy, however, when we find our rivals outstripping us in the race toward our common goal, to concede frankly that their success is due to superior skill, and with the best intentions in the world, the majority will be apt to exercise its political power in directions which, honestly devised to equalize conditions, will really deprive the minority of their equal rights. Happy is that country which, like ours, has, *by command of the people themselves*, made the square deal the ultimate and supreme law of the land. That country has taken the wisest means to save itself against sorrow and distress. It has taken the first and most essential step toward making the square deal an actual and legal fact, because it has made it legally possible for every man who thinks he is oppressed to seek protection against invasion of his rights by resort to the quiet chambers of an impartial tribunal where both sides can be heard, rather than to the heat and passion of political struggle.

The European communities have not yet been able to incorporate into their systems of government any provisions which correspond to our bill of rights or which give fundamental guaran-

ties of protection against wrong. In those countries, therefore, the minority is at the mercy of the majority, and they are destined to undergo long periods of turmoil, misery, and bitter injustice before the right shall prevail. Our own peril is that, through ignorance of the essential significance and value of our constitutional guaranties of personal liberty, our constitutions shall be so amended as to deprive us, rich and poor alike, of a priceless freedom. The declaration in the Fourteenth Amendment of our National Constitution that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the laws, is the culmination of a thousand years of struggle by the majority against oppression by the minority: we shall not be ultimately saved if we do not learn as a people that it is equally necessary as a guaranty against oppression of the minority by the majority.

Our courts and lawyers have much to learn as to the far-reaching effect of the two clauses in the bill of rights in which our state and federal constitutions guarantee the square deal in the form of legal and political equality. Thus the Supreme Court of the United States began its series of adjudications under the Fourteenth Amendment by substantially repudiating it. In the *Slaughter House Cases*, 16 Wall. 36, it

frankly declared the question to be, "Can any exclusive privilege be granted to any of its citizens or to a corporation by the legislature of a state?" and, having thus stated the question, answered it, strange to say, in the affirmative. The decision was obviously erroneous, however, and we may safely conclude that it would not be rendered to-day. Indeed, it has been in effect, although not explicitly, overruled by those later decisions which protect citizens generally against state oppression, notably those which protect the freedom of contract.<sup>1</sup> These decisions mark only the beginning, however, and much is to follow. The Supreme Court can still decide that under the guise of taxation the United States can destroy any lawful business, because the power to tax involves the power to destroy,<sup>2</sup> and it can still intimate that the Fourteenth Amendment is not adequate to remedy abuses if only they are hallowed by ancient custom.<sup>3</sup> Conceptions like these must be changed, because, with all due respect to the court, they violate the real principles of the Constitution, as they certainly violate all the ideals of our Anglo-Saxon jurisprudence.

In asserting our constitutional rights, we have

<sup>1</sup> *Allgeyer v. Louisiana*, 165 U. S. 578; *Lochner v. United States*, 198 U. S. 45.

<sup>2</sup> *Veazie Bank v. Fenno*, 8 Wall. 633; *McCray v. United States*, 195 U. S. 27.

<sup>3</sup> *Otis v. Ludlow*, 201 U. S. 140, 154.

the aid of a principle which has perhaps never been openly advanced, but which is none the less obviously valid: the doctrine of *stare decisis* cannot be constitutionally invoked in the decision of constitutional questions. The Constitution of the United States, to take the leading example of a written constitution, is, by essential nature and by express terms,<sup>1</sup> the supreme law of the land. When, therefore, the United States Supreme Court misinterprets its provisions, it is still the Constitution which is the law, and not the decision of the court. Any other doctrine would make it possible for the court, through a series of adjudications gradually and insidiously encroaching upon the terms of the original instrument, to pervert its meaning and eventually to abrogate the Constitution in its entirety. Any other doctrine would make it possible for the executive and legislative branches of the government to subvert the court to its own desires and by its aid to nullify the guaranties of public safety. The only protection which we can have against these results is to hold the court itself rigorously to the terms of the Constitution, to subject all its decisions to the unyielding test of reason, and, when any one of them fails to find a rational support in the Constitution, to recognize that it is not the law of the land. Any citi-

<sup>1</sup> United States Constitution, Art. VI., sec. 2.



zen, therefore, whose liberty or property is at stake, has an absolute constitutional right to appear before the court and challenge its interpretations of the Constitution, no matter how often they have been promulgated, upon the ground that they are repugnant to its provisions. In other words, he has a constitutional right to assert before the court itself that its decisions are themselves unconstitutional, and if he can establish his assertion, the court is under a sworn duty to reverse itself, because it is under a sworn duty to uphold the Constitution rather than its own opinions.

When the bar of our country understands this and respectfully but inexorably requires of the Supreme Court that it shall continually justify its decisions by the Constitution and not by its own precedents, we shall attain a new conception of the power of our constitutional guaranties. We shall learn that they lend a legal sanction to the entire body of the moral law, and that, subject only to the inherent physical limitations upon the power of a state, they convert every ethical obligation into a legal obligation and obliterate the distinction between law and morals.

It has been, indeed, a brief survey of our Anglo-Saxon jurisprudence which we have been

able to present in these pages, but it will have largely failed in its purpose, if we who are practicing lawyers do not draw from it at least one lesson for ourselves.

The existence of an erroneous doctrine in the law means that some lawyer has been inadequate to his duty. Such a doctrine cannot come into being except through a misunderstanding of principles and an acceptance of insufficient reasons. At some point in our legal history, therefore, attorneys have not been competent to protect their clients, or judges have rendered judgment upon insufficient knowledge. We, who inherit a detailed body of jurisprudence, are not adequate to our duty, either as practicing attorneys or as members of the judiciary, if we fail to correct these errors. As attorneys we are not resourceful in protecting our clients' rights, and as judges we are not diligent in studying the principles which we assume to enforce.

The result of professional failure in these matters is deplorable. Although we have an established civilization, which means that in the main our primary rights of person and property are respected, nevertheless there is a wide margin of debatable land where warring principles of justice and injustice still contend for the mastery. Questions that ought to have been settled years ago are still unsettled. Too much of our legisla-

tion violates the bill of rights. Too many of our judicial decisions are wrong, — wrong morally and wrong legally. We know no fixed principles, whether of law or of ethics, which we understand or which we can intelligently apply to the tangled transactions of a modern community.

For these results in this country we of the American bar are solely and entirely responsible. We might have to-day a nearly ideal system of jurisprudence, because the common law, reinforced by the bill of rights, contains within itself, through the power of the court to overrule erroneous decisions, the principles of its own reform. Unconstitutional legislation and erroneous doctrines of the common law can alike be corrected through the simple exercise of judicial power. We do not, however, sufficiently insist upon correct judicial reasoning, although it is upon judicial reasoning that our jurisprudence depends. We are too ready to accept decisions as final without a careful examination of the means by which they are attained. We do, indeed, sometimes protest, if an opinion seems to us not to accord with the progressive tendencies of our civilization; but our protest is vague, it voices itself in glittering generalities, it does not reach the vital point, the *ratio decidendi*, the reason for the decision. What we need is constant and unrelenting professional criticism of judicial opin-

ions, and constant and unrelenting insistence that judicial errors of reasoning shall be judicially corrected. Until we have that, we shall accomplish no substantial legal reform.

While the responsibility for the present situation is ours, it is our clients who pay the penalty. It is they whose rights are defeated and it is they who carry the consequent burdens. Unless, therefore, we understand the principles upon which their rights are founded and which ought to be embodied in the law, and unless we intelligently and courageously assert those principles before the judicial tribunals of the country, we do not competently fulfill the high and responsible function which we assume and for the performance of which we charge our fees.

It is through the understanding of this relation between lawyer and client that, in the last analysis, we shall find the most effective instrument for the establishment of justice. When client and attorney clearly perceive that the attorney cannot comprehend the legal rights of his client without comprehending his moral rights, both will automatically become agents for the improvement of the law. Their selfish interests will lead them to free and independent thinking, to the discovery and assertion of moral rights that have been hitherto unperceived and therefore hitherto neglected, and thus, through

the selfish effort to establish these rights, the law itself will be quickened and modernized.

It may seem rather shocking to find the principal agency for the advancement of justice in motives of self-interest, but the facts are not so sordid as they seem. After all, the struggle for liberty and the effort to rise to higher things must, from the very nature of our environment, spring from self-interest. Protoplasmic matter has always been compelled to fight for its existence, and in its evolutionary progress from unicellular organisms to the form of self-conscious and reasoning human beings, organized in great modern commonwealths, this necessity has never departed from it. The struggle-for-self necessarily precedes the struggle-for-others. That public spirit which makes a great citizen the leader of his fellows in civic and social effort without hope of reward is, and must be, the last flower of civilization, not its root. It will always be true that the mainspring of human activity will be ambition—the effort for personal achievement—and the highest, the purest, and the wisest altruism must recognize this fact. The moral explanation and justification of it is that, in the end, enlightened selfishness and enlightened unselfishness must be one and the same thing. Thus we must primarily look for the advancement of justice to the self-interest of clients who

desire to have their personal rights protected, and of attorneys whose livelihood is earned by defending their clients. When both of them understand that clear thinking is advantageous, that, in colloquial words, there is money in correct legal ideas, even if they are new, then the most potent of reformatory influences will be set in motion.

Whatever be the motive, however, when we who are practicing lawyers apply ourselves diligently to the discovery and exposition of the real principles of justice, when, in a word, we really qualify ourselves to understand and protect our clients' rights, then we shall achieve results of which no man dreams. In the ordinary course of our practice, by the mere insistent demand for sufficient reasons in the judicial administration of the law, we shall accomplish a revolution, peaceful, indeed, but of a magnitude which cannot be measured. We shall solve all the legal, most of the economic, and many of the sociologic, problems that now press for solution, because, in one form or another, they present questions calling for judicial decision. Indeed, we shall do far more than that: so far as is humanly possible, we shall establish the moral law as the law of the land.

## CHAPTER II

### THE LAW AS IT IS PRACTICED

**THE** Anglo-Saxon mind dislikes generalizations. It prides itself on its ability to meet facts with common sense and to dispense with far-fetched theories. The lawyer of the common law, to distinguish him from his brother trained in the Roman or civil law, is the double-distilled essence of the Anglo-Saxon mind. He dislikes legal generalizations, and prefers to administer justice in a practical way according to well-established and conventional standards.

We cannot escape generalizations, however. From the sheer physical impossibility of dealing with facts individually, we are compelled to deal with them in groups, and the lawyer of the common law has no charter of freedom from this necessity. Consequently he theorizes, and if he only understood the abandon and irresponsibility with which he theorizes, he would be shocked to the core of his conventionalized soul. He does not understand this, however, because of the form which his theories take. Instead of boldly and frankly generalizing, he thinks and argues in maxims, in proverbs, in scraps of gnomie wis-

dom, which, after all, are only generalized statements of hasty views and are not the product of scholarly or scientific investigation. Sometimes his maxims are magnificent: the prohibitions of the Fourteenth Amendment, "nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," are of unexampled efficiency and moral grandeur. Ordinarily, however, his maxims are inaccurate, not to say flagrantly erroneous. Out of the entire mass of declared maxims of the Anglo-Saxon law as set forth in its statutes, its judicial decisions, and its text-books, it is doubtful if a fair quarter of them can survive a critical examination into their technical correctness. Our statutes are incorrectly drawn, our decisions are incorrectly reasoned, and our textbooks are incorrect summaries of our incorrect statutes and incorrect decisions.

Nothing saves the lawyer of the common law from very serious disasters, the imminent results of his own false theorizing, except his practical skill in meeting facts. When a maxim of the law becomes too obviously at issue with the facts, he promptly drops it as inapplicable, and resorts to another which is less patently inapplicable and which is therefore more useful for his purpose. Even when he drops a maxim as inapplicable,



however, he does not clearly grasp its errors and he will freely resort to it again and again, whenever, under other facts, it serves his purpose. The consequence is that the common law has grown up as a mass of declared maxims which continually conflict with each other and which coexist as a coherent mass only because of the practical skill with which the lawyer effects a working balance between their contradictions.

For these reasons the lawyer of the common law is profoundly ignorant of the principles of his own jurisprudence. He cannot separate his true maxims from his false, and he cannot understand his true maxims in their full significance. As between two contradictory maxims he has no means of choosing the right one except his instinctive, but untutored, methods of dealing with facts. In a word, he is limited by his experience, and outside of his experience he wanders in a maze in which he has no guide upon which he can, or does, rely. The result is—and this is of the utmost practical importance—that outside of his experience the lawyer of the common law is essentially a helpless and incompetent adviser. He has little originality; he is afraid of new ideas, even when they advantage his client; he cannot suggest new remedies for old wrongs; and he cannot use old remedies against new wrongs. He does not, therefore, and he cannot, adequately

protect his client, and the reason is that he fears to travel outside the ruts which his predecessors have worn for him, even when experience has shown him that they lead only to disaster.

The essential helplessness of the lawyer of the common law has many illustrations, but is perhaps most strikingly exhibited in his treatment of the modern corporate problem. The corporation is essentially the discovery of the nineteenth century. As an instrument for unitary and organized action it possesses to an unequalled degree both flexibility and power, and accordingly it was speedily utilized by the commercial interests. In fact it became the dominant mode of their organization and the dominant form of investment for active capital. Consequently, the corporation, especially the big corporation known as the trust, soon became the synonym of wealth. After the American people had so far solved their two great problems of governmental polity — the problem of national organization known as the question of state rights, and the problem of state rights known as the slavery question — as to leave only minor issues for later quarreling, they had time to think of more domestic problems. Among these they began to be troubled about the condition of their poor, and they began to raise questions as to the equitable distribution of wealth. It was only natural, in fact, it was inevit-

able, that there should follow an assault upon wealth itself, and that this assault should be directed in large measure against corporations as the tangible embodiment of wealth.

Grave issues are involved in the proper disposition of the legal, constitutional, and moral questions presented by this attack. Strange as it may seem, men are not more greedy when they are incorporated than when they are unincorporated, and corporate methods, being essentially commercial methods, do not differ from the methods of the ordinary man of business. Consequently the disposition of corporate rights involves the rights of the private individual to a degree which the private individual rarely, if ever, understands. The *Dartmouth College* case in the Supreme Court of the United States,<sup>1</sup> for example, has been cited as the bulwark of so-called corporate privilege, simply because it declared that a corporate charter was a contract which could not be retroactively modified by the state legislation without violating that provision of the Federal Constitution which forbids the impairment of the obligation of contracts.<sup>2</sup> By the adoption of clauses in the state constitutions, however, declaring that corporate charters are

<sup>1</sup> 4 Wheat. 518.

<sup>2</sup> See, for example, two articles entitled "Confusion of Property with Privilege"; "Dartmouth College Case," in *The Independent* for August 19 and 26, 1909.

subject to amendment by the state legislatures, the effect of the *Dartmouth College* case on corporate powers has been largely nullified. The same court, moreover, which decided the *Dartmouth College* case declared in later years that "a statute may conflict with the Federal Constitution in denying to individuals powers which they may rightfully exercise, and yet, at the same time, be valid as to a corporation created by a state."<sup>1</sup> Thus the corporations have profited comparatively little by the decision; but its beneficent effect in protecting natural persons against the attempted retroactive legislation of the states, has remained and can hardly be overestimated. It has furnished one of the few principles in American jurisprudence which has been uniformly and consistently applied to the protection of private rights. It may be said generally, therefore, that if corporations are secure in their constitutional rights, the constitutional rights of the individual will certainly be preserved; but, on the other hand, if the constitutional rights of the corporation are ignored, there is no guaranty that similar rights of the individual may not be gravely endangered.

The attack on corporations has been so sudden, so universal, and in some respects so violent, however, that it has caught the corporation

<sup>1</sup> *Berea College v. Kentucky*, 211 U. S. 45, 54.

lawyer quite unprepared. It has transcended his experience, and consequently he has been unable to meet it. What happened was that his inherited conceptions and maxims were unexpectedly turned against him. Moribund principles were revived and given new powers of offense, and against these he had no adequate weapons. His very skill in dealing with familiar issues hampered him in meeting issues which were unfamiliar: he did not have the flexibility and ingenuity which the new conditions demanded.

The attack on corporations has aimed to secure three principal vantage-points: a general right to control corporations and the modes of their activity; a special right to regulate the rates charged by public service corporations and by corporations whose business is affected, as it is said, with a public interest; and, finally, a right to prevent combinations in so-called restraint of trade. In each instance inspection will disclose fatal legal and constitutional defects in the grounds upon which these asserted rights are supported, but it will also disclose a striking failure on the part of the attorneys of the corporations to perceive these defects and to take advantage of them in aid of their clients. More than that, however, it will disclose how seriously the private rights of individuals have been adversely affected. An investigation into these

questions will, therefore, be of value, not merely as an aid to the correction of errors in particular departments of the law, but also as a guide to the correction of errors in legal methods in general, and thus it will lead to permanent improvement in the administration of justice. For these reasons let us attempt such an investigation.

*A. The General Right to control Corporations*

When a lawyer is asked to define the difference between a partnership and a corporation, he will almost invariably reply, in substance, if not in exact language, that the one exists by virtue of the agreement of the parties, whereas the other exists by virtue of a franchise granted by the state. Since a franchise, as its etymology implies, is a freedom or privilege, the lawyer's real meaning is that the incorporated associates enjoy by governmental grant certain special and peculiar rights which they cannot otherwise obtain. This view has passed beyond the legal profession into the community at large and has thus profoundly influenced the general attack upon corporations. In particular it has been conceived that because corporations enjoy special and peculiar rights by grant from the state, they owe on that account certain special and peculiar duties to the state, and that they are therefore peculiarly appropriate subjects for its regulative jurisdiction.

If we go further and inquire into the special rights which are supposed to be conferred on corporations by state grant, the answer will be that they are principally two: the right of the corporation to sue and be sued in its own name, and the right of the corporate associates to limit their liability for the corporate debts. Are these, in truth, special and peculiar rights? Let us examine them; and first, then, of the right to sue and be sued in the corporate name.

It is perfectly true that during the whole period of the common law, from the beginning down to the present day, there has never been a time when a partnership or other form of non-corporate organization could sue or be sued in its collective name: all suits by and against partnerships must be maintained in the name of all the associates as individuals. When a partnership sues, for example, there is not one plaintiff, the firm, but there are as many plaintiffs as there are partners. To the layman the difference must seem very slight: to the lawyer it is pregnant with significance. To neither is it intelligible without a knowledge of the conditions which prevailed at the time when the problem first arose. The point of time at which the firm first came into existence in England as a commercial institution is a matter of some speculation. Perhaps it was introduced by the Lombards, who

devised double-entry bookkeeping, bills of exchange, and so many other modern methods of commerce. It was not introduced, however, until England had already developed a body of jurisprudence and a settled judicial procedure of very great complexity and very little elasticity. Moreover, at that time the bar and bench on the one hand and the merchants on the other were distinct castes, separated from each other by the intermediate caste of solicitors, and by a consequent chasm of difference in manners and customs which it is hard for us of the present day to realize. For this reason the problem of bringing the bar and the bench to a clear comprehension of the customs of merchants presented great difficulties, — so great, in fact, that it was never completely solved and even to-day creates needless complications. One of these is the matter of the unity of a firm.

Men act in groups, and for many purposes the composition of the group is immaterial. For the purposes of the group, therefore, it is quite possible, and oftentimes very convenient, to ignore the individuals and treat the group as a unit, even to the extent of giving it a collective name. So it is with merchants in partnership. Understanding instinctively that the firm is a unit, they adopt firm names, and they carry all their accounts, draw all their mercantile paper, and



transact all their business in the firm name as the name of the unit. They do this not only with outsiders but among themselves, and each partner has his own account with the firm. The lawyers, however, did not and do not understand this, and are still in much doubt as to the nature of a firm. The nearest approximation to the truth is an elaborate theory, which has occasionally found its way into judicial decisions, that the firm is an "entity," a mysterious "personality," not tangible, but "ideal," existing only "in contemplation of law." But even this theory, which is nothing but an over-refined expression of an essentially simple fact, was not comprehended at the beginning and has not yet fully impressed itself upon the legal mind. To-day, therefore, the bar and the bench, still failing to understand the unity of the firm, compel the partners, when they come into court at all, to come not as one but as many, not as a firm but as differentiated individuals.

There was in the beginning, however, and there is now, no reason of substantive law and no reason of legal procedure why the partnership unity should not be understood and judicially recognized. The Continental lawyers, who were presented with the same question, solved it without difficulty, and in English-speaking jurisdictions the courts are entirely at liberty to solve

it for themselves and as it should be solved. There is, in other words, nothing but custom which prevents the American courts from allowing the firm to sue as a firm instead of in the name of the partners separately. If to-day, therefore, some venturesome attorney were to sue and to serve process in the name of the firm instead of in the names of all the partners, he would inspire the judicial breast with tremendous, though nameless, terrors and he would have his trouble for his pains; but he could comfort himself at the end — when he had paid his costs — with the retrospective pleasures of a good fight in a good cause, and with the reflection that in all the discussion caused by his practice he had heard no better objection urged against it than that it had never been tried before.

There is no seriously debatable question about it: a partnership is just as much an organic and legal unit, just as capable of unitary action, — in the courts and out of them, — as is a corporation. When, therefore, we find a jurisprudence like ours, which accords to the corporation and denies to the partnership the right to sue and be sued in its own name, that is, in its unity, we find a jurisprudence which, instead of granting a special and peculiar privilege to the incorporated associates, denies an unquestionable debt of justice to the unincorporated associates. In

no sense of the term, therefore, is the right to sue and be sued in a corporate name a special privilege. On the contrary, it is an inherent right which cannot be justly denied.

On the question of the limited liability of stockholders we must again cast a glance backward. Prior to the nineteenth century there were only two methods of securing judicial recognition of corporate existence. One of these was by the actual and undisputed exercise of corporate functions for a long period of time, that is by prescription, and the other was by special grant from the sovereign, which in later years meant an act of Parliament in England, and an act of the legislature in this country. Since prescriptive rights were difficult to obtain for new corporations, a legislative act of incorporation became practically necessary whenever a new corporation was to be formed, and new corporate charters were in fact originally obtained by special legislative enactment. With the commercial expansion of the nineteenth century, however, the number of commercial organizations demanding the corporate form became so great, the delays and expense of securing the necessary legislation became so burdensome, and the scandals connected with the passage of these charters became so unendurable, that at last general acts were passed permitting incorporation

without special legislative leave. Constitutional provisions were even adopted in some American states forbidding special incorporating acts. At the present time the process has gone so far in most, if not in all, of our states that the act of incorporation consists principally in signing a paper, filing it in one or two public offices, and paying a fee — and the states are competing for the fees.

Concurrently with these increased facilities for incorporating came another change. The early commercial companies did not limit the liability of the associates, and consequently the associates were personally responsible for all the debts of the company. After a time, however, a limitation of this liability was allowed, and by the middle of the nineteenth century became frequent. At first it was regarded as an anomaly and was required to be publicly announced. This was effected by compelling the word “limited” to be included in the corporate name. So frequently, however, was advantage taken of this permission that the word ceased to be a mark of distinction and became a mere tag without special significance. The use of it, therefore, was generally discontinued, and, when maintained at all, it is only as a survival from the older practice. At the present time, then, in most corporations, the liability of the stockholder is reduced and limited to his actual

investment in the enterprise. The impulse that was behind this change of corporate law and custom was the need of enabling business men to engage in business enterprises without risk to their whole fortune. That much of the commercial progress of our time has been due to the discovery of this method of attaining so desirable an end is beyond question. How many of the great enterprises that have linked the widespread commonwealth of man into one indissoluble commercial whole—steamship lines, railroads, cables, canals, telegraph lines, bridges—would have been begun if the associates had been responsible for the debts of the undertaking to the full measure of their property? Indeed, it is hardly too much to say that the discovery of such a device has equaled in value the discovery of steam as a motive power, since it has made possible the use of steam on an adequate scale.

The corporation, then, as we know it to-day, and as it was not known a hundred or even fifty years ago, is a mere device to put at the risk of a given enterprise a fixed and limited capital. If the corporate form had not been devised to meet this end, it is certain that the same result would have been accomplished by other means, and legal ingenuity would have been entirely capable of bringing it about if the necessity had arisen. Indeed, the limited risk of special partners

is such a device, and it has been recognized by the common law without any legislative enactment whatever. Another device, which has been employed to escape the burdens which in late years have been imposed upon corporations, is to be found in the limited liability of trustees.

The question, then, to determine is the question whether the right to put at risk a fixed and limited capital is a peculiar privilege conferred by the state of its especial grace and mere motion, or whether it is such a right as every citizen may demand of the state as of course. The question answers itself: whatever may be the theory of our lawyers, handed down from elder days and uncritically received as applying to new conditions, the fact is that a community which should fail to extend to such a right the full protection of its laws, even without special legislation, would be guilty of a grave injustice, for which it would itself pay a heavy penalty through the consequent obstruction to its own commercial development. Like the right to sue and be sued in the corporate name, therefore, the right to a limitation of liability for corporate debts is in no sense of the term a special privilege, but, on the contrary, is an inherent right which cannot be justly denied.

There are some other particulars in which the corporation might seem to possess peculiar privi-

leges, but limits of space forbid a discussion of them, and we may fairly assume that upon analysis they will yield the same results as those which have been specifically discussed. Upon that assumption, then, it is obvious that a corporation, while it is unlike a partnership in some particulars, is nevertheless like a partnership in this, that it derives its existence not from any favor of the state, but from an agreement of the parties which it is the unequivocal duty of the state to recognize and protect, and that it enjoys no special privileges whatever. In this view the corporation ceases to be a creature of the state, endowed with an occult personality, possessed of mysterious powers, and a source of phantasmic terrors, and becomes like other forms of mercantile enterprise, a mere mode of organized private activity with which the government should interfere for those reasons only which would justify its interference with other modes of organized private activity.

Here, then, we find the first point in which essential and underlying principles have been misunderstood by the lawyer of the common law. The assailants of corporations have claimed to possess rights to regulate corporations in the conduct of their business which they would never venture to exercise in the case of firms or of individual enterprises. The defenders, however, have signally failed to perceive that the ground

of this claim is essentially fallacious, and, because of this failure, corporations are permitted to be harassed and trammled with all sorts of hostile and discriminating restrictions. The fact is that the attack, by its unwarranted assumption of governmental power, and the defense, by its strange and unaccountable acquiescence in that assumption, has enabled the state to foist upon corporations something like a gold brick. The corporations have accepted the corporate name and the limitation of stockholders' liability as signal marks of legislative favor and have meekly submitted to impositions in return for this supposed favor which a clearer view of their rights would have prevented them from accepting.

### *B. Rate Regulation*

In modern times there has arisen a class of corporations to which are delegated certain functions which are normally governmental, but which for one reason or another the government fails to perform and which it therefore delegates to private individuals in return for the profit that they yield. The transportation of passengers by railroads, by elevated, surface and sub-surface cars, the transmission of messages by telegraph and telephone, the distribution of light, heat, and power by gas and electricity, the furnishing of water, — these are all func-



tions of general interest, or rather, under our modern conditions, of general necessity. Their adequate fulfillment, however, requires the use of certain governmental powers of which the principal is the right of eminent domain, or the right to take private property at a just compensation against the will of the owner, and if these functions are to be exercised by private citizens, these correlative powers must accompany them. In such cases we have instances of true special privilege, that is, franchises in the proper sense of the term, which are to be sharply distinguished from the false franchise to be merely a corporation.

Now, while it is proper that private individuals who thus exercise a governmental function should receive a profit for the services which they render to the community, it is also clear that when the government invests them with its power of eminent domain there is, or ought to be, in the transaction a limit as to the amount of the profits. There is an inherent obligation that they shall not pass beyond certain ill-defined bounds. In other words, any profit arising from the use of the people's power should be reasonable and not exorbitant. It is a rather natural consequence of these conditions that there should usually arise a conflict between the right of the grantees of the franchise to make a profit and

the right of the people that that profit shall not be excessive. In times past the corporations to whom these public powers were intrusted have been allowed to conduct their business under a very inefficient public supervision, and they have been most astute in taking advantage of this opportunity for private enrichment. Watered stock and excessive charges have been the natural consequences of the public negligence. Of late years, however, there has been a great change in these conditions. The people have become aroused and have endeavored to secure for themselves better terms than they have ever before demanded. There is even a tendency to make those terms too stringent for their own good. Just as there is a temptation on the part of the public service corporations to make their profits excessive, so there is a correlative temptation on the part of the people to deny to the public service corporations an adequate return on their investment. The consequence is that the people are at times in danger of defeating their own good by delaying needed public facilities and in diminishing those that now exist. While they should be rigorous in preventing over-capitalization and in seeing to it that the service that is rendered is of the best possible character, it is not a very wise policy from the point of view of their own best interests to

limit the profits too narrowly. Whatever may be the right or wrong of these disputes, however, the regulation of the rates charged by public service corporations has now become almost, if not quite, universal in this country.

There is another class of cases in which rate regulation has been attempted. From time immemorial common carriers in England were forbidden by the common law, that is to say, by the courts without legislative enactment, to charge more than reasonable rates. A similar law prevailed in the case of wharfingers and innkeepers, and perhaps in some other cases. The principle has been extended in this country, and in the so-called *Granger Cases* in the Supreme Court of the United States it was held that the owners of certain private grain elevators were subject to legislative regulation in respect to their rates.<sup>1</sup> The ground for this decision was that the business was of such importance as to be "affected with a public interest," which, being translated into less technical language, means merely that the business entered so largely into the daily life of the people that they were justified by their own needs in regulating the rates to be charged for this kind of service. Now, although the public may have a very vital *interest* in regulating the rates to be charged

<sup>1</sup> *Munn v. Illinois*, 94 U. S. 113.

by private enterprises, it does not follow by any means that they have any *right* to regulate them. Public interest and public right are two very different things, and when the Government undertakes to fix the price at which a private individual may sell his services or his property, the burden of proof to establish its right is certainly very heavy. It is not discharged by merely proving that it would be advantageous to the people that the price should be fixed. The *Granger Cases* are still to be justified. They ought to be challenged until the court points to a basis for them which is much more sound in point of morals than any which has yet been advanced.

Whatever the ground for rate regulation may be, however, the fact still remains that the people undertake to exercise it, and do exercise it very freely, in large classes of industrial enterprises. In the majority of cases it is exercised in the form of enactments by the legislature. This is a mode of regulation which has been accepted by the corporations and their attorneys without protest, and yet it is vitiated by legal and moral defects which are of the utmost importance, not only to the corporations concerned, but to the people at large.

The Fourteenth Amendment to the Constitution of the United States provides that no person

shall be deprived of life, liberty, or property without due process of law, and it has been universally held that it is of the essence of due process of law that any person whose liberty or property is at stake shall have a right and opportunity to be heard in his own defense: before his liberty is abridged or his property taken, he must be served with notice of the proceedings and be accorded the right to appear in his own behalf personally or by authorized agents. When, however, a legislature undertakes to fix rates in the usual manner of its legislation, the individual or corporation affected has no hearing. Under the most favorable circumstances the legislature appoints an investigating committee to summon witnesses and take evidence; but the corporations affected are not usually allowed to appear by counsel, or, if counsel are accorded the courtesy of a seat at the sessions of the committee, they are not allowed the privilege of cross-examining witnesses or of introducing evidence. Moreover, there is seldom, if ever, an attempt to insure that the various corporations affected shall have notice of the proceedings. It is obvious, therefore, that a legislative enactment of this character does not in any substantial particular whatever give the corporations a right to be heard, and therefore that it does not conform to the constitutional requirements of due process of law. In its

purely moral aspect it does not in any particular give the corporations a "square deal."

This obvious objection seems to have been completely lost to the view of the lawyer of the common law. Instead of taking advantage of the defense that legislation of this character is unconstitutional because their clients had no opportunity to be heard in their own behalf, the attorneys for the public service corporations have attacked it, when they have attacked it at all, upon the ground that the rates as fixed have been "confiscatory," by which they merely mean that the rates do not afford a reasonable return upon the investment. The consequence is that instead of showing that the just requirements of the due process of law were not observed, a matter of fact which is susceptible of the simplest kind of proof and will usually appear upon the face of the proceedings, they have involved their clients in the enormous expense of proving the value of the business, the relation of cost of operation to the charges rendered, and all the other complicated facts and issues involved in the question of the reasonableness or unreasonableness of the rate in question.

A striking example of this method of defense against rate regulation is to be found in the case of *Wilcox v. The Consolidated Gas Co.*, 212 U. S. 19. The legislature of the State of New

York had limited the price of gas in the City of New York to eighty cents a thousand cubic feet. This rate was fixed after a legislative investigation which aroused the greatest public interest. Counsel for the gas company were allowed to be present, but were not permitted to offer evidence or to cross-examine witnesses. The statute in question was enacted as the result of that investigation. On the very day it took effect the gas company brought suit to restrain the Public Service Commission from enforcing it. The court thus stated the issue:—

The question arising is as to the validity of the acts limiting the rates for gas to the prices therein stated. The rule by which to determine the question is pretty well established in this court. The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of private property for public use without such compensation as under the circumstances is just both to the owner and the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public.

In support of their allegations as to the unfairness of the rate, the gas company went into a very elaborate presentation of evidence as to the value of its assets and of the rate of return which would be reasonable, and it was vigorously opposed by the state. It is certain that the cost of the litigation was enormous, and it is cur-

rently reported to have amounted to more than a million dollars. The ultimate decision of the Supreme Court of the United States was to the effect that the company had "failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the legislature of the State of New York are in fact confiscatory;" but the court added that "a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court."

The net result of all that expenditure of time, money, and energy was therefore merely to procure a final adjudication that the complainant would have to submit to an actual loss of profits before it could secure relief, or, in other words, that it could not have the statute declared unconstitutional as confiscatory until some of its property had been actually and irrevocably confiscated. It is difficult to conceive a more barren issue.

American lawyers should have learned by this time that even a reasonable rate, if established by a legislative process which denies an opportunity to be heard, is unconstitutional. The legislature has no more power to adjudicate rates with-



out a hearing than it has to adjudicate rights without a hearing. A statute enacted without a hearing directing A to pay B a fixed sum of money would be admittedly unconstitutional, even though A actually owed the money, and upon precisely the same principle a statute fixing the amount which A could charge B for providing him with gas would be unconstitutional, even though the rates fixed were actually just and reasonable. In both instances a sanction of law is attempted to be affixed to an existing obligation without a proper examination into the facts and without giving the person affected an opportunity to be heard in his own defense: to do that is to take property without due process of law.

The explanation of the failure of the American lawyer to take objection to the statutory regulation of rates is that he has been confused over the question of legislative *power*. He has inherited from England the doctrine that the legislative body exercises the sovereign power of the people. He believes, therefore, that it has the power to regulate rates, and he draws the inference that the power to regulate rates is a legislative and not a judicial function. He has not, however, become fully cognizant of the fact that even the legislative power is limited in this country. Although the legislature represents the people,

it is subject to the limitations imposed by the Constitution, and even the legislature cannot legally deprive a man of his property or of his liberty without giving him due notice of its proceeding and an opportunity to be heard in his own behalf.

The failure of the American lawyer to grasp this simple conception has been an unmixed evil. A legislature has no business to attempt to regulate rates. The issues involved are too complicated for its clumsy processes. They are business questions, they call for special study by specially qualified experts, and even experts cannot accurately determine them without hearing both sides. The people are slowly coming to a perception of this inherent legislative incapacity, and more and more they are leaving such matters to public service commissions. Even yet, however, they do not clearly understand the true function which these commissions fulfill. It is still possible for the Supreme Court of the United States to call it sometimes judicial and sometimes legislative.<sup>1</sup> Such commissions are, however, courts of a very high order. They hear evidence, they listen to arguments on the law and the facts, they render judgments of the greatest complexity and detail, and in general they do not differ in any

<sup>1</sup> *Ex parte Young*, 209 U. S. 123, 144 (judicial); *Home Telegraph Co. v. Los Angeles*, 211 U. S. 265, 278 (legislative).

essential particular from other courts except in the scope and character of their jurisdiction. If the American lawyer had only understood these matters, not only would his clients, the corporations and the stockholders, have received a protection in the exercise of their just rights which they have utterly failed to receive, but much of the agitation and unrest of the people would have been avoided, while the people themselves would have been better served. The questions arising out of the regulation and control of public service corporations would have been removed from the storm-ridden field of politics and graft to the quiet halls of a municipal building, there to be tried out by our old Anglo-Saxon method of hearing both parties — to the lasting benefit of everybody concerned.

### *C. Anti-Trust Legislation*

#### *1. Contracts in Restraint of Trade*

The Sherman Anti-Trust Act provides in its first section that —

Every contract . . . in restraint of trade or commerce between the states is hereby declared to be illegal.

The first question to spring to the lips of any court which is called upon to administer such a statute as this should contain an inquiry into the

nature of a contract in restraint of trade, its necessary characteristics, and its distinguishing marks. How does a contract operate when it is in restraint of trade? If a man makes a contract in the course of trade and for trade reasons, does such a contract restrain trade? If a man makes more money by agreeing for a consideration not to trade than by continuing to trade, does he restrain trade by making such an agreement? What has happened when trade has been restrained? Has anybody suffered? If so, who and how? What is trade? Does it mean *volume* of transactions, or *number*? If two men make an agreement by which the total number of sales has been diminished, but the sum of the payments has been increased, or *vice versa*, has their agreement restrained trade?

These and a thousand like questions must be answered before statutes like the Sherman Anti-Trust Act — and their name by now is legion — can be intelligently administered; but it is typical of the intellectual processes of the lawyer of the common law that it has apparently never occurred to him to ask them. At any rate, there are no decisions of importance which define, or even discuss, the necessary terms or the characteristic incidents of a contract in restraint of trade. Probably no statutes and no decisions have ever aroused so much popular interest or

such intense feeling as the Sherman Anti-Trust Act and the decisions under it, and yet after more than twenty years of litigation and popular agitation the one underlying question has never been answered.

What has actually happened has been this: —

Prior to the days of Adam Smith there were rife in England two economic doctrines of considerable historic significance. One of them was to the effect that it was an economic disadvantage to any state to diminish its supply of gold, and that if its imports were in excess of its exports, so that it was compelled to pay the difference in cash, its economic condition was unfavorable. This was the balance of trade theory. The other was to the effect that if two men agreed not to compete, their contract was fraught with injurious consequences to trade because the elimination of competition would enable them, or tend to enable them, to raise prices. This was the restraint of trade theory.

The balance of trade theory was effectively demolished by Adam Smith and has long since ceased to be an influence in economic thought. The restraint of trade theory, however, has never found its Adam Smith, and it still troubles us at the present day. Because the seeming impolicy of permitting competition to be eliminated or "stifled" furnished one of those sonorous and

plausible maxims which appeal to the lawyer of the common law and which he rolls under his tongue with an obvious delight, it entered into the domain of the law, and the English courts held, as one of their declared principles of public policy, that no man could lawfully agree to refrain from competing with another, upon the ground, among others, that he thereby restrained trade. It also entered into legislation, and there were early statutes against such strange-sounding crimes as "forestalling," "regrating," and "engrossing," which were medieval names for medieval efforts to corner the market. The basic doctrine of these decisions and statutes, however, was economically unsound, and so obviously deprived the trader of his inherent right to put his own price upon his own property that they gradually fell into innocuous desuetude. In particular, the doctrine that as a matter of public policy a man could not agree not to compete with another man has long been substantially overruled, even at common law. It does, indeed, still command a sort of lip service in the fact that it is declared that such an agreement cannot lawfully be absolute; but as a practical matter, if there is somewhere within the four corners of the contract a stipulation, however slight, which redeems it from being absolute, it will usually receive judicial sanction as not being in "unrea-

sonable restraint of trade," and thus the ancient test of eliminated competition has been almost abandoned at common law.<sup>1</sup>

In spite of its virtual disappearance from the common law, however, the test of eliminated competition continues to dominate the legal and economic thought of our time. Every lawyer, be he judge or advocate, assumes that "contract in restraint of trade" and "contract in restraint of competition" are synonymous terms. To his mind the two are identical for all purposes: the very words are interchangeable. In all his speech and in all his writings he slips from one to the other in complete unconsciousness of their difference. The result has been that ever since the enactment of the Sherman Anti-Trust Act he has instinctively assumed that its prohibitions, which in terms forbid only contracts in restraint of trade, really forbid contracts in restraint of competition. Accordingly the Supreme Court of the United States in administering its provisions has uniformly assumed, without discussion and without exciting any controversy or remark, that a case of restraint of trade has been made out upon the mere evidence of restraint of competition. Hence it is that we may read its decisions in vain for any information as to the nature of a contract in restraint of trade, except such as we

<sup>1</sup> See cases cited in Beach on Monopolies, chap. II.

can glean by inference from tacit assumptions and undisclosed premises. The truth is, therefore, that the Supreme Court has not yet decided the question which it must ultimately decide: What is a contract in restraint of trade? Its hitherto untested assumption, however, that trade is restrained when competition is eliminated, presents one aspect which calls for our consideration at this time because it illustrates once more the essential helplessness of the lawyer of the common law in an emergency.

It is generally perceived that every form of commercial organization, from the smallest to the largest, eliminates a previously existent competition between those who combine. Whenever a business becomes organized and ceases to be conducted by single individuals without partners, without employees, and without trade agreements, it automatically eliminates competition somewhere and somehow. Consequently, if restraint of competition is the test of contracts in restraint of trade, then every partnership, every corporation, and every trade agreement, no matter how small, automatically restrains trade. The magnitude of the business does not enter into the question. "Size is not made the test: Two individuals who have been driving rival express wagons between villages in two contiguous states, who enter into a combination to join forces and



operate a single line, restrain an existing competition; and it would seem to make little difference whether they make such combination more effective by forming a partnership or not.”<sup>1</sup>

The test of eliminated competition presents, therefore, a serious problem. Because it condemns the smallest combinations as well as the largest, so long as it is adopted by the courts as the test of illegality, practically every man's business will run the risk of sometime being declared illegal and will always be conducted at the peril of suit by the government. This is no idle fear. The anti-trust prosecutions, state and federal, have already reached a point in the descending scale of magnitude which makes it evident that in one way or another there is no man's business which is not, directly or indirectly, in danger of serious attack. Even workingmen and farmers have been assailed because they have tried in unison to better their modest scale of living. There emerges into view, therefore, a dilemma which cannot be escaped and which involves the validity and truth of the underlying doctrine upon which the restraint of trade cases are founded. If the elimination of competition is the true test of contracts in restraint of trade,

<sup>1</sup> Per Lacombe, J., *United States v. American Tobacco Co.*, 164 Fed. Rep. 700, 702. See a further discussion of this case, *post*, p. 249.

then, simply because commerce cannot be carried on without eliminating some competition, practically the entire body of our commerce restrains trade and is illegal, either under the federal or under the state statutes, and nearly every business man in the land is breaking the law every day. In other words, the test reduces itself to the *reductio ad absurdum* of declaring that all business is illegal, and the only escape from this conclusion is to abandon the test altogether. This is the inexorable dilemma of the restraint of trade theory as administered in our law today: either all trade is illegal or the test of eliminated competition is wrong.

With this preface let us turn to the decisions of the Supreme Court of the United States. In the first case which came before it under the Sherman Anti-Trust Act it escaped the responsibility of passing upon the real issues of the act by holding that the contract then before it did not affect interstate commerce and therefore did not come within the scope of the act or within the constitutional power of the United States.<sup>1</sup>

In the next case which came before it, the attorneys for the defense, besides contending that their clients were not engaged in interstate commerce, turned also to the merits of the act. They argued that the phrase "contract in re-

<sup>1</sup> *United States v. E. C. Knight Co.*, 156 U. S. 1.

straint of trade," as used in the act, had its usual common law significance, that Congress must be deemed to have intended only contracts which the common law declared to be illegal, and that, inasmuch as the common law had reached the point of forbidding only contracts which it regarded as in unreasonable restraint of trade, its enactment did not apply to the agreements between their clients, which were claimed to be wholly reasonable.<sup>1</sup>

This argument, be it observed, contained a vital error, because it admitted, or rather assumed, the identity of contracts in restraint of trade with contracts in restraint of competition, and confined itself to an attempt to modify the statute by reading into it the word "unreasonable." The suggestion, however, that the phrase "every contract in restraint of trade" is equivalent to the phrase "every contract in *unreasonable* restraint of trade" was patently absurd and was rightly overruled.

The business world was greatly alarmed by this decision, however, and in the third case which came before the Supreme Court a serious attempt was made to induce it to reconsider its position. The leaders of the bar were assembled in aid of the defense, and they endeavored, this time on new arguments, to reopen the whole case.

<sup>1</sup> *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290.

In particular they assailed the statute as unconstitutional. We cannot do better than take Mr. Justice Peckham's summary of this new argument, because it is entirely fair and accurate:—

Upon the constitutionality of the act it is now earnestly contended that contracts in restraint of trade are not necessarily prejudicial to the security or welfare of society, and that Congress is without power to prohibit generally all contracts in restraint of trade, and the effort to do this invalidates the act in question. It is urged that it is for the court to decide whether the mere fact that a contract or arrangement, whatever its purpose or character, may restrain trade in some degree, renders it injurious or prejudicial to the welfare or security of society, and if the court be of opinion that such welfare or security is not prejudiced by a contract of that kind, then Congress has no power to prohibit it, and the act must be declared unconstitutional. It is claimed that the act can be supported only as an exercise of the police power, and that the constitutional guarantees furnished by the Fifth Amendment secure to all persons freedom in the pursuit of their vocations and the use of their property, and in making such contracts or arrangements as may be necessary therefor. In dwelling upon the far-reaching nature of the language used in the act as construed in the case mentioned, counsel contend that the extent to which it limits the freedom and destroys the property of the individual can scarcely be exaggerated, and that ordinary contracts and combinations, which are at the same time most indispensable, *have the effect of somewhat restraining trade*

*and commerce, although to a very slight extent, but yet, under the construction adopted, they are illegal.*

As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggest all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the good will of a business with an agreement not to destroy its value by engaging in similar business; and a covenant in a deed restricting the use of real estate. *It is added that the effect of most business contracts or combinations is to restrain trade in some degree.*<sup>1</sup>

Here stands the ancient error of the common law perpetuated in the cold pages of a judicial record. The elimination of competition and restraint of trade were once more inextricably confused. What counsel obviously meant to say was that most business contracts or combinations eliminate competition. What counsel actually said

<sup>1</sup> *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 567.

was that they restrain trade. The consequence was that they sacrificed their cause by conceding the quality of economic danger to the very contracts and combinations which they were trying to defend as economically harmless, if not beneficial. In other words, they allowed the question to turn upon the power of Congress to forbid the making of contracts which they admitted to be prejudicial to the people, and thus unwittingly they surrendered all the advantage of their position. Furthermore, although they obviously had a glimpse of the dilemma which the test of eliminated competition involves, they did not understand it and consequently they failed to set it properly before the court. By conceding that most business contracts and combinations restrain trade, they failed to draw the distinction between trade and competition, and thus they permitted the illegitimate transition from the premise of eliminated competition to the conclusion of restrained trade to pass unchallenged. For this reason they failed to make clear either the real nature of the dilemma or the duty which it imposed upon the court to reëxamine its own positions.

Now let us turn to the reception which their argument received at the hands of the court. After stating it in the terms which we have just quoted, Mr. Justice Peckham went on to make the following answer:—

This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the court, and there is some *embarrassment* in assuming to decide herein just how far the act goes in the direction claimed. Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment, by two or more producers, of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri* case as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business. *The instances cited by counsel have in our judgment little or no bearing upon the question under consideration.*<sup>1</sup>

In thus answering counsel, the court failed to take advantage of their admission. It might have utilized the concession, that "most business con-

<sup>1</sup> *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 567-68.

tracts or combinations restrain trade in some degree," to declare that it was bound by the terms of the statute, and that since the statute had declared every such contract to be illegal, it had no alternative but to declare illegal every such contract, however small, which came before it. While the court failed to take this position, it did not, on the other hand, answer the point which the argument was really intended to make. Instead of recognizing in the argument the dilemma which its own decisions had created, or meeting the *reductio ad absurdum* that under those decisions practically all interstate commerce is illegal, the court declared that it was under an "embarrassment" in deciding "how far the act goes in the direction claimed."

We should pause for a moment over this word "embarrassment," for it is laden with unhappy significance. As we have seen, counsel had seriously misapprehended the situation, but, in spite of their misapprehension, they had hit upon the fundamental dilemma which the situation presented, and were pressing it upon the court with all the strength that their misapprehension would permit. The court, however, did not meet their argument either in its outward form or in its inward substance, but curtly dismissed it as having "little or no bearing upon the question under consideration." They did not even take pains to



point out how it was irrelevant. Of course, the issues of the case were not properly presented to them, and they themselves were caught in the meshes of the error that hampered the argument of counsel, so that the full significance of the situation was not apparent to them, but, nevertheless, the rather naïve language which they used indicates that in spite of their expressed belief that the argument was irrelevant, they still labored under an uneasy consciousness that all was not right and that there was a problem still to be solved. In simple truth, the court evaded the issue, and therein they fell short of discharging their high judicial duty. No court is justified in thus avoiding the contentions of counsel, especially when presented with such weight and authority and in a cause of such large importance. They should never have rendered a judgment in the case before them until they were able either to answer the question, or else to point out why an answer to it was not necessary to the judgment. As a matter of fact, the argument which was dismissed so curtly as being irrelevant was so far from being irrelevant that it was decisive of the whole issue.

The question thus attempted to be raised in the *Joint Traffic* case was not answered then, and it has remained unanswered to this day. Although the Supreme Court has uniformly applied

the test of eliminated competition to the big combinations, it has not met the question of its applicability to the small ones. The entire country dimly perceives this omission. It is waiting to see "how far the court will go" in declaring trade combinations illegal. It has waited eagerly for each decision in the hope that it would in some way diminish the peril of the small combination, but without any satisfactory result. Each decision leaves the problem still unanswered and the peril still undiminished. The court constantly throws out hints that there may be some abatement from the rigor of its holdings. In the *Joint Traffic* case itself, Mr. Justice Peckham said that the instances of small contracts which were cited by counsel were not in the opinion of the court within the purview of the statute. In the *Northern Securities* case, Mr. Justice Brewer said that the statute was not aimed at "minor contracts in partial restraint of trade."<sup>1</sup> In the *Standard Oil* case, Mr. Justice White said that the statute must be interpreted in the light of reason.<sup>2</sup> Cheered by hints like these, the people have constantly refused to believe, in spite of the decisions, that all contracts which eliminate competition will be held to be void. Meanwhile,

<sup>1</sup> *United States v. Northern Securities Co.*, 193 U. S. 197, 361.

<sup>2</sup> *United States v. Standard Oil Co.*, 221 U. S. 1. See *post*, p. 237, for a further discussion of this case.

however, the court has actually held that no limitations can be imported into the statutory phrase, and, except in the *Knight* case, it has affixed the stamp of illegality to every contract which has come before it under the act, and the hints of mercy which it has thrown out have never materialized in any actual judgment. In the technical language of the law, everything that it has said looking to a mollified "interpretation" of the act has been *obiter dictum*. It is not strange that the people cannot understand these decisions and are afraid.

This situation of suspense cannot continue forever. Sometime the Supreme Court will be confronted with the problem of the small combination in exact and logical relevancy to its own doctrines and under such circumstances that it cannot evade the issue. When that time comes, the court will be compelled to choose between alternatives which are mutually exclusive and which it can by no possibility reconcile. Either it must decide that every contract which eliminates competition restrains trade, no matter how small it may be, or else it must decide that a contract which eliminates competition does not, for that reason alone at any rate, restrain trade. If it accepts the first horn of the dilemma, it will be compelled to hold that the entire body of interstate commerce, with the small exception

of private individuals conducting business without partners, without employees, and without trade agreements, is illegal. If it accepts the second horn of the dilemma, it will be compelled to hold that all its prior decisions, except the *Knight* case, have been erroneous. There is no escape from this dilemma. With the negligible exceptions noted, one of two things is inexorably true: *either all interstate commerce is illegal, or all the decisions of the Supreme Court under the first section of the Sherman Anti-Trust Act have been wrong.*

Strange as it may seem, it is still possible to secure that reconsideration of the restraint of trade problem which counsel sought so earnestly to bring about in the *Joint Traffic* case. It is true that there have been twenty years of discussion of this problem in the Supreme Court; it is true that the decisions of that court have been iterated and reiterated after argument by the leaders of the bar of two generations, and in litigations affecting some of the largest private organizations which the world has ever known; it is true that these decisions have been conformable to an almost universal popular demand and that a departure from them would excite a great outburst of popular condemnation; and therefore it would seem to follow that hardly any argu-

ment could be sufficient to countervail these forces of established precedents and opinions. Such a conclusion is essentially fallacious, however. The compulsive power of reason is always sufficient in the long run to overturn any established custom, however firmly rooted it may be in the habits or feelings of the people. Nothing can stand against it. Error, passion, prejudice, self-interest, — all these ultimately yield to its irresistible pressure. If only the power of reason can be invoked against these decisions of the court, therefore, they must be ultimately modified, if not indeed directly overruled.

Under ordinary circumstances, the progress of reason against a general misconception is slow, so slow as at times to be almost imperceptible. In the present instance, however, there are special considerations which make both for power and speed in an effort to secure a reconsideration of the trust problem. In the first place, there are indications in the opinions of the court itself which suggest the possibility that it may withdraw from some of the stringent positions of the past. More than that, however, the court has involved itself in a dilemma from which there is no escape save through an examination of the subject which in itself will involve a radical change in its conclusions. If only this dilemma can be properly presented to the court, not all the ad-

verse influences of precedent and popular opinion can obstruct or prevent the rightful issue: the court has involved itself in a dilemma and it must and will extricate itself.

There is no better way to make the dilemma obvious and irrefutable than to begin with the striking illustration put by Mr. Justice Lacombe: —

Size is not made the test: Two individuals who have been running rival express wagons between villages in two contiguous states, who enter into a combination to join forces and operate a single line, restrain an existing competition.

Upon this illustration we can found a question which will surely elicit the truth. We must not ask whether, under the circumstances supposed, the combination violates the statute, because that question involves the very conclusion which we desire to test. Moreover, it has been asked before, and always without definite effect. What we must do is to ask this question: "*Do these two expressmen, when they enter into a combination, thereby restrain trade?*" That is the question which makes it impossible to avoid the issue. If the court answers it in the affirmative, it instantly brings their combination within the express terms of the act and by its own judgment condemns substantially the entire body of interstate trade as illegal. If, however, the court an-

swers it in the negative, the court will deny its basic premise, that the elimination of competition involves a restraint of trade, and having demolished the foundation upon which its present structure rests, it will be driven inexorably to the reconstruction of its conclusions. It is because this dilemma has been hanging over the court like the sword of Damocles that the court cannot evade or ignore it. The time will come when the thread must be cut and the consequences accepted. The attorney for the corporations who shall place that alternative before the court in its ultimate simplicity will have found a compulsive power superior to all the adverse influences which he will have to meet.<sup>1</sup>

## 2. *Monopolies*

The second section of the Sherman Anti-Trust Act provides that —

Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations shall be deemed to be guilty of a misdemeanor.

<sup>1</sup> While the preceding pages have been going through the press, the Supreme Court has held, *United States v. Winslow*, Feb. 3, 1913, that the act does not apply to the combination of non-competing concerns. It is thus judicially established that the elimination of competition is the only test of contracts in restraint of trade. It is more important than ever to determine whether the elimination of competition is a true test.

Monopolies were defined by Lord Chief Justice Coke as follows :—

A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.<sup>1</sup>

It will be seen that the effect of a monopoly as thus defined is produced, not because there is any grant of new rights, but because already existing rights are taken away. When Queen Elizabeth, for example, granted to Edward Darcy the exclusive right to manufacture and sell playing-cards within the realm, she did not really give him anything which he did not have before. What she did do was to deprive all the rest of her subjects of a great deal to which, up to that time at least, they were clearly entitled. After the grant Darcy had no greater facilities or rights to manufacture cards than he had before the grant, but the people of England generally were deprived, *pro tanto*, of their fundamental liberties. The essence of a monopoly, therefore, lies in the fact that it is an embargo upon private enterprise which is enforced by the superior power of the government.

<sup>1</sup> 3 Inst. 181, c. 85.



In England the crown assumed the right to issue monopolies as part of its royal prerogative. In other words, the crown claimed the right to tell its subjects that they could not do certain things which otherwise they might lawfully do. This was an assumption of legislative power. So far as it was valid, if at all, it had the effect of a statute forbidding the subjects to engage in the designated occupations. Under the pressure of royal necessities, these legislative acts, masquerading under the name of a grant of a special privilege, were bestowed so frequently as to become a great burden. For long years, therefore, the people struggled against them while the crown struggled to maintain its prerogatives. Finally the people prevailed, and through the famous *Case of Monopolies*, 11 Co. 84, they secured a judicial decision in their favor. In that case it was held that the grant by Queen Elizabeth to Edward Darcy of the exclusive right to manufacture and sell playing-cards within the realm was void as against the common law.

It is sometimes said that the *Case of Monopolies* decides that monopolies are void at the common law: but this is a grave and serious error. It was held, indeed, that the King could not grant monopolies, but the power to grant them still remained in Parliament. Even to-day Parliament can forbid the manufacture and sale

of playing-cards within the realm to everybody except some modern Edward Darcy, and if it ventures to enact such a prohibition, no English court will declare its action to be void. The *Case of Monopolies*, therefore, was in its true effect merely a decision that the crown was not vested with the right of legislation, and that the legislative sovereignty was resident in the Parliament.

These monopolies, founded on grant, carried with them, of course, an exclusive control of the subject-matter of the grant, and from this control the word "monopoly" has been extended by way of metaphor to many other instances in which the control is not dependent upon grant, and does not involve a sovereign prohibition. Any dictionary will illustrate this transition of thought. This from the *Century* is apposite:—

The possession or assumption of anything to the exclusion of other possessors: thus, a man is popularly said to have a *monopoly* of any business of which he has complete control.

Caleb hain't no *monopoly* to court the seenoreetas.  
Lowell, *Biglow Papers*, 1st ser., ii.

There is, however, an immeasurable difference between these two kinds of monopoly, the real and the metaphorical. It is the difference between special privilege and equality before the law. In the one case a man secures his control

because his natural competitors are forbidden through the exercise of sovereign power to compete with him : in the other case, a man secures his control just because competition has been preserved. In the one case, A cannot sell to X because the government steps in in behalf of B and forbids him to make the sale : in the other case, A cannot sell to X because B offers X a better bargain. In the one case, A loses his sale through the prohibition of a superior power : in the other case, he loses it because he cannot meet the free conditions of business. In the one case, Darcy's monopoly comes from governmental favoritism : in the other case, Caleb's monopoly comes, if at all, from his personal prowess in a fair field. The real monopoly involves governmental oppression : the metaphorical monopoly involves freedom of competition. Real monopoly tramples upon the rights of the people : metaphorical monopoly is the direct product of legal and commercial freedom.

The Supreme Court of the United States has given no evidence of apprehending the character, the extent, or the importance of this distinction. In England, as we have seen, the struggle over monopolies and special privileges was a struggle between the people and the crown, and the people eventually prevailed. In the Supreme Court of the United States, however, the people did

not prevail, as is shown by the history of its decisions.

The State of Louisiana, by legislative grant, conferred upon the Crescent City Live Stock Landing and Slaughter House Company the exclusive privilege of conducting and carrying on the live-stock landing and slaughtering-house business within the city of New Orleans and certain adjacent parishes, a territory which covered altogether more than eleven hundred square miles, and provided that no butcher should slaughter within the specified territory except at the houses of the company and upon the payment of fixed fees for the use of the accommodations furnished. Some of the butchers of the city actively resisted the enforcement of the statute upon the ground, among others, that it was a monopoly which deprived them of the equal protection of the laws as guaranteed by the Fourteenth Amendment, and they carried their cause to the Supreme Court of the United States.<sup>1</sup>

The court met the issue without evasion. It frankly declared the question to be:—

*Can any exclusive privileges be granted to any of its citizens or to a corporation by the legislature of a state?*

And, having framed the question in these terms, it answered it in the affirmative. It held

<sup>1</sup> *Slaughter House Cases*, 16 Wall. 36.

that the provisions of the Federal Constitution furnished no restrictions upon the power of the state to grant a monopoly, and based its judgment on the ground that the clause of the constitution which in expressed terms secured the equal protection of the laws to everybody was in fact intended only in aid of the negro. It even went so far in its opinion as to challenge the monopolistic character of the privilege granted. It said (page 61): —

The wisdom of the monopoly granted by the legislature may be open to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily services in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit.

Again, the State of Texas passed a statute which, under the thin disguise of making them state officers, limited the number of pilots who might ply their trade in the harbors of the state and forbade any persons not of the number to act as pilots. The court held that this statute did not offend either against the Fourteenth Amendment or against the prohibition of monopolies contained in the Sherman Anti-Trust Act, because “no monopoly or combination in a legal

sense can arise from the fact that the duly authorized agents of the state are alone allowed to perform the duties devolved upon them by law."<sup>1</sup>

Thus stands the court with reference to special privilege, that is to say, to that real monopoly which makes it unlawful for a free people to engage in industrial enterprises which are harmless and beneficial. When, however, we come to that metaphorical monopoly which involves no governmental favoritism and which can only arise under conditions of free competition, then we find a very different situation. In the *Sugar Trust* case,<sup>2</sup> the court dismissed the proceedings under the Sherman Anti-Trust Act, upon the ground that interstate commerce was not involved, but it hospitably received the argument of the government that the *Case of Monopolies*, 11 Co. 84, was an authority upon the question of monopoly. In the *Standard Oil* case,<sup>3</sup> the court did, indeed, advert to the distinction between the monopoly which is "the consequence arising from the exercise of sovereign power" and the monopoly which is "the creation" of "an individual"; but when it enumerated the evils of monopolies, it could apparently point to

<sup>1</sup> *Olsen v. Smith*, 195 U. S. 332, 344.

<sup>2</sup> *United States v. Knight Co.*, 156 U. S. 1.

<sup>3</sup> *Standard Oil Co. v. United States*, 221 U. S. 1, 52.

nothing but the merely economic evils, the power to injure the public by enhancing the price, the power to limit production, and the danger of deterioration in the quality of the monopolized article. At any rate, it was silent as to the moral wrong involved in depriving the people of their natural rights. From the first page of the opinion to the last, there is not one word that indicates an appreciation of the fact that the real monopoly involves a tyrannical interference with the liberties of the people, and that the metaphorical monopoly cannot arise unless those liberties are amply protected.

The broad effects of these English and American decisions are important to our problem. The *Case of Monopolies* was the last step in that long process by which the English crown was shorn of its power and England, from being a monarchical autocracy, more or less absolute, became a constitutional monarchy. While, however, the *Case of Monopolies* deprived the crown of its last vestige of legislative power, it still left the powers of Parliament without any restrictions whatever, — except, indeed, such as may have been contained in the various charters and bills of rights with which the history of England has been studded, — and therefore, although through the *Case of Monopolies* England had become a constitutional monarchy, it did not, and appar-

ently has not yet, become a constitutional government. It remained for the American people to achieve that supreme ideal. In the National Constitution of the United States, the power of the National Legislature was carefully restricted at the outset, and thus the United States emerged, full-fledged, as a government in which the ultimate sovereign had no constitutional power to oppress the people. Similarly, constitutional limitations upon the power of the legislatures were afterwards adopted in the several states, and thus the form of the state governments was changed from an unlimited legislative autocracy to a limited and constitutional government. Finally, as the result of the war between the states, the people of the United States, as a people, enacted a further limitation upon the power of the state legislatures. By adopting the Fourteenth Amendment they added to the local restrictions contained in the state constitutions a universal restriction applicable to all the states. In the original Constitution <sup>1</sup> the people of the United States guaranteed to every state "a republican form of government": by the Fourteenth Amendment they guaranteed to every person that his state should exist as a constitutional form of government. Thus the Fourteenth Amendment gave to the private citizen his last and highest possible

<sup>1</sup> Art. IV, sec. 4.



protection against even governmental invasion of his rights.

There seems to have been originally, and there still seems to survive, a curious fear that the Fourteenth Amendment somehow infringes upon the rights of the states, as if the states had a right to do wrong. Of course, it limited their powers, because it forbade them to take any man's rights without giving him an opportunity to be heard in his own defense, and forbade them to give preferential rights to any man as against any other; but they had no right to do these things, and the Amendment imposed, and imposes, no limitation whatever upon the exercise of any just power or of any real right.

When the English court decided, in the *Case of Monopolies*, that the crown had no power to grant a monopoly, it took a step forward in the march of progress: it removed at least one obstacle to that ideal kind of government in which the rights of the humblest person cannot be invaded even by the supreme political power. When the American court, in the *Slaughter House Cases*, decided that the state legislature had power to grant a monopoly, despite the guaranties of the National Constitution, it turned back the march of progress: so far as it could, it nullified the will of the people and put the rights of the citizen again at the mercy of that

supreme political power from which the people had tried to remove them.

So far as the Supreme Court of the United States is concerned, it has exhibited a complete transposition of ideas. Special privileges and monopolies, which when granted by the crown were declared in England to be against the common law, have been held in this country, when granted by the legislature, not to be forbidden by a constitutional provision which guarantees the equal protection of the law, while business supremacy, the product of commercial freedom, attained without special privileges or monopolies, and therefore necessarily dependent upon nothing but individual initiative and energy, is declared to violate the fundamental rights of the people.

The transposition of ideas which has been exhibited by the Supreme Court manifests itself in the statute. The monopoly which is there intended is clearly not the real monopoly which is founded upon the tyrannical exercise of power by the sovereign. On the contrary, the statute obviously aims to prevent that position of commercial supremacy which enables the possessor of it to make most, if not all, of the sales in his particular department of trade. It is important, therefore, to know how its prohibitions would operate if they were actually put in force. When a merchant makes, or attempts to make, any sale

whatever, he thereby excludes, or attempts to exclude, everybody else from making the sale, and in that act he monopolizes, or attempts to monopolize, his particular branch of commerce. The very act of doing business, in other words, involves the exclusion, accomplished or attempted, of all other persons from that business, and therefore comes within the terms of the statute. Consequently the second section of the statute can have no meaning that does not carry with it a legislative condemnation of all business, and its enactment necessarily imports a legislative declaration that all interstate commerce is illegal. Whatever may be the power of an English Parliament, unrestrained as it is by constitutional clauses, to enact a statute of this sweeping character, there can be no doubt that there is no such power resident in any American legislature, and yet, in all the history of the anti-trust statutes, there has been no adequate attempt to bring out this constitutional defect.

The fact is that combination and competition alike result in that metaphorical monopoly of the Sherman Anti-Trust Act. The Supreme Court itself has admitted this truth, though perhaps unwittingly. "Competition, free and unrestricted," said Mr. Justice Peckham, quoting Mr. Justice Shiras, "is the general rule which governs all the ordinary business pursuits and transactions

of life. Evils, as well as benefits, result therefrom. *In the fierce heat of competition the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world.*"<sup>1</sup> In other words, the evils of competition are identical with the evils of combination. In the "fierce heat of competition" the more resourceful merchant attains precisely the same kind of dominance that is condemned as monopoly when it is the result of combination. This tendency has been especially marked in the marvelous growth of modern commerce. Production and distribution have become so extensive and so complicated that in the staple lines of trade the small manufacturer or merchant is almost inevitably supplanted by his more heavily capitalized competitors. The process is irresistible. "Monopolies" in the metaphorical sense are the necessary product of commercial conditions and will continue to exist and to increase as commerce increases, whether our merchants combine or compete. They cannot be stopped. Canute, ordering back the advancing sea, presents a magnificent spectacle of kingly success beside the

<sup>1</sup> *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 337.

puny efforts of our legislators to stay the growing tide of "monopolies."

*3. The Relation between Contracts in Restraint of Trade and Attempts at Monopoly*

When A, B, and C, engaged in interstate commerce, are competing independently for the trade of X, each seeks to monopolize it. Each, therefore, necessarily violates the second section of the Sherman Anti-Trust Act, and none of them can do business without violating it. When A and B join forces and, ceasing to compete with each other, continue to compete with C, they combine to monopolize the trade of X. They therefore violate the second section of the act in making that combination. The Supreme Court has tacitly assumed that the elimination of the competition between them restrains trade, and has therefore held that their agreement is a contract in restraint of trade and violates the first section of the act.

Under the two sections, therefore, however a merchant engaged in interstate commerce may conduct his business, whether alone or in combination with others, he is rendered liable to fine and imprisonment. If he competes, he is guilty of an attempt at monopoly. If he agrees not to compete, he is held guilty of a contract in restraint of trade.

Under the first section of the act Congress intended to preserve competition by forbidding competitors to combine. It thought it could accomplish this result by forbidding contracts in restraint of trade, and the Supreme Court held a similar view; but the fact is that an agreement by competitors to combine does not restrain trade, and, consequently, the law as enacted does not express the intention of its draftsmen. Under the second section of the act, Congress intended to prevent the control of commodities, and therefore it forbade the effort to secure control. By forbidding the effort to secure a monopoly, however, it forbade the principal element or factor in the commercial process, the competitive effort to make sales, and consequently the law as enacted goes far beyond the intention of its draftsmen. The intended effect of the first section was therefore to preserve competition, and the actual effect of the second section was to forbid the necessary results of competition. In both sections the object of attack was "big business," and small business was intended to be left alone. Neither section accomplished its purpose: the first section does not reach big business, and the second section attacks small business.

Out of all this confusion only one certain result emerges: it is impossible to dissect the con-

stituent enactments of the Sherman Anti-Trust Act into their ultimate and necessary elements without coming to the irresistible conclusion that it is either nugatory as a statute, because it does not do what its framers intended it to do, or else constitutionally void, because it denies all right to do business. The American lawyer has attempted to bring order out of this chaos. He has, indeed, by making some unverified assumptions, by "interpreting" the statute to mean some things which it does not mean, and by ignoring some things which it does mean, succeeded in compelling several big organizations to dissolve, but after twenty years of litigation he has not brought to light a single intelligible principle either of law or of economics which justifies the decrees of dissolution. Meanwhile the entire interstate commerce of the country has been threatened with the pains and penalties of illegality.

It is worth while to consider for a moment the statutory history of monopoly in this country.

For years, particularly since the Civil War, Congress has enacted a series of tariff laws which have forbidden the American citizen to buy his goods where he pleases or in the cheapest market, except under severe pecuniary penalties. Such a statute is an unspeakably tyrannical invasion of his rights. It strikes at the very roots

of communal life and civic freedom. It denies that liberty of private action in harmless matters which is the necessary basis of a free government. If the citizen cannot buy his food, his clothing, his fuel, the materials for his shelter when and how and where he pleases, even if he goes out of the country to buy them, then he has no rights which are worthy of the name.

The excuse which has been offered for this restriction of natural and undoubted liberties has been that somehow the citizen is benefited by it. It is claimed that the added expense which he is compelled to incur in the purchase of the necessities of life will be more than reimbursed to him. The process is that he is forbidden to buy from foreign manufacturers except under the penalties prescribed in the tariff laws, and is therefore compelled to buy at increased prices from American manufacturers. The theory of the process is that the increased price, which, of course, primarily benefits the American manufacturer, tends to diffuse itself in a general prosperity, particularly among the wage-earning classes, in which the American consumer shares. The best answer to this absurd theory is that, if it were correct, we should accomplish the same result much more effectively and economically by levying a direct tax upon the consumer and distributing the funds so collected among such manu-



facturing concerns as could prove by proper sworn evidence that they needed it: the cost of collecting such a tax, considerable as it would be, would be far less than the amounts that are now paid by the consumer to concerns that do not need it.

Now this prohibitory legislation has the effect of giving the American manufacturer an exclusive control of the American market,—exclusive, that is to say, because it excludes the foreign manufacturer from the American market by forbidding the American citizen to buy the necessities of life wherever in the markets of the world he can find them cheapest. Thus the tariff laws deny to the American consumer the most fundamental of his natural rights, and at the same time they confer upon the American manufacturer a monopoly in the most literal and most offensive sense of that word. By cutting off his competition arbitrarily and through the display of brute power, they enable the American manufacturer to extort a price for his products which he could not secure under conditions of freedom. It is strange, indeed, that the people have been so backward in understanding how seriously these laws have curtailed their most sacred liberties.

The unjust enrichment of the American manufacturer at the expense of the American consumer has been inevitable. As a matter of fact he has prospered exceedingly. He has accumu-

lated wealth in hitherto unexampled masses. He has organized trade combinations on a scale so vast as to stagger the imagination. It is little wonder that the American people have become alarmed at the Frankenstein which they have created and have hastily tried to destroy it. They did not understand the situation, however. They did not perceive that the monopoly which they had created was the primary cause of the evils which oppressed them. They credulously believed that they were sharing in the profits which they conferred upon their oppressors. Consequently, when they legislated with the intention of remedying their evil plight, they did not repeal the statutes which created the condition, but merely enacted statutes which were intended to forbid the consequences. Thus the Sherman Anti-Trust Act came into being as the antidote for evils which were caused by the tariff. The resulting situation was that Congress, by eliminating foreign competition, authorized the American manufacturer to raise prices to the extent of the tariff, and then tried to punish him as a criminal if, by eliminating domestic competition, he availed himself of his legal privilege.

Simple as this situation is, the lawyer of the common law has never understood it. When he has represented the consumer, he has not perceived the tyrannical invasion of the consumer's

constitutional and moral rights which the tariff has effected. When he has undertaken to draft a statute in order to suppress the evils which the tariff produced, he has not drafted an act which said what he wished to say. Finally, when he has been called upon to defend the corporations which were prosecuted under the statute that was enacted, he has failed to understand either the ineffectiveness and futility of a part of its prohibitions or the broad scope and unconstitutionality of the rest.

#### *D. The Rights of the People*

We must not imagine that it is only the corporations which have suffered by the inability of the lawyer of the common law to disentangle the underlying principles of the law from the complexity of circumstance. The people have suffered from the same inability quite as much as the corporations. In the defense and assertion of their ordinary rights he displays a strange lack of comprehension of the most familiar legal concepts. No word, for example, is more common in the mouths of both lawyers and laymen than the word "title," and, for historical and other reasons, it plays an especially important rôle in Anglo-Saxon jurisprudence. Nevertheless, the lawyer of the common law does not know what it is and cannot tell what constitutes title in large classes

of cases. Again, a very large proportion of the wealth of the country is in the form of estates in trust, and trusts have been administered in the courts of England and the United States for centuries; but the lawyer of the common law cannot even yet accurately define the nature of the interest which the beneficiary of a trust has in the trust estate. Still again, no subject comes home to the average citizen more closely than the subject of taxes, and tax litigation is a most important branch of our jurisprudence. The lawyer of the common law, however, has not as yet satisfactorily determined whether we tax persons or tax property. For a final illustration, we may advert to the subject of mortgages. Most of the land of the country is mortgaged, and yet the lawyer of the common law cannot accurately define the respective interests of the mortgagee and the mortgagor.

It must not be supposed that the lawyer of the common law is incapable of giving advice on these topics. On the contrary, his advice is usually both sound and valuable. It is only in the usual case, however, that he can be trusted. In the unusual case, in which unexpected or unaccustomed complexities occur, he becomes an unsafe guide. His training in facts has so limited him that it is difficult for him to follow the straight path of reason when the facts are not within his experience.

At the present time a new problem looms upon the horizon. It is called the problem of "social" or "industrial" justice, and the lawyer of the common law is beginning to be much concerned with it. It does not bulk so large in the total field of jurisprudence as he is inclined to believe, nor does it involve any reconsideration of the essential principles of the law. Even when we achieve it as the actual attainment of an actual stage of civilization, it will not bring about any violent or extensive changes from our present habits or customs. The lawyer of the common law, however, is not yet fitted to cope with the problem. In the first place it calls for the application in new experiences of the altruistic principle, and he has not yet appreciated that principle in its full force, still less has he defined it or ascertained either its possibilities or its limitations as an administrative principle of government. In the second place, apart from its purely ethical aspect, the advocates of a new social justice undertake to deal with economic conditions, and the lawyer of the common law knows little of economic conditions or of the operation of economic laws. For these reasons his efforts to improve conditions which certainly need improvement are likely to be most unwise. The danger will be that the burden of his mistakes will fall, not upon the classes, but upon the

masses, and that the very objects of his solicitude will be the principal sufferers. His tendency will be to enrich the poor unjustly and at the expense of the rich. He is likely to forget that, as a matter of sheer morality, an unjust dollar is not the less unjust because it is taken from a man who can afford to lose it, and that as a matter of pure economics, the poor man who gets it will, in the long run and in spite of all human laws, be compelled to pay it back — with interest and costs.

The effort to establish social justice will lead us into a field of jurisprudence in which the state in one form or another undertakes to interfere with the relations which men establish between themselves as a matter of contract. It aims to counterbalance the economic advantage which lies in the possession of capital, and to put the poorer and weaker members of the community on a basis which more nearly approaches equality than that which now prevails. The danger which threatens us, however, in any such effort is twofold. There is the danger of depriving the man who has capital of an advantage which is justly his and which should receive the protection of the law. There is also the danger of unwise charity, of giving to the man who has not capital a factitious aid which may, indeed, redound to his immediate financial betterment, but which in the long run will undermine his

manhood. An undisciplined sympathy with the toiling masses can be even more dangerous than cold-blooded selfishness. Because the lawyer of the common law has not sufficiently thought out the moral principles which must govern the reform of existing conditions, and because he has no adequate knowledge of the consequences that are sure to follow from unwise effort, he is likely to do more harm than good and to set in motion forces which will inevitably produce results which we shall greatly regret, but which it will be a task of enormous difficulty to undo or rectify. It will certainly be a boon to the laboring classes if reactionary courts shall restrain his zeal until he knows more about the subject than he does at the present time. To understand this we have only to summarize his views of social justice as they are now current in this country.

Profoundly oblivious of the merciless and long-drawn-out torture of the poor caused by a tariff law which forbids them, except under enormous penalties, to buy the necessaries of life, — food, clothing, fuel, and materials for shelter, — where they want to and where the market is cheapest, and which consequently subjects their scanty earnings to a ceaseless drain, permitting himself to be deluded into the preposterous belief that, through some circuitous economic process which

he can neither prove nor understand, the poor will be enriched if the government compels them to pay more than is necessary for what they buy, the lawyer of the common law makes little or no effort to ameliorate or correct the cruel and bitter wrong of a protective tariff. Perhaps he even helps to carry it to unexampled extremes. On the other hand, inspired by a yearning to alleviate sufferings which are only too obvious, filled with an anxious desire to give "a square deal to the under dog," he devises all sorts of experimental industrial legislation and grows hotly impatient of anything which delays or hinders his benevolent projects. When some court interposes a constitutional objection to his enactments, instead of trying to convince the court that it is wrong, he is all for abolishing the Constitution as an eighteenth-century obstacle to twentieth-century progress. He makes no distinction among constitutional provisions, but, so far at least as they block his headlong rush, he would sweep them all away, even those which guarantee equality before the law and the right of every man to be heard in his own defense. He would go even further. He would invade the judicial function itself and would transfer to the people at large, through the recall of judges and the recall of decisions, the determination of rights so complex and difficult of comprehension that he



cannot make them plain to the specially trained occupants of the bench. For the sake of untried schemes, therefore, which he does not comprehend, he would sacrifice the only real and substantial guaranty of a "square deal" which the poor laboring man has ever had, — a guaranty which is the glorious result of twenty centuries of bloody struggle for the rights of the people. A fig for such a social justice! If that is all he has to offer, — and it is all that he has offered up to date, — well may the laboring classes pray to be delivered from their friends!

Tested by his theories and judged by his results, the lawyer of the common law has failed his clients, the peoples of the common law jurisdictions throughout the world, in the hour of their great need. At a time when, as never before, the economic processes of modern civilization, that world-wide succession of transactions by which men earn their daily bread, have been subjected to searching and relentless criticism as to their morality and legality, he has been almost helpless. He has been unable to view them accurately, either in their larger aspects as a world process governed by universal laws and tendencies, or in their smaller aspects as a matter of individual rights in individual cases. Of course, it has not been his specific function to understand

the ethics and economics of these transactions ; but it has been his duty to understand the law of them, and it is in the matter of the law that his failure has been the most disastrous. In those jurisdictions where there have been no constitutional protections against government invasion of private rights, and in which consequently it is of the utmost importance that the people should be fully advised of their legal rights ere they legislate them away, he has not opposed, indeed, he has only too often fostered, the denial or abrogation of rights which are as moral as they are legal and are as legal as they are moral. In those jurisdictions in which the citizen is protected by the Constitution against governmental invasion of these fundamental rights, he has not advised his clients as to the extent of the protection which the Constitution has afforded them. The consequence is that throughout the English-speaking world the most sacred rights, legal and moral, the rights to which the English-speaking peoples proudly point as the inalienable and indestructible foundation of their liberties, are being constantly invaded by one form or another of governmental tyranny ; and the lawyer of the common law makes no protest. He is hardly conscious of the fact. He is, to his credit be it said, deeply concerned over the oppression of the weak by the strong ; but he is unaccountably

oblivious of the oppression of the citizen by the sovereign state. The only excuse which can be pleaded in his behalf is that in this shortcoming he is quite impartial. The rich, the poor, and the middle class alike suffer at his hands, and it would be difficult, if not impossible, to ascertain which has suffered the most. The ultimate consequence is that because he does not understand when the state oppresses the citizen, he does not understand when the strong oppress the weak, and his efforts in behalf of the weak are rather mischievous than helpful.

The explanation of the failure of the lawyer of the common law lies in his mental habits. He is continually searching for what he calls "general principles"; but he has no adequate conception of a general principle. His inveterate custom is to formulate a generalized statement in haste, call it a general principle, and then, at his leisure, limit it by exceptions devised to meet unexpected contingencies. General principles so laboriously tested and so accurately formulated at the outset that exceptions are not subsequently needed are so far beyond his experience that he hardly conceives the possibility of their existence. He has, therefore, never searched patiently enough to find the real general principles of the law which he practices. For that reason he cannot determine what the law is in a new or strange

or complicated case, and the first step toward the improvement of the law and the attainment of justice is that he should learn the law. When he has learned the law, then he will know how to modify it, if necessary, in the interest of justice.

## CHAPTER III

### THE LAW AS IT IS ADMINISTERED

WHEN the lawyer of the common law is elevated to the bench, he does not cease to be a man: still less does he cease to be a lawyer. He carries with him as part of his natural equipment his admirable common sense, together with a really high ideal of his function and duty and a truly conscientious desire to render his judgments according to justice. At the same time he carries with him his natural limitations. As a judicial officer he displays no greater power to discover or define ultimate principles than he displayed as an advocate. On the contrary, through his sense of responsibility, his conservative tendencies are accentuated and he hesitates to extend his principles beyond the facts before him. His desire is to decide the cases submitted to him rather than to set forth broad and synthetic principles of law. He becomes, if anything, more analytical and less constructive than he was before he assumed his judicial robes.

There is a curious, somewhat obscure, but highly important sequel to this temperamental development. The common law judge is, in spite

of his training in legal analysis, quite untaught in the technique of the reasoning process. He accepts the reasons which occur to him and which he permits to dominate his conclusions without probing into their accuracy or rational sufficiency. If they seem on their face to be adequate, he accepts them implicitly. Thus among conflicting arguments, his ultimate choice is determined by a process which is more intuitional or instinctive than it is strictly rational.

It is at this point that the common law judge betrays his greatest weakness. Whenever our human activities cease to be strictly rational and are governed to any considerable degree by instinctive impulses, they afford valuable clues to the subconscious mental processes of which they are the result. Much appears of which the actor is quite unaware. This is a principle which is of recent discovery, but of which great use is being made in modern science. To a marked degree the phenomenon manifests itself in judicial opinions. They are considerably more revealing than the writers of them suspect, and therefore they often become human documents of absorbing interest. They disclose, with an unconscious simplicity which it is extremely difficult to reconcile with the rather sophisticated character of the judicial mind, deep-lying predilections, not to say prejudices, which must be clearly per-

ceived and understood if the force and effect of our judge-made law is to be adequately measured.

Ordinarily these subconscious predilections are not discreditable to the judicial officer, but the fact that they exist and that they so largely determine his judicial action is not, and cannot be, conducive to real justice. A search for them in our reported decisions will therefore disclose unfortunate weaknesses even in the most conscientious of courts. We cannot, however, understand the law as it is *administered*, — and that is a very different thing, indeed, from the law as it *is*, — unless we make allowance for their effects, nor can we hope for radical improvement in the administration of the law unless we find means to counteract their influence. Let us, therefore, analyze certain reported cases in an effort to discover these subconscious impulses as distinguished from their ostensible reasons. The results of the investigation will not be altogether pleasant, and it will lead, indeed, to some disquieting conclusions. Nevertheless, we shall learn from it much that is necessary to be known, and in the end we shall arise from it with the comforting assurance that the evils which it discloses are by no means irremediable: we shall, indeed, conclude that the remedy for them is to be found not in restricting judicial powers, but in enlarging them, not in distrusting our judicial officers,

but in reposing increased confidence in their essential uprightness and integrity.

### *A. Judicial Disregard of the Law*

In the case of *Griffin v. Interurban Street Railway Co.*, 179 N. Y. 438, the plaintiff sued the defendant to recover four penalties under a statute which provided that for "every refusal" to give a transfer at intersecting points on a street railroad the operating company should forfeit fifty dollars. It was not controverted that the defendant refused to give the plaintiff transfers on four separate occasions; but the defendant challenged the right of the plaintiff to recover any penalty whatever, and also challenged his right to recover cumulative penalties. The Court of Appeals of the State of New York held with the plaintiff on the first question, sustaining his recovery of one penalty, but held in favor of the defendant on the second question, permitting him to recover only one penalty instead of the four which he asked for in his complaint. The portion of the court's opinion which relates to this second question and which is of interest to us at the present time is as follows:—

There is a second question in these cases that was not orally argued, but is discussed in the briefs of counsel, which is as follows: Can a plaintiff, seeking to recover penalties under section 104 of the Rail-



road Law, join in his complaint more than one penalty?

The provision of section 104 of the Railroad Law, relating to this subject, reads as follows: "*For every refusal to comply with the requirements of this section, the corporation so refusing shall forfeit fifty dollars to the aggrieved party.*"

It is no doubt the rule to be deduced from the decisions of this court that no action for cumulative penalties is permissible unless it is clear from the language of the act inflicting the penalty that it was the intention of the legislature to provide a penalty for each and every violation of the statute.

In *People v. New York Central R. R. Co.*, 13 N. Y. 78, this court allowed cumulative penalties under section 39 of the General Railroad Act of 1850 for sundry omissions to ring a bell or sound a steam whistle on engines upon approaching and crossing a highway. The statute in that case contained the words "for every neglect."

In *Suydam v. Smith*, 52 N. Y. 383, cumulative penalties were allowed where a statute contained the words "for each offense." In that case Judge Rapallo (p. 388) distinguished the case of *Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 644, pointing out that the act there construed did not contain words indicating that the legislature intended to permit a recovery for each offense.

In *Sturgis v. Spofford*, 45 N. Y. 446, a cumulative recovery was disallowed, the legislative intent not appearing in the language of the statute.

In *Grover v. Morris*, 73 N. Y. 473, a cumulative recovery was permitted. The offense was the sale of tickets in an illegal lottery. Each sale of a ticket was

visited with a penalty; and it was held that it was proper to unite in a single action claims to recover back moneys paid on several separate purchases.

Cumulative recoveries have not been permitted in two recent decisions in this court, where the legislative intention was not to be found in the statute under construction. (*Jones v. Rochester Gas & Electric Co.*, 186 N. Y. 65; *Cox v. Paul*, 175 N. Y. 328.)

Referring once more to the language of section 104 of the Railroad Law, imposing the penalty, we find the single sentence in which it is contained opening with the words "For every refusal to comply."

It is quite obvious that the legislative intention to permit the recovery of cumulative penalties for refusals of the defendant to comply with the provisions of the Railroad Law in regard to the transfer of passengers, is as clearly manifested as in any of the cases cited.

Notwithstanding this fact, a majority of my brethren are of opinion that while the rule for the recovery of cumulative penalties, as already adverted to, is firmly established by the earlier decisions of this court, yet the changed conditions in the modern life of great cities render its modification imperative.

There have been presented at the bar of this court, civil and criminal cases where the aggregate penalties sought to be recovered have amounted to enormous and well-nigh appalling sums by reason of plaintiffs permitting a long period to elapse before beginning actions. Actions of this nature have become highly speculative and present a phase of litigation that ought not to be encouraged.

The court is of opinion that if cumulative recoveries are to be permitted, the legislature should state its

intention in so many words ; that a more definite form of statement be substituted for the words hitherto deemed sufficient.

We intend no reflection upon the plaintiffs in the cases now under consideration, but are dealing with a great abuse which demands immediate correction.

A sound public policy requires that only one penalty should be recovered in a single action, and that the institution of an action for a penalty is to be regarded as a waiver of all previous penalties incurred.

It follows that, in each of the actions before us, the judgment should be modified and reduced so as to permit a recovery for one penalty only, without costs to either party.

An analysis of this opinion discloses three separate and distinct reasons for the final conclusion. The first is that the changed conditions of modern life rendered it necessary to change the law permitting the recovery of cumulative penalties. This reason is set forth at length in five of the concluding paragraphs of the opinion and constitutes the predominant *ratio decidendi*, or ground of judgment. The second reason is that the legislative declaration was not sufficiently definite in its terms to create such a right. The statement of this reason is confined to one of the concluding paragraphs, and is next in order of importance. The third and last reason is that, by instituting an action for one penalty, the plaintiff waived his right to all previous penalties. It

is to be found in a single parenthetical clause in the last paragraph but one of the opinion and is the least important of all.

The first observation to be made upon these reasons is that they completely negative each other. The second negatives the first, because, if the legislature had not sufficiently expressed its intention to allow cumulative recoveries, there was no law permitting them which required to be changed. The third reason negatives the second because the plaintiff could not waive a right to cumulative penalties unless there was a right in existence which was capable of being waived, and no such right existed unless the legislature had expressed its intention with sufficient clearness to confer it. Upon the same principle the first reason negatives the third, because, if the law as changed did not give a right to cumulative penalties, there was no right to them which the plaintiff could waive. It is already apparent, therefore, that the court was more eager to defeat the effort to recover cumulative penalties than to find a consistent series of grounds upon which to rest its conclusions. Let us, however, subject the individual reasons themselves to an attentive scrutiny.

The first reason, as we have seen, was that the changed conditions of modern life required a change in the law permitting cumulative penal-

ties. The law to be changed, however, could only be found in the statute, and consequently, since the legislature had not come forward with an amendment, and the change, if it was to be made at all, could come only through judicial action, the first reason amounts, with hardly an attempt at disguise, to the assertion of a judicial power to overrule legislative enactments whenever changed conditions shall warrant it. The opinion is indeed remarkable for its bold assumption of power. It would be difficult to match it in the whole history of the common law. It is elemental, of course, that no such power is vested in any court.

The second reason was that the statute was not sufficiently definite in its mode of statement. It is to be noted, however, that a precisely similar form of legislative statement, to wit, the words, "for every neglect," had been regarded by the court in former years as quite sufficient to carry cumulative penalties.<sup>1</sup> The decision, therefore, that the statute in question was indefinite in its mode of statement directly overruled a prior decision of the court. It needs no court decision, however, to make it abundantly clear that there was no indefiniteness in the word "every." It is one of the two or three all-inclusive and perfectly definite generalizing words in

<sup>1</sup> *People v. N. Y. Central R. R.*, 13 N. Y. 78.

the English language and is the one word which excludes ambiguity. The whole situation is admirably summarized by Mr. Justice Gaynor in the following language :—

The legislature followed a line of decisions of the Court of Appeals, cited in the *Griffin* case, in using the phrase "every refusal" in the Railroad Law. It is now told that its language is not plain enough. I hope I may say, with the highest respect for all concerned, that I do not see how the legislature can make its meaning plainer without passing a bill of remonstrance that it means just what it says.<sup>1</sup>

The third reason is to the effect that bringing an action for one penalty involved a waiver of all previous penalties. A waiver, however, has been defined by the court itself as "a voluntary relinquishment of some right,"<sup>2</sup> and therefore this reason of the court resolves itself into the remarkable conclusion, that, by bringing an action to recover four rights, the plaintiff voluntarily relinquished three of them!

Even one who is untrained in the law can comprehend the utter insufficiency of reasons like these as a basis for a judicial decision, and yet these were the grounds upon which the court ventured to hold that, when a statute conferred a right to recover a penalty for "every refusal"

<sup>1</sup> *Harkow v. N. Y., N. H. & H. R. R. Co.*, 121 App. Div. 194, 198.

<sup>2</sup> *Cowenhoven v. Ball*, 118 N. Y. 231, 234.

to do a certain act, the plaintiff could recover a penalty for only one refusal.

Let us turn from the Court of Appeals of the State of New York to the Supreme Court of the United States.

When the Republic of Hawaii joined the United States it was provided, through a joint resolution of Congress known as the Newlands Resolution and an acceptance of it by Hawaii, that the municipal law of Hawaii, "not contrary to the Constitution of the United States," should remain in force until Congress should further legislate. Formal annexation occurred on the 12th day of August, 1898, but Congress did not legislate until June 14, 1900. There was, therefore, an interregnum between those two dates when the Republic of Hawaii existed under its own laws except so far as they were modified by the Constitution of the United States. Now our Constitution requires that no person shall be indicted for a felony except by a grand jury or be convicted except by the unanimous verdict of a petit jury, while by the law of Hawaii criminals were indicted by the court and could be convicted by a majority verdict of the petit jury of nine to three. During the interregnum one Osaki Mankichi was held, tried, and convicted of murder according to the provisions of the Hawaiian

law, and after his conviction it was claimed in his behalf that the conviction was void because it violated the Constitution of the United States. The island court sustained this contention and directed his release upon *habeas corpus*. Upon appeal to the Supreme Court of the United States the decision was reversed, however, upon the ground that, although the proceedings were admittedly in conflict with the terms of the United States Constitution, nevertheless those terms of the Constitution were not in force.<sup>1</sup> The pertinent passages from the court's decision are as follows:—

By a joint resolution adopted by Congress, July 7, 1898, 30 Stat. 750, known as the Newlands Resolution, and with the consent of the Republic of Hawaii, signified in the manner provided in its constitution, the Hawaiian Islands, and their dependencies, were annexed "as a part of the territory of the United States and subject to the sovereign dominion thereof," with the following condition: "The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution, *nor contrary to the Constitution of the United States*, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." . . . Though the resolution was passed July 7, the formal transfer was not made until August 12, when, at noon of that day, the American flag was raised over the Government House, and the

<sup>1</sup> *Hawaii v. Mankichi*, 190 U. S. 197.



islands ceded with appropriate ceremonies to a representative of the United States. Under the conditions named in this resolution the Hawaiian Islands remained under the name of the "Republic of Hawaii" until June 14, 1900, when they were formally incorporated by act of Congress under the name of the "Territory of Hawaii." (31 Stat. 141.) By this act the Constitution was formally extended to these islands (sec. 5), and special provisions made for empaneling grand juries and for unanimous verdicts of petty juries (sec. 83).

The question is whether, in continuing the municipal legislation of the islands not contrary to the Constitution of the United States, it was intended to abolish at once the criminal procedure theretofore in force upon the islands, and to substitute immediately and without new legislation the common law proceedings by grand and petit jury, which had been held applicable to other organized Territories (*Webster v. Reid*, 11 How. 437; *American Publishing Co. v. Fisher*, 166 U. S. 464; *Thompson v. Utah*, 170 U. S. 343), though we have also held that the States, when once admitted as such, may dispense with grand juries (*Hurtado v. California*, 110 U. S. 516); and perhaps allow verdicts to be rendered by less than a unanimous vote (*American Publishing Co. v. Fisher*, 166 U. S. 464; *Thompson v. Utah*, 170 U. S. 343).

In fixing upon the proper construction to be given to this resolution, it is important to bear in mind the history and condition of the islands prior to their annexation by Congress. Since 1847 they had enjoyed the blessings of a civilized government, and a system of jurisprudence modeled largely upon the common law of England and the United States. Though lying

in the tropical zone, the salubrity of their climate and the fertility of their soil had attracted thither large numbers of people from Europe and America, who brought with them political ideas and traditions which, about sixty years ago, found expression in the adoption of a code of laws appropriate to their new conditions. Churches were founded, schools opened, courts of justice established, and civil and criminal laws administered upon substantially the same principles which prevailed in the two countries from which most of the immigrants had come. Taking the lead, however, in a change which has since been adopted by several of the United States, no provision was made for grand juries, and criminals were prosecuted upon indictments found by judges. By a law passed in 1847, the number of a jury was fixed at twelve, but a verdict might be rendered upon the agreement of nine jurors. The question involved in this case is whether it was intended that this practice should be instantly changed, and the criminal procedure embodied in the Fifth and Sixth Amendments to the Constitution be adopted as of August 12, 1898, when the Hawaiian flag was hauled down and the American flag hoisted in its place.

If the words of the Newlands Resolution, adopting the municipal legislation of Hawaii *not contrary to the Constitution of the United States*, be literally applied, the petitioner is entitled to his discharge, since that instrument expressly requires (Amendment 5) that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury"; and (Amendment 6) that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

crime shall have been committed." But there is another question underlying this and all other rules for the interpretation of statutes, and that is, What was the intention of the legislative body? Without going back to the famous case of the drawing of blood in the streets of Bologna, the books are full of authorities as to the effect that the intention of the lawmaking power will prevail, even against the letter of the statute, or, as tersely expressed by Mr. Justice Swayne in *Smythe v. Fisk*, 23 Wall. 374, 380: "A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the law-maker is the law." A parallel expression is found in the opinion of Mr. Chief Justice Thompson, of the Supreme Court of the State of New York (subsequently Mr. Justice Thompson of this court), in *People v. Utica Ins. Co.*, 15 Johns. 358, 381: "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute, is not within the statute, unless it be within the intention of the makers." . . .

Is there any room for construction in this case, or are the words of the resolution so plain that construction is impossible? There are many reasons which induce us to hold that the act was not intended to interfere with the existing practice when such interference would result in imperiling the peace and good order of the islands. The main objects of the resolution were, 1st, to accept the cession of the islands theretofore made by the Republic of Hawaii, and to annex the same "as a part of the territory of the United States and subject to the sovereign dominion thereof";

2d, to abolish all existing treaties with various nations, and to recognize only treaties between the United States and such foreign nations; 3d, to continue the existing laws and customs regulations, so far as they were not inconsistent with the resolution, or contrary to the Constitution, until Congress should otherwise determine. From the terms of this resolution it is evident that it was intended to be merely temporary and provisional; that no change in the government was contemplated, and that until further legislation the Republic of Hawaii continued in existence. Even its name was not changed until 1900, when the "Territory of Hawaii" was organized. The laws of the United States were not extended over the islands until the organic act was passed on April 30, 1900, when, so careful was Congress not to disturb the existing condition of things any further than was necessary, it was provided (sec. 5) that only "the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." There was apparently some discretion left to the courts in this connection. (*Indianapolis, etc., R. R. Co. v. Horst*, 93 U. S. 291, 299.)

The fact already mentioned that Congress in this organic act inserted a provision for the empaneling of grand juries and for the unanimity of verdicts indicates an understanding that the previous practice had been pursued up to that time, and that a change in the existing law was contemplated.

Of course, under the Newlands Resolution, any new legislation must conform to the Constitution of the United States, but how far the exceptions to the existing municipal legislation were intended to abol-

ish existing laws must depend somewhat upon circumstances. Where the immediate application of the Constitution required no new legislation to take the place of that which the Constitution abolished, it may well be held to have taken immediate effect; but where the application of a procedure, hitherto well known and acquiesced in, left nothing to take its place, without new legislation, the result might be so disastrous that we might well say that it could not have been within the contemplation of Congress. In all probability the contingency which has actually arisen occurred to no one at the time. If it had, and its consequences were foreseen, it is incredible that Congress should not have provided against it.

If the negative words of the resolution, "nor contrary to the Constitution of the United States," be construed as imposing upon the islands every provision of a constitution, which must have been unfamiliar to a large number of their inhabitants, and for which no previous preparation had been made, the consequences in this particular connection would be that every criminal in the Hawaiian Islands convicted of an infamous offense between August 12, 1898, and June 14, 1900, when the act organizing the territorial government took effect, must be set at large; and every verdict in a civil case rendered by less than a unanimous jury held for naught. Surely such a result could not have been within the contemplation of Congress. It is equally manifest that such could not have been the intention of the Republic of Hawaii in surrendering its autonomy. Until then it was an independent nation, exercising all the powers and prerogatives of complete sovereignty. It certainly could not have anticipated that, in dealing with another inde-

pendent nation, and yielding up its sovereignty, it had denuded itself, by a negative pregnant, of all power of enforcing its criminal laws according to the methods which had been in vogue for sixty years, and was adopting a new procedure for which it had had no opportunity of making preparation. The legislature of the Republic had just adjourned, not to convene again until some time in 1900, and not actually convening until 1901. The resolution on its face bears evidence of having been intended merely for a temporary purpose, and to give time to the Republic to adapt itself to such form of territorial government as should afterwards be adopted in its organic act. . . .

It is insisted, however, that as the common law of England had been adopted in Hawaii by the Code of 1897, it was within the power of the courts to summon a grand jury, and that such action might have been taken and criminals tried upon indictments properly found, and convicted by unanimous verdict. The suggestion is rather fanciful than real, since section 1109 of the Code of 1897, adopting the common law of England, contained a proviso that "no person shall be subject to criminal proceedings except as provided by the Hawaiian laws." These laws provided expressly (sec. 616, Penal Laws of 1897) as follows: "The necessary bills of indictment shall be duly prepared by a legal prosecuting officer, and be duly presented to the presiding judge of the court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not." The question thus squarely presented to every judge in the Republic was, whether he was bound to summon a grand jury under the Newlands Resolution,

when no provision existed by law for empaneling the same or their payment, and when in so doing he was obliged to ignore the plain statute of his own country.

It is not intended here to decide that the words "nor contrary to the Constitution of the United States" are meaningless. Clearly they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing provisions conducive to the peace and good order of the community. Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: "Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the legislature and without process, or confiscating private property for public use without compensation, remain in force after an annexation of the Territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?" We would go even farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well-being.

This argument is much more complicated than was the argument in the *Griffin* case, and therefore, unfortunately, calls for a much more detailed analysis. Reduced to its lowest terms it is to the effect that, because the Republic of Hawaii was unprepared for the change from its established practice to the new practice, the consequences of putting the Constitution of the United States into immediate effect would have been so disastrous that they were in all probability neither understood nor anticipated and certainly could not have been intended, and that, therefore, in spite of the express terms of the resolution our Constitution was not intended to become operative in Hawaii, at least in all respects.

As in the *Griffin* case, so in the *Mankichi* case, the opinion of the court harbors an internal contradiction. The court declared that "in all probability the contingency which has actually arisen occurred to no one at the time. If it had and its consequences were foreseen, it is incredible that Congress should not have provided against it." From this premise the court drew the conclusion that neither Congress nor the Republic of Hawaii intended that the Constitution should become operative in its entirety. The premise, however, precisely negatives the conclusion. If the high contracting parties were unaware of what was about to happen, the mat-



ters of which they were ignorant could not possibly be factors in their intention. The only true or rational inference, therefore, which could be drawn from the assumption of the court was that they intended exactly what they said, although, if they had foreseen the consequences, they might have said something different. They might have changed the form of their agreement or might have guarded it by appropriate provisos. Even though they acted under a mistake, however, their mistaken intention was perfectly clear and unambiguous, and the court was under a duty to carry it out unless the parties themselves asked to have their agreement reformed. In the absence of such an application, it was no function of the court to change the contract. It is certainly not a doctrine of English or American jurisprudence that a legislative enactment does not become operative because the legislature fails to foresee all the consequences that may be involved in its enforcement. Upon its own premises, therefore, the court drew exactly the one inference that was unsound, incorrect, and contrary to law.

There is a further contradiction to be found in the opinion of the court, and it is a contradiction of singular importance. For obvious reasons, the court was unwilling to hold that the terms of the resolution were entirely inoperative, or

that the Constitution of the United States should have no force whatever in Hawaii, and therefore it became necessary for it to determine what constitutional provisions were to become operative and what were to remain inoperative. It therefore became necessary to supply, openly or surreptitiously, a kind of limitation which the resolution did not contain, and the process by which the court undertook to supply it is illuminating in a high degree.

As we have said, the resolution itself afforded no clue to the limitations which were necessary to effectuate the supposed legislative intent, and the result was that the court had to spin them out of its inner consciousness. In deciding this matter, the court took two positions. In one passage of its opinion it declared that "where the immediate application of the Constitution required no new legislation to take the place of that which the Constitution abolished, it may well be held to have taken immediate effect; but where the application of a procedure, hitherto well known and acquiesced in, left nothing to take its place, without new legislation, the result might be so disastrous that we might well say that it could not have been within the contemplation of Congress." In another passage, however, the court took a different stand. It declared that it placed its decision "upon the ground that

the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure." Thus in one passage the court declared that the Constitution was intended to be operative except when supplemental legislation by Congress was necessary to make it practically effective, and in another passage that it was intended to be operative except when the rights which it guaranteed were merely procedural. It is apparent, of course, that the resolution itself, which was the sole origin of the law of the case, furnished no ground for either limitation, and the very confusion of the court proves how far it was departing from the real intent of the resolution. More than that, however, the two suggested limitations were inconsistent. There might be a right which, on the one hand, was procedural and not fundamental, but which, on the other hand, might have been readily enforced without any supplemental legislation by Congress. In such a case one of the limitations would be necessarily inapplicable. As we shall see later, this contingency actually arose, and the result was that in that particular the court's position was self-contradictory. Let us, therefore, consider both limitations, and first, the limitation of supplemental legislation.

The defendant claimed that his constitutional

rights were invaded because he was held to answer for an infamous crime without the indictment of a grand jury, and also because he was convicted by less than the unanimous verdict of a petit jury. Under the limitation of supplemental legislation, therefore, it became incumbent upon the court to show that legislation was necessary in order to effect a change of the Hawaiian practice in both of these particulars.

With regard to the defendant's right to an indictment by the grand jury, the defendant insisted in his argument that there was no necessity for any legislation whatever, because, by the Hawaiian Civil Code, it had been expressly provided that, except as modified by statute, the common law should be in force throughout the Republic, and, relying upon that clause, the defendant cited numerous cases to show that under the common law the courts have inherent power to summon a grand jury, even in the absence of express legislative authority. Among the cases cited was one in which the Supreme Court of the Territory of Hawaii had expressly decided that the courts of Hawaii had that power and that case was itself based upon authorities in the United States courts, including a decision by our own revered John Marshall and a later decision in the Supreme Court of the United States

itself.<sup>1</sup> The Supreme Court of the United States, however, characterized this argument as a "suggestion" which was "rather fanciful than real," and supported its position by pointing to a further clause in the Civil Code of Hawaii which expressly modified the common law so as to provide that no person should be "subject to criminal proceedings except as provided by the Hawaiian laws." It then added:—

The question thus squarely presented to every judge in the Republic was, whether he was bound to summon a grand jury under the Newlands Resolution, when no provision existed by law for empaneling the same or their payment, and when in so doing he was obliged to ignore the plain statute of his own country.

So far as concerns the power of the Hawaiian courts to empanel or pay a jury without statutory authority, it is to be noted that the court advanced no argument to meet the authorities which the defendant cited. So far as concerns the fact that the courts would be obliged to "ignore" the statutes of their own country, it must be remembered that the question at issue related to a constitutional provision, and that when constitutional provisions are adopted, they override all inconsistent statutes. The reasoning

<sup>1</sup> *Ex parte Edwards*, 13 Hawaii, 47; *United States v. Hill*, 1 Brock. 156, 159, per Marshall, C. J.; *United States v. Clawson*, 114 U. S. 486.

of the court, therefore, which completely overlooks this aspect of the case, reversed this rule, and sets the statute above the Constitution. It reduces itself to the clearly untenable position that newly adopted constitutional provisions do not become operative if they require the judges to "ignore" the provisions of previously existing statutes. Thus on the question of the right of the defendant to an indictment by a grand jury, the court silently overruled a well-settled and obviously just principle of law, and it also adopted a principle which, if it were in fact the law, would subordinate newly adopted constitutional amendments to all statutory enactments existing at the time of their adoption.

With regard to the defendant's right to a unanimous verdict by the petit jury, it was necessary for the court, under the suggested limitation of supplemental legislation, to hold that the provision of our own Constitution which guaranteed it could not become operative in Hawaii of its own force without legislative sanction. It is clear, however, that any such holding would be erroneous. The only judicial procedure that was required was a charge from the bench in all criminal trials that the verdict of the jury must be unanimous, and that was a charge which could be given just as well under a constitution as under a statute. No statute could possibly give

any more explicit authority in so simple a matter than the constitutional provision itself. This was clearly pointed out, not only by counsel for the defendant on the argument, but by the dissenting opinion in the court itself. Upon its own criterion, therefore, the decision of the court should have been different. We dwell upon this point as of the utmost importance, because, although the court felt bound to consider the suggested limitation of supplemental legislation in relation to the requirement of a grand jury, the opinion nowhere touches upon it in relation to the requirement of a unanimous verdict, and yet that was one of the two points upon which the defendant directly assailed the legality and constitutionality of his conviction. Therefore, if the criterion of supplemental legislation was decisive of the issue, the court decided against the defendant without passing upon one of the two branches of his case, and rendered a judgment which, upon its own reasons, was erroneous.

It remains to consider the limitation which the court suggested to the effect that those clauses of our Constitution which guarantee merely certain forms of procedure were not intended to be operative. We may search the record in vain for any reason upon which this suggestion is based. More than that, however, it finds no support in the argument from conse-

quences. That argument was that, because the consequences of enforcing our Constitution in its entirety would have been highly disastrous, Congress and the Republic must be supposed to have intended that the provisions of our Constitution which involved those consequences should not be operative in Hawaii. The consequences, however, which the court desired to avoid had nothing to do with the distinction between procedural and fundamental rights. They related exclusively to procedural rights and involved a distinction between those procedural rights which could be enforced without legislation and those which could not be enforced unless ancillary legislation was enacted. There is nothing, therefore, either in the terms of the resolution itself, or in the emergency which those terms created and which the court wished to obviate, which sustains in the slightest degree the distinction between procedural and fundamental rights, or which tends to show that the procedural clauses, as such, were not intended to operate.

Upon the whole case, therefore, when we summarize the opinion, we find that it interpolated qualifications into a solemn treaty between independent and sovereign states upon two principles which were inconsistent with each other, and of which one proved the decision to have been erroneous, and of which the other, intended to



obviate certain dreaded consequences, had no relevancy to the consequences which the court professed to dread, and would not have obviated them, if it had been operative.

Such were the reasons upon which the Supreme Court of the United States, sworn by its oath of office to uphold the Constitution of the United States, formally adjudged that, although two independent sovereign states had solemnly agreed that that Constitution should be the law of Hawaii, nevertheless it was not the law of Hawaii. There is, however, a further aspect of this decision which demands the closest possible scrutiny and to which we must now direct our attention.

The evil consequences which were supposed to follow if it were held that our Constitution had become immediately operative in Hawaii furnished the real ground of the decision. We have seen that they did not in reason justify the conclusion that was drawn from them, and that the court never reached a satisfactory basis for its final judgment. Our examination of the decision would not be complete, however, if we failed to inquire by what means the court convinced itself that these consequences were imminent.

The Hawaiian court had granted the prisoner's writ of *habeas corpus* and had adjudged that he should be set free. The Territory of Hawaii thereupon took an appeal to our Supreme Court,

and on that appeal the Solicitor-General of the United States intervened in behalf of the Territory. He submitted briefs in which he set forth the situation as he believed it to exist in Hawaii. He alleged that the Hawaiian legislature had adjourned before the act of union took place, and that the Hawaiian courts, unaided by legislation supplemental to our Constitution, had continued to follow their familiar customs: they held prisoners without indictment and permitted them to be convicted on verdicts of nine out of twelve petit jurors. He asserted that, if their practice was not upheld, so many sentences for crime were in danger of being invalidated that there was likely to follow what he termed "a general jail delivery," and that for that reason, as an officer of the United States, he felt justified in intervening in behalf of the Hawaiian government. An examination of the record discloses no other source from which the court derived its knowledge of the consequences which it feared, and the closeness with which it follows the brief of the Solicitor-General in matters of detail leads persuasively to the inference that his brief was in fact the real source of its information. It is obvious, however, that his allegations were statements of fact and not of law. They related to conditions in far distant islands. They involved records of numerous judicial proceedings; and

before they could be substantiated, before, for example, it could even be known that there was any considerable number of prisoners who had not waived their constitutional rights and were still in a position to assert them, a long and detailed investigation was necessary. On their face they were hearsay, and, if they were accepted, they were accepted without a judicial investigation into their truth or into any collateral facts which might affect their importance. Unless, therefore, the court was furnished with information which does not appear on the record, and the sources of which it does not disclose, it is a just and necessary conclusion from the record that the Supreme Court of the United States affirmed the conviction of an obscure little Japanese prisoner upon the unsworn and hearsay evidence of a prosecuting officer, given upon appeal, not subjected to the tests of cross-examination, and not even relevant upon any issue of the cause!

It will not do to shut our eyes to the sinister significance of these decisions. Two powerful courts, one the highest in the land and the other the highest in a great state of the Union, refused to enforce perfectly clear and unambiguous legislative commands, upon reasons which need but little analysis to make obvious their insufficiency. These decisions are not to be taken as isolated

instances, however. They are indeed extreme, but they are not sporadic. An examination of the official reports will disclose the lamentable fact that, when our courts fear the consequences of a given decision, they will only too often find a means to evade the law, whether it has been enacted by the legislature or declared by themselves. The phenomenon is altogether too common to be disputed, or even to cause surprise. Any attorney who has been familiar with the remedial legislation of which the late years have been so prolific can bear witness to the process of amendment, not to say nullification, through which it must pass at the hands of hostile courts before it can become effective. Perhaps the most remarkable instance of it has been the fate of the Fourteenth Amendment. Although it is perfectly general in its terms, although its obvious intent, as well as its specific command, is to secure that ideal of our Anglo-Saxon civilization, the equality of all men before the law and the right of every man to be heard in his own defense, yet in the beginning, as we have seen, the Supreme Court of the United States so "construed" it as to limit those inestimable privileges to persons of African descent,<sup>1</sup> and even yet it is not prepared to extend those privileges in

<sup>1</sup> *Slaughter House Cases*, 16 Wall. 36. See *ante*, pp. 75 and 137.

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See *ante*, pp. 75 and

their beneficent plenitude. This is not "construction" or "interpretation": it is a judicial refusal to fulfill the judicial function of enforcing the law.

Let us face the facts without concealing them in euphemistical phrases: There is no court in the land in which any suitor can be certain that his rights will be protected. There is no court in the land of which it can be confidently said that it will under all circumstances apply the law as it is to the cases which come before it.

There is a special aspect of these decisions which should cause the gravest concern. It is to be found in the irrational character of the process by which our judicial officers permit themselves to render their judgments. When the Court of Appeals of the State of New York can find an ambiguity in the word "every," when the Supreme Court of the United States can hold a constitutional provision to be inoperative because it requires the judges to "ignore" previously existing statutes, then indeed it is time to take serious counsel.

For the office and person of the judge we must, and, to the credit of the people be it said, we do, preserve a high respect; but the reasons of the judge stand upon a different plane. They are his justification for his judicial action. They are his appeal to the forum of reason. They have

no claim to respect except that which is conferred upon them by their inherent rationality. They must be judged strictly and mercilessly according to the standards of reason if the liberties of the Republic are to be preserved. If they are sound and wise, that fact should be made known to the people. If they are absurd and casuistical, that fact should also be made known to the people, and made known in no uncertain terms. If the people do not know how their laws are enforced, their rights are in danger and their government will fail in its most essential purpose.

In the decisions which we have here discussed, the reasons advanced, when judged by the standards of reason, are erroneous. More than that, they are so erroneous as not even to command respect. More, even, than that, and this is the point at which we must pause, they are unworthy of the judicial officers who enunciated them. There was not a member of either bench who was not capable, both by natural gifts and by acquired experience, of perceiving their fallacies at a glance. The fact that they should have been rendered, therefore, is inexplicable. Haste, the pressure of business, and even the desire of the court to reach a conclusion which it believed the exigencies of the case to demand, are not adequate as explanations. The most hurried ex-



amination should have prevented the judges of the Court of Appeals of the State of New York from believing that the word "every" was not sufficient to make plain the legislative intent. The most eager desire to secure justice should not have led the judges of the Supreme Court of the United States to object to the operation of our Constitution in Hawaii because it would require the Hawaiian judges to "ignore" previously existing statutes. Both courts were obviously conscientious. They were plainly trying to do what they believed to be right, and yet, in spite of that fact, they rendered judgment upon grounds which, as they should have known and were capable of knowing, were utterly, even frivolously, insufficient.

Whether or not the fact is explicable, it still remains the fact that our judges continually work below their capacity. They do not decide cases as well as they know how. An examination of our reports will disclose only too many decisions based upon reasons which the very courts who rendered them would, upon the slightest reflection, perceive to be erroneous. Our litigations are in fact tried and decided with a degree of carelessness and irresponsibility which is little understood, but which constitutes a real peril to the body politic. Ordinary individuals may commit thoughtless errors in their own

affairs without being held to account; but responsible courts, charged with the highest duty which can be entrusted to any human being, have no such privilege, and the fact that they exercise it is the greatest danger that confronts our country to-day. Without exception, it transcends in dire significance all other perils which threaten our Republic.

### *B. Judicial Insincerity*

In the *Griffin* case the plaintiff moved for a reargument, but the Court of Appeals denied his motion in the following opinion: <sup>1</sup>—

The respondent now moves for a reargument and insists that by the reduction of the judgment he has been deprived of his property without due process of law. This claim is made on the theory that when the judgment was recovered the respondent was entitled to recover cumulative penalties and that we have deprived him of his recovery by an arbitrary declaration that a recovery of cumulative penalties is against public policy. This singular contention is based on isolated sentences taken from the opinion of the learned judge who wrote in the case which, even standing by themselves and dissevered from the context, warrant no such construction. As appears by the opinion, the learned judge thought the case before us could not be distinguished from certain previous decisions of the court where cumulative penalties were allowed. But the majority of the court were of contrary view and

<sup>1</sup> *Griffin v. Interurban St. Ry. Co.*, 180 N. Y. 538.

he yielded to their judgment. We thought and still think that the statute should not be so construed as to give cumulative penalties in actions of the character of the one before us unless the legislative intent is expressed so clearly as to leave no room for misunderstanding. We also think this rule of construction is in harmony with the previous decisions of the court in *Sturgis v. Spofford*, 45 N. Y. 446, and *Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 644. In the earlier of those cases Chief Judge Church said: "Prosecutions for aggregated penalties should not be encouraged. . . . It is a wholesome rule not to allow a recovery for aggregated penalties unless the language of the statute clearly requires it. Under this rule the party prosecuted will have an opportunity to desist from doing the act complained of, and if he does not he will knowingly incur all the hazards of repeated prosecutions." In *Suydam v. Smith*, 52 N. Y. 383, where the recovery of cumulative penalties was upheld, the statutory words imposing the penalty were "for each offense." We think that "every" is not always necessarily the synonym of "each." In *Grover v. Morris*, 73 N. Y. 473, the recovery was under an act which authorized a purchaser to recover double the amount paid by him in the purchase of any lottery tickets. It was held that he was entitled to recover the total amount paid whether the purchase was made on one occasion or on several. This was a necessary construction of the statute and the case was not strictly one of cumulative penalties. In the most recent decisions of this court, *Jones v. Rochester Gas & Electric Company*, 168 N. Y. 65, and *Cox v. Paul*, 175 N. Y. 328, we have reiterated the doctrine of the *Sturgis* case. The majority of the

court, therefore, believe that the judgment rendered by it in this case was in harmony with the previous decisions of the court.

The plaintiff based his motion for reargument upon those passages in the principal opinion of the court in which it had declared that the changed conditions of life imperatively called for a change in the rule permitting cumulative penalties. Those passages, as we have seen, constituted, in mere bulk, five sixths of that part of the opinion which was devoted to the exposition of judicial reasons, and they were in fact the main ground of judgment. The plaintiff urged that they amounted to an arbitrary declaration of policy by which the court deprived him of his statutory rights. The court, in answer, characterized this contention as "singular" and declared that it was based on "isolated sentences" which, even when taken by themselves, did not warrant any such construction. The record does not bear it out, however. A reference to the original opinion will show that the sentences in question were not "isolated," but constituted the bulk of the opinion on that branch of the case, and that, whether dissevered from the context and standing by themselves, or examined *in situ* and interpreted by the context, they amply sustain the contention of the plaintiff: the court did, in very truth, take a position as the main

ground of its judgment which, by necessary implication and almost by express terms, asserted a judicial power to overrule a legislative enactment.

If that had been the only ground of the judgment, the plaintiff would have made out a complete case for a reversal of the decision. As it was, he at least made out a moral right to a re-argument.

We now come to the most important feature of the opinion. The court was, in effect, driven from its original position. It was compelled to disavow any claim of judicial power to overrule statutes, and was under the necessity of basing its decision upon other grounds. Accordingly, it reverted to its second and less important reason, and, declaring that the statute was not sufficiently definite in its terms, elevated that reason from its subordinate position to the position of being the real ground of the judgment. Having proceeded so far, however, it became necessary for the court to take account of its former decisions interpreting other similar statutes, and it therefore went on to consider, apparently in detail, the decisions which it had cited in its principal opinion, with the avowed intention of showing that its judgment in the case at bar was not inconsistent with its previous holdings.

Now, it so happens that in the original opin-

ion *seven* cases were cited. In the opinion on the motion for reargument, the court cited only *six*. It becomes pertinent to inquire as to the *seventh* case.

A comparison of the two opinions discloses that the *seventh* case was that of *People v. N. Y. Central R. R. Co.*, 13 N. Y. 78. In that case the phrase was "every neglect," and the decision of the court was to the effect that it authorized cumulative penalties. It was the only case which was precisely in point upon the construction of the word "every," it was the only case which the court did not find a means of distinguishing, and it is obvious that it was a case which it was impossible to distinguish. Nevertheless the court concluded its opinion by saying that the majority of the court "believed" its judgment to be "in harmony with *the* previous decisions of the court."

Let us examine the opinion on the reargument in still more detail. After stating that the statute should not be construed so as to give cumulative penalties unless the legislative intent was perfectly clear, the court went on to say: "We also think this rule of construction is in harmony with *the* previous decisions of the court in *Sturgis v. Spofford*, 45 N. Y. 446, and *Fisher v. N. Y. C. & H. R. R. R. Co.*, 46 N. Y. 644." Thus the court begins the enumeration of its former

decisions by asserting that its judgment in the case at bar was in harmony with *two* previous cases. It then briefly adverted to a *third* case, *Suydam v. Smith*, 52 N. Y. 383, in which the statutory word was "each," and it added, "We think that 'every' is not always necessarily the synonym of 'each.'" Having distinguished a *third* case, it then distinguishes *three* later cases, and thus disposes of *six* out of the *seven*. It then concludes with the final assertion that the majority of the court believe that its judgment was in harmony "with *the* previous decisions." Nowhere in this recapitulation does it advert to the *seventh* case, or pause to consider whether "every" when used before the word "neglect" was synonymous with the same word when used before the word "refusal." In a word, the court began by saying that the judgment in question was consistent with *two* of its prior decisions, and ended by saying that it was consistent with *all* of them, when, as a matter of fact, it was inconsistent with *one* of them and that *one* was not mentioned at all.

The evidence is too strong. It is impossible, as a mere matter of comprehending human states of mind, to believe that the omission of the *seventh* case was inadvertent. It is impossible to acquit the court of an intentional suppression of a decision which, as a matter of principle, was

correct, and as a matter of authority, if precedents are conclusive, was binding upon the court.

The Court of Appeals of the State of New York is not alone in this practice. A substantially similar suppression of adverse authority occurred in the Supreme Court of the United States in the *Mankichi* case. In that case the defendant argued that the courts of Hawaii had inherent power to summon a grand jury, and in support of his argument, as we have already seen, he cited the case of *Ex parte Edwards*, 13 Hawaii, 47, in which the Supreme Court of the Territory of Hawaii had adjudicated precisely that point. He also cited several common law authorities and the following cases in the United States courts: *United States v. Hill*, 1 Brock. 156, 159; and *United States v. Clawson*, 114 U. S. 486. Some of these authorities, notably the two cases in the federal courts, had been cited by the Hawaiian court. The Supreme Court of the United States, however, refusing to dignify the defendant's contention as an argument and, characterizing it as a "suggestion" which was "fanciful rather than real," did not even mention the authorities which the defendant cited, or refer to the fact that he cited any.

Let us acknowledge, with a shamed sense of personal responsibility for the fact, that even our



most conscientious courts have apparently permitted themselves to believe that they can accomplish justice by methods which involve the suppression, and even the perversion, of the truth.

### *C. Judicial Bias and the Substantive Law*

That psychological law of our being, that our opinions shall be profoundly affected by our sympathies or antipathies, operates just as effectively in the administration of justice as in the more ordinary affairs of life. When the courts have a strong leaning in any direction, their decisions will as strongly lean in the same direction. Thus, from a known leaning we can discover the trend of the decisions, and from a known trend of decisions we can discover the leaning. Many groups of cases will illustrate the operation of this law, — mortgage foreclosures, disputes between creditors and stockholders of insolvent corporations, matrimonial actions, personal injury suits, and so forth ; but perhaps none will better illustrate it than the litigations which concern the collection of taxes.

It might be supposed that the courts, especially in jurisdictions where the judiciary is elective, would have their sympathies enlisted in favor of the people rather than in favor of the government ; but, strangely enough, such is not the

case. As one branch of the government, they are loath to interfere with the collection of its revenues by another branch, and in consequence of this view they enter upon the consideration of tax matters with a predisposition to sustain the tax. As a matter of fact, therefore, the taxpayer suffers, and suffers severely. His just rights are continually denied, and he is the victim of decisions which are not only erroneous, but are sometimes flatly contradictory. The court will at one time affirm a principle which at another time it will reject, and on each occasion the taxpayer's claims will be defeated. These cases therefore illustrate a fact of which we must take careful note if we are to improve the administration of the law: the predilections of the courts are so powerful in their effect as to amount to an oftentimes unconscious, but always distinct, judicial bias, and they strongly influence the actual form of the law. We do not understand the law as it is administered, therefore, until we understand the operations of these predilections.

The following pages contain the by-products of an investigation into the law of taxation in the State of New York. They are taken almost word for word from a brief which was submitted in a tax litigation, and they serve to illustrate, better than reams of speculative discussion, the extent to which the substantive law can be de-

terminated by the bias of silent, half-unconscious, but dominant, prepossessions of the judicial mind.

In the fourth edition of his great work on injunctions, speaking of the judicial restraint of taxation, Mr. James L. High says : —

While it is not difficult to deduce from the great mass of authorities bearing upon the general subject certain cardinal principles which may be said to have the weight of authority in their support, yet it is difficult, if not impossible, to completely and perfectly harmonize these principles with all the decided cases. And the most patient and painstaking analysis must still fail to reconcile the opinions of many of the most respectable courts with the more generally received doctrines governing applications for preventive relief in restraint of the taxing power.<sup>1</sup>

For confirmation of these views we have only to turn to the subsequent pages of his own book. Thus, in section 487 he cites authority to the point that courts of equity will not interfere with the assessment of taxes, —

the levying and collection of a tax being *in no sense a judicial function*, but one which pertains rather to the political functions of the government, to be exercised by the proper officers to whom the power is entrusted.

In section 490a, however, he cites authority for the proposition that courts of equity will not interfere with the assessment of taxes, because —

<sup>1</sup> High on Injunctions (4th ed.), 439.

where the law imposes the duty of valuing property for taxation upon a particular officer or tribunal, their action *is judicial in its nature*, and so long as they exercise their honest judgment in the matter and are guilty of no fraud, caprice or other improper motive, their action is not reviewable in equity.

The inconsistency thus illustrated is serious enough when considered by itself alone. It leaves the law in inextricable confusion — one thing one day and another thing another day. We are bidden to follow precedent, but of two directly contradictory judgments, which shall we follow? But the inconsistency which we are now considering does not stand alone. On the contrary, it is complicated with another fact of even more serious import: the burden of it falls all too frequently on one side of the litigation, and that side the taxpayer's. In the cases cited, inconsistent reasons were advanced for denying relief to the taxpayer, and many other cases may be cited in which the taxpayer has met the same fate.

When, for example, a corporation, in making a return of its gross assets for the purposes of taxation, returns its real estate at the assessed value, that is, at the value which the assessors have officially sworn that it possesses, it is held that the assessors may "legally disregard" their assessment for the purpose of placing upon the

real estate a greatly increased value.<sup>1</sup> When, however, a corporation for the purpose of resisting a tax offers an affidavit by an assessor to the effect that the assessment was not made according to law, then "public policy" intervenes and "restrains public officials, certainly those acting in a judicial capacity, from impeachment of judicial acts which the laws require and which they have solemnly declared that they have performed."<sup>2</sup>

Again, although assessors can offer proof that their sworn assessment is erroneous,<sup>3</sup> yet as against the taxpayer, the assessment has "all the force and effect of a judgment," and cannot be "questioned by a collateral proceeding."<sup>4</sup>

It is usually supposed that a party to a litigation who secures a judgment in his own favor is bound by it, even though as to the other party it is void and illegal.<sup>5</sup> In the case of a sworn assessment, however, we have a judgment which is binding upon the taxpayer, but is not binding upon the city which procured it, and is not even binding upon the judicial officer who rendered

<sup>1</sup> *People ex rel. Equitable Gas Light Co. v. Barker*, 144 N. Y. 94.

<sup>2</sup> *Brooklyn El. R. R. v. City of Brooklyn*, 11 App. Div. 127.

<sup>3</sup> *Dexter v. Palmer*, 86 Hun, 513; affirmed without opinion, 148 N. Y. 732.

<sup>4</sup> *United States Trust Co. v. The Mayor*, 144 N. Y. 488.

<sup>5</sup> *Starbuck v. Starbuck*, 173 N. Y. 503; *People ex rel. Shradly v. Shradly*, 47 Misc. 333.

it under oath, unless indeed his attempt to impeach it would redound to the benefit of the taxpayer, and then it is binding.

Again, although assessors may offer proof in contradiction of their own return sworn to and filed in response to a writ of *certiorari*,<sup>1</sup> yet, as against the taxpayer, the return is conclusive and his only remedy for a return which is false in fact is an action against the assessors for a false return.<sup>2</sup>

Usually a pleading is a conclusive admission by the party who files it which may be contradicted by his opponent. Here, however, in the case of a return, we have a pleading which may not be contradicted by the opposite party, but which may be contradicted by the party who swears that it is true.

Again, the courts will deny the request of a

<sup>1</sup> *Dexter v. Palmer*, 86 Hun, 513; affirmed without opinion, 148 N. Y. 732.

<sup>2</sup> *People ex rel. Rochester Lamp Co. v. Feitner*, 65 App. Div. 224. See also *People ex rel. Lazarus v. Feitner*, 65 App. Div. 318; affirmed without opinion, 169 N. Y. 604. It may be explained to the lay reader that at common law a court of general jurisdiction could in some instances review the proceedings of a lower court. The process was to issue a writ requiring the lower court to certify its proceedings for examination and correction if they were found to contain error. The writ was called the writ of *certiorari*, and the certified record of the lower court was called the return. If the return was false in fact, it was nevertheless conclusive upon the petitioner for the writ (called the *relator*), but he had an action for a false return against the members of the court.

taxpayer to indulge in a legal presumption or to take judicial notice of the fact that assessors in the State of New York uniformly undervalue real property;<sup>1</sup> and yet nothing is more common than for the court to assert in favor of the city that the custom is well known to exist and that "assessment at the full value is the exception, not the rule,"<sup>2</sup> or to declare that "until the assessors in all the counties follow the statutory rule, or until the state board of equalization remedies this abuse, it is doubtful if the court should compel the officers of one county alone to observe the statute to the prejudice of the taxpayers of such county."<sup>3</sup>

We may close this catalogue of rulings with a reference to judicial theory of the statutory writ of *certiorari* to review assessments. If the taxpayer adopts any other remedy, he is likely to be told that *certiorari* is intended to be the exclusive method of correcting errors of assessment.<sup>4</sup> If, however, he tries *certiorari*, he may encounter all sorts of obstacles. It will not suffice, for example, to remedy the inequalities of assessment as

<sup>1</sup> *People ex rel. Manhattan Ry. v. Barker*, 146 N. Y. 304, 313.

<sup>2</sup> *People ex rel. Equitable Gas Light Co. v. Barker*, 144 N. Y. 94, 100.

<sup>3</sup> *Mercantile Nat'l Bank v. Mayor*, 27 Misc. 32, 40.

<sup>4</sup> *Matter of the City of Rochester v. Bloss*, 77 App. Div. 28; *City of New York v. Tucker*, 91 App. Div. 214; *U. S. Trust Co. v. The Mayor*, 144 N. Y. 488. See *ante*, p. 209, n., for an explanation of the writ of *certiorari*.

between realty and personalty.<sup>1</sup> It will not remedy an assessment where the relator's complaint is founded on the fact that the assessment is illegal for want of notice.<sup>2</sup> Nor would it afford the relator any remedy in a case where the ground of his complaint is a vice existing in the whole assessment roll, for it is likely not to be of sufficient power to bring the whole roll under review.<sup>3</sup> Finally, it will not remedy an assessment on the ground of inequality where only one instance of inequality is shown.<sup>4</sup>

Not only is the taxpayer subjected to the burden of these inconsistencies, but his substantial remedies have been involved in the greatest confusion.

In the year 1899, one Theodore Jackson was assessed for the same property in two different boroughs of the city of New York—a clear case of literally double taxation. He paid the tax in the borough where he lived; but he was quite ignorant of the other tax until payment of it was demanded by the marshal. It was then too late to make a protest before the tax commissioners, and he immediately instituted proceedings in equity to restrain the collection of the second tax. The city did not deny the facts, but took

<sup>1</sup> *Mercantile Nat'l Bank v. The Mayor*, 172 N. Y. 35.

<sup>2</sup> *Trumbull v. Palmer*, 104 App. Div. 51.

<sup>3</sup> *Rumsey on Taxation*, p. 336.

<sup>4</sup> *People ex rel. Withaus v. O'Donnell*, 46 Misc. 519.



the simple objection, by demurrer, that the plaintiff had mistaken his remedy. The court at Special Term dismissed the complaint upon the ground that the plaintiff's allegations disclosed a remedy at law.<sup>1</sup> The Appellate Division reversed the Special Term on the express ground that the remedy at law was "doubtful."<sup>2</sup>

For nearly a thousand years the Anglo-Saxon race has been fighting its way to freedom, and its struggle has largely taken the form of resisting unjust taxation. On that issue Magna Charta was wrested from King John, and on that issue these United States came into being. During all that time we have had courts to administer the law. They have been allowed to promulgate the law in accordance with their own opinions and to formulate a method of procedure and remedies pretty much at their own will. Occasionally the legislative branch of the government has intervened to extend powers which the courts were doubtful of possessing; but rarely, indeed, has it undertaken to limit their powers. With all this, it is now, in the twentieth century of grace, judicially determined that there is a "doubt" about the legal rights and remedies of a citizen when his own city insists upon taxing him twice in the same year for the same property.

<sup>1</sup> *Jackson v. The City of New York*, 34 Misc. 380.

<sup>2</sup> *Jackson v. The City of New York*, 62 App. Div. 46.

There was little occasion for doubt, however. The question of the plaintiff's legal rights had been settled beyond a peradventure. *He had none whatever.* None of the common law writs which are preserved by the Code, or which exist independently of the Code, were available to him, and as for remedies at law, either by way of defense to an action for the collection of the tax, or by way of an action to recover back a tax paid under protest, those remedies are no longer open to the taxpayers of this state. Regardless of any question of voluntary payment, an assessment for taxes is in the nature of a judgment which cannot be attacked collaterally, *and a suit to recover taxes paid under protest is a collateral attack.*<sup>1</sup> Through that decision the taxpayer of this state has lost the well and favorably known common law remedy for illegal taxes — a remedy which is simple and direct in itself, which involves no difficulties of procedure, which produces the minimum of disturbance to the revenue, and which has recently received the approval of the United States Supreme Court.<sup>2</sup>

For another illustration of the complications which lie in the path of a taxpayer resisting illegal taxes, we may turn to the case of *Stuart v. Palmer*, 74 N. Y. 183. The plaintiff in that

<sup>1</sup> *U. S. Trust Co. v. The Mayor*, 144 N. Y. 488.

<sup>2</sup> *De Lima v. Bidwell*, 182 U. S. 1.

case resisted an assessment for improvements against his property upon the ground that the statute authorizing it provided for no notice of the proceedings, and that in fact he had received no such notice. The court at Special Term dismissed the complaint upon the ground that notice was *not* necessary. The General Term dismissed the complaint upon the same ground. The Court of Appeals, in an historic and very valuable opinion, dismissed the complaint on the ground that notice *was* necessary, but that since the statute did not require notice, the statute was unconstitutional and the assessment was null and void upon its face. Thus the taxpayer had his complaint dismissed, first, because notice was *not* necessary, and afterwards, because it *was* necessary; and he had to pay the town officials in the town of New Lots the costs of three courts because he succeeded in establishing that they were illegally taking his property; and an assessment on his property was adjudged to be null and void upon its face and to be no cloud upon the title to his lands, after two respectable courts had declared it to be a perfectly legal and valid lien.

But more important than all these as indicating the attitude of the courts in tax matters, are the cases which involve the undervaluation of real property by the assessors.

From time immemorial the assessors, whose

duty it is under the statute to appraise real property at its full value,<sup>1</sup> have insisted upon appraising it at anything that has appealed to their fancy, provided only that it has *not* been the true value. Not content with that violation of the statute, however, they take oath *before* assessing that they *will* obey the law and *after* assessing that they *have* obeyed the law, and all the time they know that their oaths are false. In other words, they are guilty of perjury.<sup>2</sup> The consequence is that tax offices all over the state have been storm centres of graft and corruption. Illegal and corrupt favoritism has run riot, and the levying and collection of taxes have presented a perennial scandal which, if once investigated, would rival the recent insurance disclosures. For years there has been hardly a tax collected throughout the state which has not been based upon a perjured tax roll, and hardly an assessor who has been anything but an unconvicted felon.

Under these circumstances numerous attempts have been made by taxpayers to correct the injustices which they have suffered. Proceeding after proceeding has been instituted in the courts. Counsel have exhausted their ingenuity in devising methods of securing relief. *An extensive*

<sup>1</sup> *Mercantile Nat'l Bank v. The Mayor*, 27 Misc. 32, 34.

<sup>2</sup> Penal Code, sec. 485.

*examination, however, has disclosed no single instance in which counsel have devised a remedy which has survived the criticism of the courts.*

When a corporation, for example, was assessed for its real estate on the real estate rolls at one sworn valuation, and pursuant to section 12 of the Tax Law was assessed for the same real estate as part of its gross assets on the personal estate rolls at another and totally different sworn valuation, it could elicit from the Supreme Court of the United States no remark more serious than that "the mere fact that the law gives the assessors in the case of corporations two chances to arrive at a correct valuation of their real estate, when they [*i.e.*, the assessors] have but one in the case of individuals, cannot be held to be a denial to the corporations of the equal protection of the laws."<sup>1</sup>

The "chance" which those assessors had was to take two official oaths to the value of one property: the use that they made of it was to make one of those official oaths false.

The writ of *certiorari* was unavailing in that case to remedy an assessment where the assessors swore that the same property had two different values at the same time.

Again, under the same section of the Tax

<sup>1</sup> *New York State v. Barker*, 179 U. S. 279, 285.

Law, a corporation cannot take advantage of the sworn valuation of the assessors by returning that value in the statement of its gross assets.<sup>1</sup>

Again, to take a very different kind of case, a taxpayer cannot maintain an action against the assessors personally for willfully and maliciously assessing all the real estate of the town, except the plaintiff's real estate, below its real value.<sup>2</sup> One of the justices who decided that case subsequently gave the following statement of the facts:—

There the assessors, after assessing the value of the land in their town, willfully inserted in the assessment roll all of the land at one third of the value at which they had actually estimated it, excepting, however, the ground rents owned by the plaintiffs, which were inserted at their full value.<sup>3</sup>

Again a taxpayer failed in having his assessment declared void, although the assessors intentionally omitted "a large quantity of real estate," and "in the years 1882 and 1883 . . . resolved that no personal property within the city should be assessed, and in pursuance of such resolution no person resident within the city was assessed in either of the two years on account of any personal property."<sup>4</sup> The inequality of assessment

<sup>1</sup> *People ex rel. Equitable Gas Light Co. v. Barker*, 144 N. Y. 94.

<sup>2</sup> *Youmans v. Simmons*, 7 Hun, 466.

<sup>3</sup> *People ex rel. U. & D. R. R. Co. v. Smith*, 24 Hun, 66, 67.

<sup>4</sup> *Van Deventer v. Long Island City*, 139 N. Y. 133.

which naturally resulted from this practice of the assessors was a great evil; but it was one which the courts of New York felt themselves without power to remedy until the statute expressly provided the writ of *certiorari*.<sup>1</sup> The writ now exists as a specific remedy for inequality of assessment, but, unfortunately, it has been substantially nullified in its remedial efficiency by a ruling which seems to have acquired the force of law to the effect that it will not be entertained in a case where the relator exhibits only one instance of inequality.<sup>2</sup> The consequence is that in order to secure equality of assessment, the taxpayer must go through a process of proof as to many parcels which is so expensive as to be prohibitive in all except the most extreme instances.<sup>3</sup> It is the law now, under the decisions, that the assessors may assess one house at one value and assess a contiguous house, precisely similar, for a fourth of that value, and the injured taxpayer be without remedy.

The most remarkable instance, however, of the refusal of the courts to interfere with the

<sup>1</sup> *People ex rel. U. & D. R. R. Co. v. Smith*, 24 Hun, 66, 67; *Rumsey on Taxation*, 287-288.

<sup>2</sup> *People ex rel. Withaus v. O'Donnell*, 46 Misc. 519, and see cases cited.

<sup>3</sup> See *People ex rel. Stewart v. Feitner*, 95 App. Div. 481; *People ex rel. Mutual, etc., Ass. v. Feitner*, N. Y. Law Journal, Dec. 19, 1905.

practice of the assessors in undervaluing real estate is to be found in a very late case.<sup>1</sup> The stockholders of the Mercantile National Bank were assessed as for personal property in the City of New York at the full value of their holdings of stock in that bank. As the bank was required by law to pay the tax in behalf of the stockholders, it protested against the assessment, claiming that inasmuch as realty in the City of New York was assessed at not more than about sixty per cent of its true value, personal property should be assessed accordingly. Its protest was overruled by the tax commissioners. When the time to pay the tax arrived, it tendered to the receiver of taxes sixty-five per cent of the amount claimed, and when he refused to accept anything less than the full amount, it brought suit to restrain the collection of the excess over the amount it tendered. The complaint alleged that "the real estate of said city liable to taxation was *deliberately and intentionally* assessed and taxed at not more than sixty per cent of the actual value thereof."

The City demurred to the complaint.

The court at Special Term sustained the demurrer and dismissed the complaint, upon the ground that the plaintiff had chosen the wrong

<sup>1</sup> *Mercantile Natl. Bank v. The Mayor*, 27 Misc. 32, affirmed without opinion, 50 App. Div. 628; affirmed, 172 N. Y. 35.



remedy and that its true remedy was under the common law writ of *certiorari*. In the course of its opinion, the court said:—

Until the assessors in all counties follow the statutory rule [of full valuation], or until the state board of equalization remedies this abuse, *it is doubtful whether the court should compel the officers of one county alone to observe the statute to the prejudice of the taxpayers of such county.*<sup>1</sup>

The Appellate Division affirmed the judgment of the Special Term without opinion.

The Court of Appeals affirmed the judgment of the courts below upon the ground that while the plaintiff had chosen a right remedy, it had suffered no wrong. The reasoning was this: The ground of complaint, reduced to its lowest terms, is that real property is assessed at a different rate from personal property. This inequality, however, does not constitute a “legal grievance,” inasmuch as different classes of property may be taxed at different rates. To be sure, in establishing this inequality, the assessors disregarded a general statutory rule, but this was “in the exercise, presumably, of an honest and reasonable judgment,” and did not effect an undue discrimination.

The following extract from the opinion will give the point of it:—

<sup>1</sup> 27 Misc. at p. 40.

A general statutory rule has been disregarded by the assessors, in the exercise, presumably, of an honest and reasonable judgment, as nothing is charged to the contrary; but their action was impartial and with reference to the whole community. [N. B. This, in the face of a record which charged a "deliberate and intentional" undervaluation, *i.e.*, a valuation contrary to law.] What discrimination was exercised was, solely, as to the basis of valuation for each of the two classes of property, into which all of the property of the community was divided. . . . I think we may, fairly, assume that the assessors were influenced by the consideration that an assessment of personal estate is subject to a deduction for the debts of its owner, while the real estate is not, and that the latter form of property bears a greater proportion of taxes, for the reason that, unlike personal property, it cannot be concealed. It is a fact of common knowledge and discussion, that a disproportionate share of the public burdens is thrown on certain kinds of property, because they are visible and tangible; while others are of a nature to elude vigilance. (*Commonwealth v. P. F. C. S. Bank*, 5 Allen, 428, 436.) *Such considerations may well influence a board of assessing officers to assess real estate upon a different basis of valuation, in order to equalize the burdens of taxation.*

In other words, it is now the law of the state, as declared by the courts, that the assessors may lawfully disobey the law; that in their discretion they may use a standard of valuation which the people of the state, through the legislative and executive branches of its government, have ex-

pressly declared that they may not use. Furthermore, since the assessors, before taking office, swear that they will use the standard which the people have prescribed, and after making the assessment swear that they have used that standard, although they know that they have done no such thing, it is now the law of the state, as announced by the courts, that the assessors may lawfully commit perjury.

The hearts of our people are filled with a deep and sullen distrust of the courts. It is highly probable that no judicial officer comprehends either its intensity or its extent. It is present, nevertheless, and it is to-day a dangerous factor in the popular unrest.

The courts are not wholly to blame for it. There is some injustice in the convictions of the people, some groundless suspicion, some causeless revolt against right decisions. There is a sort of retributive justice, however, in this very injustice. Our courts are not adequately fulfilling their function. They are not even fulfilling it as well as they know how, and, in comparison with the injustice which the people receive at the hands of the courts, the injustice which the courts receive at the hands of the people is an infinitesimal and negligible quantity. It is not altogether to be regretted, therefore, that the

courts should suffer in some slight degree as the people suffer in a much greater degree.

While the courts are not solely responsible for the existing situation, they are mainly responsible for it. Even when they are thoroughly honest, and, in the abstract, well intentioned, in the concrete they yield to considerations which should have no part in judicial processes. In the dispatch of their business they are not governed as they should be by the single-hearted desire to settle cases according to the law. They are not always courageous. They are not always intellectually honest. They are sometimes careless and irresponsible. The result is that even when their motives are disinterested, they arouse suspicions which are unjust, but which are most humanly natural. When, for example, the *Griffin* case was decided by the Court of Appeals of the State of New York, the people were much exercised over what they believed to be the evasion of its legal obligations by a great public service corporation which controlled substantially the entire surface railway system in the City of New York, and the action was brought in an effort to enforce observance of those obligations by collecting penalties which the statute clearly imposed for non-observance. It was under circumstances like these that the Court of Appeals came to the aid of the corporation by a decision which, in

effect, and almost in words, annulled the statute and declared that the word "every" meant, not "every," but "only one." If unjust and untrue suspicions ran to and fro among the people after that decision, who but the Court of Appeals was responsible for them?

This lamentable antagonism between the courts and the people is entirely unnecessary. The people have a natural respect for authority. They want to believe in their courts. They do not know the law, nor do they claim to know it. They do not even expect that judicial decisions will always coincide with their own views, and, when they are convinced of the integrity and capacity of their courts, they ultimately accept any just decision without an undue protest. What they desire above all things is that their judicial officers should administer the law influenced by no considerations save those which spring from the law itself. They believe, however, and their belief is just, that this is not the case, and they are correspondingly resentful.

What is the remedy for this dangerous condition?

We may dismiss with contempt those vile political nostrums, the popular recall of decisions and the popular recall of the judges. They are not remedies for anything. They will only increase the evils which they are supposed to cure.

They require the people to judge the judges and their judicial action without giving them the kind of judicial investigation which the people demand for themselves. Could anything be more preposterous than that? The advocates of these so-called remedies are pleased to call themselves "Progressives." As a matter of fact, they are retrogressives of the most antiquated type. They would take us back to that period of history in which an Athenian citizen could vote to banish Aristides because he was tired of hearing him called the "Just," and the Athenian people could condemn Socrates to death on the charge of corrupting the Athenian youth.

There is no single remedy. We need many remedies. We need, for example, a better judicial machinery for selecting our judges and for controlling them after they are selected. Judges should not be appointed until they have been subjected to an extremely severe test in order to ascertain their competence, and they should be readily removable by judicial proceedings for incompetence, because outside of the judiciary there is no position in the service of the people in which incompetence causes so much cruel wrong or so much useless suffering. Again, we must eliminate the influences of popular feeling. If, with all their special training, the judges are not adequate to the task, the people are still less

adequate. Consequently, if they want justice, they must see to it that they preserve the courts and set them above the reach of all disturbing influences, even the influence of the people themselves.

In the last analysis, the one supreme remedy is education. Our judges must be taught to think. They must grasp and assimilate the fact that the greatest wrong which they can commit is to think wrong, because if they think wrong, they will almost inevitably decide wrong. This is a long, hard lesson to learn. The difficulty is threefold: the people, the lawyers, and the judges. All of them are impatient of close and accurate thinking. They want results, and if the results appeal to them, they are content to let the process go without much examination. They do not realize that, if the process were right, the results would be much better. That is the lesson to be learned. In this broad land of ours we shall never understand justice, and we shall never have justice, until, as a people, we learn to detest and abhor the moral wrong which lies in a wrong judicial reason.

We have said that the courts are mainly responsible for the popular distrust in which they are held, and this is true. The people themselves, however, are guilty of exactly the same errors and wrongs as those which they charge

against the courts. They, too, take a direct part in the administration of justice, and they do not play that part even so well as the judges. As grand jurors, charged with the duty of investigating and indicting for crime, they are notoriously deficient in courage, and as petit jurors they are not governed by the evidence, but permit themselves to be so swayed by immaterial considerations, sometimes corrupt and sometimes purely sentimental, that many lawyers believe that the jury system should be altogether abolished. There is, in fact, not a single evil in the administration of justice of which the people themselves are not guilty.

Despite all these menacing tendencies, there is a deep and powerful influence which makes for the strengthening of our judicial system. After all possible criticisms are made, the fact remains that in the judicial forum both parties to a controversy get a hearing. Because the people know this, they are constantly adding to the kind of disputes which they take into court for judicial settlement. Our modern judges pass on questions which a few years ago nobody would have dreamed of submitting to them. This remarkable fact is convincing evidence that the injustice in the administration of the law in our country has not yet exceeded the margin of safety. There are grave evils to be remedied, but they are not



so grave as to endanger the body politic. They produce serious ills, but they do not threaten communal death.

What we have to contend with in the administration of justice is not corruption, judicial or popular, for that is comparatively rare and is notably on the wane, but our national characteristics. Like the courts, the people desire results without regard to the process. They hold to a complacent belief that they can get right results by a process which is slipshod and careless. It is a viciously mistaken view. We cannot get the best, or even very good, results unless the process by which they are attained is carefully regulated and purged of errors. That is the lesson which the efficiency engineers are trying to teach the people in matters material: it is the one great lesson which all our people, including the lawyers and the judges, must take to heart in matters intellectual, moral, and spiritual.

There is one strange question which is suggested by the cases which have been cited in this chapter and with which it is fitting that the chapter should close. It is best presented by the situation which was created by the decision in the *Griffin* case.

The legislature of the State of New York has enacted a statute that under certain circum-

stances, which are therein specified, a passenger upon a street railroad can recover a penalty of fifty dollars "for every refusal" of the railroad company to give him a transfer. The Court of Appeals of the State of New York has decided that a passenger, under the circumstances specified in the statute, cannot recover a penalty "for every refusal," but can recover a penalty for only one out of a number of refusals. The Court of Appeals has no jurisdiction to amend or repeal a statute enacted by the legislature. The question therefore arises whether it is now the law of the State of New York that, under the circumstances specified in the statute, a passenger can recover a penalty "for every refusal" of the company to give him a transfer, or whether it is now the law that under those circumstances he can recover for only one refusal.

He who can fully and accurately answer this question, whether he be lawyer or layman, will know more about the law, not only of the State of New York, but also of all other common law jurisdictions, than has yet appeared in any legal treatise or decision. He will, for one thing, have fathomed the distinction between the law as it *is*, and the law as it is *administered*.

## CHAPTER IV

### THE PRINCIPLE OF SUFFICIENT REASON

THE rule of *stare decisis*, that is to say, the rule that in rendering decisions the court must follow its previous decisions in like cases, has departed from our law — never to return. Several causes have led to this result and have made it inevitable. The rule, at most, is an advisory rule of practice, because the courts have long recognized their right to overrule erroneous decisions. Again, the mere lapse of time relegates ancient decisions to oblivion and consequently invites unacknowledged and unperceived departures from them. We have only to observe the difference between the common law as it was in the seventeenth and eighteenth centuries and the common law as it is to-day to learn what striking changes can insensibly creep in without formal amendment of the law. Still again, the growing confusion of precedents deprives the rule of much of its applicability. When two decisions conflict, neither of them, from the point of view of precedent, can be authoritative. The most important cause of all, however, is the fact that that respect for precedent which was so marked a feature of

the common law in its earlier periods has signally diminished. Our courts disregard their prior decisions to a degree which has not received general recognition, but which is in fact one of the most powerful of all the influences which are now modifying our law. The *Griffin* and *Mankichi* cases, which we have already discussed, are but types of decisions which are rapidly increasing in number and importance.

The truth is that in the administration of the law to-day there are tendencies, but no dominating principles. In the scholastic period a medieval formalism and a belief in technical logic were the governing characteristics; but in their revolt against this spirit our courts have gone to the other extreme. Impatient of what they believe to be mere technicalities, and skeptical of the value of careful and sustained reasoning, they are apt to render their judgments according to what they conceive to be the "substantial justice of the cause." They first reach a general conclusion as to the judgment which ought to be rendered, and then they find their reasons and their authorities. The result is that the law is administered by a process of instinct which is founded neither upon principle nor upon precedent. Of course, the courts are strongly influenced by their training, and as a practical matter, therefore, they maintain a continuity with the past

which protects the law, even as now administered, from violent changes ; but in spite of this conserving tendency, it is difficult, if not impossible, to exaggerate the chaos into which the law has fallen. There is no living man who knows enough about justice to be trusted to find "substantial justice" by any process of instinct, and the search for it usually results, in fact, has resulted, in a miserable mess both of justice and of law. Under its influence, therefore, our law as administered has become a mass of contradictions, absurdities, and technicalities beside which the scholasticism of the Middle Ages is the very essence of reason and justice. The scholasticism of the Middle Ages produced the common law and made it a real system of jurisprudence ; but our modern thirst for "substantial justice" could never have produced it, and is, in fact, rapidly destroying it.<sup>1</sup>

We cannot, and we should not, go back to the principle of *stare decisis*. Even if we could summon the wisdom of all the ages to its aid, it would not serve to bring order out of the exist-

<sup>1</sup> See a remarkable article by Dean Ashley of the New York University Law School, "The Doctrine of Consideration," 26 *HARV. LAW REV.* 429, March, 1913. His point is that even the ancient and hallowed doctrine of consideration "is likely to be entirely abolished," and that "an able judge might, by an authoritative statement, overrule the entire doctrine." The reason is that "after all these years of discussion and adjudication, well-trained lawyers are still in doubt as to fundamental questions concerning consideration."

ing chaos. If we are to redeem the law at all, therefore, if we are to check a process of decadence which, unchecked, will endanger our very existence as a nation, we must adopt radical measures of relief. There is, however, only one source from which we can obtain effective relief. The appeal to authority is impossible: the appeal to instinct and "substantial justice" has wrought untold evil: there remains only the appeal to reason. The time has come when the people should insist that every decision shall be rendered upon a reason which is rationally sufficient and that prior decisions, if they are erroneous, should be overruled. The people must learn that, if their courts are unable to find a rationally sufficient reason for every judgment which they render, they do not know enough to be intrusted with the responsibility of rendering any judgment at all.

In order to adopt reason as the standard of decisions, it is not necessary to abandon the results which have already been achieved or to relinquish the rich harvest of human experience which has been garnered in our common law. On the contrary, intellectual honesty, every consideration of justice, and the principle of sufficient reason itself, require that we should not depart from the past, except for a sufficient reason. Prior decisions should always be examined

with the most scrupulous respect. No court should depart from them, except when it can conclusively show that they were erroneous. To ignore them, as the courts did in the *Griffin* and *Mankichi* cases, is altogether reprehensible.

No revolution, therefore, is necessary to bring order out of chaos. We need only the exercise of common sense. There is no reason why a wrong decision should forever stand as the unappealable law of the community. On the contrary, being wrong, justice requires that it should be overruled and nullified at the first opportunity. Changes of law will certainly follow, but change is not confusion, and the change from wrong decisions to right ones cannot mean anything but an advance from chaos to order, from injustice to justice. A resort to the principle of reason, therefore, will not only introduce a safe and trustworthy guide into the administration of the law, but it will also remedy evils which are rapidly becoming intolerable.

The chief difficulty in the application of reason to the determination of judicial questions arises from the fact that we are not, for the most part, trained in its use. If we are to improve the law to any appreciable extent, we must begin a conscious study of the rational process. We must cease to rest content and self-satisfied in the assumption that any man can reason. We

must learn that training is just as essential to the proper exercise of our intellectual energies as of our physical energies, and that there is just as much difference in efficiency between trained and untrained reasoners as between skilled and unskilled laborers.

Let us not take alarm at mere phrases. After all, the resort to reason means merely that, instead of putting forth hasty and ill-considered generalizations, such as we are altogether too prone to offer, we should pause long enough to make certain that they are true. There are certain tests of truth which are capable of speedy and effective application, and what is required is that we should not venture on generalized statements until we have taken pains to check them up with these tests. To be sure, as in any other course of training, the beginning of the process is difficult and tiring, because the conscious effort to guide our energies according to rule rather than to allow them to follow their natural impulses increases the total expenditure of energy; but if we persevere, this added expenditure ceases and ultimately the normal expenditure is diminished. Things that we must do with conscious effort at the outset are done unconsciously when we have learned how, and the end is unaccustomed ease and certainty of achievement. This is just as true in the domain



of law as elsewhere. There is not nearly so much doubt about our legal questions as we are prone to believe. In the great majority of cases the solution of them is as certain and exact as an answer to a problem in mathematics, and it brings with it precisely the same intellectual satisfaction. Moreover, the ultimate result of the exercise of reason, over and above the certainty, exactitude, and the intellectual satisfaction, is that justice is attained.

It is impossible within the permissible limits of our space, even if it were desirable, to give a treatise on the technique of reasoning ; but there are two or three logical processes which are frequently employed in forensic debate, but which we do not ordinarily utilize to their utmost advantage because we are not trained in their application, and an examination of some of them, with illustrations of their misuse or violation by the courts, will serve to show how far-reaching and important may be the effects of a neglect to observe the seemingly barren rules which the technique of reasoning prescribes. Such an examination will almost necessarily be tedious, but if it is rightly conducted it will shed a flood of light on the administration of the law, both as it is and as it ought to be.

*A. The Principle of Alternatives*

When any matter is capable of being the subject of affirmation, it is always possible to frame two or more affirmations about it which are exactly exclusive of each other and which include all the possibilities of the situation. Under such circumstances, while all the affirmations cannot be true, at least one of them must be true; and, therefore, if we know that all but one are false, it is possible to draw a perfectly correct inference that the remaining one is true. Arguments based on this inference are of frequent occurrence, though the principle upon which they rest is not generally well understood. Now, it is obvious that this principle of alternatives, as we shall call it, is not properly applied unless the various possibilities are so accurately delimited that we can be sure that they are strictly exclusive of each other and that they exhaust the possibilities. A failure to observe this requirement in the *Standard Oil* case<sup>1</sup> completely vitiated the inference, and led to unfortunately serious consequences.

It will be remembered that in two cases<sup>2</sup> the

<sup>1</sup> *Standard Oil Co. v. United States*, 221 U. S. 1.

<sup>2</sup> *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290 ; *United States v. Joint Traffic Ass'n*, 171 U. S. 505 ; see *ante*, pp. 119-126.

Supreme Court of the United States had held that the inhibitions of the first section of the Sherman Anti-Trust Act extend to all contracts in restraint of trade, whether the restraint of trade is reasonable or unreasonable. In the *Standard Oil* case, however, the court attempted to hold that contracts in reasonable restraint of trade are not within the act.<sup>1</sup>

We say "attempted" advisedly, because, in spite of the detailed discussion of the question in the opinion of the court, the point was not actually decided. There cannot be a decision of it until the court holds that, although some particular combination then before it restrains trade, nevertheless the restraint is reasonable, and that therefore the statute is not violated and the proceedings should be dismissed. Until such a judgment is rendered, any discussion of the question by the court, however elaborate, is purely academic, or, in the technical language of the law, is *obiter dictum*, and does not amount to a decision. There was no such judgment in the *Standard Oil* case, and the friends of the statute may therefore console themselves with the reflection that, whatever the court may do in the future, and whatever it may have said in the past, it has not yet amended the first section of

<sup>1</sup> See *ante*, p. 112, for a discussion of contracts in restraint of trade.

the Act by inserting the word "unreasonable" before the words "restraint of trade." The opinion of the court, however, *dictum* as it was, brought forth such a vigorous protest within the court itself, and aroused so much popular excitement, that it is worth while to analyze it until we are sure that we fully understand its precise purport and effect. The gist of the argument is completely contained in the following passage : —

*Second. The contentions of the parties as to the meaning of the statute and the decisions of this court relied upon concerning those contentions.*

In substance, the propositions urged by the government are reducible to this : That the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language. The error involved lies in assuming the matter to be decided. This is true because as the acts which may come under the classes stated in the first section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether if the act is within such classes its nature or effect causes it to be a restraint of trade within the intendment of the act. To hold to the contrary would require the conclusion either that every contract, act,

or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or if this conclusion were not reached, then the contention would require it to be held that as the statute did not define the things to which it related and excluded resort to the only means by which the acts to which it relates could be ascertained — the light of reason — the enforcement of the statute was impossible because of its uncertainty. The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of restraint of trade as used in the statute leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.

The course of this argument is as follows: —

Counsel for the government contended that the prohibitions of the statute extended to every case within its literal language. The court declared that contention to be erroneous. To prove the error, it asserted a given proposition of law, and then, to prove that proposition of

law, it attempted to set forth the alternatives to it and to draw the inference that because the alternatives were absurd and impossible, the original proposition was true. To reverse the process, therefore, if those alternatives exhaust every possibility except those included in the original proposition, and if they were absurd, then the proposition of law was true, and the contention of the government was erroneous. In pursuance of this argument the court formulated three affirmations which were supposed to be mutually exclusive, of which two were supposed to be absurd, and of which the remaining one was therefore supposed to be necessarily true. These three alternatives may be diagrammatically exhibited as follows :—

*Either* JUDGMENT must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether, if the act is within such classes, its nature or effect causes it to be a restraint of trade within the intendment of the statute ;

*Or else* EVERY contract, act, or combination of any kind or nature, whether it operates a restraint on trade or not, is within the statute, and thus the statute is destructive of all right to contract in any respect

whatever as to subjects embraced in interstate commerce ;

*Or else* THE statute does not define the things to which it relates and excludes resort to the only means by which those things can be ascertained — the light of reason ; and therefore the enforcement of the statute is impossible because of its uncertainty.

These are the alternatives as stated in the language of the court itself. They are capable, however, of being reduced to the following much simpler terms : —

*Either* REASON must in every case be called into play in order to determine whether a particular contract is within the statutory classes, and, if it is within such classes, whether it is within the statute ;

*Or else* EVERY contract is within the statute, whether it operates a restraint of trade or not ;

*Or else* No contract can be known to be within the statute, and therefore the statute is unenforcible because of its uncertainty.

It should be observed that two of these alternatives are not in themselves accurate statements of a possibility. In the first of them the court

said that judgment, that is to say, reason, must be called into play to determine, first, whether the particular contract is within the statutory classes, and second, whether, if it is within the statutory classes, it is within the statute. There is no difference, however, between these two matters to be determined. If a given act is within the statutory classes, it must be within the statute itself. This conclusion is so obvious that it is difficult, if not impossible, to surmise what distinction the court could have had in mind when it wrote that sentence. In the second alternative the court said that every contract is within the statute, whether it operates a restraint of trade or not. A contract cannot be within the statute, however, unless it operates as a restraint of trade, and the second alternative, therefore, resolves itself into this contradiction in terms: Every contract is in restraint of trade whether it operates a restraint of trade or not. These two errors are not necessary to the argument, however, and it is therefore possible to eliminate them without affecting the course of thought. If they are so eliminated, the argument can be still further reduced to the following form: —

*Either* REASON must be used to determine whether a contract is in restraint of trade;



*Or else* EVERY contract is in restraint of trade ;  
*Or else* No contract can be known to be in re-  
straint of trade.

It is upon these three alternatives that the entire position of the Supreme Court is based. The first observation to be made upon them is that they are not really alternatives. They do not accurately set forth the different possibilities which the situation presents, nor are they mutually exclusive. The court's first alternative is that reason must be used to determine whether a contract is in restraint of trade. Its true companion alternative is that reason need not be used to determine whether a contract is in restraint of trade, which is very different from the court's alternatives. The court's second alternative is that every contract is in restraint of trade, and its true companion alternative is that at least one contract is not in restraint of trade, which again is very different from either of the court's alternatives. Finally, the court's third alternative is that no contract can be known to be in restraint of trade, and its true companion alternative is that at least one contract can be known to be in restraint of trade, which is also different from the court's alternatives. In no instance, therefore, did the court formulate the correct alternatives, and consequently the inference which it drew, that be-

cause two of them were absurd, the third was necessarily true, was not sustained.

The truth is that the alternatives which the court proposed have no relation to each other; but their very lack of relation affords a clue to its underlying error and betrays the illegitimate transition of thought which vitiates the conclusion. The court argued that because reason must be used in interpreting the statute, therefore reason must be looked for in the character of the contracts which were the subject-matter of the statute. This is an entirely unwarranted transition. Reason in the judicial process is one thing: reason in the character of a contract prohibited by statute is quite another and a very different thing. For example, even if the statute had expressly prohibited contracts in reasonable restraint of trade, which is the interpretation which the court desired to avoid, it would still have been necessary, in any given case, to exercise reason in order to find out whether the contract restrained trade in any degree, reasonably or unreasonably.

This illegitimate transition of thought from reason as a basis of judicial action to reasonableness in the contract under consideration is exhibited in numerous passages in the opinion of the court. For example, in speaking of the two earlier cases, the court says:—

It is undoubted that in the opinion in each case general language was made use of, which, when separated from its context, would justify the conclusion that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute.

The court was gravely in error in this intended admission, however. The earlier decisions never took the position that they could not resort to reason in order to determine whether or not a given contract came within the statute. Such a position would be obviously absurd. What they did say, and what they were right in saying, was that the statute does not exclude from its operation those contracts which restrain trade in a reasonable degree.

The argument of the court is of difficult and unusual subtlety and it is not altogether easy to seize its underlying thought. There seems, however, to be another method of stating it, and both the importance of the subject and justice to the court require that every aspect of it should be examined with minute care. This form of argument is nowhere directly expressed, and it is to be gathered only by inference from scattered phrases, such as the brief passage which we have just quoted; but it involves precisely the same error as the argument which we have just analyzed. When fully stated, the thought seems to run somewhat as follows :—

We must resort to reason in order to interpret the statute. The resort to reason shows that it is unreasonable to interpret the statute as inhibiting contracts in reasonable restraint of trade. Therefore the statute is to be interpreted as not inhibiting contracts in reasonable restraint of trade.

The argument, so stated, possesses a certain plausibility; but it is vitiated by another transition of thought like that which characterizes the argument already examined. In this instance, however, the transition is not from reason in the judicial process to reason in the character of the contract, but it is from reason in the judicial process to reason in the legislative process. The assumption that it is unreasonable to interpret the statute as prohibiting contracts in restraint of trade amounts to the assumption that it would be unreasonable for Congress to enact such a statute, and that is an assumption of reasonableness in Congress which is quite apart from the matter of reasonableness in the court. The true fact, of course, is that the reasonableness or unreasonableness of an interpretation depends upon the language of the statute, and not at all upon the reasonableness or unreasonableness of enacting it. Unless, therefore, it is unreasonable to interpret the words "every contract in restraint of trade" as meaning what they say and therefore as including contracts in reasonable restraint

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**THE PRINCIPLE OF SELF-DEFENSE**

We must not forget that the principle of self-defense is the same as the principle of the law of nature. The law of nature is the law of the universe, and it is the law of the universe that we must follow. The law of the universe is the law of the universe, and it is the law of the universe that we must follow. The law of the universe is the law of the universe, and it is the law of the universe that we must follow.

The argument is that the law of the universe is the law of the universe, and it is the law of the universe that we must follow. The law of the universe is the law of the universe, and it is the law of the universe that we must follow. The law of the universe is the law of the universe, and it is the law of the universe that we must follow.

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of trade, even this amended argument of the court must fall. Such is in fact the conclusion to which we must ultimately come, no matter how many or how varied the arguments to the contrary may be. The statute says "every contract," and that phrase cannot be limited by any judicial process which does not involve an abandonment of the judicial duty to administer the law and an illegal assumption of a judicial power to amend legislative enactments.

Thus the opinion in the *Standard Oil* case, in so far as it attempts to modify the statute by interpolating the word "unreasonable" before the words "restraint of trade," is seen to be only a *dictum*, and, as a *dictum*, it rests upon a confusion of thought as to the identity of reason in the judicial process and reason in the character of the contracts which are the subject of judicial process. All this error, all the disturbance in the court itself, and all the subsequent excitement of the people, would have been avoided if the court, instead of putting forth hasty and ill-considered generalizations, had only taken enough pains to make them conform to its own test of the principle of alternatives.

### *B. The Test of the Reductio ad Absurdum*

Whenever a proposition is advanced as universally and necessarily true, it is possible to test

it in numerous ways. One of these is by applying to it special instances. If in a given case which comes within the terms of the principle as formulated, it is apparent that the principle cannot be actually operative, its validity as a universal and necessary law is at once disproved. This is a form of the *reductio ad absurdum*, and it is so called because in the given instance the proposition reduces itself to an absurdity. This form of argument is very common. By its means we are continually testing our theories by our experience and correcting our hasty and vague generalizations. Its practical value is therefore almost incalculable, and the careful and conscious application of it to our legal and judicial processes will be certainly productive of beneficent results. Let us take as an illustration a judicial use of it which was almost successful, and which, if it had been consciously applied, would have gone far towards solving one of the chief problems of the American people.

In the case of *United States v. American Tobacco Company*, 164 Fed. Rep. 700, Mr. Justice Lacombe prefaced his opinion with the following impressive paragraph:—

Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), in its first section, declares to be illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade



or commerce among the several states, or with foreign nations." That declaration, ambiguous when enacted, is, as the writer conceives, no longer open to construction in the inferior federal courts. Disregarding various *dicta* and following the several propositions which have been approved by successive majorities in the Supreme Court, this language is to be construed as prohibiting any contract or combination whose direct effect is to prevent the free play of competition, and thus tend to deprive the country of the services of any number of independent dealers however small. As thus construed the statute is revolutionary. By this it is not intended to imply that the construction is incorrect. When we remember the circumstances under which the act was passed, the popular prejudice against large aggregations of capital, and the loud outcry against combinations which might in one way or another interfere to suppress or check the full, free, and wholly unrestrained competition which was assumed, rightly or wrongly, to be the very "life of trade," it would not be surprising to find that Congress had responded to what seemed to be the wishes of a large part, if not the majority, of the community, and that it intended to secure such competition against the operation of natural laws. The act may be termed revolutionary, because, before its passage, the courts had recognized a "restraint of trade" which was held not to be unfair, but permissible, although it operated in some measure to restrict competition. By insensible degrees, under the operation of many causes, business, manufacturing and trading alike, has more and more developed a tendency toward larger and larger aggregations of capital and more extensive combinations of individual enterprise. It is contended that, under

existing conditions, in that way only can production be increased and cheapened, new markets opened and developed, stability in reasonable prices secured, and industrial progress assured. But every aggregation of individuals or corporations, formerly independent, immediately upon its formation terminates an existing competition, whether or not some other competition may subsequently arise. The act as above construed prohibits every contract or combination in restraint of competition. Size is not made the test: Two individuals who have been driving rival express wagons between villages in two contiguous states, who enter into a combination to join forces and operate a single line, restrain an existing competition; and it would seem to make little difference whether they make such combination more effective by forming a partnership or not.

This passage contains one of the most notable statements of the anti-trust situation to be found in all our legal literature, and it approaches more nearly to an exact statement of the truth than any other legal utterance, whether by text-writers, by counsel, or by the court. Nevertheless it is lacking in accuracy in two particulars of vital importance. One of them is not directly relevant to our present point, but has an indirect bearing on it. The other shows how the courts have missed the truth because they have neglected to apply the principle of the *reductio ad absurdum*.

The learned justice declares that the first sec-

tion of the Sherman Anti-Trust Act is "ambiguous" and that the Supreme Court "construed" its language as prohibiting any contract or combination whose direct effect is to prevent the free play of competition. There is no ambiguity in the statute, however. It does, indeed, forbid contracts in restraint of trade, and therefore imposes upon the court the duty to ascertain the effect on trade of the various contracts which have been brought under its supervision, — a duty which the court has by no means fulfilled except by making ill-considered and tacit assumptions which are demonstrably erroneous, — but the duty to ascertain the effect on trade of given contracts is by no means a duty to "construe" the statute. The error lies in the failure to distinguish between construing a statute and applying it, a distinction which is fundamental. When, therefore, the Supreme Court holds that a contract which eliminates competition thereby effects a restraint of trade, it is not interpreting the statute at all: it is only laying down a supposed law of economics which may or may not be true. If that supposed law of economics is not true, then contracts in restraint of competition do not come within the terms of the statute, however the statute may be interpreted. The confusion which has accompanied the administration of the Sherman Anti-Trust Act has been largely due to

the judicial failure to make this distinction. In the particular instance under consideration it leads to the second error, to which we will now give our attention.

The passage which we have cited can be reduced to the following simpler form :—

The statute declares every contract in restraint of trade to be illegal. The Supreme Court has construed this statute as prohibiting any contract which restrains competition. The act as thus construed prohibits every contract in restraint of competition, regardless of size. As thus construed the statute is revolutionary, but it is not intended to imply thereby that the construction is incorrect.

If we disregard the distinction between construing an act and applying it, this argument is complete and accurate in every particular *except in the conclusion*. The conclusion of the learned justice is that the statute as interpreted is revolutionary, but that the interpretation is not necessarily incorrect. The true conclusion is precisely the contrary, — that the statute is not revolutionary, but that the so-called “construction” of it was vitally incorrect, because it reduces itself to an absurdity. Carried to its logical conclusion so as to embrace all the cases which come within its terms, the “construction” is equivalent to a finding that Congress intended

to make illegal every combination, no matter how small, engaged in interstate commerce, and that is obviously absurd. Thus the *reductio ad absurdum* was adequately set forth, but the correct conclusion from it was never drawn.

If at the beginning of the anti-trust litigation court and counsel had only resisted the fatal tendency of the Anglo-Saxon mind to deal in maxims rather than principles, and had subjected their maxims, before relying upon them, to the simple test of the *reductio ad absurdum*, the history of the United States since the Sherman Anti-Trust Act became a law would have been very different from what it has been.

### *C. The Principle of the Argumentative Traverse*

There is an old doctrine of the common law which, together with much else that is valuable, has fallen into disuse. It is to the effect that pleadings in a court of law must not be argumentative. They must assert facts and not leave a conclusion to be gathered by inference. Thus, if a pleader is to deny a given allegation, he is to do it directly and not by argument. In one case, for example, the plaintiff sued the defendant for converting his goods, and the defendant answered that the plaintiff never owned the goods. The plea was improper. The proper plea would have been "not guilty." If the plaintiff never

had the goods, the defendant could not be guilty of converting them, and his plea was really a denial of the conversion. A plea in denial is technically called a traverse, and in this case, therefore, the plea was an argumentative traverse, and, being argumentative, was not sufficient in law.

Like many other rules of special pleading which formerly bred so much technicality, the rule which forbade an argumentative traverse concealed under a technical form a really great virtue. It compelled the pleader to distinguish between arguments and denials, and thus demanded an ability to analyze complicated situations which was of the utmost value. Much of the forensic debate which now characterizes our legal proceedings is worse than useless, because the contending parties do not know whether they are arguing, or whether they are merely contradicting each other. If they only understood the principle which forbids an argumentative traverse, they would analyze their contentions until they could understand and define the precise issue between them. When an issue, framed by an affirmation on the one side and a denial on the other, is clearly defined, the quarrel is half settled. Two cases which are immediately adjacent to each other in one volume of cases decided by the Court of Appeals of the State of New York will illustrate perfectly how two principles which

the court supposed to be quite independent of each other are, as a matter of fact, merely argumentative denials of each other, and were therefore flatly inconsistent.

It is a fundamental principle of reason, as it is of morals and of law, that a man shall not occupy, or attempt to occupy, two inconsistent positions at one and the same time. If he is found in this inconsistency, he must make an election between them. This principle governs the law of contracts. It sometimes happens, for example, that after a man has made a contract and has received the whole or a part of the consideration which is due to him, he discovers that the contract was obtained by fraud, or that the other party to it is unable to perform, or that there is some other reason which justifies him in withdrawing from his engagement. Under these circumstances the courts will permit him to withdraw and will excuse him from performance on his own part. He has, however, received something under the contract, and therefore if he is to withdraw from it, he must surrender what he has received. To rescind the contract is to abandon his claim to what he has received under it; but to retain possession of what he has received under it is to affirm the contract and not to rescind it. If, therefore, he attempts to retain what he has received, he will not be

permitted to rescind, and if he wants to rescind, he must offer to return what he has already received.

This is a principle which is well recognized under the maxim that he who asks equity must do equity; but an exception to it has been introduced in cases in which the contract calls for the conveyance of real property. It is held that if an intending purchaser desires to be relieved of his contract because the title is not good, he can not only rescind the contract, but he can also have what is called a vendee's lien on the land for the amount of any payment which he may have made in advance. Thus he can go into a court of equity, and secure a judgment that he have his money back, that the land be sold, and that his payment be returned to him out of the proceeds of the sale. Observe the inconsistency. By attempting to rescind the contract, he abandons his claim to the land, and yet, by asking for a vendee's lien on it, he claims a preferential interest in the very land which, as he says, he does not want. In other words, he is taking two inconsistent positions, or, as the courts would say, when he is asking for equity, he does not do equity.

In the case which we have assumed, the purchaser has not yet received title to the land. If the title has been actually conveyed to him,



so that he has become a purchaser in possession who has not paid the purchase price, he can still be relieved of his bargain, but equity will require him to make a tender of the title as a condition precedent to recovering his payment, and if he failed to offer back his legal title, equity would not permit him to rescind. The curious result is that when a purchaser has actually received what is due to him under the contract, a court of equity will compel him to offer it back again when he wishes to abandon his bargain; but if he has not received what is due to him under the contract, a court of equity will first give him a lien on property which he says he does not want, and then will allow him to enforce a lien on the property at the same time that he declares that he wants to abandon his contract right to it.

It is no wonder that the doctrine of the vendee's lien has been seriously challenged. It is founded in utter confusion of thought. Our courts and text-writers who have sustained it have not perceived that it is merely an argumentative traverse of the doctrine that he who seeks equity must do equity, or, in other words, that the two are directly inconsistent. If the vendee's lien is just, then it is unjust that he who seeks equity must do equity. If it is just that he who seeks equity must do equity, then

the vendee's lien is unjust. There is no rational escape from these conclusions.

With this explanation let us consider the cases of *Elterman v. Hyman*, 192 N. Y. 113, and *Davis v. Rosenzweig Realty Co.*, 192 N. Y. 128, which are the cases to which we have referred.

In the *Davis* case the plaintiff asked to rescind the contract upon the ground that it had been obtained by fraud. He alleged that he had paid five thousand dollars upon the contract and asked that he have a lien on the premises in question for that amount, that the premises be sold, and that out of the proceeds he be repaid that amount. The court held very properly that he could have no lien, saying:—

Rescission destroys the contract *ab initio* and leaves the parties in the same situation as if no contract had ever been made. Under these circumstances there can be no lien.

This decision is obviously correct. The plaintiff should not be allowed to assert a preferential interest in the land at the very time that he says he does not want it and tries to abandon it.

In the *Elterman* case, the plaintiff found that the defendant could not convey to him a good title, and therefore brought a suit to recover back the sum of fifteen hundred dollars which

he had paid down. As in the *Davis* case, he asked that a vendee's lien be impressed upon the land, that the land be sold, and that his fifteen hundred dollars be paid to him out of the proceeds. It is obvious that this action did not differ from the other one except that the ground of it was a failure of the title instead of fraud, and that the plaintiff avoided any reference to a rescission. The court held, however, reversing the court below, that he could have the relief for which he prayed.

The court distinguished the two cases upon the ground that the plaintiff in the *Elterman* case was not seeking a rescission of the contract. In support of this position it said:—

Part payment creates partial ownership, and the vendee has an interest in the land itself to the extent of the payments made thereon. The contract and payment in full make him the equitable owner of all the land. The contract and payment in part make him the equitable owner *pro tanto*. . . . The vendee does not elect to nullify the contract nor seek remission to his original rights when he asserts his acquired rights, depending wholly on the contract and his action thereunder. He recognizes the contract as a subsisting obligation, valid in its inception and still in force, and finds his entire claim for relief on the theory that because it is valid and he has made payments on it as required by it, he has become an owner of the land in equity to the extent of such payments. He accepts the "situation which the wrongdoing of the other party has brought about" and tries to get out of the land what he paid on it under

the contract. The termination of the contract as to the future by one party owing to the default of the other is a rescission neither *ab initio* nor in any true sense (*Hurst v. Trow B. & P. Co.*, 2 Misc. Rep. 361, 366; 142 N. Y. 637). . . . The vendee does not rescind when without fault he goes into a court of equity and insists on a right springing from the contract and payment thereof pursuant to its terms. He does not repudiate the contract, but stands on it and affirms it as the foundation of the right he seeks to enforce, as fully as if he sought entire specific performance.

If, however, we examine the situation of the parties in the action to establish a vendee's lien, we shall find that it is identical with the situation of the parties in the action for a rescission. In both cases the purchaser of land recovers his advance payment; in both cases he is free from any further obligation under the contract; and in both cases, if the seller returns the advance payment with interest and costs, he gets his land back and is freed from any obligation to convey it. Thus in both cases at the end of the litigation the contract is rescinded in fact and in law, and the only conclusion which we can draw from the two decisions of the Court of Appeals is that it was so confused over its doctrine that partial payments create partial ownership that it did not understand the legal effect of its own judgment and could not tell whether it was rescinding a contract or enforcing it.

The decision in the *Elterman* case is remarkable in many particulars. One of them should be particularly noticed. An examination of the original record discloses the fact that when the defendant Hyman made his contract to sell the land to the plaintiff, he did not have title to it, but had only contracted to buy it from a third party, who was himself not the owner, but had only contracted to buy it from still a fourth party. Moreover, the plaintiff himself, in his complaint, alleged that the defendant did not own the property and had only a vendee's interest in it. The real owner was not made a party to the action. The net result of the decision was, therefore, that, without argument by counsel on the point, the Court of Appeals held that a payment by the plaintiff to the defendant gave the plaintiff a partial interest in land which the defendant did not own and could not convey, and which the plaintiff declared he did not want, although, if the defendant had himself given the plaintiff an interest in the land, the plaintiff would have been compelled to surrender it as a condition precedent to being relieved of his bargain.

Such a confusion could never have occurred if the Court of Appeals, before adopting the maxim that partial payment creates partial ownership, had only subjected it to a critical examination in the light of some of its other maxims in an effort

to discover whether or not it amounted to an argumentative traverse of them.

It is not too much to expect that the practicing lawyer will take the trouble to subject his arguments to the rigid scrutiny which these and the other rules of the reasoning process require, but it is especially necessary that the young lads of the law schools should practice them with energy and persistence. They should learn that they will never understand a decision until they understand the exact steps in the process, rational or irrational as they may be, by which the court advances from its premises to its final judgment. No matter how carefully they may study it, something will be lacking if they cannot formally reduce it to its lowest terms and ascertain the precise character, rational or irrational, of its premises and of the transition from its premises to its conclusion. When, however, they have dissected it into its really ultimate, fundamental elements, then they will know what it actually decides and what place it should occupy in the jurisprudence of their country.

Unexpected consequences will follow this practice. The law will become strangely familiar and yet strangely unfamiliar. Well-established and indubitably just principles will suddenly appear in the most unlooked-for guise, and the student,

even when he is following well-trodden paths, will suddenly find himself led into new and unexplored regions. As a net result of his practice, he will find his confidence in the ultimate principles of the law immeasurably strengthened, but he will find the law itself to be something far different from anything that appears in the text-books, from anything that his elders have taught him, and even, paradoxical as it may seem, from anything that the courts may say it is. In some respects, too, he will find it to be far different from anything which the people hope for; but also he will find that it is just.

Our consideration of the principle of sufficient reason would be to a large extent inadequate if we did not illustrate its practical use by applying it in at least one concrete instance. Let us therefore apply it to the "fellow-servant rule," that long-established judicial doctrine which, at last perceived to be grossly unjust, now demands immediate correction. Such a doctrine will furnish an admirable means of testing the practical efficiency of any projected theory of legal reform.

In 1842, the Supreme Judicial Court of Massachusetts held that a railway engineer, who was thrown from the cab of his engine because a switchman had placed a switch "in a wrong con-

dition," could not recover damages from the company, because the switchman and engineer were fellow servants.<sup>1</sup> The opinion of the court is too long for quotation, but its argument can be briefly summarized as follows:—

The rule that the master shall be responsible for the acts of his servant is adopted from general considerations of policy and security. It does not apply, however, in the case of one who is injured by the acts of a fellow servant. The reason is that, among fellow servants, each is in a position to know and guard against the perils of the service as well as the master, and consequently, as between master and servant, the servant ought, upon grounds of public policy, to assume the risks of the employment. There was no express contract to that effect, and therefore the law implied one. Because of that implied contract, the usual rule of responsibility of the master for the acts of his servant did not come into operation.

The opinion was written by Chief Justice Shaw, who is one of the great figures in our American juridical history; it became at once the leading authority on the point in this country; it was followed in all the other jurisdictions of the Union; and yet, as we now know, it was

<sup>1</sup> *Farwell v. Boston & Worcester R. R. Co.*, 4 Metc. (Mass.) 49.



erroneous. There is, indeed, hardly a position which it takes, whether by way of premise or by way of conclusion, which is correct.

In the first place, the law that the master shall be responsible for the acts of his servant rests not at all upon public policy, but upon the fact that the act of the servant is the act of the master. The master delegates to the servant the performance of certain duties, and by that act of delegation makes the servant his instrumentality in the execution of his purposes. Whatever is done in the fulfillment of those purposes, therefore, is as much the act of the master as if the master had done it himself.

To take an extreme illustration, which is the more illuminating because it is extreme, when one man causes the death of another by the hand of a hired assassin, it does not occur to anybody to ascribe his legal responsibility for the murder to public policy. The natural moral sense of the people recognizes that he is a murderer because he inspired the act, and that the hireling was as much an instrumentality of the master as would have been a merely material weapon. The same principle holds even when the master does not directly will the act in question, but simply delegates to the servant the performance of a general duty. Thus, if the hireling in the case supposed should kill an innocent bystander in the strug-

gle, the master would be responsible for that death, because, by the selection of the servant as an instrument to do an act, he makes himself responsible for whatever occurs in the commission of the act.

In the *Farwell* case, the company did not, of course, order the switchman to misplace the switch; but the company had delegated to the switchman the general duty of managing the switch and thereby made itself responsible for his proper fulfillment of that duty. The wrongful placing of the switch was, therefore, just as much the act of the employer as the rightful placing of it would have been its act. This is a proposition of law which was admitted by the court, although the court did not appreciate its bearing upon the case before it.

Because the responsibility of the master rests upon the fact that the servant is his instrument for doing an act, it exists whenever that relation of instrumentality can be established. In the *Farwell* case the causal chain of instrumentality reached from the switchman who misplaced the switch to the associates in the enterprise of running the railroad; in other words, to the stockholders. They elected the directors and confided to them the operation of the road. The directors, in turn, appointed the officers and thus delegated a part of their functions. Finally, the

officers hired the employees and effected a further delegation of function. Thus, through a continuing delegation of authority effected by the personal will of the stockholders, the employees were the instrumentalities of the stockholders, and their acts were the acts of the stockholders. The stockholders were, therefore, morally and legally responsible for the act of the switchman in misplacing the switch, because it was their act. Their liability was limited, indeed, because they were associated under a form of organization which carried with it that limitation, and they were properly suable as a group under the corporate name of the organization; but, while there was a reason of judicial procedure, there was no reason of judicial principle for not bringing an action against all the stockholders as individuals. Their responsibility was just as direct, and just as personal, as if they had been partners instead of stockholders. We shall not understand either the law or the morals of the responsibility in the case of corporations, unless we understand this fact. Every stockholder in a railroad corporation is as directly and personally responsible, legally and morally, for the wrecks which occur on the road by reason of the negligence of the trainmen as if he had occasioned them himself, and it is only the limitation in the extent of his liability and the technical mode

of enforcing it that distinguishes him from any other man who is guilty of a similar wrongful act.<sup>1</sup>

The initial error of the court in assuming that the master's responsibility is based upon public policy led to the second error in its opinion that it could invoke public policy to relieve the master in cases when, in its opinion, public policy required that he should be so relieved. Upon grounds of public policy the court undertook to draw a distinction between the case in which the person injured was a stranger and the case in which he was a fellow servant. This was no ground of distinction, however. When the act is the master's act, he is responsible for it without regard to the identity of the victim. It is as much his act, when the victim is a fellow servant, as when the victim is a stranger. In the *Farwell* case the act by which the plaintiff was injured was the act of the stockholders, because the causal chain of instrumentality led directly from the switchman to the stockholders, and the moral and legal potency of that chain was not diminished or altered by the fact that the plaintiff happened to be a fellow servant of the switchman. The plaintiff, therefore, was injured by the act of the employer, and when the court denied

<sup>1</sup> See the discussion of the corporate form of organization, *ante*, pp. 91-101.

him a recovery it refused to enforce well-settled and indisputable legal rights.

The court in its opinion declared that the *Farwell* case was of first impression. The principle of legal responsibility for delegated acts, however, had been recognized by the unanimous perceptions of mankind for a period which long preceded even the obscure beginnings of the common law. The *Farwell* case presented, therefore, only the application of an old rule to new facts, and was not a case of first impression in any sense whatever. If there was any law in Massachusetts outside of the constitution and statutes of the state,—in other words, if the common law was in any aspect of the case the law of Massachusetts,—then, on the day before the *Farwell* decision was rendered, the plaintiff was legally entitled to damages at the hands of the defendant and it was the legal duty of the court to award them. The act of the court in refusing to award them and in declaring that the plaintiff was not entitled to them was, therefore, an act of judicial legislation. It deprived the plaintiff of an existing right through an assumption of power which did not reside in the court. It is true that the court thought the plaintiff had no such right; but the court, as we now know, was clearly in error, and the error of the court could not confer upon it a jurisdiction which it did not in fact

possess. It still remains true, therefore, that in the *Farwell* case the court assumed a power which did not rightfully or legally belong to it. What was true in Massachusetts is true in any jurisdiction of the common law in which that decision is followed: the fellow-servant rule rests upon the fact that the court exceeds its authority in refusing to enforce well-settled and indisputable legal principles. Under the law as it is, therefore, as distinguished from the law as it is administered, the fellow-servant rule has not been, and is not now, the law in any common-law jurisdiction.

These considerations dispose of the decision in the *Farwell* case; but we shall not completely understand it unless we discuss two other errors contained in the opinion of the court.

The court declared that the rule of the responsibility of the master for the acts of his servant did not operate because there was a contract implied by law that when a workman enters the service of an employer he assumes the risk of the employment. The court admitted that there was no express contract of this character, and, therefore, rested its decision upon what it termed an implied contract. It is in this so-called implied contract that we find the basis of the doctrine of the workman's assumption of risk.

Now, as we have seen, when a workman enters

upon any employment, the master does not thereby cease to be responsible for the acts of the other servants, and the workman has a clear legal right to hold him to that responsibility. It is true that the workman may waive that right and may agree that he will not enforce it. If such a contract exists, and it is not procured from him by fraud or duress, it is binding upon him; but its existence must be proved by proper and legal evidence, and in the absence of any such evidence the master's responsibility must be enforced. The court has no jurisdiction to deprive him of it. When, therefore, the court admitted that there was no express contract between the plaintiff and defendant and undertook to "imply" one, the effect of its decision was to take away the plaintiff's right, not by the plaintiff's consent or waiver, but by judicial act. In other words, instead of an assumption of risk by the workman, there was and is only an imposition of risk by the court — an imposition in more senses than one.

There is not, and there never has been, any basis for the judicial doctrine of assumption of risk. It has its origin solely in a figment of the judicial mind, which is contrary to fact and contrary to law. It has only succeeded in establishing itself as a doctrine because the courts have deceived themselves as to the nature of the process by which it was established. By using the

phrase "a contract implied by law" they have concealed from themselves the true state of the case, and have argued themselves into a belief that their own arbitrary act has some foundation in the consent of the workman. Such is not the fact, however. In the absence of an actual stipulation entered into at the time of the employment, the workman never assumes the risk of anything that the master ought to do, whether by "contract implied in law" or otherwise. Indeed, there is never any such thing as a contract implied in law. If there is no real contract, the law cannot imply one, and if there is a real contract, there is nothing to imply. It may be laid down, therefore, as a general rule, that when a court bases its decision upon the ground of a contract implied in law, it is up to some mischief and that its opinion is likely to be harmful. The mischief of the *Farwell* case was seventy years of injustice to the American workman.

All this assumption of judicial power, and all this unacknowledged judicial legislation, grew out of the court's conception of what it deemed to be the public policy of the case. Because, in the opinion of the court, the perils of the employment are "perils which the servant is as likely to know and against which he can as effectually guard as the master," the court drew the inference that as a matter of public policy the risk



of those perils ought to be thrown upon the shoulders of the employee. We have long outgrown this belief. For years we have seen that as a practical matter the servant can hardly ever guard himself against the wrongdoing of his fellow servants. The assumed principle of public policy, therefore, which actuated the court in 1842 has been proved by practical experience to be wholly unsound and to the last degree unjust. The point is, however, that the court ought to have known in 1842 that it was unsound and unjust. It was obvious in the very case before it that the plaintiff was in no position to protect himself against the perils of a misplaced switch, and the theory that he could protect himself against them was, as a matter of fact, only another of those false and superficial generalizations which are the bane of the administration of the law in our common-law jurisdictions. Our reports are full of just such futile theorizing, as unjust as it is unpractical and as unpractical as it is unjust, but which is nevertheless solemnly put forward by court and counsel as grounds of decision.

The *Farwell* case is illustrative of many things. For one thing, it is illustrative of the helplessness of the lawyer of the common law in an emergency. Counsel for the plaintiff was suddenly confronted with a new application of an old

principle, but he could not see that it applied. He even went so far as to concede that it did not apply. He expressly admitted that the doctrine of the master's responsibility for the act of the servant could not be invoked in his client's behalf. When the question arose in other jurisdictions, the *Farwell* case was implicitly followed with apparently no perception of its fatal errors. Thus it became the general law of the United States simply because it seems never to have occurred to the lawyers of the common law that the identity of the victim has nothing whatever to do with the responsibility of the master for an injury committed by his chosen instrument.

Again, the *Farwell* case illustrates the error which lies at the bottom of the sociological theory of jurisprudence. It assumed to find the ground of its decision, not in moral principle, but in man-made considerations of public policy, and, therefore, was only another application of that theory. Viewed in that light, it brings into glaring relief, not only the hollow superficiality of the sociological conception, but also its most serious menace. Honesty is the best policy, and the best policy is honesty; but the man who guides his conduct by any theory of policy is in far greater danger of being both impolitic and dishonest than he who guides his

conduct by the rule of honesty. The reason is that it is much easier to determine what is morally right than what is practically politic, and the man who follows policy, even when he is honest, deliberately chooses the most difficult road to travel and the one which is beset with the most dangerous pitfalls. The failures of the sociological jurisprudence are due to the like fact that its adherents have had the wrong criterion in view. They would base the law upon what they believe to be policy, and they ignore the moral principle. The consequence is that too often they accomplish neither justice nor policy. In the early days of employment on a large scale, for example, their theories of policy led them into the adoption of the fellow-servant rule and the assumption-of-risk doctrine. In later days they discovered their mistake without, however, perceiving the error of their underlying hypothesis. They still worship their false gods. They are still trying to settle the problem of workmen's compensation as a matter of economics and not as a matter of moral right. The consequence is that they are as far astray at the present time as they were seventy years ago. Their modern slogan is, not that the workman assumes the risk of the employment, but that the risk of the employment should be carried by the industry. It is said, for example, that "the cost

of industrial injuries should be borne, like the cost of worn-out machinery, by industry itself." Such a pronouncement is hopelessly irrational. An industry does not, and cannot, bear the cost of anything. Individuals, either singly or in groups, bear the cost, and the modern sociologist, instead of trying to place the responsibility for injuries where it morally belongs, is seeking to shuffle it about on supposed principles of political economy entirely regardless of moral obligations, — with the result that he is as wrong economically as he is wrong morally. Some of the results of this misdirected effort have been so shocking in their injustice as to be almost unbelievable, and the danger which threatens us in the future can scarcely be exaggerated. It is only too true that the new industrial justice is largely a new injustice and the new freedom largely a new tyranny.

The present situation is that for seventy years the courts, following the *Farwell* case, have been denying the workmen of the country a proper measure of justice. The present problem, therefore, is, how shall justice be secured to them?

The answer of the lawyer of the common law to this question is that the courts are bound by their prior decisions and that there is no judicial remedy. Consequently he can find no adequate

means of rendering justice to the workmen save by an appeal to the legislature. He would have statutes enacted which would change the rules laid down by the courts. The Court of Appeals of the State of New York has gone so far as to declare its opinion that such a statute would be constitutional.<sup>1</sup> Thus, at the very time when he is loudly protesting against the overloading of our law with statutes, the lawyer of the common law asks for more statutes. Such a solution, however, is wholly unnecessary and wholly undesirable. The fact that the courts have rendered injustice for seventy years is no reason, in law or in morals, in common sense or in abstract reason, for continuing to do injustice for the future. There is nothing to prevent any court from declaring that in spite of its prior decisions it will render justice in the cause before it. If, on examination of its prior decisions, it shall reach the conclusion that they were wrong, it should correct them. Courts are not infallible. They must of necessity commit mistakes, and when they commit mistakes, if they are to command the respect of the people, they must correct them — even after seventy years. As the most practicable method of legal reform and the attainment of justice, therefore, the first attorney who has a litigation in which his client's rights are imper-

<sup>1</sup> *Ives v. South Buffalo Railway Co.*, 201 N. Y. 271.

iled by the fellow-servant rule should assert a right to reargue the rule *de novo*, and demand that the court should give him a hearing on its merits and on the right of his client to have it overruled. If, instead of sheltering themselves behind seventy years of error, the courts shall allow such a hearing, then we shall have the question of the justice of the rule properly and promptly decided. Both workman and employer will be heard in their own behalf, and their respective rights will be determined more efficiently, more speedily, and more decisively than by any resort to the dilatory and incompetent action of state and national legislatures.

In very truth the principle of sufficient reason — the principle that the court shall not consider itself bound by its previous erroneous decisions, but will correct them whenever it finds them to be erroneous — furnishes the only practicable method of general legal reform, apart from questions of mere procedure and organization, which is now available in any common law jurisdiction. In our present amorphous condition we are altogether too ignorant of rational methods and of essential principles to attempt a statutory codification, and we are, therefore, remitted, whether or no, to the courts. With their aid, however, freely and broadly given, we can accomplish all that is practically desirable with a maximum of

speed and efficiency. With that aid, indeed, and with a correlative independence of mind on the part of the bar, there is no assignable limit to our possible success in diminishing the margin of difference between law and justice.

## IN CONCLUSION

THE time has come when we of the United States can *afford* to have an ideal system of justice. In one sense, of course, there has never been a time in the history of any community when it could not afford to have such a system, but it has often happened that wrongs have been so firmly wrought into the social structure that to eradicate them immediately would have involved serious injury to those who, in a sense, were their innocent beneficiaries and thus, at the time, have made the price of justice seem prohibitive. Such was the case with slavery in this country. We were afraid to abolish it. Except for slavery, however, most of these vested wrongs have never existed at all in this country. We have never had to sustain the burdens of a royal establishment, or of an aristocracy endowed with hereditary privileges, or of a church in temporal alliance with the state, or most of the other forms of legalized superiority of rights. Nevertheless, there are some which still survive even here. A large part of the intelligent population is still disfranchised; the churches are still exempt from taxation; the people are still forbidden to buy the necessaries of their existence where they



want to buy them ; and there are some minor institutional injustices which need to be corrected. To remedy them would occasion loss to those whose fortunes have been built upon them ; but in no instance would the sacrifice involved in correcting them begin to equal the beneficent results that would immediately follow, nor would it approach in magnitude some of the sacrifices for the sake of justice which have been made in times past. The most serious injury which could probably be occasioned would follow the abolition of the tariff laws which forbid the people to make their purchases as cheaply as possible. Even if that were accomplished at one stroke, however, as by a decision of the Supreme Court of the United States that they deprive the people of their liberty without giving them an opportunity to be heard in their own defense and are therefore in violation of the guaranties of the Constitution, the injury to the protected interests would be negligible in comparison with the relief to the people from the long, slow agony of a daily drain upon their earnings. I repeat, therefore, that the time has come when we of the United States can, in every sense of the word, afford to have an ideal system of justice, and no court should be permitted to hesitate for a moment in rendering justice because of the fear of the consequences that might follow its decision.

Of course, an ideal system of justice is not a system of ideal justice. Between the making of the law and the administration of it human frailties necessarily intervene, and no matter how just the law may be, the application of it may involve grave injustice. Nevertheless, it is possible to have in this country a system of jurisprudence which shall be founded upon, and shall actually enforce, the ultimate principles of justice, and when we have learned enough to attain such a system, the administration of justice will perforce immeasurably improve.

There is no obstacle to the attainment of a system of justice, save our reluctance to take pains enough to think correctly. As a people we are not wanting in moral purpose or in the moral enthusiasms which are required to spur us onward, nor are we wanting in the intellectual equipment which is necessary. For some reason or other, however, we have lost faith in what seem to us to be the abstract processes of reason, and the consequence is that, while in mechanical invention and in observational research we have surpassed all former ages and are making discoveries which revolutionize our modes of living with every generation, nevertheless, in the domain of purely intellectual activity, we have allowed ourselves to fall far below the standards of former ages. Our little philosophers are playing with the stones

of ruined but once stately systems. Our little divines are offering the people a mush of doctrine in which Christianity, Judaism, and the esoteric doctrines of the Far East are rapidly losing their identity. Our little economists and sociologists have lost their way in the tangled forest of statistics. Our little politicians and publicists would cure deep-seated organic weaknesses of the body politic with adhesive plasters of reform. Except in narrow fields, we are nowhere doing intellectual work which, considered purely as intellectual work, is comparable in quality with that which was done in the earlier centuries.

The ultimate lesson which we must all learn is the practical efficiency of consciously governed and corrected reasoning as opposed to hasty and unthinking generalizations. When we learn this lesson, we shall take in our evolutionary progress the last great step which we must take in order to conquer our environment. We shall learn how to achieve rational results and how to verify them after they are achieved. At that moment the doubts and difficulties which assail us on all sides will begin to disperse like fog before the clearing wind. We shall have found the key to the unknown. Questions that now seem insoluble will answer themselves. Results that now seem unattainable will be surpassed by achievements as far beyond anything that we now imagine as

what we have now achieved exceeds that which our savage ancestors imagined. By the sheer power of reason we shall attain the highest ideal of every community, — not the mere material and intellectual welfare of the people, but the very reign of justice and human brotherhood.

**THE END**



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