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The True Path to a Proper Administration of Justice

May I ask a short space in your excellent Law Review for a brief presentation of the views of the writer regarding what he deems to be even in these days of universal war, of paramount importance—the way to secure a proper administration of Justice? There can be no doubt of the paramountcy of this. Organized society depends for its security and permanency upon the law properly administered. The law is indeed the cement that holds such a society together; without it, there is untold confusion which must culminate in anarchy and chaos. We are apt to get confused upon fundamentals, may I not say with all due respect? We forget, or seem at least not to keep in mind, that the law does not really deal with material things, except so far as such things are the objects of rights, but only with rights themselves. The classification of the law by Blackstone and other writers is mainly responsible for this; and their treatises do not clear up the subject, but still further confuse it. Now, in very truth the law has nothing whatever to do with anything but Rights. When John sells and conveys a piece of land to Bill, the land does not pass from John to Bill; it has nothing to do with the transaction and cares nothing about it; but what does pass are all the rights which John possessed at the time of his conveyance, to, over and upon the land. Before the sale and conveyance John possessed, so far as the land was concerned, all the rights in rem; after this Bill possessed them—that is, by the sale and conveyance they had passed from one to the other. So clear is this, that a mere statement of it ought to be sufficient. And yet our students are generally taught that jurisprudentially there can be such things as incorporeal hereditaments; and hence we have the absurdity of a right and the object of a right being classed as the same thing, and the further absurdity of a right being said to issue out of a material object, as rent issuing out of land. Salmond in his book on jurisprudence recognizes these incongruities, but insists that they can be reconciled by using figures of
speech. But jurisprudence must rest on plain and unambiguous speech and not on trope. Now how plain all this can be made by adhering to Rights; and before this illumination the fog of confusion melts away. The device of incorporeal hereditaments is not only unnecessary, but harmful and confusing. Take a piece of land owned by John, who hence possesses all the rights to the land that any one can possess. He mortgages it; under our system, he still has these rights but they are subordinate to the right of the mortgaee. He grants to Sam a right of way over the land; he still owns the land, but his rights in rem, are reduced by so much as the right granted. He grants other easements; he still possesses his rights in rem, but those rights are reduced by so much as the right granted to each owner of the easement granted. Now is it not plain from this that rights and rights only are all we have to do with in the instance cited? And such would prove to be the case no matter what the instance that could be cited. So I think we may safely assert that Rights and Rights only does the law have to do with. A thing, as said above, is the object of a right; it is that upon which the right expends itself but is never the right itself. Whence does the right issue? From the sovereignty. It is this supreme power which makes the laws that give us all the rights we have. Natural rights may exist in principles of morality, but never in the law. The contest between those who contend for natural rights and those who contend otherwise is mere logomachy. When a person is born, he is at once clothed with the natural right of self-realization, unhindered and undisturbed; but whether he will so remain depends entirely upon what the sovereign may decree.

The law then dealing wholly with Rights, how important must it be to have the Rights of a people made clear and specific. What then shall be said of the civilization of those who patiently, for year on year, willingly submit to two systems of rights, and those two at odds with each other? A contract under one system is no contract under the other; a consideration that would suffice under one system is none at all under the other; a defense to a contract under one system would be quite insufficient under the other; and so on through the whole gamut, as one may readily ascertain from any of the treatises on equity. But the crowning absurdity of all is the historical fact that one of the two systems
was created for the express purpose of either destroying the other or of so controlling or modifying it that it could not do harm. It was to be kept on foot, but it must do what the other commanded. It must be kept checked within reasonable bounds. It must exist and not exist at the same time. It has been said that the law was the “perfection of reason.” If this be so, why was it necessary to set up a special system for its correction? Under the circumstances, one would be tempted to affirm that it was the perfection of unreason. The man from Mars would surely expire with wonder or die in uncontrollable laughter, when these two systems of human rights were surveyed by him. Just take some instances of the many innumerable ones from those which come under the maxim of equity following the law. In the common law form of mortgage, the mortgage deed was a sale and conveyance of the land on condition subsequent; and if the mortgagor did not pay the money according to the condition, the land was lost to him forevermore. This was the law—now see how closely equity followed it. It simply set aside, not only the law of the land but the agreement as well of the parties. It said truly that the title had passed on condition subsequent, but we shall treat this title as not being what the parties agreed, but a mere lien as security for the money lent; more than that, the debtor shall have, what the parties expressly declined to let him have, time beyond that expressly stipulated for payment. It consequently set up an equity of redemption, and by so doing compelled the creditor to a strict foreclosure in a Court of Equity. And yet all the time equity admitted that the mortgage deed had conveyed the title.

Take the case of parties making a deed with the grantee not recording it, with entry by the grantee, and then the deed subsequently surrendered and destroyed. The grantor sues for the possession of his property. The grantee, relying upon the law, refuses to surrender the possession, the title still being in him, as it is, for the title was not reconveyed by the destruction of the deed. All this equity admits; but it will not under the circumstances permit the grantee to use the title which is in him by the law. In cases of estoppel, equity prevents the title from being used, although according to the law the holder of it would be free to use it. A tenant for life without impeachment for waste
was at the common law entitled to waste as he chose, but equity restrained him in the exercise of his legal right and determined for itself what waste he could commit. The law of California expressly forbids the conveyance of a mere expectancy, and yet our Supreme Court has held that if the grant of such expectancy be upon consideration it will be upheld. But why multiply examples which are innumerable?

Law and equity, in matter of substance, are now as wide apart as ever they were centuries ago. England missed her opportunity when in 1873 she overturned her legal system and set up a new one. She then drew back from the threshold of great things and after all only succeeded, as did our own reformers, in achieving procedural results, particularly in the matter of pleading and rules of Court. Even in procedure, law and equity remain strangers, at least in California; at law the jury is obligatory, and only the waiver of both parties will dispense with it, while in equity the judge has the discretion to try the case with or without a jury as he pleases; and when the verdict comes in it is merely advisory to him; he may set it aside at his pleasure, in the same way as could the equity judge of old when he directed an issue. These are striking instances. And as to substance, our Supreme Court has undeviatingly held from the very beginning that no relief could be had in equity if there was a remedy at law. In this they have been at one with the other courts of the United States.

The course of equity has been over the dead body of the law, and necessarily so. The writer has no lament for this, but only satisfaction. The equity judges in England and in this country have reared a legal monument magnificent to behold. By their actions and writings they have turned a barbarous code of law into one human and tolerable. The lamentable thing is that they were so short-sighted, so lacking in vision, as not to combine the two, as not to see that no country could properly progress under two systems of rights. The opportunity presented itself as far back as 1285 when Parliament enacted the great statute of In Consimili Casu, under which the chancery office was authorized to fashion new writs after the old ones. Never was a greater opportunity presented for doing a great thing; but out of this, we got only Case, Assumpsit and Trover, when we might have got
everything. It only needed some extension by Parliament, some ingenuity by the chancery clerks, and some hospitality by the judges, and the great deed were done.

For many years we have deplored our defective administration of justice. The voices that have protested against the present condition have now become uproarious. It was thought by those who years ago were instrumental in getting up our so-called Reformed Procedure that that would bring the needed reform, but it has egregiously failed as it was bound to fail, for it was an attempt to amend the substantive law by changing the remedial law. Manifestly the substantive law was the thing to be amended, and so amended as to give us but one system of rights, and not to keep on foot the present absurd system, or no system. In fact we possess the luxury of three systems: Real Property, Law and Equity. Why our progenitors were not moved by the example of Rome is a puzzle. The condition of things at Rome was substantially what it was in England, and it was more necessary than in England, for the old law had to be modified and corrected, by reason of the political complexion of the inhabitants, some being citizens and governed exclusively by Roman Law, and the others being subjects who did not possess the benefit of that law. Hence it was necessary to have a system for the latter which grew up under the shaping hand of the Praetor Peregrinus to a wonderful system of equity that proved so far superior to the old law, that, when in the reign of Caracalla, in the latter part of the second century, all Roman subjects became Roman citizens, the way was clear for the two systems to become one, as they did to the fructification of the world.

But it must be remembered that the Romans were not guilty of the absurdity, as were the English, of creating a new system whereby the old system should be abolished or corrected, and at the same time kept alive. Their new system was a necessity by reason of the different political complexions of the constituent elements of their population. The new system had no relation to the old. It was adapted entirely to controversies between foreigners and citizens, and between foreigners themselves. Hence the contracts between such persons were formless agreements and were outside of the jus civile that only recognized agreements
which were in legal form—that is, were so ceremonially correct as to be clothed with an obligation, on which alone a right of action existed, for the contract as such was not suable. Without the obligation, the agreement was a *nudum pactum*. The Romans never had two systems of rights applicable to Roman citizens.

What is the administration of justice? It is the use of those instrumentalities the law has provided for the determination of the rights of contesting persons. It is the means, while the latter is the end. Hence Justice is the end to be attained by the use of appropriate means. The means are important, for without the necessary remedy the right is lost, or simply rests *in nubibus*. But how much more important is the right, as all rests on that and to go stumbling on under two systems is the folly of follies. Think of the uncertainty involved in having two systems of law where certainty is needed above everything; think of the litigant who, after long labor of himself and his lawyers and after much money and time expended, is turned out of court because he had not been preternaturally wise enough to select the right one; think of the manifest ineptitudes involved in the manner in which equity treats the law, the time involved in mastering the two systems, the duplication of courts, the abuses necessarily attendant on such a chaotic condition of things, the two systems of rights not easily apprehensible by the common man. These practically are some of the evils incident to having two systems of rights. Is it not singular that we, a progressive, intelligent people should be content to wear chains which were forged for others centuries ago and to listen to their clanking as though it were exquisite music? Many esteem it an impossibility for a complete marriage to take place between law and equity; but it is perfectly feasible. The writer submits that all that is necessary to do is to strike down all distinction between the two opposing systems and to have every grievance embodied in but one form of action, and that virtually an action on the case, where the rights of the parties are to be determined, regardless of the form in which they are shaped, and without any reference either to law or to equity. We would then reach the desired end—that of having neither actions at law nor suits in equity, but merely actions where the rights of the parties are to be determined according to the law of the land: We could then by appropriate amendment of
the adjective law reach the simplicity so much desired—a simplicity never to be reached by other means. The appropriate method would be to bring the remedial law in consonance with the new order of things by making such changes as would recognize no distinction between law and equity, and this would be mainly achieved by striking out the word equity wherever it appeared. The writer has elsewhere suggestively proposed the following amendment to our various State constitutions:¹

All distinctions heretofore and now prevailing in this state between law and equity are hereby abolished; the rule that there can be no relief in equity if there be a remedy at law is hereby abolished, and in every case where there is a conflict between the rule in equity and the rule at law such conflict must be settled in favor of the rule of equity. There shall be but one form of action in this state, and no matter how the plaintiff has shaped his case, the decision of the court must be according to the evidence, and, if necessary, the complaint shall be amended accordingly, and it shall be inadmissible for the plaintiff to state his grievance in more than one way. In order that there may be no doubt as to the meaning of this amendment, it is hereby declared that its intent is to make a complete fusion of law and equity, and thus make the law more certain and facilitate the ascertainment of the rights of litigants. The principles of equity, so far as they have been recognized by the courts of this country, and the principles of the common law, so far as they are not in conflict with those of equity, are not abrogated by this amendment but are hereby continued in force until amended or repealed.

It will be said that this is too radical. But the case demands radical treatment. If anything is to be done that is permanent and worth while we must cut wide and deep. Otherwise, “It will but skin and film the ulcerous place,” as Hamlet declared to his mother. What the Reform Procedure men attempted to do was superficial and foredoomed to failure. Let us do quite otherwise; let us take our courage in our hands and march unhesitatingly and undauntedly upon the enemy.

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¹University of Pennsylvania Law Review, December, 1917.