A BRIEF SURVEY OF EQUITY JURISDICTION

BY: C. C. LANGDELL

CATEGORY: LAW AND LEGAL – CIVIL, COMMERCIAL, & CRIMINAL

A
BRIEF SURVEY
OF
EQUITY JURISDICTION

BEING A SERIES OF ARTICLES REPRINTED FROM THE HARVARD LAW REVIEW

BY
C. C. LANGDELL, LL.D.
DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY, EMERITUS

SECOND EDITION, ENLARGED

CAMBRIDGE
THE HARVARD LAW REVIEW ASSOCIATION 1908

PUBLISHERS' NOTE.

PROFESSOR LANGDELL'S articles upon Equity Jurisdiction, which have appeared from time to time in the "Harvard Law Review," have formed, for several years, part of the course in Equity at the Law School of the University of New York. To make these essays more accessible to his students, Dean Ashley of that School suggested that they be brought together in a volume. In complying with this suggestion, in 1904, the publishers were confident that they would gratify, also, the unexpressed wish of those who had the good fortune to begin their study of Equity under the personal guidance of Professor Langdell, and of many other lawyers as well.

The book in its present form contains five articles written in the last years of the author's life, and a carefully prepared index.

The reader will find in this volume the same power of historical research, of critical analysis, and of illuminating generalization that distinguished Professor Langdell's "Summary of Equity Pleading," a book recognized at once as the work of a great master of the law.

CAMBRIDGE, October 1, 1908.

THE UNIVERSITY PRESS, CAMBRIDGE, U.S.A.

CONTENTS

PAGE

A BRIEF SURVEY OF EQUITY JURISDICTION.

I.[1]

CLASSIFICATION OF RIGHTS.

EQUITY jurisdiction is a branch of the law of remedies; and as it affects, or is affected by, nearly the whole of that law, it is impossible to obtain an intelligent view of it as a whole without first taking a brief view of the law of remedies as a whole. Moreover, as all remedies are founded upon rights, and have for their objects the enforcement and protection of rights, it is impossible to obtain an intelligent view of remedies as a whole, without first considering the rights upon which they are founded.

Rights are either absolute or relative. Absolute rights are such as do not imply any correlative duties. Relative rights are such as do imply correlative duties.

Absolute rights are of two kinds or classes: First, those rights of property which constitute ownership or dominion, as distinguished from rights in the property of another, — *jura in re aliena;* secondly, personal rights; *i.e*., those rights which belong to every person as such.

Relative rights, as well as their correlative duties, are called obligations; *i.e*., we have but one word for both the right and its correlative duty. The creation of every obligation, therefore, is the creation of both a right and a duty, the right being vested in the obligee, and the duty being imposed upon the obligor. Undoubtedly the word "obligation" properly expresses the duty,

[1] 1 HARV. L. REV. 55.

and the use of the same word to express the right is a defect of nomenclature which is unfortunate, as it has given rise to much confusion of ideas.

Obligations are either personal or real, according as the duty is imposed upon a person or a thing. An obligation may be imposed upon a person either by his own act, namely, by a contract, or by act of law.[1]

An obligation may be imposed upon a thing either by the will of its owner, manifested by such act or acts as the particular system of law requires, or by act of law. It is in such obligations that those rights of property originate which are called rights in the property of another, — *jura in re aliena*. Instances of real obligations will be found in servitudes or easements, in which the law regards the servient tenement as owing the service; also in the Roman *pignus* and *hypotheca*, in which the *res*, pignorated or hypothecated to secure the payment of a debt, was regarded as a surety for the debt. The *pignus* has been adopted into our law under the name of *pawn or pledge*. The *hypotheca* has been rejected by our common law,[2] though it has been adopted by the admiralty law. A lien is another instance of a real obligation in our law, the very words "lien" and "obligation," having the same meaning and the same derivation. A familiar instance of a real obligation created by law will be found in the lien of a judgment or recognizance.[3]

[1] Strictly, every obligation is created by the law. When it is said that a contract creates an obligation, it is only meant that the law annexes an obligation to every contract. A contract may be well enough defined as an agreement to which the law annexes an obligation.

Strictly, also, a tort gives rise to an obligation as much as a contract; namely, an obligation to repair the tort or to make satisfaction for it; but this is an obligation which the law imposes upon a tort-feasor merely by way of giving a remedy for the tort. In the same way the breach of a contract gives rise to a new obligation to repair or make satisfaction for the breach.

[2] It would, however, be more correct to say that our law does not permit the owner of property to hypothecate it at his own will and pleasure; for hypothecations created by law do exist with us, as will presently be seen.

[3] Such a lien is an hypothecation created by law. It is what civilians call a general hypothecation, because it attaches to all the land of the judgment debtor or recognizer, whether then owned by him or afterwards acquired.

Instances of hypothecations of goods created by law will be found in the lien given to a landlord on the goods of his tenant to secure the payment of rent, and in the lien on beasts *damage feasant*, given to the person injured to secure satisfaction for the injury done. These liens are enforced by distress. The former is in a sense general; *i.e.*, it attaches on all the goods which are on the demised premises when the rent becomes due.

Relative rights differ from absolute rights in this, that the former add nothing to the sum or aggregate of human rights; for what an obligation confers upon the obligee is precisely commensurate with what it takes from the obligor. Absolute rights, therefore, make up the entire sum of human rights.

Every violation of a right is either a tort or a breach of obligation. Every violation of an absolute right is, therefore, a tort. So is every violation of a right arising from an obligation (*i.e*., of a relative right) which does not consist of a breach of the obligation. Hence every act committed by any person in violation of a right created by a real obligation is a tort; for such an act cannot be a breach of the obligation.

Whether a right created by a personal obligation can be violated by an act which constitutes a tort, *i.e*., by an act which does not consist of a breach of the obligation, is a question involved in much doubt and difficulty. In Lumley *v*. Gye,[1] and in Bowen *v*. Hall,[2] this question was decided broadly in the affirmative; for it was held in each of those cases that it was a tort maliciously to procure an obligor to break his obligation. In each of them, however, the Court was divided; in Lumley *v*. Gye there was a very powerful dissenting opinion, which was fully adopted by one of the judges in Bowen *v*. Hall; and, though the writer is not at present prepared to say that the decisions were wrong, yet neither is he prepared to admit that they were right.[3]

An obligation may, however, be so framed as to make it possible for the obligor or a third person to destroy the obligation before the time for its performance arrives. For example, if the performance of an obligation be made conditional upon the happening of an event which is subject to human control, any act which prevents the happening of that event will destroy the obligation; and there can be no doubt that such an act, if done for the purpose of destroying the obligation, will constitute a

[1] 2 El. & Bl. 216. [2] 6 Q. B. D. 333.

[3] "N. B. Any prevention of the completion of an obligation (*stricto sensu*) caused by a third party would be no violation of a right in the *obligee*, or, if it would, would be a violation of a distinct right. A stranger who employs a builder to undertake an extensive work, or wounds or maims him (thereby, in either case, preventing him from completing a previous contract with myself) violates no right in *me;* and my remedy is against the *builder* for the breach of contract with myself. A stranger who inveigles my servant violates, not my *jus ad rem* under the contract, but my *jus in re*. The servant himself, indeed, does; and for this breach of his obligation (*stricto sensu*) I may sue him on the contract." — *Austin, Jurisprudence* (4th ed.), Vol. 1, p. 402, note

tort. Nor does the writer see any reason to doubt that it would also be a tort maliciously to procure another person to destroy an obligation, even though the person committing the act of destruction were the obligor.[1]

For most practical purposes, however, it may be said with sufficient correctness that a right created by a personal obligation is subject to violation only by a breach of the obligation, and hence only by the obligor; for it will very seldom happen that any question will arise as to the violation of such a right by any person other than the obligor, or in any way other than by a breach of the obligation.

What has thus far been said of rights and their violation has in it no element of equity. The rights which have been described may be defined as original and independent rights, and equity has no voice either in the creation of such rights or in deciding in whom they are vested. Equity cannot, therefore, create personal rights which are unknown to the law; nor can it say that a *res*, which by law has no owner, is a subject of ownership, nor that a *res* belongs to A which by law belongs to B; nor can it impose upon a person or a thing an obligation which by law does not exist; nor can it declare that a right arising from an obligation is assignable, if by law it is not assignable. To say that equity can do any of these things would be to say that equity is a separate and independent system of law, or that it is superior to law.

If there is no element of equity in a right, neither is there in the violation of that right; for what is a violation of a right depends entirely upon the extent of the right. If, therefore, equity could declare that a right has been violated when by law it has not, it could thus enlarge the right of one man and curtail that of another.

When, however, it is said that equity has no voice in a given question, it must not be inferred that a judge sitting in equity has no such voice. An equity judge administers the same system of law that a common-law judge does; and he is therefore constantly called upon to decide legal questions. It, therefore, sometimes happens that courts of equity and courts of common law declare the law differently; and a consequence of this may be that courts of equity will recognize a certain right which courts of common

[1] See the observations of Professor Ames, 1 HARV. L. REV. 10.

law refuse to recognize; but it does not follow that the right thus recognized is properly an equitable right. So courts of equity may treat an act as a violation of a legal right, which courts of common law treat as rightful; but it does not follow that such an act is properly an equitable tort. A well-known instance of such an act is found in what is commonly called equitable waste. For example, if a tenant for life, without impeachment of waste, cut down ornamental trees, or pull down houses, a court of equity says he has committed waste, while a court of common law says he has not. Either court *may* be wrong, and one of them *must* be; for the question depends entirely upon the legal effect to be given to the words "without impeachment of waste," and that cannot depend upon the kind of court in which the question happens to arise. Yet the practical consequence of this diversity of view is, that there is a remedy in equity against the tenant in the case supposed, while there is none at law; and this gives to the act of the tenant the semblance of being an equitable tort. In truth, however, the act is a legal tort, if the view taken by courts of equity is correct, while it is a rightful act, if the view taken by courts of common law is correct.

There are, however, true equitable rights, and also true equitable wrongs, the latter being violations of equitable rights. A true equitable right is always derivative and dependent, *i.e.*, it is derived from, and dependent upon, a legal right. A true equitable right exists when a legal right is held by its owner for the benefit of another person, either wholly or in part. Such a right may be defined as an equitable personal obligation. It is an obligation

because it is not ownership;[1] and because it is relative, *i.e*., it cannot exist without a correlative duty; and it is personal because the duty is imposed upon the person of the owner of the *res (i.e*., of the legal right), and not upon the *res* itself. And yet courts of equity frequently act as if such rights were real obligations, and even as if they were ownership. Indeed, it may be said that they always so act when they can thereby render the equitable right more secure and valuable, and yet act consistently with the fact

That is, it is not ownership of the thing which is the subject of the obligation. For example, when land is held by one person for the benefit of another, the latter is not properly owner of the land even in equity. Of course the equitable obligation itself is as much the subject of ownership as is a legal obligation; and the only reason why such ownership is not recognized by courts of common law is that the thing itself which is the subject of the ownership (*i.e*., the equitable obligation), is not recognized by them.

that such right is in truth only a personal obligation. For example, a personal obligation can be enforced only against the obligor and his representatives; but an equitable obligation will follow the *res* which is the subject of the obligation, and be enforced against any person into whose hands the *res* may come, until it reaches a purchaser for value and without notice. In other words, equity imposes the obligation, not only upon the person who owned the *res* when the obligation arose, but upon all persons into whose hands it afterward comes, subject to the qualification just stated. But the moment it reaches a purchaser for value and without notice, equity stops short; for otherwise it would convert the personal obligation into a real obligation, or into ownership. Why is it, then, that equity admits as an absolute limitation upon its jurisdiction a principle or rule which it yet seems always to be struggling against, namely, that equity acts only against the person, — *æquitas agit in personam ?* One reason is (as has already appeared) that equity has no choice or option as to admitting this limitation upon its jurisdiction. Another reason is that if equitable rights were rights *in rem*, they would follow the *res* into the hands of a purchaser for value and without notice; a result which would not only be intolerable to those for whose benefit equity exists, but would be especially abhorrent to equity itself. Upon the whole, it may be said that equity could not create rights *in rem*[1] if it would, and that it would not if it could.

The Roman *pignus* and *kypotheca* were rights *in rem*. The *pignus* was admitted into our law because it affected chattels only, and because it could not be effected without delivery of possession; but the *hypotheca* was rejected because it affected

[1] Here again, when it is said that equity cannot create rights *in rem*, reference is had to the *res*, which is the subject of the equitable obligation. Regarding the equitable obligation itself as the *res*, there can be no doubt that an equitable obligation, like a legal obligation, always creates a right *in rem (i.e*., an absolute right), as between the obligee and all the rest of the world except the obligor; for it can create a right *in personam (i.e*., a relative right) only as between the obligee and the obligor. To say, therefore, that an obligation can create a relative right *only*, is to say that it can create no right whatever, except as between the obligee and the obligor. Moreover, if an obligation does not create

an absolute right, it is impossible to support Lumley *v*. Gye and Bowen *v*. Hall, though the converse does not necessarily follow.

As an equitable obligation creates a right which (in one of its aspects) is absolute, of course it follows that such a right may be the subject of a purchase and sale, or of a new equitable obligation. If, then, the owner of such a right first incur an obligation to hold it for the benefit of A, and afterward sell it to B, who has no notice of the previous obligation to A, will B be bound by the obligation to A? Prof. Ames has clearly

land, and did not require any change of possession.[1] Equity introduced the *hypotheca* without any violation of law, and with the most beneficial effects. Why ? Because equity introduced it as a right *in personam* only.

Legal personal obligations may be created without limitation, either in respect to the persons between whom, or the purposes for which, they are created, provided the latter be not illegal. But it is otherwise with equitable obligations; for, as they must be founded originally upon legal rights, so they can be imposed originally only upon persons in whom legal rights are vested, and only in respect of such legal rights; *i.e*., only for the purpose of imposing upon the obligors in favor of the obligees some duty in respect to such legal rights. But the original creation of equitable obligations is subject to still further limitations, for it is not all legal rights that can be the subjects of equitable obligations. Only those can be so which are alienable in their nature. Of absolute rights, therefore, none of those which are personal can ever be the subjects of equitable obligations, while nearly all rights which consist in ownership can be the subjects of such obligations. Relative rights can generally be the subjects of equitable obligations, but not always. For example, some rights arising from real obligations, are inseparably annexed to the ownership of certain land, and, therefore, are not alienable by themselves. So, also, some rights arising from personal obligations are so purely personal to the obligee as to be obviously inalienable. It is only necessary to mention, as an extreme case, the right arising from a promise to marry.

What has thus far been said applies to equitable rights as originally created, *i.e*., to equitable rights which are derived immediately from legal rights; but there are equitable rights which are derived from legal rights only mediately. For, when an

shown, as the writer thinks, that he will not. 1 HARV. L. REV. 9-11. To hold otherwise would be to hold that equity will not afford the same protection to property of its own creation that it does to property not of its own creation; which would be not only absurd in itself, but contrary to the principle that equitable property is governed by the same rules as legal property.

If Prof. Ames's doctrine is correct, it proves the statement in the text, namely, that equity will not create a true, real obligation (*i.e*., one which will follow the *res* into the hands of a purchaser for value and without notice), even when it has the power to do so; for of course, as between conflicting rights of its own creation, equity may do whatever justice is supposed to require.

[1] See *supra*, page 2, note 3.

equitable right has once been created it may in its turn become the subject of a new equitable right, *i.e.*, its owner may incur an equitable obligation to hold his equitable right for the benefit of some other person; and this process may go on *ad infinitum*, each new equitable right becoming in its turn the subject of still another equitable right, and all the equitable rights being derived from the same legal right, the first immediately, the others mediately. It is to be observed that these equitable rights are created without any alienation or diminution of the rights from which they are derived. For it is not the nature of an obligation, real or personal, legal or equitable, while it remains an obligation merely (that is, while it remains unperformed) to alienate or diminish in any way any right vested in the obligor. In the case, therefore, of a succession of equitable rights derived from one legal right, the legal right remains undiminished in its original owner, and so does each equitable right, and yet the equitable rights add nothing to the sum of human rights,[1] the aggregate of the legal right and all the equitable rights only equalling the legal right. So if the legal right be destroyed (*e.g.*, by the act of God), all the equitable rights will fall to the ground. It is to be further observed that the legal owner is bound only to the original equitable owner, and the latter to the second equitable owner, and so on. If the legal owner and the equitable owners be conceived of as standing in a line, one behind the other, in the reverse order of the time of the creation of their rights, it will be seen that each one in the line is equitably bound to the one immediately before him, and to no one else, and hence that there are as many equitable bonds as there are persons in the line, less one, — the one standing in front being, of course, subject to no bond.

The foregoing method of deriving an indefinite succession of equitable rights from one legal right may be termed the method by sub-obligation.

Another method is for the first equitable obligee to assign his equitable right, at the same time receiving from the assignee a new equitable obligation. He may then assign his new equitable right to a new assignee, at the same time receiving from the latter still another equitable obligation; and this operation may be repeated indefinitely. This method takes place in the common case where

[1] See *supra*, page 3.

land is mortgaged in the ordinary way to several persons in succession; for in that case each successive mortgage has a twofold operation, namely, that of an assignment or transfer to the mortgagee, and that of imposing an equitable obligation on the mortgagee in favor of the mortgagor. For example, the first mortgage has the twofold operation of assigning or transferring the land to the mortgagee, and of creating an equitable obligation in the latter to reconvey the land to the mortgagor on payment of the mortgage debt; and in this way the first or original equitable right is created. Then a second mortgage has the twofold operation of assigning this original equitable right, and of creating in the assignee an equitable obligation to reassign it to the mortgagor on payment of the second mortgage debt. In this way a second equitable right is created, which in its turn may be assigned by a third mortgage, the third mortgagee incurring an equitable

obligation to reassign it to the mortgagor on payment of the third mortgage 'debt; and this operation will be repeated as often as a new mortgage is given.

If, upon the making of the first mortgage, the mortgagor and the first mortgagee be conceived of as standing one behind the other, the effect of a second mortgage will be to place the second mortgagee between the mortgagor and the first mortgagee, and thus to separate the two latter; for the second mortgagee, as assignee of the mortgagor, steps into the shoes of the latter as to the first mortgagee, becoming in effect the mortagor as to the latter, just as if he had purchased the equitable right of the mortgagor (*i.e*., his equity of redemption), absolutely. As the mortgagor thus ceases to have any relations, for the time being, with the first mortgagee, of course he must give up his place to his successor, the second mortgagee. Still the mortgagor does not stand aside as a mere stranger, as he would do if he had simply sold his equity of redemption; but he takes his place next to the second mortgagee by virtue of the new equitable obligation (*i.e*., equity of redemption) running from the latter to him. For the same reasons a third mortgagee will take his place between the mortgagor and the second mortgagee, and so on. Therefore, the mortgagor will always be at one end of the line, and the first mortgagee at the other end, the latter always remaining stationary, but the former moving, as often as a new mortgage is given, to make room for the new mortgagee.

A question, however, still remains, namely, is the first mortgagee to be placed in front, with the several other mortgagees, and the mortgagor behind him in the order of time, or is the mortgagor to be placed in front with the several mortgagees behind him in the reverse order of time ? The answer depends upon whether the mortgagees and the mortgagor are to be placed with reference to the operations of the mortgages as transfers or assignments, or with reference to their operation as creating equitable obligations. If the former, the first mortgagee should stand in front; if the latter, the mortgagor should stand in front. And, as we are now considering mortgages, with reference to their operation in creating equitable obligations, it is clear that the mortgagor and the mortgagees should be placed with reference to that operation. Thus, we have the same final result, whether a succession of equitable obligations be created by successive mortgages, or by successive sub-obligations, though this result is produced by different machinery. In both cases there are as many equitable obligations as there are persons in the line, less one. In both cases every person in the line, except the first and the last, is both an equitable obligor and an equitable obligee, the first being an equitable obligee only, and the last an equitable obligor only. The only differences are, first, that, in the case of successive mortgages, each successive equitable obligation is made the subject of a new equitable obligation (*i.e*., of a sub-obligation), not by the original obligee, but by his assignee; and, secondly, that all the successive equitable obligations are made in favor of the same person, namely, the mortgagor, the latter always acquiring a new equitable obligation the moment that he relinquishes an old one.

There are still other modes in which an indefinite number of equitable rights may be derived from one legal right, namely: first, the owner of the legal right, instead of incurring one equitable obligation as to the whole of the legal right, may incur an indefinite number of equitable obligations, each as to some aliquot part of the legal right;

secondly, the owner of the original equitable right may assign that right to an indefinite number of persons by assigning some aliquot part of it to each.

With respect to the modes in which they are created, equitable obligations differ widely from legal obligations. Most legal obligations are created by means of contracts; *i.e*., a person promises (expressly or by implication), or covenants to do or not to do

something, and the law annexes to the promise or covenant an obligation to do, or refrain from doing, according to the terms of the promise or covenant. But a purely equitable obligation cannot be made in that way. I say "a purely equitable obligation," because an obligation is frequently annexed to a promise or covenant both by law and by equity, *i. e*., the law annexes a legal obligation, and equity annexes an equitable obligation. But equity cannot annex an obligation to a promise or covenant to which the law refuses to annex any obligation.[1] In a word, there is properly no such thing as an equitable promise or covenant, and no such thing as an equitable contract. The reason, therefore, why a contract cannot result in creating a purely equitable obligation is, that a contract always results in creating a legal obligation.

How, then, are purely equitable obligations created ? For the most part, either by the acts of third persons or by equity alone. But how can one person impose an obligation upon another. By giving property to the latter on the terms of his assuming an obligation in respect to it. At law there are only two means by which the object of the donor could be at all accomplished, consistently with the entire ownership of the property passing to the donee, namely: first, by imposing a real obligation upon the property; secondly, by subjecting the title of the donee to a condition subsequent. The first of these the law does not permit; the second is entirely inadequate. Equity, however, can secure most of the objects of the donor, and yet avoid the mischiefs of real obligations, by imposing upon the donee (and upon all persons to whom the property shall afterwards come without value or with notice) a personal obligation with respect to the property; and accordingly this is what equity does. It is in this way that all trusts are created, and all equitable charges made (*i. e*., equitable hypothecations or liens created) by testators in their wills. In this way, also, most trusts are created by acts *inter vivos*, except in those cases in which the trustee incurs a legal as well as an equitable obligation. In short, as property is the subject of every equitable obligation, so the owner of property is the only person whose act or acts can be the means of creating an obligation in respect to that property. Moreover, the owner of property can

[1] See *supra*, page 4.

create an obligation in respect to it in only two ways: first, by incurring the obligation himself, in which case he commonly also incurs a legal obligation; secondly, by imposing the obligation upon some third person; and this he does in the way just explained.

But suppose a person, to whom property is given on the terms of his incurring an equitable obligation in respect to it, is unwilling to incur such obligation, shall it be imposed upon him against his will ? Certainly not, if he employs the proper means for

preventing it; but the only sure means of preventing it is by refusing to accept the property, *i. e*., to become the owner of it; for no person can be compelled to become the owner of property even by way of gift. If he once accept the property, the equitable obligation necessarily arises, and he can get rid of the latter only by procuring some one else to accept the property with the obligation; and even this he cannot do without the sanction of a court of equity.

An owner of property may, however, incur an equitable obligation in respect to it, founded upon his own act and intention, and yet make no contract, nor incur any legal obligation. For example, if an owner of property do an act with the intention of transferring the property, but which fails to accomplish its object because some other act is omitted to be done which the law makes necessary, equity will give effect to the intention by imposing an equitable obligation to do the further act which is necessary to effect the transfer, provided a valuable consideration was paid for the act already done, so that the transfer, when made, will be a transfer for value, and not a voluntary transfer. So, if an owner of property, thinking that he has the power to hypothecate it merely by declaring his will to that effect, declare, for a valuable consideration, that such property shall be a security to a creditor for the payment of his debt, though he will not create a legal hypothecation, nor incur any legal obligation, yet he will create an equitable hypothecation or an equitable lien; *i. e*., equity will give effect to the intention by creating an equitable obligation to hold the property as if it were legally bound for the payment of the debt. In both the cases just put, equity proceeds upon the principle that the act already done would be effective for the accomplishment of its object in the absence of any positive rule of law to the contrary; and in both cases equity gives effect to the inten-

tion without any violation of law; for, in the first case, equity compels a performance of every act which the law requires, while, in the second case, equity merely creates a personal obligation which violates no law, in lieu of a real obligation, which the law refuses to create.

Many equitable obligations are created and imposed by equity alone; and this is done upon the principle that justice can thereby be best promoted. For example, it is by force of equity alone that an equitable obligation follows the property which is the subject of the obligation until such property reaches a purchaser for value and without notice. The obligation may have been created originally through the act or acts of the owner of the property; but it is by force of equity alone that this obligation is imposed upon subsequent owners of the property who had no part in its original creation. So also all that large class of equitable obligations commonly known as constructive trusts are created by equity alone. For example, where property is obtained by fraud, unless (as seldom happens) the fraud be of such a nature as to prevent the legal title from passing, the only legal remedy will be an action for damages against the party committing the fraud; but equity, by creating an equitable obligation, can and will follow the property itself (until it comes into the hands of a purchaser for value and without notice), and compel a specific restoration of it. If it be asked why a legal obligation to restore the property is not created, and how equity can go beyond the law, the answer is that the right is created in such a case merely for the sake of the remedy, and that the common law never contemplates any

remedies other than those which the common law itself affords. The common law does not, therefore, create an obligation to restore the property, because it would regard such an obligation as useless. It could only give damages for a breach of the obligation; and it can equally well give damages for the fraud itself. Moreover, the equitable obligation is generally conditional upon the restoration by the person defrauded of the consideration received by him, and courts of common law have no adequate machinery for dealing with conditions of such a nature.

Another large class of equitable obligations created by equity alone are those (already referred to) imposed upon mortgagees in favor of mortgagors. A mortgage is a transfer of property, either defeasible by a condition subsequent, namely, by the payment of

the mortgage debt on a day named, or accompanied by an agreement to reconvey the property upon a condition precedent, namely, the payment of the mortgage debt on a day named. In either case, if the mortgagor suffer the day to pass without performing the condition, his right to have the property restored to him is entirely and absolutely gone at law; and it is at the very moment that the mortgagor loses his legal right that his equitable right arises, namely, to have the property reconveyed to him (notwithstanding his failure to perform the condition agreed upon), on payment of the mortgage debt, interest, and costs. But how is it that equity can create such an obligation, it being not only without any warrant in law, but directly against the express agreement of the parties ? Because, while the mortgagor has lost his right to the land, the mortgage debt remains wholly unpaid; and consequently the mortgagee can at law keep the land, and yet compel the mortgagor to pay the mortgage debt. In a word, the mortgagor loses (*i.e*., forfeits) his land merely by way of penalty for not performing the condition; and though this is by the express agreement of the parties, yet equity says the only legitimate object of the penalty was to secure performance of the condition; and, therefore, it is unconscionable for the mortgagee to enforce the penalty, provided he can be fully indemnified for the breach of the condition; and, the condition being merely for the payment of money, the mortgagee will, in legal contemplation, be fully indemnified for its breach by the payment of the mortgage debt (though after the day agreed upon) with interest and costs. In short, equity creates the equitable obligation in question upon the ancient and acknowledged principle of relieving against penalties and forfeitures.

Still another important class of equitable obligations created by equity alone are those commonly known as rights of subrogation. For example, a debtor becomes personally bound to his creditor for the payment of the debt, and also pledges his property to the creditor for the same purpose. A third person also becomes personally bound to the creditor for the payment of the same debt as surety for the debtor, and pledges *his* property to the creditor for the same purpose. In this state of things justice clearly requires that the debt be thrown upon the debtor, or upon the pledge belonging to him, and that the surety and the pledge belonging to him be exonerated from the debt, provided this can

be done without interfering with the rights of the creditor. The latter, however, has the right to enforce payment of his debt in whatever way he thinks easiest and best, *i. e*., in

whatever way he chooses; and equity cannot prevent the exercise of that right without a violation of law. If, then, the surety or his property should be compelled to pay the debt, the legal consequences would be, first, that the debt would be gone, and the debtor's personal obligation to the creditor extinguished, for payment by the surety or by his property has the same legal effect as payment by the debtor or by his property; secondly, that, the *personal* obligation of the debtor being extinguished, the *real* obligation of his property would be extinguished also, for the latter is only accessory to the former, and hence it cannot exist without it. Moreover, other legal consequences to the surety would be, first, that the surety would lose the benefit of any legal priority that the creditor might have had over other creditors of the same debtor; secondly, that the surety would have no means of obtaining indemnity from the debtor unless he could prove a contract by the latter (either express or implied in fact) to indemnify him. But here equity employs a useful fiction in aid of the surety; for it treats the latter as having (not paid, but) purchased the debt. Hence, it treats the debt as still subsisting in equity until it is paid by the debtor or by his property. In other words, payment by the surety or by his property does not extinguish any of the rights of the creditor in equity, though it does at law; and yet, after payment by the surety or by his property, the creditor holds his rights, not for his own benefit, but for the benefit of the surety. This, therefore, is an instance in which equity creates one equitable right (namely, in the creditor), in order to make it the subject of another equitable right (namely, in favor of the surety).

There are other cases in which the object of subrogation is to obtain not exoneration, but contribution, namely, where there are several persons who ought in justice to contribute equally towards the discharge of a debt or other burden. Such is the case when there are several co-sureties for an insolvent debtor, or when several persons incur a debt jointly.

There is a class of cases in which the doctrine of subrogation seems to have been unwarrantably extended under the name of marshalling. For example, if the owner of houses A and B

(worth, respectively, $10,000 and $5,000) mortgage them both to C for $5,000, and then mortgage A to D for $10,000, and then become insolvent, it is said that D may throw the whole of C's mortgage on B, and thus obtain payment in full of his own mortgage out of A, though the consequence be that unsecured creditors of the insolvent will receive nothing; and the principle upon which this is held is generalized by saying that when one of two creditors has the security of two funds, and the other has the security of only one of those funds, the latter creditor may throw the debt of the former creditor wholly upon the fund which is not common to both (provided, of course, that fund be sufficient to pay it), in order that he may obtain payment of his own debt out of the fund which is common to both. This doctrine had its origin in efforts of courts of equity to prevent the harsh and unjust discriminations which the law formerly made between creditors of persons deceased, whose claims were in equity and justice equal; and it seems that the doctrine, as a general one, cannot be sustained upon any principle. For example, in the case just supposed, the doctrine of marshalling assumes that, in equity and justice, house B ought to exonerate house A from the first mortgage, whereas, in truth, they ought to bear the

burden of the first mortgage equally. As between secured and unsecured creditors, equity clearly ought to favor the latter class, if either.

Lastly, still another instance of an equitable obligation created by equity alone, is the equitable hypothecation or lien given to a vendor, upon land which he has sold and conveyed, to secure the payment of the purchase-money.

Reference has been already made to cases in which a contract results in an equitable as well as a legal obligation. Why is this ? Because the legal obligation is not sufficient for all the purposes of justice. In what contracts, then, do the purposes of justice require an equitable as well as a legal obligation ? Chiefly in those which consist in giving (*dando*) instead of doing (*faciendo*). What are the defects in the legal obligation annexed to such contracts ? Chiefly these: First, although an obligation to give a thing is said to confer on the obligee a right to the thing, a *jus ad rem*, yet this right can be enforced only against the obligor personally. A consequence of this is, that, if the obligor become insolvent after receiving the price of the thing, but before the thing

is actually given to the obligee, both the thing itself and its price will go to the creditors of the insolvent. Of course justice requires that, the obligor having obtained the price of the thing, the obligee should obtain the thing itself; and this an equitable obligation enables him to do. Secondly, a legal obligation can never be enforced against any person other than the obligor or his personal representative. If, therefore, the owner of a *res* who has incurred a legal obligation to give it to A, choose to give it to B, or if he die, and the *res*, being land, descends to his heir, it will be impossible for A to obtain any relief except damages, however inadequate such relief may be. But if an equitable obligation has also been incurred, it will be possible for A to obtain the *res* itself, notwithstanding the death of the obligor, and also notwithstanding the transfer of the *res* to B, unless the latter be a purchaser for value and without notice. Thirdly, a legal obligation creates a right (*i.e.*, a relative right) in the obligee alone, and this right must remain in the obligee until his death, unless it be previously assigned either by his own act or by act of law; and upon the death of the obligee, the right must vest in his personal representative. When, therefore, a contract is made with A to give a thing to B, it seems impossible to enforce the contract effectively by virtue of the legal obligation annexed to it; for it can be enforced by A alone, and he can recover no more than nominal damages. Equity will, however, annex to such a contract an obligation directly to B; and hence the latter can obtain in equity without difficulty, the benefit intended to be secured to him by the contract. So, if a legal obligation be incurred to convey land to the obligee, and the latter die before the land is conveyed, the sole right to enforce the obligation will go to the personal representative of the obligee; and yet, clearly the heir ought to have the land, though the personal representative ought to pay for it; for such would have been the effect of the performance of the obligation but for the accident of the death of the obligee. To meet this difficulty, therefore, equity will create an equitable right in the obligee, which, upon the death of the latter, will go to his heir.

Having thus treated with sufficient fulness of equitable rights, it remains to speak briefly of the violation of such rights. In respect to their violation, equitable obligations are

subject to nearly the same observations as legal obligations. Equitable obligations are, however, more subject to violation by tortious

acts than are legal obligations; for, as an equitable obligation always has some legal or equitable right for its subject, any tortious injury to, or destruction of, this latter right, or any wrongful transfer of it, will, it seems, be a tort to the equitable obligee. Thus, a trespass committed upon land or upon a chattel which is the subject of an equitable obligation, is, it seems, a tort to the equitable obligee, though, as it is also a tort to the legal owner, and as the equitable obligee can, as a rule, obtain redress only through the legal owner, the tort to the equitable obligee seldom attracts attention. So it seems that any wrongful extinguishment by the obligee of an obligation which is itself the subject of an equitable obligation, though it is a breach of the equitable obligation, is also a tort to the equitable obligee. So it seems that the alienation by its owner of any right which is the subject of an equitable obligation, in disregard of such obligation, is a tort to the equitable obligee.

This completes what it was proposed to say upon the subject of rights and their violation, and the way is thus prepared to treat of remedies.

ARTICLE II.[1]

II.

CLASSIFICATION OF WRONGS.

IT is because rights exist and because they are sometimes violated that remedies are necessary. The object of all remedies is the protection of rights. Rights are protected by means of actions or suits. The term "remedy" is applied either to the action or suit by means of which a right is protected, or to the protection which the action or suit affords. An action may protect a right in three ways, namely, by preventing the violation of it, by compelling a specific reparation of it when it has been violated, and by compelling a compensation in money for a violation of it. The term "remedy" is strictly applicable only to the second and third of these modes of protecting rights; for remedy literally means a cure, — not a prevention. As commonly used in law, however, it means prevention as well as cure; and it will be so used in this paper. In equity the term "relief" is commonly used instead of "remedy;" and, though relief is a much more technical term than remedy, it has the advantage of being equally applicable to all the different modes of protecting rights.

Though remedies, like rights, are either legal or equitable, yet the division of remedies into legal and equitable is not co-ordinate with the corresponding division of rights; for, though the reme-

[1] 1 HARV. L. REV. 111.

dies afforded for the protection of equitable rights are all equitable, the remedies afforded for the protection of legal rights may be either legal or equitable, or both.

Actions are either *in personam* or *in rem.* Actions *in personam* are founded upon torts, actual or threatened, or upon breaches of personal obligations, actual or threatened. They are called *in personam* because they give relief only against the defendant personally, *i, e*., the plaintiff has no claim to or against any *res*. Actions *in rem* are founded upon breaches of real obligations, or upon the ownership of corporeal things, movable or immovable. Actions founded upon breaches of real obligations are called *in rem*, because they give relief only against a *res.* Actions founded upon the ownership of corporeal things are called *in rem*, because the only relief given in such actions is the possession of the things themselves. Actions *in rem*, as well as actions *in personam*, are (except in admiralty) in form against a person. The person, however, against whom an action *in personam* is brought, is fixed and determined by law; namely, the person who incurred (and consequently the person who broke or threatened to break) the obligation, or the person who committed or threatened to commit the tort, while the person against whom an action *in rem* is brought is any person who happens to be in possession of the *res*, and who resists the plaintiff's claim. The relief given in actions *in personam* may be either the prevention or the specific reparation of the tort or of the breach of obligation, or a compensation in money for the tort or for the breach of obligation. The relief given in an action *in rem*, founded on the breach of a real obligation, is properly the sale of the *res*, and the discharge of the obligation out of the proceeds of the sale. The relief given in an action *in rem*, founded on the ownership of a corporeal *res*, is the recovery of the possession of the *res* itself by the plaintiff.

Actions *in rem* founded upon ownership are anomalous. As every violation of a right is either a tort or a breach of obligation, it would naturally be supposed that every action would be founded upon a tort or breach of obligation, actual or threatened; and if this were so, the only actions *in rem* would be those founded upon breaches of real obligations. But when a right consists in the ownership of a corporeal thing, a violation of that right may consist in depriving the owner of the possession (and consequently of the use and enjoyment) of the thing. If such a tort had the

effect of destroying the owner's right, as the physical destruction of the thing would, it would not differ from other torts in respect to its remedy; for the tort-feasor would then become the owner of the thing, and its former owner would recover its value in money as a compensation for the tort. And by our law, in case of movable things, the tort often has the effect practically of destroying the owner's right, sometimes at his own election, sometimes at the election of the tort-feasor. But, subject to that exception, the tort leaves the right of the owner untouched, the thing still belonging to him. He can, indeed, bring an action for the tort, and recover a compensation in money for the injury that he has suffered down to the time of bringing the action;[1] but the compensation will not include the value of the thing, as the thing has not, in legal contemplation, been lost. If, therefore, an action for the tort were the owner's only remedy, he must be permitted to bring successive actions *ad infinitum*, or as long as the thing continued to exist; for in that way alone could he obtain full compensation for the injury which he would eventually suffer.

But, as the law abhors a multiplicity of actions, it always enables the owner to obtain complete justice by a single action, or at most by two actions. Thus, it either enables him to recover the value of the thing in an action for the tort, by making the tort-feasor a purchaser of the thing at such a price as a jury shall assess, or it enables him to recover the possession of the thing itself in an action *in rem*. He is, however, further entitled to recover the value of the use and enjoyment of the thing during the time that the defendant has deprived him of its possession, together with compensation for any injury which the thing itself may have suffered while in the defendant's possession; and this he recovers, sometimes in the same action in which he recovers the thing itself or its value, and sometimes in a separate action.

[1] The reader should be reminded, however, that by our law an owner of immovable property who has been dispossessed (*i.e*., disseised) of it, can recover damages in an action of tort only for the original dispossession; he cannot recover damages for the subsequent detention of the property until he has recovered its possession. The reason is, that a loss of the possession or seisin of immovable property is technically a loss of the ownership, and the acquisition of possession or seisin is an acquisition of ownership, though it may be wrongful. Hence, a disseisor ceases to be a trespasser the moment his disseisin is completed. When, however, the original owner recovers back his lost seisin, his recovered seisin relates back to the time of the disseisin, the law treating him as having been in possession all the time. Hence, he can then recover damages for the wrongful detention of the property.

It seems, therefore, that an action *in rem*, founded upon ownership, may be regarded as a substitute for an infinite or an indefinite number of actions founded upon the tort of depriving the plaintiff of the possession of the *res*, which is the subject of the action; and that such an action may, therefore, be regarded as in a large sense founded upon the tort just referred to, and the recovery of the thing itself as a specific reparation of that tort.

Thus far, in speaking of actions and remedies, it has been assumed that the law of any given country is a unit; *i. e*., that there is but one system of law in force by which rights are created and governed, and also but one system of administering justice. Whenever, therefore, any given country has several systems, whether of substantive or remedial law, what has been thus far said is intended to apply to them all in the aggregate, — not to each separately. Thus, in English-speaking countries there are no less than three systems of substantive law in force, each of which has a remedial system of its own; namely, the common law, the canon law, and admiralty law. There is also a fourth system of remedial law, namely, equity. What has been said, therefore, of actions and remedies applies to all of these systems in the aggregate.

It follows, therefore, that in English-speaking countries civil jurisdiction is parcelled out among the four systems just referred to; and it is the chief object of this paper to ascertain what portion of this jurisdiction belongs to equity, and for what reasons.

But here an important question arises as to the nature of equity jurisdiction. If we have three systems of substantive law, each exercising jurisdiction over those rights which are

of its own creation, and if equity is a system of remedial law only, how does it happen that equity has any jurisdiction ? Do not the other three systems divide among themselves the entire field of jurisdiction, and how then is there any room for equity ? The answer is that the term "jurisdiction," as applied to equity, has a very different meaning from what it has as applied to courts of law; and the failure to recognize that fact has caused much confusion of ideas. As applied to courts of law, the term is used in its primary and proper sense; as applied to equity, it is used in a secondary and improper sense. For example, when two courts of law, created by the same sovereign, are independent of each other, the jurisdiction of each is either exclusive of the other, or concurrent with it, or it

is partly exclusive and partly concurrent. If one invades a province which belongs exclusively to the other, it acts without right (if not without power), and ought to be restrained by the common sovereign. If a particular province belongs to them both (*i.e*., if they have concurrent jurisdiction over it), each is entitled to enter it, while neither is entitled to interfere with the other; and hence questions of priority are liable to arise between them, *i. e*., questions as to which of them first obtained jurisdiction over given controversies. But the terms "concurrent" and "exclusive" have no proper application to equity, or rather they do not correctly describe the relations between equity and the other three systems. On the one hand, equity never excludes either of the other systems. It is true that equity alone exercises jurisdiction over equitable rights; but that is not because equity claims any monopoly of such jurisdiction, — it is because the other systems decline to exercise it, they not recognizing equitable rights. On the other hand, equity is never excluded by either of the other systems; and hence equity exercises jurisdiction over legal rights (as well as over equitable rights) without any external restraint. Since, however, one or more of the other systems has jurisdiction over every legal right, the jurisdiction of equity over legal rights is in a certain sense concurrent, but never in any proper sense; and not unfrequently it is in fact exclusive in the sense of being the only jurisdiction that is actually exercised. It is not properly concurrent, because there is no competition between the two jurisdictions. Courts of law act just as they would act if equity had no existence, just as in fact they did act before equity had any existence. Nor does equity ever complain of their so acting, or seek to put any restraint upon their action, or question the validity and legality of their acts; and yet equity acts with the same freedom from restraint, even when dealing with legal rights, that courts of law do when dealing with rights of their own creation.

What has thus far been said, however, is calculated rather to stimulate than to satisfy inquiry. How is it that equity has the power to invade at will the provinces of other courts ? What object has equity in assuming jurisdiction over rights which it is the special province of other courts to protect ? What is the extent of that jurisdiction ? The answer to the first of these questions will be found in the fact that the jurisdiction of equity is a prerogative jurisdiction; *i. e*., it is exercised in legal contemplation by

the sovereign, who is the fountain from which all justice flows, and from whom, therefore, all courts derive their jurisdiction. The answer to the second question is that the object of equity, in assuming jurisdiction over legal rights, is to promote justice by supplying defects in the remedies which the courts of law afford. The answer to the third

question is that the jurisdiction *is* coextensive with its object; that is, equity assumes jurisdiction over legal rights so far, and so far only, as justice can be thereby promoted. But then the question arises, How does it happen that the protection afforded by courts of law to legal rights is insufficient and inadequate, and how is it that equity is able to supply their short-comings ? The answer to these questions, so far as regards the largest and most important part of the jurisdiction exercised by equity over legal rights (namely, that exercised over common law rights), will be found chiefly in the different methods of protecting rights employed by courts of common law and courts of equity respectively, *i. e*., in the different methods of compulsion or coercion employed by them.

A court of common law never lays a command upon a litigant, nor seeks to secure obedience from him. It issues its commands to the sheriff (its executive officer); and it is through the physical power of the latter, coupled with the legal operation of his acts and the acts of the court, that rights are protected by the common law. Thus, when a common-law court renders a judgment in an action that the plaintiff recover of the defendant a certain sum of money as a compensation for a tort or for a breach of obligation, it follows up the judgment by issuing a writ to the sheriff, under which the latter seizes the defendant's property, and either delivers it to the plaintiff at an appraised value in satisfaction of the judgment, or sells it, and pays the judgment out of the proceeds of the sale. Here, it will be seen, satisfaction of the judgment is obtained partly through the physical acts of the sheriff, and partly through the operation of law. By the former, the property is seized and delivered to the plaintiff, or seized and sold, and the proceeds paid to the plaintiff. By the latter, the defendant's title to the property seized is transferred to the plaintiff, or his title to the property is transferred to the purchaser, and his title to its proceeds to the plaintiff. So if a judgment be rendered that the plaintiff recover certain property in the defendant's possession, on the ground that the property belongs to the plaintiff,

and that the defendant wrongfully detains it from him, the judgment is followed up by a writ issued to the sheriff under which the latter dispossesses the defendant, and puts the plaintiff in possession. This is an instance, therefore, in which a judgment is enforced through the physical power of the sheriff alone. If, however, the property be movable, and the defendant remove or conceal it so that the sheriff cannot find it, the court is powerless. So, under a judgment for the recovery of money, the court is powerless, if the defendant (not being subject to arrest) have no property which is capable of seizure, or none which the sheriff can find; and it matters not how much property incapable of seizure he may have. Even when the defendant is subject to arrest, his arrest and imprisonment are not regarded by the law as a means of compelling him to pay the judgment; but his body is taken (as his property is) in satisfaction of the judgment.

Nor is our common law peculiar in its method of protecting rights; for the same method substantially is and always has been employed in most other systems of law with which we are acquainted. *Nemo potest præcise cogi ad factum* was a maxim of the Roman law, and it has been adhered to in those countries whose systems of law are founded upon the Roman law.

Equity, however, has always employed, almost exclusively, the very method of compulsion and coercion which the common law, like most other legal systems, has wholly rejected; for when a person is complained of to a court of equity, the court first ascertains and decides what, if anything, the person complained of ought to do or refrain from doing; then, by its order or decree, it commands him to do or refrain from doing what it has decided he ought to do or refrain from doing; and finally, if he refuses or neglects to obey the order or decree, it punishes him by imprisonment for his disobedience. Even when common law and equity give the same relief, each adopts its own method of giving it. Thus, if a court of equity decides that the defendant in a suit ought to pay money or deliver property to the plaintiff, it does not render a judgment that the plaintiff recover the money or the property, and then issue a writ to its executive officer commanding him to enforce the judgment; but it commands the defendant personally to pay the money or to deliver possession of the property, and punishes him by imprisonment if he refuse or neglect to do it.

This method was borrowed by the early English chancellors from the canon law, and their reasons for borrowing it were much the same as those which caused its original adoption by the canonists. The canon-law courts had power only over the souls of litigants; they could not touch their bodies nor their property. In short, their power was spiritual, not physical, and hence the only way in which they could enforce their sentences was by putting them into the shape of commands to the persons against whom they were pronounced, and inflicting upon the latter the punishments of the church (ending with excommunication) in case of disobedience. If these punishments proved insufficient to secure obedience, the civil power (in England) came to the aid of the spiritual power, a writ issued out of chancery (*de excommutticato capiendo*), and the defendant was arrested and imprisoned.

When the English chancellor began to assume jurisdiction in equity he found himself in a situation very similar to that of the spiritual courts. As their power was entirely spiritual, so his was entirely physical. Through his physical power he could imprison men's bodies and control the possession of their property; but neither his orders and decrees, nor any acts *as such* done in pursuance of them, had any legal effect or operation; and hence he could not affect the title to property, except through the acts of its owners. Moreover, his physical power over property had no perceptible influence upon his method of giving relief. Even when he made a decree for changing the possession of property, it took the shape, as we have seen, of a command to the defendant in possession to deliver possession to the plaintiff; and it was only as a last resort that the chancellor issued a writ to his executive officer, commanding him to dispossess the defendant and put the plaintiff in possession.

Such, then, being the two methods of giving relief, it is easy to understand why that of equity has supplemented that of the common law; for the former is strong at the very points where the latter is weak.

It has been said that the extent of the jurisdiction exercised by equity over common-law rights is measured by the requirements of justice. But what are the requirements of justice

? In order to answer that question we must first know definitely in what particulars the common law fails to give to common-law rights all the protection which it is possible to give, and which, therefore, ought

to be given; and we shall have taken an important step in that direction if we classify all the remedies furnished by the common law, and compare them with the classification before made of judicial remedies generally.

Common-law actions, like actions generally, are either *in personam* or *in rem*. Common-law actions *in personam* are founded upon the actual commission of a common-law tort or the actual breach of a common-law personal obligation. Common-law actions *in rem* are founded upon the ownership of corporeal things, movable or immovable. The relief given in a common-law action *in personam* is always the same; namely, a compensation in money for the tort or the breach of obligation, the amount of which is ascertained or assessed by a jury under the name of damages.[1] The relief given in common-law actions *in rem* is also always the same, namely, the recovery of the *res;* but, then, it is to be borne in mind that the only action strictly *in rem* that lies for a movable *res* is the very peculiar action of replevin; and, when that action cannot be brought, the only available actions are trover, in which the value of the *res* in money can alone be recovered, and detinue, in which either the *res* itself or its value in money is recovered, at the option of the defendant. Indeed, as has been already seen, the common law has not generally the means of enabling a plaintiff to recover the possession of a movable *res* against the will of the defendant. In replevin that object is accomplished by dispossessing the defendant of the *res*, and placing the same in the plaintiff's possession, at the very commencement of the action; but that would be obviously improper except when the defendant has acquired the possession of the *res* by dispossessing the plaintiff of it. The obstacle in the way of recovering possession of the *res* itself in an action of detinue does not arise from the nature of the action, but from the common-law mode of

[1] Our law regards a debt as a specific thing belonging to the creditor and in possession of the debtor; and hence the remedy specially provided for the breach of an obligation to pay a debt, namely, the action of debt, is technically an action *in rem*. Sometimes this is the only remedy; but in most cases the creditor has an election between an action of debt, founded upon the debt itself, and an action of assumpsit or covenant, founded upon the contract by which the debt was created. In the former action, the judgment is that the plaintiff recover the debt itself as a specific thing; in the two latter, the judgment is that the plaintiff recover damages for the detention of the debt. Still, this is only a technical distinction, for the same amount is recovered either way, and the mode of enforcing the judgment is the same.

enforcing a judgment. Detinue is in its nature an action purely *in rem;* and it only ceased to be so in practice because a judgment *in rem* was found to be wholly ineffective; and consequently a judgment was rendered in the alternative, namely, for the recovery of the *res* itself or its value in money.

If, now, we compare the foregoing common-law remedies with the scheme of remedies generally, as previously given, we find that the common law does not attempt (as indeed it could not) to prevent either the commission of a tort or the breach of an obligation; nor does it attempt to give a specific reparation for either, except so far as the recovery of the *res* in an action *in rem* may be so considered; nor does it give any action whatever for the breach of a real obligation; nor does it enable the owner of movable things to recover the possession of them when wrongfully detained from him, except in those cases in which replevin will lie. Of these four defects in common-law remedies, the first two are the most conspicuous; and it is chiefly for the purpose of supplying those two defects that equity has assumed jurisdiction over torts (*i.e.*, legal torts) and over contracts, — the two largest and most important branches of the jurisdiction exercised by equity over legal rights. The jurisdiction over torts has been assumed chiefly for the purpose of supplying a remedy by way of prevention; that over contracts for the purpose of supplying a remedy by way of specific reparation. The former is commonly treated of under the head of Injunction; the latter, under the head of Specific Performance.

The mode of giving relief in equity is not only peculiarly adapted to the purpose of preventing the commission of wrongful acts, but it is the only mode in which such a remedy is possible. No mode of giving relief is, however, alone sufficient to make such a remedy effective; for relief cannot be given until the end of a suit, *i.e.*, until the question of the plaintiff's right to relief has been tried and decided in the plaintiff's favor; and, long before that time can arrive, the wrongful act may be committed, and so prevention made impossible. If, therefore, a court would prevent the doing of an act, it is indispensable that it interpose its authority, not only before any trial of the question of the defendant's right to do the act, but at the very commencement of the suit, and frequently without any previous notice to the defendant; and accordingly equity does so interpose its authority by granting an

injunction against the doing of the act until the question is tried and decided. Such an injunction is called a temporary injunction, and is not technically relief. If the question is finally decided in the plaintiff's favor, the injunction is then made perpetual, and becomes relief.

Upon the whole, therefore, the equitable remedy by way of prevention is as effective as such a remedy can possibly be made; and it is also as effective and as easily administered as any remedy in equity is. Moreover, the remedy by way of prevention, if it does not come too late, is always the easiest, as well as the best, remedy that equity can give in case of a tort; and, therefore, it, is never an answer to a bill for an injunction to prevent the commission of a tort, that the tort, if committed, can be specifically repaired by the defendant; and the only question of jurisdiction that such a bill can ever raise is this: Will more perfect justice be done by preventing the tort than by leaving the plaintiff to his remedy at law ? This, however, is a very complex question, depending partly upon the nature of the tort, and partly upon other considerations. In respect to the nature of the tort, also, there are several distinctions to be taken. For example, some torts cause no specific injury; others cause injury which, though it is specific, can be specifically repaired by the person injured; others cause injury which, though specific and incapable of specific

reparation, can be fully paid for in money. On the other hand, a tort may cause an injury which is specific, and which cannot be specifically repaired (or can be specifically repaired only by the tort-feasor), and which cannot be fully paid for in money. So, too, the injury caused by a tort, though not specific, or though capable of being specifically repaired by the person injured, or though capable of being fully paid for in money, yet is of such a nature that it is impossible to ascertain or estimate its extent with any accuracy. Whenever, therefore, a tort will cause an injury which is specific, and which the person injured cannot specifically repair, and which cannot be paid for in money, *or* an injury the extent of which it is impossible to ascertain or estimate with any accuracy, there is a *prima facie* case for the interference of equity to prevent the commission of the tort; otherwise the remedy at law is adequate so far as regards the nature of the tort. If a plaintiff make out a *prima facie* case in one of the two ways just indicated, he will be entitled to the interference of equity unless the defendant can show

that the damage which will be caused to him by the prevention of the act will so much exceed the damage which will be caused to the plaintiff by the doing of the act that the interference of equity will not be promotive of justice. If the defendant can show *that*, the plaintiff should, it seems, be left to his remedy at law. One objection to the interference of equity under such circumstances is that it is not likely to have any other effect than that of compelling the defendant to purchase the plaintiff's acquiescence at an exorbitant price.

It must be confessed, however, that the foregoing distinctions, though, it is conceived, they will throw much light upon the jurisdiction actually exercised, will not fully account for it, either affirmatively or negatively, even when it depends wholly upon the nature of the tort. Questions of jurisdiction do not receive the same careful and constant attention which is bestowed upon questions of substantive right; and therefore, in dealing with such questions, the elements of haste, accident, caprice, the habits of lawyers, the leanings of individual judges, and the ever-changing temper of public opinion, have been factors of no inconsiderable importance. The jurisdiction of equity over torts in particular has grown up by slow, almost imperceptible degrees; and the jurisdiction exercised over one class of torts has often had little influence upon the exercise of jurisdiction over other and analogous classes of torts.

It becomes necessary, therefore, to inquire briefly into the jurisdiction actually exercised by equity over different classes of torts. There are two large and important classes of torts over which equity practically assumes no jurisdiction whatever, namely, torts to the person and to movable property. Its jurisdiction, therefore, is substantially limited to torts, to immovable property, and to incorporeal property. Torts to immovable property are waste, trespass, and nuisance. Torts to incorporeal property may, it seems, all be classed as nuisances, though it is usual to treat torts to certain lawful monopolies, not relating to land (*e.g.*, patent-rights and copy-rights), as constituting a class by themselves under the name of infringements of the rights violated.

Waste is a tort committed by the owner of a particular estate in land, the person injured being the remainder-man or reversioner. It is, therefore, a tort to the land, committed by a person in possession of the land, and whose possession is rightful, against a

person who has neither the possession nor the right of possession. Hence, it is not a trespass, the essence of which is always a wrongful entry, and which is always an injury to the possession. It always consists in injuring or destroying something upon the land which belongs to the owner of the fee.

A nuisance to land is any injury to it which is committed without making an entry upon the land, and which, for that reason, is not a trespass. Any injury to incorporeal property is a nuisance, as a trespass can be committed only against corporeal things. Therefore, an act which would be a trespass to a corporeal thing will be only a nuisance to an incorporeal thing. For example, an obstruction by A of a right of way which B has over the land of C, is a trespass to C, but only a nuisance to B.

Over all the foregoing torts, namely, waste, trespass to land, and nuisance either to land or to incorporeal property (including infringements of such lawful monopolies as patents and copyrights), equity exercises a jurisdiction of greater or less extent; and it may be stated as a general rule, that, whenever the injury caused by a tort belonging to either of these classes will be of a serious and permanent character, equity will interfere to prevent it; but that for injuries which are only technical, or slight, or temporary, or occasional, the person injured will be left to his remedy at law. Thus, the injury caused by waste is necessarily permanent, being an injury to the inheritance; and in the great majority of cases the injury is of a substantial character. Accordingly, equity interferes to prevent waste almost as of course. If, however, the acts complained of, though technically waste, do not in fact injure the land, — still more, if they actually improve it, — the remainderman or reversioner will be left to his remedy at law.

Acts which will constitute waste when committed by the owner of a particular estate, will, of course, be (not waste, but) trespass when committed by a stranger; but such acts clearly ought to be prevented equally in either case. Accordingly, the rule now is, that equity will interfere to prevent destructive trespass to land, or trespass in the nature of waste; but it will not interfere to prevent trespasses which injure only the present possession; and, indeed, the first instance in which equity interfered to prevent destructive trespass was in the time of Lord Thurlow.[1]

[1] Flamang's case, cited in Mitchell *v*. Dors, 6 Ves. 147, in Hanson *v*. Gardiner, 7 Ves. 305, 308, in Smith *v*. Collyer, 8 Ves. 89, and in Thomas *v*. Oakley, 18 Ves. 184, 186.

In cases of waste there is seldom any controversy about the title to the land. Acts in the nature of waste, however, frequently raise questions of title; for such acts may be committed by a person who claims to own the land, but whose title is denied by another person who also claims to own the land; and in such a case either of the adverse claimants may be in possession. If the acts be committed by the one out of possession, he can always successfully defend an action of trespass by showing that the land is his. If the

acts be committed by the one who is in possession, the one out of possession has no remedy at law, except an action of ejectment to recover the land itself. If he succeed in ejectment, and recover possession of the land, the other's acts will then (but not till then) become trespasses by relation, and damages may be recovered for them. How, then, will equity deal with such a case, if applied to by either of the claimants to prevent acts of the other in the nature of waste ? The chief difficulty arises from the fact that the trial of the title does not belong to equity. Each claimant has a right to have the title tried at law and by a jury. Equity will not, therefore, interfere with the trial of the title. What will it do ? If the plaintiff in equity is in possession there is no serious difficulty. Equity will entertain a bill, as in other cases, and will grant a temporary injunction; but the injunction will not be made perpetual until the plaintiff has recovered in an action of trespass; and if the plaintiff fail to bring such an action promptly, or to prosecute it with diligence, the injunction will be dissolved on the defendant's application. So, if the action be defended successfully, the bill in equity will be dismissed. If a temporary injunction be obtained before any trespass has been committed, of course the plaintiff in equity cannot maintain trespass upon the actual facts; but equity will get over that difficulty by directing the plaintiff to bring his action, and to declare in the usual form, and by directing the defendant not to traverse the declaration, but to plead only his affirmative defence of title.

When the plaintiff in equity is out of possession the difficulty is much greater. The acts of the defendant are not then trespasses, or torts of any kind, until made so by fictitious relation. How, then, can equity grant an injunction against acts which confessedly, upon the facts before the court, are not wrongful ? Our law may be open to criticism for making no provision (except such as is made by the statutes against forcible entry and detainer) for

trying questions of possession in a summary way; but equity is not a lawgiver. Moreover, if equity is to interfere in such a case, it must, it seems, either strictly limit its interference to the granting of an injunction during the pendency of an ejectment, or it must take the entire litigation into its own hands, assuming control of the action of ejectment, if one has been already brought, or directing one to be brought and prosecuted under its control; and either of these courses is open to serious objection. In point of authority courts of equity have almost invariably refused to interfere in such cases, though several judges have expressed surprise and regret that the jurisdiction had not been exercised; and intimations have been thrown out that it would be exercised whenever a sufficiently strong case should be presented. In one case, also, a temporary injunction was granted; but the facts sworn to were very strong, and the defendant, though served with notice, did not appear to oppose the motion.[1]

As nuisances consist, for the most part, in so using one's own land as to injure the land or some incorporeal right of one's neighbor, it follows that the injuries caused by nuisances are generally more or less permanent; and, hence, they not unfrequently call for the interference of equity to prevent them. Yet such interference has been found to be attended with great difficulties. An act which is wrongful in itself may be adjudged wrongful before it is committed as well as afterwards; nor is there any question as to the extent of the wrongfulness, for the entire act is wrongful. But an act which is in itself

rightful, and which is wrongful only because of some effect which it produces, or some consequence which follows from it, can seldom be proved to be wrongful by *a priori* reasoning, or otherwise than by actual experience; and even when it does sufficiently appear that a given act done in a given way will be wrongful, it does not follow that some part of it may not be rightfully done, or even that the entire act may not be done in such a way as to be rightful. For these and similar reasons a court of equity frequently finds it impossible to interfere in case of a nuisance until the act which constitutes the nuisance is either fully completed, or at least far advanced towards completion; and, in either of the latter events, it will often be found that the damage to the defendant which the interference of the court

[1] Neale *v*. Gripps, 4 K. & John. 472.

will cause will be out of all proportion to the damage to the plaintiff which it will prevent.

A distinction must be taken, however, between things erected or constructed on one's own land which are in themselves a nuisance to one's neighbor, and those which are so only because of the uses to which they are put; for, in cases belonging to the latter class, there may be no occasion for equity to interfere until injury is actually caused, nor is it ever too late to prevent a nuisance for the future without causing anything to be undone.

So, too, when a nuisance is caused by the carrying on of an offensive trade, equity finds no especial difficulty in interfering, unless expensive works have been constructed for the express purpose of carrying on that trade, and which the abandonment or removal of the trade will render wholly or nearly worthless.

The most difficult of all nuisances for a court of equity to deal with are those caused by the erection of massive and costly buildings in large cities. In such cases, if there is danger of a wrong being done, and yet the court does not see its way to granting an injunction, a convenient course is for the court to require the building to be constructed under its own supervision, by directing the defendant to lay his plans before the court, and obtain its approval of them before proceeding.[1]

The interference of equity to prevent the infringement of patents and copyrights is attended with none of the peculiar difficulties which so often occur in cases of ordinary nuisance; and, though a single infringement does not of itself produce any permanent injury, yet the example of successful infringement is contagious and pernicious; and, as it is extremely difficult to prove the extent of the infringement, and so the remedy at law is very inadequate, equity interferes by way of prevention as a matter of course.

Such are the cases in which equity will interfere for the prevention of a tort on account of the nature of the tort, or of the injury caused by it; but there are other cases in which it interferes for a wholly different reason, namely, to prevent the necessity of bringing a great or indefinite number of actions. Thus, if A commit a tort against B, which is capable of indefinite repetition, and B bring an action and recover damages, and A persist notwithstanding in committing the tort, a court of equity will entertain a

[1] Stokes *v*. City Offices Co., 2 H. & M. 650.

bill for an injunction; for otherwise B might have to bring an indefinite number of actions. If, indeed, there be a question of right involved between A and B, equity will not necessarily interfere after a single trial at law, but it will interfere as soon as it thinks the right has been sufficiently tried. So if many persons are severally committing, or threatening to commit, similar torts against one, and each tort involves the same questions, both of fact and law, as every other, the one may file a bill against the many (or against a few of them on behalf of themselves and all the others), and obtain an injunction; for otherwise he would have to bring a separate action at law against each. So, too, if one person is committing, or threatening to commit, torts against each of many others, each tort involving the same questions of fact and law as every other, the many (or a few of them representing themselves and all the others) may file a bill against the one, and obtain an injunction; for other wise each of them would have to bring an action against him. In such cases the bill is commonly called a bill of peace.

When a court of equity is applied to for a remedy by way of prevention, the defendant may have already begun the commission of the acts of which a prevention is sought, or the plaintiff's case may be merely that the defendant will commit them unless prevented by an injunction. In the latter event the plaintiff may encounter a difficulty in the way of proof; for a court of equity cannot interfere to prevent the commission of an act, however wrongful, merely because the defendant is liable to commit it, nor even because other people think he will commit it; it must be satisfied that he intends to commit it. And yet an intention to commit a wrongful act is apt to be one of the most difficult things to prove, as a person who has such an intention is not likely to proclaim it beforehand by words or deeds; and yet these are the only means by which the intention can be proved.

If the remedy by way of prevention is not made effective until the commission of the acts sought to be prevented has been begun, the plaintiff, of course, needs a double remedy; namely, prevention as to the future, and specific reparation or a compensation in money for the past. If it is a case in which equity can and will compel specific reparation, of course the plaintiff will obtain complete relief in equity, both as to the past and as to the future. But how will it be if (as commonly happens) the plaintiff can have

only a compensation in money for the past? On the one hand, equity will not entertain a bill for the mere purpose of giving a compensation in money for a past tort; and this for two reasons, — namely, first, the remedy at law is perfectly effective; secondly, equity cannot assess damages. On the other hand, if equity does not give relief for the past tort in the case supposed, the burden of two suits will be imposed upon the parties. To avoid this evil, therefore, equity will give relief for the past tort if the plaintiff will accept such relief as equity can give. It is, indeed, possible for equity to give relief for a past tort by way of damages; but it can only do so by sending the case to a court of law for an assessment of damages, and that is quite as objectionable as a separate action. If, however, the tort be one by which the defendant obtains a direct and immediate profit, equity can and will compel him to account with the plaintiff for such profit; and this relief is commonly preferred to an action for damages. Accordingly, in cases of waste,

destructive trespass, and infringement of patents and copyrights, it is the constant practice for the plaintiff to pray for an account as well as an injunction. In cases of nuisance, however, an account is seldom asked for, as there are seldom any profits sufficiently direct and immediate to be accounted for.

The next question is, In what cases will equity compel the specific reparation of torts already committed ? This question can arise, of course, only in reference to such torts as are in their nature capable of being specifically repaired; and it does not often arise, except in reference to torts committed by the defendant on his own land (*i.e.*, nuisances); for in other cases the plaintiff may generally as well recover damages of the defendant, and then repair the tort himself.

It must be confessed that the ordinary mode of giving relief in equity is not as well adapted to specific reparation as it is to prevention. It is scarcely possible, in the nature of things, for a court successfully to compel the performance of specific affirmative acts, unless they be of a very precise and definite character, such, for example, as paying money, producing documents, delivering possession of property, and executing conveyances of property; and clearly a court ought to be very cautious about attempting what it cannot successfully carry out. It is singular, therefore, that courts of equity have confined themselves so exclusively to their favorite mode of giving relief. In cases where

the title to property is to be affected, no other mode is open to them; but, in cases which involve only the exercise of physical power, courts of equity have all the resources which it is possible for any court to have. When, therefore, justice requires that a tort should be specifically repaired, it would seem to be much more feasible for a court of equity itself to undertake the repair of it, at the expense of the tort-feasor, than to attempt to compel the latter to repair it. For example, specific reparation in the case of a nuisance is an abatement of the nuisance; and there seems to be no good reason why a court of equity should not abate a nuisance, if justice require its abatement. The ancient common law regarded abatement as the proper remedy for a nuisance; and though damages alone can be recovered at law at the present day, that may be only because the actions anciently provided have been superseded by the action on the case.

Courts of equity have shown little disposition, however, to try new modes of giving relief; and hence they seldom attempt to give a remedy for a tort by way of specific reparation. There is believed to be but one instance (and that an ancient one) in cases of waste,[1] no instance in cases of trespass, and but few instances in cases of nuisance,[2] in which an English court of equity has attempted to give such a remedy.

Moreover, notwithstanding what has been said in favor of the abatement of nuisances, it is undoubtedly true that such a jurisdiction should be exercised in modern times with great caution. In many cases of nuisance there is no reason for imputing any intentional wrong to the defendant; and it must not be forgotten that the rights of the latter are as sacred as those of the plaintiff; and, if courts of equity find insuperable difficulties in the way of arresting an expensive work when near completion, much more will they find

insuperable difficulties in the way of pulling it down when completed. The mere cost of abating such a nuisance may

[1] Vane *v*. Lord Barnard, 2 Vern. 738; S. C. *nom*. Lord Barnard's case, Ch. Prec., 454 (the case of Raby Castle). According to the report in Vernon the decree directed the master to see the castle repaired at the defendant's expense. Whether the decree was ever performed or not does not appear. It is said not to have been performed during the defendant's life. See Rolt *v*. Lord Somerville, *2* Eq. Cas. Abr. 759.

[2] The first instance was in the case of Robinson *v*. Lord Byron, 1 Bro. C.C. (Belt's ed.) 588, *2* Cox, 4, Dickens, 703. Then followed Lane *v*. Newdigate, 10 Ves. 192, and Blakemore *v*. Glamorganshire Canal Co. I M. & K. 154. In very recent times instances of such relief have been much more common.

easily exceed in amount the damage which will be caused to the person injured by its being suffered to remain. Upon the whole, therefore, it cannot be expected that a court of equity will ever make a decree that a costly building, which has been completed, be pulled down; and, if such a decree shall ever be made, there is little likelihood that it will be executed.

There is, however, an obstacle in the way of obtaining a remedy at law for a permanent nuisance, which has not yet been adverted to. Such a nuisance is a continuing tort, *i. e*., it is a new tort every moment; and the only damages that can be recovered for such a tort are such as have been already suffered; and hence the person injured, if he would obtain full indemnity, must sue periodically so long as the tort continues. Moreover, if he lets too long a time elapse without suing, the tort-feasor may acquire a prescriptive right to continue what was at first a tort. If, therefore, a permanent nuisance has been erected, and it cannot be abated, justice would seem to require that the person injured by it should at least recover at once, and by a single action, a full compensation in money for the injury, and this measure of justice equity may, it seems, grant; for, though equity cannot itself assess damages, yet it may have the full amount of the damages which will be caused by the nuisance assessed by means of a feigned issue, and it may then make a decree that the defendant pay the damages so assessed; and if the defendant, having paid these damages, shall be afterwards sued at law, he may obtain an injunction against the prosecution of the action.

It is well known that every tort as such dies with the person committing it; and therefore no action at law founded strictly upon a tort ever lies against an executor or administrator as such, or against an heir as such. If, however, the deceased tort-feasor has been enriched by his tort, and his ill-gotten gains have gone to his representatives, justice clearly requires that the latter should restore them to the person injured; and accordingly they may be recovered by an action at law, if there be an action, not founded upon the tort, which is adapted to the circumstances of the case. Thus, if a tort-feasor have converted the fruits of his tort into money, an action for money had and received will lie against his executor or administrator. So if the tort consisted in wrongfully taking or

detaining property, and the property so wrongfully taken or detained has gone to the executor or administrator, or to the

heir (as the case may be) of the tort-feasor, an action will, of course, lie to recover it back. Frequently, however, there will be no action at law which will be adapted to the circumstances of the case; and in all such cases it seems that equity ought to interfere by compelling a restoration to the person injured of any fruits of the tort which can be found in the possession of the representatives of the tort-feasor. This, however, is not entirely clear upon authority.[1]

It has been assumed hitherto that every tort consists in misfeasance. In fact, however, some torts consist in nonfeasance merely; for whenever the law imposes a duty upon a person, which does not amount technically to an obligation, any failure to perform that duty by which another person is injured (as it is not a breach of obligation) is a tort. It is generally true that a misfeasance is a tort, and a wrongful nonfeasance a breach of obligation; but the converse is also sometimes true; for, as a nonfeasance may be a tort, so a misfeasance may be a breach of obligation. There is, however, a broad distinction, in respect to equity jurisdiction, between misfeasance and nonfeasance; and this fact may suggest the propriety of dividing the jurisdiction over torts and contracts into cases of misfeasance and cases of nonfeasance. It certainly is not convenient to consider those torts which consist in nonfeasance, until those nonfeasances are considered which consist of breaches of contract; but neither is it convenient to consider those breaches of contract which consist in misfeasance until those breaches of contract which consist in nonfeasance are considered. Therefore, both classes of cases will be postponed until the jurisdiction over affirmative contracts is disposed of, *i. e*., those contracts the breaches of which consist in nonfeasances.

1 See Bishop of Winchester *v*. Knight, 1 P. Wms. 406; Thomas *v*. Oakley, 18 Ves. 184, 186, *per* Lord Eldon; Pulteney *v*. Warren, 6 Ves. 72; Phillips *v*. Homfray, 24 Ch. D. 439.

crops have been severed from the soil, but still remain in the field where they grew; and it is not practicable for any court to compel the doing of anything at any precise time. Secondly, for the same reason, specific reparation is out of the question. Thirdly, the setting out of tithe consists of so many particulars, and involves so much exercise of judgment, care, and honesty, that it would be very injudicious for any court to attempt to enforce it specifically.

The conclusion therefore is that a compensation in money seems to be the only remedy practicable for a refusal or neglect to set out tithe, without a radical change in the nature of the obligation itself.

ARTICLE IX.[1]

VIII.

CLASSIFICATION OF RIGHTS AND WRONGS.

MORE than twelve years ago, the writer published in this REVIEW,[2] by way of introduction to a series of articles on equity jurisdiction, a classification of those rights which it is the duty of courts of justice to protect and enforce, and also of the wrongs by which such rights may be infringed. The views then stated, having only recently been adopted by the writer, were comparatively crude and undeveloped. Since that date, however, he has given considerable attention to the classification of rights and wrongs, and has made his views upon that subject the basis of an elementary course of instruction on equity jurisdiction; and the result has been that his views of twelve years ago have undergone some modification and much development. It has occurred to him, therefore, that a re-statement of the views now held by him might not be out of place, especially *as* some of his former pupils, now engaged in teaching, have done him the honor to make some use of his former observations in their own teaching.

As those rights which it is the duty of courts of justice to protect and enforce include equitable as well as legal rights, and as each of these classes of rights requires separate treatment, it will be convenient to begin with legal rights.

Legal rights are either absolute or relative. An absolute right is one which does not imply any correlative obligation or duty. A

[1] 13 HARV. L. REV. 537.

[2] See *supra*, pp. 1-39.

relative right is one which does imply a correlative obligation or duty.[1]

Absolute rights are either personal rights or rights of property. A personal right is one which belongs to every natural person as such. A right of property is one which consists of ownership or dominion *{dominium}*.

Every personal right is born with the person to whom it belongs, and dies with him. Personal rights, therefore, can neither be acquired nor parted with, and hence they are never the subjects of commerce, nor have they any pecuniary value. For the same reasons, courts of justice never have occasion to take cognizance of them except when complaints are made of their infringement; and even then the only question of law that can be raised respecting them is whether or not they have been infringed. It follows, therefore, that all the knowledge that we have of personal rights relates to the one question, what acts will constitute an infringement of them. We can neither number them nor define them, and any attempt to do either will be profitless. There is, however, one personal right which differs so widely from most others that it deserves to be mentioned, namely, the equal right of all persons to use public highways, navigable waters, and the high seas.

In all the foregoing particulars, rights of property are the very converse of personal rights. All such rights are acquired, and they may all be alienated. They are all, therefore, the subjects of commerce, and they all have, or are supposed to have, a pecuniary value. For

the same reasons, courts of justice take cognizance of them for a great variety of purposes, and they are all capable of being enumerated and defined.

Rights of property are said to be either corporeal or incorporeal. In truth, however, all rights are incorporeal; and what is meant is that the subjects of rights of property (*i.e.*, things owned) are either corporeal or incorporeal. A thing owned is corporeal when it consists of some portion of the material world, and incorporeal when it does not.

A single material thing may be owned by several persons, and

[1] Writers upon jurisprudence generally use the terms *in rem* and *in personam* to mark the primary division of legal rights, and it is, therefore, proper for me to explain why I use the terms "absolute" and "relative" instead. It will, however, be more convenient to do this after treating of the different classes of legal rights. See *infra*, p. 229, n. 1.

that too without any division of it, either actual or supposed, each person owning an undivided share of it; and in that case each owner has a right of property just as absolute as if he were the sole owner of the thing. In case of land also, the ownership, instead of being divided into shares, may be divided among several persons in respect to the time of their enjoyment, one of them having the right of immediate enjoyment, and the others having respectively successive rights of future enjoyment. This peculiarity in the ownership of land comes from the feudal system. Land itself is also peculiar in this, namely, that a physical division of it among different owners is impossible; and hence the land of A, for example, is separated from the adjoining land only by a mathematical line described upon the surface, A's ownership extending to the centre of the earth in one direction, and indefinitely in the other direction. By our law, land is also capable of an imaginary division, for the purposes of ownership, laterally as well as vertically; for one person may own the surface of the land, and another may own all the minerals which the land contains. Such a mode of dividing the ownership of land certainly creates many legal difficulties, but it seems to be persisted in notwithstanding, at least in England.[1] In like manner, by our law, a building is capable of an imaginary division, for purposes of ownership, both lateral and vertical.[2]

Relative rights are either obligations or duties. Strictly, indeed, "obligation" or "duty" is the name of the thing with which a relative right correlates; but such is the poverty of language that we have to use the same word also to express the right itself.

An obligation is either personal or real, according as the obligor is a person or a thing. An obligation may be imposed upon a person either by his own act, *i. e.*, by contract (*pbligatio ex contractu*), or by act of law (*obligatio ex lege*, or *obligatio quasi ex contractu*).

An obligation may be imposed upon a thing either by the law alone, or by the law acting concurrently with the will of the owner of the thing. In the latter case, the will of the owner must be manifested in such manner as the law requires or sanctions. By our law, it is sometimes sufficient for the owner of a thing to impose an obligation upon himself, the

law treating that as sufficient evidence of an intention to impose it upon the thing also, — when, for example, the owner of land enters into a covenant respecting

[1] Humphries *v*. Brogden, 12 Q. B. 739, 755.

2 *Ibid*., 756-757.

it, and the covenant is said to run with the land. The most common way, however, in which an owner of land manifests his will to impose an obligation upon it is by making a grant to the intended obligee of the right against the land which he wishes to confer, *i. e*., he adopts the same form as when he wishes to transfer the title to the land. If, however, an owner of land, upon transferring the title to it, wishes to impose upon it an obligation in his own favor, he does this by means of a reservation, *i. e*., by inserting in the instrument of transfer a clause by which he reserves to himself the right which he wishes to retain against the land. An owner of a movable thing imposes an obligation upon it by delivering the possession of it to the intended obligee, declaring the purpose for which he does it, as when a debtor delivers securities to his creditor by way of pledge to secure the payment of the debt. A real obligation is undoubtedly a legal fiction, but it is a very useful one. It was invented by the Romans, from whom it has been inherited by the nations of modern Europe. That it would ever have been invented by the latter is very unlikely, partly because they have needed it less than did the ancients, and partly because they have not, like the ancients, the habit of personifying inanimate things. The invention was used by the Romans for the accomplishment of several important legal objects, some of which no longer exist,[1] but others still remain in full force. It was by means of this that one person acquired rights in things belonging to others (*jura in rebus alienis*). Such rights were called *servitutes (i. e*., states of slavery) in respect to the thing upon which the obligation was imposed, and they included every right which one could have in a thing, short of owning it. These servitudes were divided into real and personal servitudes, being called real when the obligee as well as the obligor, *i. e*., the master (*dominus*) as well as the slave (*servus*), was a thing, and personal when the obligee was a person. The former, which may be termed servitudes proper, have passed into our law under the names of easements and profits *à prendre*. The latter included the *pignus* and the *hypotheca, i.e*., the Roman mortgage, — which was called *pignus* when the thing mortgaged was delivered to the creditor, and *hypotheca* when it was constituted by a mere agreement, the thing mortgaged remaining in the possession of its owner. Originally, possession by the creditor of the thing mortgaged was indispensable, and so the *pignus* alone existed; but, at

[1] See *supra*, p. 193.

a later period, the parties to the transaction were permitted to choose between a *pignus* and a *hypotheca*. So long as the *pignus* was alone in use, it is obvious that the obligation could be created only by the act of the parties, as they alone could change the possession of the property. But when the step had been taken of permitting the mere agreement of the parties to be substituted for a change of possession, it was another easy step for the law, whenever it saw fit, to substitute its own will for the agreement of the parties; and hence hypothecations came to be divisible into such as were created by the acts of the

parties (conventional hypothecations), and such as were created by the act of the law (legal or tacit hypothecations). Again, so long as a change of possession was indispensable, it is plain that the obligation could attach only upon property which was perfectly identified, and that there could be no change in the property subject to the obligation, except by a new change of possession. But when a change of possession had been dispensed with, and particularly when legal or tacit hypothecations had been introduced, it became perfectly feasible to make the obligation attach upon all property, or all property of a certain description, either then belonging to the debtor or afterward acquired by him, or upon all property, or all property of a certain description, belonging to the debtor for the time being; and hence hypothecations came to be divided into those which were special and those which were general.

The *pignus* has passed into our law under the name of pawn, or pledge, as to things movable, but has been wholly rejected as to land. The conventional *hypotheca* has been wholly rejected by our common law, though it has passed into our admiralty law. The legal or tacit hypothecation, on the other hand, has been admitted into our common law to some extent, though under the name of lien (a word which has the same meaning and the same derivation as "obligation"). Thus, by the early statute of 13 E. I. c. 18, a judgment and a recognizance (the latter being an acknowledgment of a debt in a court of record, of which acknowledgment a record is made) are a general lien on all the land of the judgment debtor and recognizer respectively, whether then owned by them or afterwards acquired. So also, in many cases, the law gives to a creditor a similar lien on the debtor's movable property, already in the creditor's possession when the debt accrues, though, in respect to the creditor's possession, this lien has the features of a *pignus* rather than of a *hypotheca*.

There are also in our law other instances of what the Romans would have called personal servitudes, if they had existed in their law; for example, easements and profits in gross,[1] *i.e*., easements and profits which exist for the benefit of their owner generally, — not for the exclusive benefit of some particular estate belonging to him. Rents and tithes seem also to fall into the same category.[2]

Passing from obligations to duties, the first thing to be observed is that the latter are either public or private, according as they are imposed for the benefit of individuals as such, or for the benefit of the public, or of some portion of the public.

Duties have attracted very little notice either from courts or from legal writers. There has, indeed, been a general failure, as well in our law as in the Roman law,[3] and also among writers on jurisprudence,[4] to discriminate between obligations and duties; and yet the distinctions between them are many and important. All duties originate in commands of the State; while all obligations originate either in a contract between the parties, or in something which has been done or has happened to the gain of the one and the loss of the other, and under such circumstances as make it unjust for the one to retain the gain or the other to suffer the loss. It is true that every obligation (being a *vinculum juris*) has in it a legal element, and that those obligations which do not originate in contract are pure creatures of the law: yet, in creating obligations, the only object of the State is to see that

all persons within its jurisdiction act justly towards others, while, in imposing duties, it acts from motives of policy, or at least it imposes them as a part of the system of law which it adopts, and without reference to any particular case or any particular persons. Moreover, in creating obligations, the State acts in each particular case, and only after the events have happened which render its action necessary, and in each case its action has reference solely to the parties between whom the obligation is created, while, in

[1] See Gale on Easements, Part 1, c. 1, s. 4 (Part 1, c. 2, s. 4 of the 6th and 7th eds.).

[2] See *supra*, p. 199.

[3] Thus, in Justinian's Institutes, *L*. 3, *Tit*. 27, six instances are given of what are called *obligationes quasi ex contractu* (namely, *negotiorum gestorum, tutelæ, communi dividundo, familiæ erciscundæ, ex testamento, solutio non debiti*), only the first and last of which seem in truth to belong to that category, the other four being instances of duties.

[4] See Holland, Jurisprudence, Part 2, c. 12, in which obligations are declared to embrace all rights *in personam (i. e*., all relative rights), and in which obligations and duties are treated of indiscriminately.

imposing duties, the State issues its command once for all, and the command always precedes the duty. In creating obligations, the State acts generally through its courts of justice, while, in imposing duties, it acts directly or indirectly through its legislature, *i. e*., duties are imposed by positive laws. In short, the necessity for creating an obligation is established by *a posteriori* reasoning, while the necessity for imposing a duty is established by *a priori* reasoning. To an obligation there must always be two parties or sets of parties, and neither of them can ever be changed except by authority of law. Of duties, on the other hand, parties cannot properly be predicated, as duties are imposed, not upon identified persons, but upon persons in certain situations, or occupying certain positions, and they are imposed also in favor of persons in certain situations, or occupying certain positions, and, therefore, the person who is to perform a given duty, as well as the person in whose favor it is to be performed, is liable to constant change.

The cases in which duties are imposed, especially by modern statutes, are numberless, and any attempt to enumerate or classify them would be futile.[1] There are, however, many duties, most of which are imposed by ancient statutes, or by rules of the common law or the canon law which have the force of statutes, — which are well known, and some of which it may be well to mention. Probably the most ancient instance to be found is the duty imposed upon an executor to pay legacies. It was originally imposed by the Roman law upon the predecessor of our executor,

[1] In Couch *v*. Steel, 3 El. & Bl. 402, it was held that the statute of 7 & 8 Vict. c. 112, s. 18, makes it the duty of a ship-owner to keep on board a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages; that the duty is both public and private; that for a breach of that duty the only remedy of the public was the penalty provided by the Act, the common-law remedy by indictment being by implication taken

away; but that a seaman, serving on board a ship at the time of the breach, was entitled to the common-law remedy of an action on the case, notwithstanding the penalty.

By The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), after a railway company has given to a land-owner a notice that it will require his land for the purposes of its line, in accordance with s. 18 of the Act, the duty is imposed upon the company of taking the proceedings provided for by the Act for acquiring the land and paying the purchase-money. See Haynes *v*. Haynes, I Dr. & Sm. 426, and cases there cited.

The decision in the celebrated case of Ashby *v*. White, 2 Ld. Raym. 938, 1 Smith's L. C. (2d ed.) 105, involved two propositions, namely, first, that the plaintiff, being a burgess of the borough of Aylesbury, was entitled as such to vote for two burgesses to represent that borough in the House of Commons; secondly, that the duty was imposed upon the defendants, at an election held for electing such burgesses, of receiving and counting the votes of the electors, and that for a breach of that duty the plaintiff was entitled to maintain an action on the case.

namely, the heir appointed by the will of a deceased person; but when the Roman empire became Christian, and the Church at length obtained exclusive jurisdiction over the estates of deceased persons, it was by a law of the Church that the duty was imposed. This duty constitutes the only legal means of compelling an executor to pay legacies, as the assets out of which they are to be paid vest in him absolutely, both at law and in equity. A closely analogous duty is that imposed by the Statute of Distributions[1] upon administrators of the estates of intestates to divide the estate among the intestate's next of kin. Another ancient duty (which, however, no longer exists in English-speaking countries) was the duty imposed by the canon law upon every tithe-payer to set out the tithes payable by him, *i. e*., to sever the tenth part from the other nine parts, and to set apart the former for the tithe-owner. It was by means of this duty alone that payment of tithes could be enforced; for, until tithes were set out, the title to the entire produce of the land was vested in the tithe-payer, but, when the tithes were set out, the title to the tenth part vested in the tithe-owner, who had accordingly, in respect to it, the same common-law remedies as any other owner of chattels. Another ancient instance is the duty imposed by the common law upon the heir of a deceased person to assign dower to the widow of the latter. Here, again, the enforcement of this duty was the widow's only resource, as the title to all the land of which her husband died seized vested in the heir, both at law and in equity. Another very numerous class of duties consists of those which are imposed upon all persons who travel upon public highways, or upon navigable waters (including the high seas), with respect to other persons with whom they come in contact. It is upon these duties that the rights of such persons as against each other wholly depend. Other instances will be found in the well-known duties imposed by the common law upon common carriers and innkeepers, not only towards the employers of the one and the guests of the other, but also towards all those who desire to employ the one or to become the guests of the other; also in the duty imposed by the common law upon professional men, and upon others whose callings require the exercise of special skill, to exercise reasonable skill on behalf of all those by or for whom they are employed. In the cases mentioned in the last sentence, there may, indeed, be a liability on contract;

[1] 22 & 23 Car. II. c. 10.

but, on the other hand, in many of those cases there may either be no contract, or none that can be proved, while the duty is always available, and never involves any difficulty as to proof.

Domestic or family relations give rise to a numerous class of duties, but most of them are moral rather than legal, or, at all events, are not such as any court of justice will enforce, and do not, therefore, come within the scope of this article.

Another very numerous and important class of cases consists of those in which duties are imposed upon joint-stock corporations towards their shareholders, and also towards those who establish a right to become holders of their shares. As a rule, these duties furnish the only means by which these two classes of persons can enforce their rights against the corporation. There may be exceptions to this rule, and one exception certainly is where a dividend has been declared (and the declaration of a dividend is the performance of a duty); for then the amount payable to each shareholder becomes a debt, and so, of course, an obligation.

The class of cases, however, in which an alleged breach of duty becomes more frequently the subject of litigation than in all other cases put together, is that in which the duty imposed is to exercise care and diligence to secure the safety of others, or to avoid being the cause of personal harm to others. Such a duty is imposed upon all persons to whom the personal safety of others is largely intrusted, and especially upon all carriers of passengers. A similar duty is also imposed upon all persons whose occupation involves special danger to the public, for example, upon railway companies, or who do or permit to be done, or keep or permit to be kept, upon their own land, what is fraught with a like danger. A breach of this duty is negligence, and whether such breach has been committed is the question to be tried in what is by far the most numerous class of litigated cases with which courts of justice are troubled. Negligence may, indeed, be a breach of contract, and it may also be one of the elements of an affirmative tort, namely, where one person by an affirmative act unintentionally causes harm to another, but might have avoided doing so by the exercise of reasonable care. It would not, however, be too much to say that, in ninety-nine out of every hundred of the reported cases involving a question of negligence, the alleged negligence was a breach of duty.

We are now prepared to inquire why it is that duties have at-

tracted so little attention. Some of the reasons certainly are not far to seek. In several particulars, duties bear a striking resemblance to personal rights. The latter are pure creatures of the law, and are not in the least dependent upon the will or the action of the person to whom they belong. The former also are pure creatures of the law, and are not directly (though they may be indirectly) dependent upon the will or the action either of the person upon whom the burden of them is imposed, or of the person entitled to have them performed. Personal rights accompany their owner from his birth to his death; and while that is not true of duties, yet it is true of every duty that it is a mere legal incident of

certain situations, that a person can avoid incurring liability to a duty only by avoiding the situation to which such liability is incident (as he can free himself from a duty, to which he has once incurred liability, only by ceasing to occupy the situation to which such liability is incident); and that a person can acquire a right to the performance of a duty only by placing himself in a situation to which such right is incident, and will lose the right whenever he ceases to occupy that situation. A personal right can neither be bought, nor sold, nor be the subject of commerce, nor have any pecuniary value; and so also the right to have a duty performed can neither be bought, nor sold, nor be the subject of commerce, nor have any pecuniary value, except indirectly, as stated above. As courts of justice can have no occasion to take cognizance of personal rights, except when complaints are made of their infringement, so also the same thing is true of duties; and though a duty, unlike a personal right, may be easily formulated, and the question of its existence is entirely distinct from the question of its infringement, yet the former, in comparison with the latter, very seldom arises, and, even when it does arise, there is little in it to stimulate inquiry beyond the mere practical question whether the person charged was bound to do the thing the not doing of which is the alleged cause of action. If an explanation be asked of the comparative infrequency with which any question as to the existence of a duty arises, it may be answered that a duty once existing continues to exist so long as the statute which imposed it remains in force, or so long as the situation which gave rise to it continues to exist; and that, while an obligation as a rule is capable of but one performance and one breach, and, therefore, when once performed or once broken, is at an end, the same duty may be imposed upon an unlimited number of persons, and may be per-

formed an unlimited number of times, and hence is capable of an unlimited number of breaches.[1]

Having now gone through with the different classes of legal rights, it is next to be observed that a relative right is relative only as between the person to whom the right belongs and the person who is subject to the correlative obligation or duty; and, therefore, so far as such a right concerns the rest of the world, it is an absolute right of the second class, *i. e*., a property right. Moreover, every relative right which has, or is supposed to have, a pecuniary value, does or may concern the rest of the world. What relative rights then have, or are supposed to have, a pecuniary value? Clearly, all obligations fall within that category; and though in strictness this cannot be said of any duty, yet some duties consist, in whole or in part, in transferring money, or other things of value, to other persons, and when that is the case, and especially when the duty furnishes the only legal means of compelling such transfer, the performance of the duty certainly confers a pecuniary benefit upon the person in whose favor it is performed, and yet, prior to its performance, the only legal right vested in the latter is the right to have the duty performed. Of this description is the duty of an executor to pay legacies, of the administrator of an intestate to divide the personal estate of the

[1] I now proceed to do what, in a previous note (p. 220, n. 1), I postponed until now; namely, to explain why I used the terms "absolute" and "relative" to mark the primary division of legal rights, instead of the terms *in rem* and *in personam*. I. If I had used the

latter terms, I should have required them both to designate relative rights, and should, therefore, have had nothing left for absolute rights; for rights *in personam* would clearly have embraced only those rights which are created by personal obligations and duties, and, therefore, I must have used the term *in rem* to designate those created by real obligations. 2. If the phrase "rights *in personam*" perfectly describes all those rights which are created by personal obligations or duties, then the phrase "rights *in rem*" perfectly describes those rights which are created by real obligations, when considered as obligations; and, if so, it is clearly impossible that it should also correctly describe absolute rights. 3. The phrase "rights *in rem "does* not, in fact, describe correctly either class of absolute rights. It might, indeed, be used, without any great impropriety, to describe ownership of corporeal things, but to use it to describe ownership of incorporeal things is certainly taking great liberties with language, and to use it to describe personal rights seems to me to be in the highest degree absurd. 4. The terms *in rem* and *in personam* are properly applicable to procedure only, and the use of them was limited to procedure by the Romans. 5. The terms "absolute" and "relative," as used by me, require neither explanation nor justification, while the terms *in rem* and *in personam*, if used for the same purpose, would have required both. 6. The terms *in rem* and *in personam*, as applied to rights, are wholly foreign, while, in using the terms "absolute" and "relative" instead, I follow the example of Blackstone.

latter among his next of kin, and of a tithe-payer to set out tithes.

Probably many persons will be surprised at being told that the legatees and next of kin of deceased persons have no right or interest in the estates out of which their legacies and distributive shares are respectively to be paid. Their surprise ought, however, to cease when they are further told that, by the Roman law, no one could directly dispose of any part of his estate by will; that when a person died, whether testate or intestate, his entire estate vested absolutely and by operation of law in his heir, namely, in his *hæres natus* if he died intestate, and in his *hæres factus* if he died testate; that property could be given by will only in the form of legacies, and that legacies could be given only indirectly, namely, by directing the heir to pay them; and, lastly, that our executor and administrator have respectively succeeded, as to personal estate, to the situation of the *hæres factus* and *hæres natus* of the Romans. Hence it is that, while the real estate of a deceased person passes, upon his death, directly to his heir, no one can acquire any interest in his personal estate except through his executor or administrator, *i. e*., through the performance of a duty imposed upon the latter.

It follows from what has been said that all obligations, whether personal or real, and also such duties as have just been described, have two aspects, *i. e*., they are to be regarded as relative rights, or as absolute rights, according to the point of view from which they are looked at, but with this difference, that, while personal obligations and duties are chiefly to be regarded as relative rights, real obligations are chiefly to be regarded as absolute rights.

It is now necessary to return to the subject of incorporeal things which may be owned, — of which it has thus far only been said that they constitute no part of the material world, and that is no more than saying that they are incorporeal.

Ownership of corporeal things is merely the result of appropriation by individuals to themselves, with the sanction of the law, of portions of the material world; *i. e*., all material things exist in nature, though their form and appearance may be indefinitely changed, and their value in consequence indefinitely increased or diminished. All that can be done, therefore, respecting them by human will or human action, is to change their form and appearance, and to make them the subjects of individual ownership. Those incorporeal things, however, which may be owned, have no

existence in nature, and are all, therefore, of human creation. Moreover, they are all created either by the State alone, or by private persons with the authority of the State. A private person can create incorporeal ownership either against himself or against things belonging to him. He does the former whenever he incurs a personal obligation, *i. e*., he creates in the obligee a relative right as between the latter and himself, and an absolute right as between the obligee and the rest of the world. So, too, a private person creates an absolute right against himself when he grants an annuity, and in that case there is no relative right. A private person creates an incorporeal property right against a thing whenever he creates a real obligation, *i.e*., imposes an obligation upon a thing belonging to him; for, though the right thus created is relative as between the obligee and the thing upon which the obligation is imposed, yet it is also absolute, not only as to all persons other than the owner of the thing, but even as to him. In case of some duties, also, a private person may contribute to the creation of incorporeal ownership, not against himself personally, nor against things belonging to him, but against another person, though in respect of things belonging to himself, as when a testator directs his executor to pay legacies to certain persons out of his personal estate, or to sell certain land and pay the proceeds to persons named, the land not being devised to the executor, but left to descend to the testator's heir; for in each of these cases the law makes it the duty of the executor to do as the testator has directed, and this duty the beneficiaries can compel him to perform; and this right in the beneficiaries is incorporeal property.

Another important class of cases in which a private person may create incorporeal ownership, is where an owner of things grants to another person an authority to transfer the title to them, or to use and enjoy them. In the first of these cases, the authority is technically called a power, and the acts authorized to be done would, without such authority, be inoperative and void. In the second case, the authority is commonly called a license, and the acts authorized to be done would, without such authority, be tortious. The grantor of a power may limit the persons in whose favor it may be exercised (not including the grantee), or he may authorize its exercise for the grantee's own benefit. In the former case, the grantee of the power is not entitled to receive any pecuniary benefit from its exercise, while, in the latter case, the power is practically equal to ownership of the things over which

it extends. In point of law, however, it is, in each case, incorporeal property, *i. e.*, it is no less than that in the first case, and no more in the second. In the first case, the exercise of the power may be discretionary or mandatory, and, if mandatory, its exercise will be a duty.

A license is commonly granted for the benefit of the licensee, and in that case the right granted differs practically from ownership only in being less extensive. It may, indeed, differ practically from ownership only in not being exclusive; but a grant by the owner of a thing of all his rights as such owner will be a grant of the ownership itself, though in terms a license only be granted. A good illustration of a license will be found in the grant of a right to work a patent for a new invention, neither the patent itself, nor any part of it, being granted. This is an instance, moreover, of a license in which the thing to be enjoyed, as well as the right to use and enjoy it, constitutes incorporeal property. Another good illustration will be found in a grant by an owner of land of the right to dig in his land for minerals, and to appropriate to the grantee's own use all the minerals dug and carried away by him. Care must be taken, however, not to confound this case with that of a grant by an owner of land of all the minerals under the land, the latter being, as has been seen, a grant of corporeal property.[1]

Another instance of incorporeal ownership created by private persons is where a right is created which depends upon the happening of a condition. Thus, if A incur an obligation to B to pay him $100 on the happening of some uncertain event, the obligation does not come into existence until the event happens, and yet B has a fixed right to be paid $100 by A in case the event happens. So, if A give B a legacy of $100 in the event of B's attaining the age of twenty-one years, the gift will not take effect during B's infancy, but yet he will have a fixed right to have the legacy paid to him by A's executor, in case he attains the age of twenty-one years. So, if A give land to B, but declare that, if B die without issue then living, the land shall go to C, C will have nothing in the land during B's life, but yet he will have a fixed right, by virtue of which the ownership of the land will vest in him on the happening of the event named.

There is still another kind of incorporeal property, created by

[1] See *supra*, p. 221.

private persons, which is very different from any hitherto mentioned, namely, the property which an author, musical composer, or artist has in his literary, musical, or artistic creations. This is not a right conferred upon one person by another against himself, or against things belonging to him; nor is it a right against any person or any thing, nor is it dependent upon any person or any thing; but it is property which has a more independent existence than any corporeal thing whatever, — which a person, by his own intellectual labor, creates in himself out of nothing. It consists, not in the ideas expressed (which cannot be the subject of ownership), but in the expression of them, *i.e.*, in the case of an author or musical composer, it consists in the selection and arrangement of the words and signs by which the ideas are expressed, — in the case of an artist, it consists in what the artist embodies in his picture or statue.

It is, however, those classes of incorporeal property which are created by the State that attract the most attention. Blackstone[1] enumerates five of these, namely, advowsons, tithes, offices, dignities, and franchises. I. An advowson is the right conferred by the State upon a person who has founded and endowed a church, and upon his heirs and assigns forever, of appointing the priest who is to officiate in that church. Though this right has no existence in this country, it is a very important right in England, as most of the parish churches in that country were originally founded and endowed by the lords of the manors in which they are respectively situated; and hence it is that the parson of a parish is there generally selected, not by the parishioners, but by the lord of the manor. 2. "Tithes" mean either the things received under that name, or the right to receive them, and that right is created by the State, and is incorporeal property. Like other property rights, it may be temporary or perpetual. Presumably all the tithes payable in any parish are payable to the parson of the parish for the time being, and they ought always to be payable to, or for the benefit of, either the parson of the parish, or other persons holding spiritual offices, and, if they had been, they would never have made an important figure as a species of incorporeal property. By an abuse, however, they were permitted to be alienated in fee simple, and vested in laymen; and hence they became subject to all the usual incidents of private property. 3. Most offices are not only

[1] 2 El. Com. 21.

created by the State, but the right to hold them, as well as the tenure of them, is regulated by law; and, therefore, though they are in their nature incorporeal property, yet they are without some of the most usual and important incidents of property, as they can neither be bought nor sold. They are also usually held, especially in this country, only for short periods. There is seldom, therefore, a serious controversy as to the title to an office, unless it be elective; and even then the only question which can often arise is, whether a person claiming it has been elected to it. Regarded as property, an office is peculiar in this, namely, that all the emoluments which are incident to it are conferred as a compensation for duties to be performed, and that no one can become entitled to receive the one without becoming bound to perform the other. The duties which the holder of an office is bound to perform may, of course, become the subject of controversy; and so, though less frequently, may the emoluments to which he is entitled. 4. When dignities exist in a State, and are held by a legal title, they also constitute a species of incorporeal property; but their existence in a State implies that the people of that State are, to some extent, ranked and graded by law; and, as that is not the case in this country, it follows that dignities have no legal existence here. 5. A franchise is defined by Blackstone[1] to be a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject, *i. e.*, by virtue of the king's grant, or by virtue of an enjoyment so long continued as to be in law equivalent to a grant. It is only in exceptional cases that the king's prerogative can thus be vested in a private person, and the fact that it can be done in those cases calls for some explanation. The explanation seems to be that certain prerogatives are vested in the king merely for the benefit of the general public. For example, the convenience of the public requires that certain services should be performed for the benefit of all persons who require their performance, and who are able and willing to pay for it; and the problem is to secure the efficient performance of such services for a fixed and reasonable

compensation. One way of doing this is for the government itself to assume the performance of the service; while another way is for the government to delegate the performance of the service to private persons or corporations, making it the duty of the latter to perform the service efficiently in consideration of receiving a com-

[1] 2 Bl. Com. 37.

pensation, either fixed and agreed upon, or to be allowed by the government for the time being. Of course, it is assumed that the principle of competition is inapplicable to the case; for if it were applicable, there would be no problem to be solved, nor anything for the government to do. Moreover, it is further assumed that the very opposite principle is applicable, namely, that of monopoly; for the State must either not interfere at all, or it must assert absolute control, *i. e.*, it must either leave the needs of the public to be provided for by free and unlimited competition, or it must make it unlawful for any one to supply such needs except with the permission and under the authority of the State. Accordingly, when the State itself undertakes the performance of a service for the general public, it always maintains a monopoly of such service, — for example, that of carrying the mails. When, therefore, the State delegates the performance of a public service to a private person or corporation, it ought to secure to the latter a monopoly commensurate, as nearly as possible, with the duty imposed.

It is upon these principles that most franchises exist in England at the present day. First, a monopoly of a certain public service is vested in the Crown. Then the Crown by its grant delegates the performance of such service to private persons or corporations. Grants of a right to keep a fair, a market, or a ferry, are the most conspicuous instances; and every such grant carries with it by implication the exclusive right of keeping a fair, market, or ferry (as the case may be), within the district which such fair, market, or ferry is supposed to serve.

Whatever belongs to the Crown in England of course belongs to the State in this country; and when the State delegates its power, it commonly does it, not by a grant, but by law, *i. e.*, by a statute;[1] and yet such delegations of the power of the State are commonly called franchises.

Even in England, a grant from the Crown has, in modern times, been found inadequate in many cases in which the power of the State is delegated. Thus, when an ancient ferry is superseded by a bridge, and it is yet thought desirable that the bridge should be built and maintained with private capital, and that the capital thus expended should be returned in tolls, a statute is found necessary. So, when the policy was successively adopted of inviting the expenditure of private capital in building and maintaining highways,

[1] But see *infra*, p. 237, as to patent rights.

canals, and railways, a statute was always indispensable, as all such enterprises involved the compulsory taking of the land of many persons. Lastly, the needs of large cities have, within recent times, introduced several species of public service which involve an

interference with public streets, and hence the right to perform such services can properly be delegated only by statute.

In this country a strong disposition has been shown to delegate the power of the State, not to particular persons or corporations selected by the legislature, but to any persons who shall voluntarily organize themselves into corporations, and comply with certain prescribed conditions. This is, of course, upon the principle of granting equal rights to all; but unfortunately the recognition of that principle has been accompanied by an abandonment of all attempt to protect from unjust and ruinous competition those who have invested their money irrevocably in providing means and facilities for serving the public. For example, when one set of men have built a railway from A to B, the State does nothing to prevent another set of men from building another railway between the same points, and as near to the former as they please.

When the State has vested in a corporation a right, for example, to take tolls in consideration of duties to be performed, as such corporation cannot transfer to any one else the burden of the duties which it has assumed, so it cannot transfer to any one else the right which was designed to furnish the means for discharging those duties efficiently. In other words, such a right is inalienable; and, therefore, it is established in England[1] that a railway company can transfer by way of mortgage only its surplus income, *i.e*., what remains for its creditors and shareholders after payment of all its necessary expenses. Unfortunately, however, our State legislatures have lost sight of these principles, and have accordingly passed statutes authorizing railway companies to mortgage all their property and "franchises"; and hence receiverships and re-organizations of railway companies, which are entirely unknown in England, have become disastrously familiar in this country.

It has been seen that the ancient franchises of fairs, markets, and ferries, as well as many modern "statutory franchises," — for example, toll-bridges, turnpike roads, canals, and railways, — have in them an element of monopoly. There are other delegations of sovereignty, however, which are monopolies pure and simple, *i. e,*,

[1] Gardner *v*. London, Chatham and Dover Railway Co., L. R. 2 Ch. 201.

delegations of an exclusive right to do what before was free and open to all. There are in modern times two classes of these rights, namely, patent rights and copyrights. They are peculiar, not only in the particular just stated, but also in being conferred, not in consideration of duties to be performed to the public, but in consideration of services already rendered, as well as in being conferred only for limited periods of time. A patent right is conferred by grant (in England from the Crown, in this country from the United States), though under statutory authority. A copyright is conferred directly by statute. A copyright must be sharply distinguished from the common-law right of an author, musical composer, or artist, heretofore mentioned. The latter exists only before publication, the former only after publication.

Although a copyright is in strictness of law a pure monopoly, yet it ought to be regarded, not as a favor conferred, but as a partial atonement for the wrong done by the State in putting an end, upon publication, to the common-law right of an author, musical composer, or artist, in his own creation.

Having now said all that it is thought necessary to say of incorporeal things, it is next in order to inquire what rights are affirmative in their nature, and what are negative. If, however, we can ascertain what rights are negative, and why, the inquiry will be fully answered. What is a negative right? Clearly, it is a right against some person or persons, *i. e., a* right not to have something done by him or them. By whom can such a right be given? Clearly, only by the person against whom it is given, or by some one in whose power such person is, *i.e*., by the State. How can one person give another a negative right against himself? Only by incurring a negative personal obligation to that other. How can the State give a negative right to one person against another? It is neither easy nor necessary to specify all the possible ways in which this can be done. How does the State in fact give a negative right to one person against another? Only by giving it against all persons within the limits of its territory, or some portion of that territory, *i. e*., by giving a monopoly or exclusive right, as already explained.

It follows, therefore, that all personal rights, all property rights, except those incorporeal rights by which the State confers a monopoly, and all relative rights, except negative personal obligations, are affirmative. If it be asked why a real obligation cannot confer a negative right against the thing bound by it, the answer

is plain: as an inanimate thing is in the nature of things incapable of acting, it is impossible that a real obligation should ever consist in doing *{faciendo);* and, though it is possible that such an obligation should consist in not doing (*non faciendo*), yet an obligation not to do what the obligor by no possibility can do, is absurd and unmeaning, and therefore, in legal contemplation, cannot exist. In what, then, does a real obligation consist? Here again the answer is plain: it consists in permitting or suffering something to be done *{patiendo*).

But, though it seems so clear upon principle that there is no such thing as a negative real obligation, yet it is far less clear upon authority; for the Civilians all say there is such a thing, and, in so saying, they are supported, to some extent, by texts of the Roman law. Thus, in Justinian's Institutes,[1] it is said there is a servitude, that one shall not build his house higher, lest he obstruct his neighbor's lights (*ut ne altius tollat quis cedes sitas, ne luminibus vicini officiatur*). Upon this passage, however, it may be remarked, first, that what it actually expresses is a personal obligation binding the owner of the house, — not a real obligation binding the house itself; secondly, that one is tempted to say that the passage is only an inaccurate mode of stating an affirmative servitude, namely, that the servient tenement is bound to permit the light to pass over it without obstruction to the windows of the dominant tenement.

If it be asked why a duty may not be negative, as well as a personal obligation, the answer is that a person can deprive himself of the right to do a thing only by conferring

upon some one else the right not to have it done, — which he can do only by incurring a negative personal obligation in favor of the latter; but when the State wishes to deprive a person of the right to do a thing, it has a much more direct and simple (and therefore a better) way of accomplishing its object than by imposing upon him a duty not to do it, — namely, by commanding him not to do it, and so making the doing of it an affirmative tort; and, as the State is never supposed to do a vain and nugatory act, nor to do circuitously what it can do directly, it follows that the State can never be supposed to impose a negative duty.

[1] *L. 2, Tit*. 3, s. 4.

ARTICLE X.[1]

CLASSIFICATION OF RIGHTS AND WRONGS (*continued*).

SOMETHING still remains to be said upon the subject of rights, but it will be convenient first to consider the wrongs by which rights may be infringed.[2] Such wrongs are divisible into two classes, namely, torts and breaches of obligation. A tort is disobedience to a command of the State, and is affirmative or negative, according as the command is negative or affirmative, the tort being in that respect the converse of the command. The State commands every person within its limits to do no act which will infringe an absolute right of any other person, *i. e*., it prohibits all such acts. Moreover, such acts are the only ones which the State prohibits in the interest of private rights. It follows, therefore, that every infringement of an absolute right is an affirmative tort, and that every affirmative tort is an infringement of an absolute right.

It will be seen, therefore, that an infringement of an absolute right is equally an affirmative tort, whether the right itself be affirmative or negative; and the reason is that the infringement constitutes equally, in either case, an act of disobedience to a prohibitory command of the State. The only important difference

[1] 13 HARV. L. REV. 659.

[2] The reader must not suppose that a person whose right has been infringed can sue the wrong-doer directly for the infringement; for that would be to punish him for his wrongful act, and he can be punished, if at all, by the State alone. All that the State regards the person wronged as entitled to is a compensation for the wrong, and such compensation it will compel the wrong-doer to make. For that purpose, however, a new right must be created, and, accordingly, the moment an obligation is broken or a tort committed, the law imposes upon the wrong-doer an obligation, in favor of the person wronged, to compensate him for the wrong, and it is upon this that the latter sues. Such rights are created solely for the sake of the remedy, and are, therefore, commonly called remedial rights. It is scarcely necessary to say that they do not come within the scope of this article.

between the two cases is that, in the case of an affirmative right, the right exists independently of the command, and the command is issued merely to protect the right, while, in the case of a negative right, the right has no existence until the command is issued, and it is the prohibitory command alone that both creates the right and makes the act of infringement tortious. This difference between an affirmative and a negative right is attended with some important consequences,[1] but they do not relate to the nature of the act which will constitute an infringement of the right.

The State also commands every person within its limits to do every act which the State makes it his duty to do. Indeed, to command one to do a thing, and to make it his duty to do it, are one and the same thing, each necessarily implying the other. Moreover, as all duties are affirmative, all commands to do one's duty are also affirmative, and these are the only affirmative commands which the State issues. It follows, therefore, that, as every breach of duty is a negative tort, so every negative tort is a breach of duty.[2]

An impression seems always to have prevailed that a tort must necessarily be an affirmative act;[3] and the explanation of this seems to lie in the fact that duties and their true nature have received so little attention. Certainly, the impression appears to rest upon no more solid foundation, for no reason can be given for regarding disobedience to an affirmative command as any less tortious than disobedience to a negative command. At all events, there is no doubt whatever that every breach of duty is a tort. This is conclusively proved by the fact that the only action that

[1] If these consequences had been attended to by the authors of the original copyright Act (8 Anne, c. 19), and the Act had accordingly been so drawn as to revest in the authors of published books the affirmative right which they were supposed to have lost by publication, instead of a new negative right, *i. t*., the exclusive right of multiplying copies, some serious evils would have been avoided. See *infra*, p. 249.

[2] As the infringement of a private duty is a negative tort, so the infringement of a public duty is a negative crime; as the former is redressed by means of an action of tort, so the latter is punished by means of an indictment. See Couch *v*. Steel, cited *ante*, p. 225, n. 1.

[3] Accordingly, an attempt has been made to give the breach of a duty the appearance of an affirmative tort by terming it a subtraction. Thus, Blackstone considers the breach of any duty which is imposed upon one person for the benefit of land belonging to another as a fifth species of injury to real property (the first four being ouster, trespass, nuisance, and waste), and he treats of such breaches in B. 3, c. 15, — which chapter is entitled, "Of Subtraction." So the canonists speak of the subtraction of tithes, of legacies, of conjugal rights, and of church rates.

will lie for a breach of duty is the Action on the Case;[l] and this again is not the least convincing proof of the correctness of the view heretofore stated as to the legal nature of a duty, and as to the radical difference between a duty and an obligation.[2] It also explains a phenomenon which has caused much difficulty to courts and lawyers, namely, that, in certain classes of actions, in which the defendant has committed no affirmative

wrong, — for example, actions against common carriers, innkeepers, or professional persons, — the plaintiff often has an option between framing his action in contract and in tort. It also explains the fact that certain classes of torts may be affirmative or negative, according as they consist of affirmative acts or of mere breaches of duty; for example, any tort committed by a tenant for life or for years as such, against the owner of the reversion, is termed waste; and this may consist either of affirmative acts which injure the reversion (*i. e*., wilful or voluntary waste), or in a failure to perform the duty of keeping the property in as good a condition as it was in when it first came into the tenant's possession (*i. e*., involuntary or permissive waste).

The infringement by an obligor of the right created by a personal obligation incurred by him is the only infringement of a right which does not constitute a tort, and hence it is distinguished from all others by being termed simply a breach of obligation. Hence also the remedy, for it is not (as for the infringement of all other rights) an action *ex delicto*, but an action *ex contractu*. This seems to prove conclusively that the State is not supposed to command the performance of obligations. It also proves the existence of the wide difference between obligations and duties which has been herein contended for.[3]

As torts are affirmative or negative, according as the commands which they infringe are negative or affirmative, the one being the converse of the other, so breaches of obligation are negative or affirmative, according as the obligation is affirmative or negative, the one being the converse of the other.

It remains to speak of the infringement of relative rights regarded as absolute rights. Such infringements always constitute affirmative torts; [4] but they chiefly occur in connection with real obligations. Indeed, as real obligations consist merely in author-

[1] See *supra*, p. 225, n. 1. [2] See *supra*, pp. 224-25.

[3] See *supra*, pp 224-25.

[4] See Lumley *v*. Gye, 2 El. & Bl. 216; Bowen *v*. Hall, 6 Q. B. D. 333.

izing something to be done, the doing of which the obligor (being an inanimate thing) has no power to prevent or even obstruct, it may be correctly said that a real obligation is incapable of being broken; and, therefore, every infringement of the right created by a real obligation, whether it be by the owner of the *res*, which is subject to the obligation, or by a stranger to the obligation, is necessarily an affirmative tort.

It has been seen that, in the case of personal obligations and duties, the infringement of the right is precisely the converse of the right itself, and, therefore, if one knows what the right is, he will necessarily know what will be an infringement of it; and, if one knows what will be an infringement of the right, he will also know what the right itself is. An infringement is not necessarily, indeed, coextensive with the right, but, so far as the

infringement goes, the correspondence between it and the right is perfect. In the case of absolute rights, however, *i. e*., in all cases in which the infringement of the right is an affirmative tort,[1] the correspondence is not between the right and its infringement, but between the latter and a prohibitory command issued by the State for the protection of the right. While, therefore, the fact that an affirmative tort has been committed is sure proof that the act which constituted it had been prohibited, and also that the right which it infringed was neither an obligation of the person committing the act, nor a duty imposed upon him, it does not necessarily furnish any further proof as to the nature or extent of the right infringed. Nor will the most perfect knowledge of the nature and extent of a right, any infringement of which will be an affirmative tort, necessarily enable one to say what acts will, and what will not, constitute an infringement of the right. It follows, therefore, that, in order to determine, in a given case, whether an affirmative tort has or has not been committed, it may be necessary, first, to identify the right which has been infringed (if there have been an infringement), and to ascertain its legal nature and extent, and, secondly, to ascertain whether the act which has been committed is an infringement of that right; and the accomplishment of the first of these objects may afford no material aid in accomplishing the second.

There is also another reason why an affirmative tort is apt to involve greater legal difficulty than a negative tort or a breach of obligation, namely, that it is more difficult to identify the right infringed, and ascertain its legal nature and extent. Obligations

[1] There is, however, one exception to this. See *infra*, pp. 248-49.

and duties are all of human creation, and it is the business of those who create them to mark out their extent; and, if they neglect to do so, they are liable to be visited with the consequences of their negligence. Hence it seldom happens, when an obligation or duty is admitted to exist, that any question arises as to its extent; and it is scarcely possible in the nature of things that any question should arise as to its identity. Persons and other corporeal things, on the other hand, exist in nature, and the rights to which they give rise have always and everywhere existed, and the State has seldom done more than passively recognize their existence. As to personal rights, the State does not, as has been seen,[1] attempt to enumerate, define, or limit them, nor even to ascertain their existence further than is from time to time found necessary for the purpose of protecting them. As to corporeal things, other than human beings, the State recognizes individual ownership of them, and, as to movable things, this seems to be all that is necessary; but individual ownership of land implies a division of it among its different owners, and accordingly the State recognizes any division which the owners may make, and, if they cannot agree upon a division, the State itself makes the division; and thus the lateral extent of each person's ownership may be definitely ascertained. But it is also necessary to ascertain how far the individual ownership of land extends vertically, and, as to that, the State has established the rule that it extends downwards to the centre of the earth, and upwards to the heavens (*usque ad cœlum*),[2] and also that this is presumptively the vertical extent of the ownership of every person who owns the surface of a given piece of land, though the contrary may be proved. The State also permits an owner of land, as such, as we have seen, to acquire rights in the land of his neighbor, — which rights the State declares to be

accessory, appendant, or appurtenant to his ownership of his own land, and which are known in our law as easements and profits.

Perhaps the reader will think there is nothing in the foregoing to cause any uncertainty or confusion in regard to rights of property in land, and perhaps also he will be right in so thinking. Unfortunately, however, uncertainty and confusion do exist upon this subject, whatever may be their cause, and it is hoped that the following observations will have a tendency to lessen them.

First. Ownership of Blackacre (for example) constitutes only a

[1] See *supra*, p. 220.

[2] See *supra*, p. 221.

single legal right. It may be said, indeed, that such ownership gives to the person in whom it is vested a right to do a great variety of things, but that only means that it enables him to do them without committing a tort, and that it renders tortious any act which prevents his doing them, or obstructs him in doing them; and it is by virtue of the one right of ownership that any act done by the owner of Blackacre is rightful, which without such ownership would be tortious; and it is the same one right that is infringed by any act which is a tort to the owner of Blackacre as such, and which, in the absence of such ownership, would be rightful as against him.

Secondly. If, therefore, the owner of Blackacre has two or more rights, which are liable to affect the legal relations between him as the owner of Blackacre and the owner of Whiteacre, which adjoins Blackacre, it is because he has one or more rights in Whiteacre, — which rights are appendant or appurtenant to such ownership. Moreover, such rights must have been acquired either by the present owner of Blackacre, or by some preceding owner, and they can have been acquired only in two ways, namely, either by grant from a person who had the power to create the right, *i. e*., from the owner of Whiteacre, or by prescription, *i. e*., by enjoyment so long continued as to be in law equivalent to a grant.

It follows, therefore, that the so-called right of support from adjoining land, whether for land or for buildings, has no existence as a right separate and distinct from the ownership of the land or buildings to be supported, unless it be a right in the land which is to give the support, and that such a right can exist only by a grant from the owner of such land or by prescription. It also follows that the so-called right of support for land from adjoining land, whether the support be lateral or vertical, has no existence as a right in the land which is to give the support, as it is admitted that such right, if it exists at all, exists independently of either grant from the owner of such land or of prescription. It also seems to follow that the so-called right to support from adjoining land for buildings, whether the support be lateral or vertical, cannot exist, except as a right in the land which is to give the support, and that, as such a right, it cannot exist by prescription, unless the support enjoyed be such as would have enabled the owner of the land giving the support, prior to

the acquisition of the right, to maintain an action for an affirmative tort, and that is something which practically never happens.

It also follows that there is no such thing as the ownership of a stream of water which flows over one's land, or of that part of it which flows over one's land, separate from the ownership of the land of which it forms a part, though there may be a right in the land of one's neighbor, in respect of such stream, and such right may consist (for example) either in a right to prevent the natural flow of the stream from the land above to one's own land, or in a right to prevent its regular and natural flow from one's own land to the land below.[1]

While, however, the ownership of Blackacre constitutes only one legal right, yet that right may be infringed in many ways. It has just been seen, for example, that such ownership enables the person in whom it is vested to do a variety of acts, and it may now be added that the State forbids any other person either to do any of those acts, or to obstruct the owner in doing any of them, and any disobedience of this command will, of course, be an affirmative tort committed against the owner of Blackacre as such. Suppose, then, A and B are adjoining owners of land, and A makes an excavation in his land, and thereby causes the soil of B to fall into the excavation. Does A thereby infringe B's right of ownership? It is clear, both upon principle and authority,[2] that he does. What is the nature of the tort which he commits? Clearly, it is trespass *quare clausum fregit;* for, though he does not personally enter B's close, yet the physical effect of his act extends into it, and thus produces important consequences. Suppose A, by means of artificial support, prevents B's soil from falling into the excavation? Then A commits no tort; and this proves, if proof be needed, that B has no right in A's land. Suppose the excavation produces no effect upon B's land for two years, but at the end of two years B's soil falls into the excavation ? It is settled by the highest authority[3] that the whole tort is committed at the latter date, and consequently that the Statute of Limitations then first begins to

[1] Wright *v*. Howard, 1 Sim. & Stu. 190; Mason *v*. Hill, 3 B. & Ad. 304, 5 *idem* I.

[2] Gale on Easements, Part 3, c. 4, s. 1, of the 6th and 7th eds., and Part 1, c. 6, s. 4, subs, 1, of the previous eds.

[3] Bonomi *v*. Backhouse, E. B. & E. 622, 646, 9 H. L. Cas. 503. The decision of this case in the Queen's Bench was in the defendant's favor, Wightman, J.,dissenting; but, on error to the Exchequer Chamber, the judgment was unanimously reversed. On error to the House of Lords, the judges were summoned, and they delivered their unanimous opinion in favor of affirming the judgment of the Exchequer Chamber, and for the reasons given by that court. The House itself also took the same view, and, therefore, the judgment was unanimously affirmed.

run in favor of A; and this proves that the tort consists, not in making the excavation, but in causing B's soil to fall into it, and consequently that the right infringed is B's ownership of his own land, and not any right of his in A's land.

Suppose the surface of certain land belongs to A, while all the minerals under the surface belong to B, or that the upper part of a house belongs to A, while the lower part belongs to B, and B so conducts his mining as to cause A's soil to sink, or so conducts the repairs of his part of the house as to cause A's part to fall? It must be regarded as settled by authority[1] that B will be liable to A in either case; and yet it is assumed that A has acquired no right in B's part of the land, nor in his part of the house, whether by reservation, grant, or prescription; and, therefore, it must follow that the causing of the surface of the land to sink, or of the upper part of the house to fall, is a tort to A's right of ownership. It seems also to be so upon principle; for, if the State is to permit so artificial and inconvenient a division of land or houses to be made between different owners, it must, in all reason, afford some protection to one who owns the surface only of land, or the upper part only of a house; and, therefore, the State is supposed to forbid the owner of the minerals, in the first case, to do anything which shall cause the surface of the land to sink, and to forbid the owner of the lower part of the house, in the second case, to do anything which shall cause the upper part to fall. It seems also that the State is supposed to impose upon the owner of the lower part of the house the duty of keeping it in such a state of repair that it will afford a sufficient support for the upper part.

Suppose A and B are adjoining owners of land, and B builds a house on his land extending to the boundary line between B and A, and then A makes an excavation in his land, but leaves a space between the excavation and the boundary line which would have been sufficient to prevent B's soil in its natural state from falling, but which proves insufficient to support the land with the house on it, and consequently the house falls? It is generally admitted[2] that A is not to be regarded as having caused B's house to fall,

[1] Humphries *v*. Brogden, 12 Q. B. 739, and see Rowbotham *v*. Wilson, 8 H. L. Cas. 348-

[2] However, in Angus *v*. Dalton, 6 A. C. 740, 804, Lord Penzance said: "If this matter were *res integra*, I think it would not be inconsistent with legal principles to hold, that where an owner of land has used his land for an ordinary and reasonable purpose, such as placing a house upon it, the owner of the adjacent soil could not be allowed so to deal with his own soil by excavation as to bring his neighbor's house to the ground."

and so has not infringed B's right of ownership, and, therefore, that he is not liable to B, unless the latter has acquired by prescription or grant a right in the land of A to have his house supported by it; and it seems to be clear upon principle that no such right can be acquired by prescription, unless it can be shown that the pressure of the house, prior to the acquisition of the right, caused such a disturbance of A's soil as to render B liable in trespass; but this cannot be asserted upon authority.[1]

If the owner of Blackacre have rights in Whiteacre, which adjoins Blackacre, and the owner of Whiteacre commit an affirmative tort against the owner of Blackacre, how shall it be ascertained whether the right infringed is the ownership of Blackacre, or some right which such owner has in Whiteacre? By ascertaining whether the tort was committed on Blackacre or on Whiteacre; and this depends, not upon where the act which constitutes the tort was done, but where it produced its tortious effect. Thus, if the tort consist in

making soap on Whiteacre, or in manufacturing thereon bones into a fertilizer, or in burning bricks thereon, or in fouling the water of a stream which flows through Whiteacre, and thence into Blackacre, and sending it into Blackacre in its foul condition, or in making a dam in a stream which flows from Blackacre into Whiteacre, and thereby flooding Blackacre, — in each of these cases, it is plain that, while the tortious act is committed on Whiteacre, yet its tortious effect is produced wholly on Blackacre, and hence the right infringed is the ownership of Blackacre. On the other hand, if the tort consist in erecting a house on Whiteacre by which the access of light and air to ancient windows on Blackacre is ob-

[1] Angus *v*. Dalton, 3 Q. B. D. 85, 4 *idem* 162, 6 A. C. 740. In this case, it was finally held that a right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time; and that it is so acquired if the enjoyment is peaceable, and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building. There was, however, much diversity in the views expressed by the judges, and still more in the reasons by which they supported them. In the Queen's Bench Division, one judge was for the plaintiff and two for the defendant; in the Court of Appeal, two for the plaintiff and one for the defendant. And, though the judges who delivered opinions in the House of Lords agreed substantially in their conclusions, yet they differed greatly in their reasons, and one of them (Lord Justice Fry), while holding himself bound by the authorities to declare his opinion in favor of the plaintiff, yet also declared the rule, which he conceived to be established by those authorities, to be absurd and irrational, and one member of the House (Lord Penzance) entirely agreed with him. These circumstances do not, indeed, derogate from the authority of the decision within the United Kingdom, but elsewhere it is conceived that they ought to affect its authority very materially.

structed, or in obstructing a way which the owner of Blackacre has over Whiteacre, it is plain that the tortious effect of the wrongful act is produced on Whiteacre; and, therefore, the right infringed is the easement of light and air in the first case, and the right of way in the second case.[1] In the second case, also, the owner of Whiteacre, if he wishes to contest the right claimed by the owner of Blackacre, may, instead of obstructing the way, sue the owner of Blackacre for trespass *quare clausum fregit;* and then the owner of Blackacre will have to set up as a defence the right of way which he claims. In case of some easements, moreover, this is the only course open to the owner of Blackacre. Thus, in the case just put of fouling the water of a stream, as well as in that of erecting a dam across a stream in Whiteacre, and thereby flooding Blackacre, the owner of Blackacre has no means of preventing the act which he claims to be wrongful, and, therefore, if he wishes to contest the right of the owner of Whiteacre to do as he has done, the only course open to him is to sue the latter, and thus compel him to set up as a defence the right which he claims.

The ownership of incorporeal things differs, in respect to its infringement, from that of corporeal things, for the former can be infringed only by interfering with the owner's enjoyment of the thing owned; and, therefore, in order to ascertain in how many and what

ways such a right can be infringed, one must ascertain in how many and what ways it can be enjoyed. The common law right of an author in his literary creations furnishes a good illustration of this. An ordinary literary composition can be enjoyed by its author to his profit in only one way, namely, by printing and selling copies of it; and, therefore, it is only by multiplying copies of it without the author's leave that his right can be infringed. The author of a dramatic composition may, however, enjoy it to his profit in another way, namely, by producing it on the stage, and, therefore, his right may be infringed either by multiplying copies of his composition, or by producing it on the stage, without his leave.

There is, moreover, one species of incorporeal ownership which is like a relative right in this respect, that it can be infringed in

[1] These distinctions were lost sight of by Sir L. Shadwell, V. C., in delivering his judgment in Sutton *v*. Lord Montfort, 4 Sim. 559, 564; for while the case before him was one of obstructing an easement of light, and while the question he was considering was one which could arise only in cases in which the right infringed was an easement or other incorporeal right, yet he referred to the case of the owner of Whiteacre committing a nuisance against Blackacre, by making soap or grinding bones, as in point.

one way only, and that its infringement is precisely the converse of the right itself, namely, a monopoly or exclusive right granted by the State, *i. e*., a negative absolute right; for, as such a right consists merely in the power to prevent any one else from doing what the grantee of the monopoly has the exclusive right to do, it is only by doing something to which the monopoly extends that the right of such grantee can be infringed. In this respect, therefore, a monopoly is strictly analogous to a negative personal obligation. By incurring a negative obligation, the obligor deprives himself of the right to do something as between himself and the obligee; by granting a monopoly the State deprives all persons within its limits, except the grantee of the monopoly, of the right to do something as between them and such grantee. For example, a copyright is simply a monopoly of the right of multiplying copies of a printed book; and, therefore, it is no infringement of an author's copyright in a published drama to produce such drama on the stage. It follows, therefore, that a copyright in a published drama is by no means equal, even while it lasts, to an author's common law right in an unpublished drama. Of course, the State might have revested in the authors of published books, for a limited period, the right which it declared them to have lost by publication, and the title[1] of the original copyright act[2] indicates that the legislature which passed it supposed that that was what it was doing; but all that the act really did was to vest in authors of published books the exclusive right of multiplying copies of them;[3] and a consequence was that, for more than a century,[4] the publication of a drama deprived its author of all exclusive right of producing it on the stage. Another consequence was, that it required two statutes, and the creation of two rights, to replace, for a limited period, the one common law right which the author of a drama was held to have lost by publishing the drama. It may be further remarked that the two statutory rights are inferior to the one common law right, not only because of their limited duration, but also because they do not extend beyond the limits of the State which creates them, while the common law right is good everywhere.

[1] "An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned."

[2] 8 Anne, c. 19 (1709).

[3] "Shall have the sole right and liberty of printing such book and books for the term of," etc. S. 1.

[4] Namely, in England, until 1833, when 3 & 4 Will. IV. c. 15, was passed; in the United States, until the passage of the Act of 1856, c. 169. 11 Stats. 138.

There are some affirmative torts which are clearly infringements of rights of property, but which consist, not in injuring anything which belongs to another, but in wrongfully depriving another of something which belongs to him, or in wrongfully intercepting something which would otherwise come to another, and yet under such circumstances that the person injured cannot be restored to what he has thus been wrongfully deprived of, and, therefore, he must content himself with a compensation in money, *i. e*., damages. In such cases, therefore, while the tort is clearly to property, yet it is not a tort to any particular thing, nor has it properly any relation to any particular thing. It is, therefore, a tort to the estate of the person injured in the aggregate, — to the *universitas* of his estate (as the Romans called it), consisting, as it does, in making him so much poorer. Of this description are many species of fraud, for example, the so-called infringement of a trade-mark, or of good-will, — which consists in wrongfully and fraudulently depriving another person of customers whose patronage he would otherwise have received.

In all such cases, it is very important that it be clearly understood that the tort is not to any specific thing; for, otherwise, one will be in danger of deceiving himself as to the nature of the right injured, — of persuading himself, indeed, that the injury is to a right which in truth has no existence. Thus, in cases of infringement of trade-mark or good-will, it has often happened that, as it was assumed that some specific thing must be injured, so it was concluded that a trade-mark or good-will is a species of incorporeal property, — a notion which clearly has no solid foundation. There may, indeed, be other reasons for the notion than the one just stated. For example, it has been found convenient to apply to trade-marks the nomenclature which had become familiar in connection with patent rights and copyrights, and the practice of doing so has suggested and made plausible the idea that the former were analogous to the two latter. So, also, trade-marks and good-will have often been spoken of and treated as proper subjects of purchase and sale. It is, however, only by a figure of speech that either of these can be said to be purchased or sold, and what is called a purchase and sale of a trade-mark or good-will is in truth only a contract, by which (for example) the so-called seller agrees to retire from business, and to introduce the so-called purchaser to his former customers and to the public as his successor.

What has thus far been said of rights and their infringement has in it no element of equity. The rights which have been described may be defined as original and independent rights, and equity has no voice either in the creation of such rights or in deciding in whom they

are vested. Equity cannot, therefore, create personal rights which are unknown to the law; nor can it say that a thing, which by law has no owner, is a subject of ownership, nor that a thing belongs to A which by law belongs to B; nor can it create an obligation or impose a duty which by law does not exist; nor can it declare that a right arising from an obligation is assignable, if by law it is not assignable. To say that equity can do any of these things would be to say that equity is a separate and independent system of law, or that it is superior to law.

If there is no element of equity in a given right, neither is there any in the infringement of that right; for what is an infringement of a right depends entirely upon the extent of the right. If, therefore, equity could declare that a right has been infringed when by law it has not, it would thus enlarge the right of one man, and curtail that of another.

When, however, it is said that equity has no voice in a given question, it must not be inferred that a judge sitting in equity has no such voice. An equity judge administers the same system of law that a common law judge does; and he is therefore constantly called upon to decide legal questions. It, accordingly, sometimes happens that courts of equity and courts of common law declare the law differently; and a consequence of this may be that courts of equity will recognize a certain right which courts of common law refuse to recognize; but it does not follow that the right thus recognized is properly an equitable right. So courts of equity may treat an act as an infringement of a legal right, which courts of common law treat as rightful; but it does not follow that such an act is properly an equitable tort. A well-known instance of such an act is found in what is commonly called equitable waste. For example, if a tenant for life, without impeachment of waste, cut down ornamental trees, or pull down houses, a court of equity says he has committed waste, while a court of common law says he has not. Either court *may* be wrong, and one of them *must* be; for the question depends entirely upon the legal effect to be given to the words, "without impeachment of waste," and that cannot depend upon the kind of court in which the question happens to arise. Yet the practical consequence of this diversity of views is,

that there is a remedy in equity against the tenant in the case supposed, while there is none at law; and this gives to the act of the tenant the semblance of being an equitable tort. In truth, however, the act is a legal tort, if the view taken by courts of equity is correct, while it is a rightful act, if the view taken by courts of common law is correct.

As legal rights have in them no element of equity, so equitable rights have in them no element of law. In short, legal rights and equitable rights are entirely separate and distinct from each other, each having a source and origin of its own, — legal rights being the creatures of the law, *i. e.*, of the State, and equitable rights being the creatures of equity. What then is the nature of equitable rights, and how can equitable rights and legal rights coexist in the same State? This question suggests another, namely, what is the nature of equity, and how can law and equity coexist in the same State? As law is the creature of the State, so equity was originally the creature of the supreme executive of the State, *i. e.*, of the king. What then was the power of the king which enabled him to create equity? It may be answered that he had in him the sole judicial authority, as well as the sole

executive power, but none of the legislative power (*i. e*., he could not alone exercise any portion of the latter). By virtue of his judicial power, he had entire control over procedure, so long as the legislature did not interfere; and this it was that enabled him to create equity. As he had no legislative power, he could not impart to his decisions in equity any legal effect or operation, but when he had, by the exercise of his judicial authority, rendered a decision in equity in favor of a plaintiff, he could enforce it by exerting his executive power against the person of the defendant, *i. e*., he could compel the defendant to do, or to refrain from doing, whatever he had by his decision directed him to do or to refrain from doing.

The subject must, however, be examined a little more closely. The cases in which equity assumes jurisdiction over controversies between litigants may be divided into two great classes, namely, those in which a plaintiff seeks relief in equity respecting some legal claim which he makes against the defendant, and those in which he makes no such claim. In the first class of cases, the ground upon which equity takes jurisdiction is that the plaintiff either can obtain no relief at all at law, or none which is adequate; and, therefore, so far as regards this class of cases, equity consists

merely in a different mode of giving relief from that employed by courts of common law, *i. e*., in a different mode of protecting and enforcing legal rights; and, therefore, the exercise of this branch of the jurisdiction has already been sufficiently accounted for.

The other class of cases, however, is not so easily disposed of. It may be divided into those in which the plaintiff sets up no legal right whatever, and those in which the only legal right he sets up is *a* defence to some legal claim which the defendant makes against him. In cases belonging to the first subdivision, equity interferes upon the ground that the substantive law (and not merely the remedial law) is inadequate to the purposes of justice. In cases belonging to the second subdivision, equity interferes upon the ground that justice requires that the plaintiff should be permitted to take the initiative in the litigation, and procure a decision of the controversy in a suit brought by himself, instead of being compelled to wait the pleasure of the defendant in suing him at law, and then to set up his defence. In one important particular, however, cases belonging to these two subdivisions are alike, namely, in the necessity which they impose upon equity of creating a new right in the plaintiff's favor; for no action or suit can be maintained in any court without some right upon which to found it. Moreover, such right must consist of a claim to be enforced against the defendant, and not merely of the means of defeating a claim which the defendant makes against the plaintiff, *i. e*., of a defence.

How then is the difficulty to be met? In early times, probably, the difficulty itself was not much felt. Perhaps, indeed, it was not felt at all, it not being perceived that the king could properly issue judicial commands only in support of some right. At the present day, however, the question whether any given action or suit will lie must be answered in one of three ways, namely, first, by showing some right in the plaintiff on which the suit can rest; secondly, by saying that it will not lie; or, thirdly, by saying it is an anomaly; and the cases in which the plaintiff asserts no legal claim against the defendant are too numerous to be disposed of in that way.

Can equity then create such rights as it finds to be necessary for the purposes of justice? As equity wields only physical power, it seems to be impossible that it should actually create anything. It seems, moreover, to be impossible that there should be any other actual rights than such as are created by the State, *i. e*., legal

rights. So, too, if equity could create actual rights, the existence of rights so created would have to be recognized by every court of justice within the State; and yet no other court than a court of equity will admit the existence of any right created by equity. It seems, therefore, that equitable rights exist only in contemplation of equity,;'. *e*., that they are a fiction invented by equity for the promotion of justice. Still, as in contemplation of equity such rights do exist, equity must reason upon them and deal with them as if they had an actual existence.

Shutting our eyes then to the fact that equitable rights are a fiction, and assuming them to have an actual existence, what is their nature, what their extent, and what is the field which they occupy? 1. They must not violate the law. 2. They must follow the analogy of one or more classes of legal rights. 3. There is no exclusive field for them to occupy; for the entire field is occupied by legal rights. Legal and equitable rights must, therefore, exist side by side, and the latter cannot interfere with, or in any manner affect, the former. 4. They must be such as can be enforced by the exercise of physical power *in personam;* for, as equity has no other means of enforcing rights, it would be in vain for it to create rights which could not be so enforced. 5. Propositions one and four prove that no equitable rights can be created, even by way of fiction, in analogy to either class of absolute rights, nor in analogy to real obligations; and, though expressions are often met with which seem to indicate the contrary, yet they must be regarded as mere figures of speech. 6. All equitable rights must, therefore, be in the nature either of personal obligations or of duties. 7. Equitable rights clearly constitute but one class, and, therefore, they must all be classed either as personal obligations or as duties. 8. They bear some analogy to duties but more to personal obligations; and, therefore, they must be classed as equitable personal obligations. They are analogous to duties in this respect, namely, that, as duties will be imposed whenever the State sees fit to impose them, so equitable rights will be created, subject to the limitations herein-before and herein-after stated, whenever equity finds it necessary to create them. In all other respects, however, they are analogous to personal obligations. 9. There is no division of equitable obligations answering to the division of legal obligations into those which are *ex contractu* and those which are *ex lege;* for a contract always produces a legal obligation. Therefore, all equitable obligations may be said to be

ex æquitate. 10. An equitable obligation cannot impose a general personal liability upon the obligor, as that would be in violation of law. Therefore, while a covenant by a purchaser of land with his vendor, that no building shall ever be erected on the land other than a dwelling-house, will bind in equity all subsequent owners of the land until it comes into the hands of a purchaser for value and without notice of the covenant, yet a covenant by such purchaser with his vendor, that a dwelling-house shall be erected on the land, within a specified time, at a cost of $10,000, will bind no one in equity whom it will not bind at law.[1] 11. An equitable obligation, therefore, can bind the obligor only in respect

of some right vested in him; and, therefore, every right created by an equitable obligation is derived from, and dependent upon, some other right vested in the obligor. Moreover, every original equitable right is derived from, and dependent upon, a *legal* right vested in the obligor. In short, every equitable right is derived, either mediately or immediately, from a legal right; and, while an indefinite number of equitable rights may be derived from one legal right, yet they will all be dependent upon that one legal right.

It is not, however, all legal rights that can be the subjects of equitable obligations. Only those can be so which are alienable in their nature. Of absolute rights, therefore, none of those which are personal can ever be the subjects of equitable obligations, while nearly all rights which consist in ownership can be the subjects of such obligations. Relative rights can generally be the subjects of equitable obligations, but not always. For example, some rights arising from real obligations are inseparably annexed to the ownership of certain land, and, therefore, are not alienable by themselves. So, also, some rights arising from personal obligations are so purely personal to the obligee as to be obviously inalienable. It is only necessary to mention, as an extreme case, the right arising from a promise to marry.

If a legal right is capable of being the subject of an equitable obligation, the power of equity to impose an obligation upon the owner of it as such is subject to one limitation only, namely, that which is imposed by law. Under what circumstances, then, can an equitable obligation be imposed upon the owner of a legal right as such without violating the law? Whenever the owner of the

[1] Tulk *v*. Moxhay, 2 Ph. 774; Haywood *v*. Brunswick Building Soc., 8 Q. B. D. 403; L. & S. W. R. Co. *v*. Comm, 20 Ch. D. 562, 582, 586, 587; Austerberry *v*. Oldham, 29 Ch. D. 750.

right has received it by way of gift, but not for his own benefit, or has obtained it by fraud or other wrong, or has received it by way of gift, or without payment of value, from one who was himself bound by an equitable obligation respecting it, or has received it for value from a person so bound, but with notice that the latter was so bound. So, also, if the owner of a legal right incur a legal obligation respecting it, equity can, subject to the qualification stated in proposition ten, enforce that obligation against all subsequent owners of the right, until the latter reaches the hands of a purchaser for value and without notice. So, also, if the owner of a right has incurred a legal obligation to transfer it to another, and everything has been done, and all things have happened, necessary to transfer the right, if it were equitable, equity will treat the right as having passed in equity, though not at law, and, therefore, will impose upon its owner an obligation to hold it for the benefit of the legal obligee.

By an unfortunate anomaly it is also now held that the owner of a legal right may, by a mere declaration in writing to that effect, incur an equitable obligation respecting that right in favor of a person between whom and himself there has been no previous relation, and from whom he receives no consideration.[1] This is as much in violation of law as the

case mentioned in proposition ten. Moreover, it is in effect enforcing an agreement which has no consideration to support it.

If A convey land to B, and the conveyance be expressed to be in consideration of money paid by B to A, but in fact the money was paid as a loan, and not as the price of the land, the inference will be irresistible that the conveyance was made merely to secure the repayment of the money lent; and, therefore, the moment the conveyance is made, B will incur an equitable obligation to hold the land for A's benefit, subject to his own rights as A's creditor, *i. e*., there will be a resulting trust in favor of the debtor.

If land be conveyed by *a* debtor to his creditor upon a condition subsequent, namely, that the title conveyed shall revest in the debtor on his paying the debt on a day named, or upon an agreement by the debtor to reconvey the land on payment of the debt on a day named, and the day be permitted to pass without payment, equity will, the moment that the debtor's legal right is thus lost, impose an obligation upon the creditor to reconvey the land

[1] Lewin on Trusts (10th ed.) 68.

upon being paid "principal, interest, and costs"; and this obligation will continue in force till equity itself puts an end to it. The principle upon which equity does this is that the debtor has lost his legal right as a penalty for not paying the debt on the day named, that the debt still remains unpaid, and, therefore, if equity does not interfere, the debtor, having lost his land, will also be compelled to pay the debt, if he have the means of doing so, — in which event he will receive nothing for his land. It may be objected that equity here violates the legal rights of the creditor by converting a penalty, agreed upon between the parties, into a mere security for the payment of a debt; but the answer is that the objection comes too late, for equity has in this manner relieved against all penalties from the earliest times, and its action in that respect has been acquiesced in by the legislature. For example, by the common law the obligor in a bond, who failed to pay on the day named in the bond, became in consequence liable to pay twice the amount of the original debt, but equity would always restrain an action to recover the penalty on payment of "principal, interest, and costs"; and the interference of equity in this way was not only acquiesced in, but its view was adopted by the legislature, and became statute law, more than two hundred years ago.[1]

If payment of a debt be secured by a pledge of the debtor's property, and also by the obligation of a personal surety, and the surety pay the debt, equity will compel the creditor to deliver the pledge to him, and not to the debtor, though the latter has a clear legal right to receive it, the debt being paid and extinguished; *i. e*., equity destroys the legal right of the debtor, and converts the creditor into a trustee for the surety. This is done upon the theory that the debt is not paid by the surety, but is purchased by him, and that he is, therefore, entitled to the pledge as an incident of the debt. This, however, is only a fiction, — a fiction, moreover, which is contrary to law; for the payment by the surety extinguishes the debt. Equity does this under the name of subrogation, and perhaps her best justification is that she borrowed both the name and the thing from the civil law.

Equity has, moreover, followed the civil law in carrying the doctrine of subrogation still further; for it permits a surety who has paid the creditor, and thus extinguished the debt, to recover a full indemnity from the debtor, and that too on the theory that the debt still remains due from

[1] Namely, by 8 & 9 Will. III. c. 11, s. 8. 17

the latter, and that the surety is enforcing the rights of the creditor.

In all the foregoing cases the obligation imposed by equity upon the owner of a legal right is affirmative, *i. e.*, it is an obligation to hold the legal right for the benefit of the equitable obligee, in whole or in part. There are cases, however, in which the object of equity is not to compel the owner of a legal right to hold the same for the benefit of another, but to restrain him from exercising it for his own benefit; and, whenever that is the case, the obligation imposed will of course be negative. Thus, if a debtor fraudulently procure from his creditor a release of the debt, or procure such release for a consideration which he afterwards refuses or fails to pay or perform, equity will impose upon him an obligation not to use the release as a defence to an action or suit by the creditor to recover the debt. So equity will impose upon a defendant to an action or suit an obligation not to use a defence which will prevent a trial of the case upon its merits, or by which the course of justice will otherwise be obstructed. So, if a legal claim be of such a nature that it may be the subject of an indefinite number of actions, and if it has already been litigated sufficiently to satisfy the purposes of justice, equity will impose upon the unsuccessful party an obligation not to prosecute the claim further, or not to resist it further, as the case may be.[1]

When an equitable right has once been created, it may in its turn become the subject of a new equitable right, *i. e.*, its owner may incur an equitable obligation in respect to it, just as the owner of a legal right may incur an equitable obligation in respect to that; and this process may go on indefinitely, each new equitable right becoming in its turn the subject of still another equitable right, and all the equitable rights being derived from the same legal right, the first immediately, the others mediately.

If equitable rights are to be classed as obligations rather than as duties, it will follow that infringements of such rights are to be regarded as breaches of obligation. Perhaps, however, it is not very material whether they be regarded as breaches of obligation or as equitable torts; for, whether they be the one or the other, it seems that the relief which equity will give will be the same. For

[1] The rights mentioned in the text, namely, the right to bring an action, and the right to defend one's self against an action, seem to be personal rights. If they are not, they relate to procedure, and hence do not come within the scope of this article. See Holland, Jurisprudence, Part 2, c. 15.

equity never gives damages for an infringement of an equitable right, but makes the wrong-doer a debtor to the person wronged instead, and proceeds upon the theory of

compelling the former to restore to the latter what he has lost, or to place him in the situation in which he would have been if the wrong had not been committed.
