DESIRABLE CHANGES IN THE COMMON LAW[1].

I appreciate the honour that was done to me when I was asked to read a paper on the subject of "Desirable Changes in the Common Law." The following observations are made with much diffidence in the hope that some of my tentative suggestions may contain here and there something worthy of discussion here or even worthy of your subsequent consideration at leisure.

1. If I had been writing only half a dozen years ago, I should naturally have begun with an outstanding defect of the common law, namely, the harsh and unjust rule which refused to recognize legitimation of children by the subsequent marriage of their parents; but in the year 1920 the Conference of Commissioners on Uniformity of Legislation in Canada prepared an Act to bring into effect in the common law provinces the rule of the civil law on this subject. This Act was adopted in the common law provinces in the course of the years 1920, 1921 and 1922, and thus very simply and quietly has been reversed the famous declaration published at the Parliament of Merton of 1235-1236, when the earls and barons of England, in answer to a question of the bishops, said *nolumus leges Angliae mutare quae usitatae sunt et approbatae*—a characteristic expression of national conservatism.[1a]

2. If I had been writing only four years ago I should naturally have advocated some change in the common law with regard to contributory negligence.

But again the Conference of Commissioners has been chiefly instrumental in bringing about the adoption in the common law provinces of the rule of the civil law by which the damages are apportioned if two parties are in fault; though, as regards form, the Conference has substantially followed the wording of the Maritime Conventions Act, 1911 (Great Britain) and 1914 (Canada).

[1] A paper read before the Canadian Bar Association on the 24th August, 1927, by Mr. John D. Falconbridge, K.C., Dean of the Osgoode Hall Law School, Toronto.

[1a] Cf. 2 Holdsworth, History of English Law, 3rd ed., 1923, p. 218, and an article in 36 Law Quarterly Review 255 (July, 1920), by James Dundas White.

Strange to say, last year Mr. Francis King, K.C., had occasion to draw the attention of the Association to the curious fact that a member of the Association could read a paper on the subject of contributory negligence without mentioning the Conference of Commissioners.[2]

Incidentally, it is proper to recall that in March, 1923, Mr. King, as president of the Ontario Bar Association, read a paper advocating the change of the common law rule, and in the same year brought the subject before the Conference of Commissioners. His paper was appended to the report of a committee on this subject in 1924.[3]

I am not overlooking the fact that in January, 1917, a paper by Mr. M. J. Gorman, K.C., appeared in the *Canadian Law Times,* advocating a change in the law, nor am I overlooking the paper read by the present Chief Justice of Canada before this Association in 1922, in which the subject was briefly referred to.[4] The last mentioned paper also refers to a number of other "differences between the law of Quebec and the law as administered in the other provinces of Canada."

After Mr. King's paper, valuable papers were written by Mr. Angus MacMurchy, K.C.,[5] and by Mr. R. I. Towers, K.C.[6] The latter paper is of especial interest because it refers to the decisions under the Ontario Contributory Negligence Act. Mr. Towers gives a qualified approval to the Act as prepared by the Conference of Commissioners as compared with the Ontario Act, though neither he nor the gentleman who read his paper in his absence seemed to be aware that it was the draft of the Conference to which approval was being given. The paper touches, however, upon a question of real difficulty and importance when the writer discusses the decisions under the Ontario Act—to the effect that the statute does not apply to a case in which ultimate negligence on the part of the defendant is proved, that is, where it is found that after the contributory negligence of the plaintiff the defendant could by the exercise of ordinary care have avoided the accident.[7]

[2] See Canadian Bar Association proceedings, 1926, pp. 39-40.
[3] See Conference proceedings, 1924, p. 37; Canadian Bar Association proceedings, 1925, p. 305.
[4] Proceedings, 1922, at pp. 231-2, 1 Can. Bar Review, at pp. 48-49; cf. *Grand Trunk Pacific Ry. Co.* v. *Earl,* [1923] S.C.R. at p. 406.
[5] Canadian Bar Association Proceedings, 1923, p. 338.
[6] Ibid. 1926, p. 170.
[7] See *Walker* v. *Forbes,* 1925, 56 O.L.R. 532; *Ferber* v. *Toronto Tranportation Commission,* 1925, 56 O.L.R. 537; cf. *Knowlton* v. *Hydro-Electric Power Commission,* 1925, 58 O.L.R. 80; *Imerson* v. *Nipissing Central Ry.,* 1925, 57 O.L.R. 588.

The latest decision on the subject is, I think, *McLaughlin* v. *Long*,[8] a decision under the New Brunswick Contributory Negligence Act (which follows the commissioners' draft). Here the Supreme Court of Canada applies to the infant plaintiff's negligence the same tests as would have been applied under the earlier Common Law in order to determine whether it was in fact *contributory* negligence, or —to follow the words of the statute—whether the damage or loss was (in part) *caused* by it.

It would appear that the same question arises under the Maritime Conventions Act.[9]

If, as I think should be done, the draft of the Conference is accepted rather than the Ontario Act, the question which I suggest for your further consideration is whether the draft of the Conference, if it does not already cover the point, should be amended so as to be made applicable to the case where ultimate negligence on the part of the defendant is proved. That is to say, the question is whether the statute should be limited to giving relief to the plaintiff in a case in which by the common law rule he would be deprived of all relief by reason of his subsequent negligence, or should be extended so as to give relief to a defendant in a case in which by reason of his subsequent negligence he would by the common law rule be deprived of all defence.

In other words, is it not desirable that the search for the ultimate negligence or the last chance to avoid the accident should be, as far as possible, rendered unnecessary? If one person has by his negligence directly or really helped to produce a dangerous situation, and another person by his subsequent negligence has failed to avoid the danger, should not the damage be divided in proportion to the respective degrees of negligence, without regard to the posibility that if the second person, whether plaintiff or defendant, had not been negligent there would have been no damage? Unless some such result as this is achieved by legislation we do not seem to be much better off than before—we must first apply the old law, and compel the jurors to answer the old series of

[8] [1927] S.C.R. 303.

[9] See *Admiralty Commissioners* v. *S.S. Volute*, [1922] 1 A.C. 129, which is cited as the *locus classicus* on this subject in *Anglo-Newfoundland Development Co.* v. *Pacific Steam Navigation Co.*, [1924] A.C. 406. In the latter case it was held that even if the respondents' vessel was crossing the Clyde in contravention of one of the Clyde Navigation By-laws, she was not liable in respect of a collision with the appellants' vessel, which was coming up stream, because the latter was solely to blame for holding on her course after she had been warned that the river was blocked.

questions, which they probably do not understand,[10] before we can decide whether the present statute applies at all, and then put another question to the jury in the event of the statute applying.

3. In leaving these two subject of legitimation by subsequent marriage and contributory negligence, I desire to remind our colleagues from the Province of Quebec that the Conference of Commissioners in each of these two striking instances has recommended the abandonment of an ancient common law rule in favour of a civil law rule.

In the face of these examples it can hardly be argued that we disciples of the common law are unwilling to adopt good things from the civil law, or that we commissioners on uniformity of legislation should be suspected of harbouring evil designs on that Ark of the Covenant—the Civil Code of Lower Canada.

We may excuse our colleagues from Quebec if at times they seem to us to adopt too jealous an attitude with regard to anything savouring of uniformity of law, because we know that the federal system has necessarily involved serious inroads by way of Dominion legislation upon the ancient law of Quebec, but after making all due allowance, I venture to suggest that they have not been as sympathetic as they might have been with the work of the Conference, and I also venture to assert that their lack of co-operation is due largely to misunderstanding.

I could write a whole paper on this subject alone, but on the present occasion I must content myself with pointing out that for the most part the commissioners have been dealing with modern commercial statutes which are altogether outside the purview of the civil code.

If we have discussed subjects such as wills, intestate succession and devolution of real property, with regard to which it is not so likely that the Province of Quebec will see eye to eye with us, is there any harm in the other provinces attempting to achieve uniformity among themselves?

On the other hand, when we discuss subjects such a bulk sales, life insurance, fire insurance, conditional sales, bills of sale, reciprocal enforcement of judgments, defences to actions on foreign judg-

[10] Some of the difficulties in finding a formula which is both comprehensible and productive of justice are pointed out by Lord Justice O'Connor in 38 Law Quarterly Review 17 (January, 1922).

ments, not to speak of legitimation by subsequent marriage and contributory negligence, is there any reason why Quebec lawyers should not join in our deliberations, or is there any fairness in depriving us of the benefit of their counsel?

4. Returning from that digression, to my main subject, I suppose that no one who is charged with speaking about desirable changes in the common law could avoid paying his respects to that hoary old sinner, the Statute of Frauds—a statute which played a useful part at a period when the law—particularly the law of contract—was comparatively undeveloped, and when parties were not allowed to be witnesses, and which so lately as 1823 could be spoken of with some enthusiasm, as witness the following passage:

In 1823, in the case of *Baldey* v. *Parker*,[11] Abbott, C.J., said:

> We have given our opinion on more than one occasion that the 29 Car. 2, c. 3, is a highly beneficial and remedial statute. We are therefore bound so to construe it as to further the object and intention of the Legislature, which was the prevention of fraud.

But the tide has definitely turned—and the dates of the next two quotations would seem to indicate that the statute allowing parties to be witnesses had something to do with the change.

In 1856, in the case of *Marvin* v. *Wallis*, [12] Lord Campbell, C.J., said:

> While the Statute of Frauds remains, we are bound to give effect to it, and shall do so, but we are doing so here - - - . I must say that, giving as I do full effect to the statute while it remains, I shall rejoice when it is gone. In my opinion it does much more harm than good. It promotes fraud rather than prevents it, and introduces distinctions which, I must confess, are not productive of justice.

In 1860, in the case of *Castle* v. *Sworder*,[13] Baron Martin said:

> I agree with the observation of Lord Campbell in *Marvin* v. *Wallis*, that so long as the 17th section of the Statute of Frauds remains in force we are bound to give effect to it; and, though it is universally disapproved of, the mode of getting rid of it is to give it its true construction, and not to put upon it a forced construction in order to enable persons to escape from it.

[11] 2 B. & C. 37, at p. 40.
[12] 6 E. & B. 726, at 736.
[13] 5 H. & N. 281, at p. 285.

An editorial note in the *Law Quarterly Review* for January, 1927,[14] is as follows:

> In the present year, 1927, we shall be celebrating an occasion of outstanding and sentimental interest to the legal profession. On March 12, 1677, was enacted the famous Statute of Frauds, 29 Ch. 2, c. iii, so that it has now attained its two hundred and fiftieth anniversary. Perhaps it is not inopportune to suggest that a dinner in its honour be given in one of the Inns of Court. A suitable number of litigants, who have been cheated of their rights by means of this interesting and aged Statute, might be invited to give relish to the affair. If some of the defendants who have sheltered themselves behind its useful provisions are also asked, care will have to be taken that none of the silver disappears. The toasts of the evening will be "The Law—may it never be reformed" and *"Floreat iniustitia."*

This is not the first reference to the Statute of Frauds in our pages. The inaugural article of Volume I, written by Mr. Justice Stephen, was an attack on section 17 of the Statute of Frauds, substantially re-enacted in the Sale of Goods Act, 1893. Although his remarks were concerned with that section in particular, they apply with equal force to most of section 4. "The special peculiarity of the seventeenth section of the Statute of Frauds is that it is in the nature of things impossible that it ever should have any operation, except that of enabling a man to escape from the discussion of the question whether he has or has not been guilty of a deliberate fraud by breaking his word. In some cases, no doubt, this may protect an honest man against perjury. In others it may enable a man to give judgment in his own favour, that a contract into which he entered, it may be improvidently, is inequitable and ought not to be carried out, but in the vast majority of cases its operation is simply to enable a man to break a promise with impunity, because he did not write it down with sufficient formality."

Not only is the Statute unjust, but it is also uncertain. "It is universally admitted, that no enactment of any legislature ever became the subject of so much litigation."[14a] Year after year new points arise, and even in 1926 judgments on the interpretation of words written two hundred and fifty years ago have been reported. "Can any one," continues Mr. Justice Stephen,

[14] Vol. 43, pp. 1-3.

[14a] Smith's "Law of Contracts," p. 38, quoted by Leake in "Transactions of the Juridical Society," Vol. I., p. 271.

"look at what has been written upon the subject without feeling some indignation at the waste of time, labour, and money, which has been incurred in solving a problem which may be thus stated: If the authors of the Statute of Frauds had ever considered the foolish question now before the Court (which it is morally certain they never did), what view are we to guess that they would have taken upon it, our guess being guided by certain artificial rules of construction, the application of which probably vitiates the result arrived at—which result, however, is not of the least importance? . . . I speak, perhaps, with excusable warmth upon this subject, because I have devoted a great deal of time which might have been better employed to this piece of morbid anatomy."

Nearly thirty years later, in Vol. xxix of this Review, at p. 247, an editorial note said: "Has it ever occurred to upholders of this piece of antiquated legislation that in 1677 the defendant could not give evidence on his own behalf, and that the protection which the Statute conferred upon him is not called for at the present day? We would also add that £10 in the time of Charles II. had a different monetary value from that which it bore in 1893, when another section was slavishly re-enacted."

It would be a work of supererogation to refer to the great number of adverse criticisms which have been expressed, both by eminent Judges and by text-book authorities, on this statute, especially within the past fifty years. Perhaps we may quote Professor Holdsworth,[14b] who cannot be accused of harbouring iconoclastic intentions against the law: "The prevailing feeling both in the legal and the commercial world is, and has for a long time been, that these clauses have outlived their usefulness, and are quite out of place amid the changed legal and commercial conditions of to-day. This is clearly the last phase."

Lord Nottingham, who prided himself upon being primarily responsible for the statute, said that "every line was worth a subsidy."[14c] Lord St. Leonards' comment on this remark is well known, "Every line of it has cost a subsidy"—a subsidy paid by honest men to the fraudulent. The Lord Chancellor who—we hope in the near future—succeeds in having the Statute of Frauds repealed will have as much reason to congratulate himself on his work as Lord Nottingham had when it was first enacted.

[14b] History of English Law, Vol. VI., p. 396.
[14c] Lives of the Norths, I. 141.

Even if there is something to be said for the first two clauses of s. 4 of the Statute of Frauds—those relating to a promise by an executor to answer damages out of his own estate and a special promise to answer for the debt, default or miscarriage of another person—because in these cases a man is sought to be made liable for something which is not primarily his own debt or liability,[15] and even if the second clause contributed in its time to the development of the law of guarantee or suretyship, is it worth while today to compel courts to indulge in mental gymnastics in order to determine whether a person who intended to guarantee the debt of another shall be liable or not?[16]

And what can really be said in favour of s. 17 of the Statute of Frauds or the corresponding section of the Sale of Goods Act? Why should a person who has orally made a contract to buy or sell goods for anything over the trifling sum of $40 be free from liability, where the evidence of the contract is clear, merely because there has been no acceptance and receipt of the goods or part of them, or part payment, or earnest?

In a review of volume 6 of Holdsworth's History of English Law, the late A. E. Randall, then editor of the *Law Quarterly Review*, wrote in April, 1925:[16a]

> "As the learned author points out, £10 represented a large sum of money in 1677. The extravagance of our dear friend Mr. Samuel Pepys in adorning his person is well known, but I do not think that he incurred a bill amounting to that sum at one and the same time, and he saw to it that Mrs. Pepys did not, so far as we can judge. Why the legislature in its wisdom did not attempt to translate the sum into modern values when it passed the Sale of Goods Act will always remain an inscrutable mystery to me - - - -. If the statute still supplies a want and it is deemed to be inexpedient to repeal it—although I must admit that I agree with the learned author that it should be consigned to the scrap-heap—it must be admitted that it affords a defence to the wealthy in many instances where it would he denied to the poor. This, of course, is a question of policy, and with questions of policy the historian and the practising lawyer have little or no concern. But the lawyer may suggest that it would be well to replace the statute by a well-considered measure expressed in clear terms."

[15] Cf. Street, Foundations of Legal Liability, 1906, vol. 2, pp. 183 ff.

[16] See, e.g. article in 68 U. of Penn. L.R. pp. 1, 137, reprinted in 55 D.L.R. 1.

[16a] 41 L.Q.R. at p. 198.

5. While I am on the subject of the Statute of Frauds, I note that several of the provinces have added a section to the statute, rendering unenforceable an oral agreement for the payment of a commission for the sale of real property.[17]

A good deal can be said in favour of this provision, and I am not advocating an indiscriminate repeal of all the sections of the statute, but rather a general reconsideration of its provisions, with a view of repealing some of them and adapting others to modern conditions.

In the case of the real estate agent and his commission, it might be worth considering whether the statute should not go a little further by way of defining what he should do in order to earn his commission. It might simplify this troublesome branch of the law if it were enacted, for example, that unless otherwise agreed, an agent's commission should be payable only in the event of a completed sale or a sale which would have been completed but for the default of the vendor. The present law seems to be that if the owner of land "lists" it with an agent for sale, or employs an agent to "sell" it, he is liable for the commission when the agent procures a purchaser, in the sense that he obtains an offer in writing on the terms authorized by the owner so that the owner can make a binding contract by accepting the offer,[18] unless it is agreed that the commission shall not be payable until the sale is completed, either expressly, or impliedly, as, for example, by a provision that the commission shall be paid out of the purchase money.[19]

6. Connected to some extent with the question of the repeal or revision of the Statute of Frauds is my next suggestion—a radical one, which has already been made elsewhere by other persons—namely that consideration as an essential element in the formation of contract should be abolished, and that the distinction between contracts under seal and simple contracts should be abolished.

Is there any sense today in saying that a promise not made under seal is invalid without consideration, whereas if one's solicitor or even one's stenographer or clerk happens to have attached a little wafer, or the printer happens to have printed a circle with

[17] See, e.g. Ontario Statutes, 1916, c. 24, s. 19, amended 1918, c. 20, s. 58.

[18] *Peacock* v. *Wilkinson*, 1915, 51 Can. S.C.R. at p. 322; *Smith* v. *Barff*, 1912, 27 O.L.R. 276; *Haygarth* v. *Webb*, 1923, 54 O.L.R. 172.

[19] *Fletcher* v. *Campbell*, 1913, 29 O.L.R. 501; *Flanagan* v. *Chapman*, 1925, 58 O.L.R. 94.

the word "seal," opposite the space where one signs, it is binding without consideration?

Will any one defend that juridical monstrosity—the irrevocable promise under seal, supposed to depend for its irrevocability on the case of *Xenos* v. *Wickham,* [20] followed in Ontario in *Nelson* v. Pellatt?[21]

Is there any sense in requiring consideration, and then reducing the requirement to an absurdity, by saying that the consideration need not be adequate? Thus we get such an edifying doctrine as that a creditor cannot accept part of his claim in settlement, unless he receives payment in some different way from that in which he was entitled to payment, or unless the debtor throws into the bargain a tom-tit or a canary, or any other article valuable or worthless which he happens to have in stock.[22] This particular phase of the doctrine of consideration has been changed in Ontario by statute,[23] but outside of the special case of a creditor making a settlement with a debtor, even in Ontario the law of contract still rejoices in subtle distinctions on the question whether the consideration, which may be admittedly inadequate and of no real weight as a reason for holding the promise to be binding, is of *some* monetary value in the eye of the law. That is, the tom-tit theory still flourishes.

Obviously, as I may point out in passing, this theory of a technical consideration, inadequate to the point of unreality and absurdity, has no relevancy when it is necessary to decide whether a person is acting in good faith—for example, in deciding whether a transaction is voidable as being in fraud of creditors, or whether the holder of a bill of exchange is a holder in due course. The inadequacy of the consideration would in such a case be an important element in deciding the question of good faith.

Holdsworth, in his History of English Law,[24] after discussing the history of consideration in English law, and comparing consideration with the Roman *causa* and the French *cause,*[25] concludes as follows, at pp. 45-48:

> Continental systems of law, therefore, by gradually altering, and then in effect dropping the doctrine of *causa,* have worked

[20] 1867, L.R. 2 H.L. 296.
[21] 1902, 4 O.L.R. 481.
[22] See, for example, *Couldery* v. *Bartrum,* 1881, 19 Ch. D. at p. 399.
[23] R.S.O. 1914, c. 133, s. 16.
[24] Vol. 8 (1926).
[25] As to which see an article by Mr. F. P. Walton, in 41 Law Quarterly Review 306 (July 1925).

out a theory of contrac[redacted]ry different from the English system based on the doctrine [redacted] consideration. But it will be clear that, if the eighteenth [redacted]tury theories of moral obligation, and still more if the [redacted]ry put forward by Lord Mansfield in *Pillans* v. *Van Mie[redacted]* had prevailed, the English theory of contract would now [redacted]pproaching very closely to the continental system. It is w[redacted]y of note that, in the case of *Pillans* v. *Van Mierop*, Wilmot, [redacted]o a large extent, based his judgment on an identification of t[redacted]ivilian *causa* with the English consideration.[26] As the civi[redacted] held that there could be no *nudum pactum* when the agreen[redacted] was put into writing, because the writing made a *causa*, sc[redacted] England writing should supply the place of consideration. [redacted] we have seen that this theory was never accepted; and tha[redacted]n the second quarter of the nineteenth century, the theory [redacted]at moral obligation was a valid consideration was rejected. [redacted]h these lines of development, therefore, were closed.

Instead, a return was [redacted]ade to those sixteenth and seventeenth century cases, in wh[redacted] the doctrine of consideration was being developed from the p[redacted]ocedural necessities of the action of assumpsit. Thus the English theory of contract is still bound up with the conditions imposed upon it by the form of action through which contracts, other than specialty contracts, became enforceable.

No doubt the resulting theory of contract has its strong points. "Roughly stated it seems plain and sensible, the court will hold people to their bargains, but will not enforce gratuitous promises unless they are made in solemn form."[27] It is in fact strong where the rival theory is weak. But it may be questioned whether, in its present form, its weaknesses do not outweigh its advantages. Some of its weaknesses have been very clearly pointed out by Markby.[28] A gratuitous promise is not actionable unless it is made in writing under seal; but the court will not enquire into the adequacy of the consideration, and a mere nominal consideration will suffice. Why should not the performance by A of his duty under his contract with B, be a consideration for a promise by C to A? Why should not a promise to keep an offer open for a week, or a promise to release a debt in consideration of part payment, be valid? Why,

[26] 1765, 3 Burr. at pp. 1670, 1671.
[27] Pollock, Genius of the Common Law, 91.
[28] Elements of Law, 3rd ed. 310-317.

in fact, should not any promise b[redacted]nding if the party promising intended to put himself under [redacted]gal liability? The requirement of consideration in its pres[redacted]hape prevents the enforcement of many contracts, which o[redacted] to be enforced, if the law really wishes to give effect to the [redacted]ful intentions of the parties to them; and it would prevent t[redacted]nforcement of many others, if the judges had not used their in[redacted]uity to invent considerations. But the invention of considerati[redacted] by reasoning which is both devious and technical, adds to t[redacted] difficulties of the doctrine.[29] Markby's strictures have recentl[redacted]ained an increasing measure of support. Sir F. Pollock ha[redacted]aid that the application of the doctrine "to various unusu[redacted]ut not unknown cases has been made subtle and obscure[redacted]y excessive dialectic refinement.[30] In a recent case Lord [redacted]nedin said: "I confess that this case is to my mind apt to r[redacted] any budding affection which one might have had for the do[redacted]e of consideration. For the effect of that doctrine in the pr[redacted]nt case is to make it possible for a person to snap his fingers [redacted]a bargain deliberately made, a bargain not in itself unfair, a[redacted]d which the person seeking to enforce it has a legitimate intere[redacted]t to enforce."[30a] Professor Lorenzen, in an able article in the *Yale Law Journal,* to which I am much indebted, takes substantially the same view.[31]

In fact, the doctrine of consideration in its present form is something of an anachronism. The substantive law has long ago broken away from the leading strings of the forms of action, and the law of actions has become merely adjective law. But our theory of contract is still governed by a doctrine which is historically developed, with great logical precision, from the procedural requirements of the form of action by which simple contracts were enforced. These procedural requirements were not mere matters of form. They were the conditions precedent for applying the remedy which was the best, and in many cases

[29] "In some cases where it was clear that contractual liability ought to be recognised, they have found great difficulty in recognising it, because they could not find any 'consideration,' although there was ample other indication of intention. They have in most cases managed to get over the difficulty, but by reasoning which is the reverse of satisfactory." Markby op. cit. 311.

[30] Genius of the Common Law, 91.

[30a] *Dunlop Pneumatic Tyre Co.* v. *Selfridge and Co.,* [1915] A.C. at p. 855; it might however be contended that the refusal to uphold the validity of the contract in this case was on the whole in accordance with public policy, as a contrary decision would have facilitated the operations of a design to keep up prices as against the public: but this does not affect the main argument.

[31] "Subject to certain qualifications relating to form, it should suffice for the formation of contracts that there exist (1) capacity; (2) an intention to contract; and (3) a possible and lawful object." Yale Law Journal, xxviii. 646.

the only remedy, which the common law possessed for the enforcement of contracts. Thus it happens that it has not been possible to treat the doctrine of consideration as mere form. It has been necessary to treat it as the essential condition for the validity of all simple contracts.

There is, it seems to me, good sense in Lord Mansfield's view that consideration should be treated, not as the sole test of the validity of a simple contract, but simply as a piece of evidence which proves its conclusion. This is in effect the view which he tried to enforce in *Pillans* v. *Van Mierop;* [32] and though, like some of his other rulings,[33] it was demonstrably not English law, it embodied a true idea of the tendency of legal development. The consequence of adopting this view would be that any lawful agreement into which the parties to it entered with the intention of affecting their legal relations,[34] would, if it could be proved by adequate evidence, be enforceable. The intention of the parties to enter into a lawful agreement affecting their legal relations would be the main thing. If that was proved the agreement would be enforceable.

We have seen that in Continental states difficulties of proof have made it impossible to adopt an attitude quite so liberal as this;[35] and to introduce any such rule into the law of this country would make a total break with all existing rules of English law. But it is at least arguable that the time has come to make some sort of a change. A legal history is not perhaps the place to make suggestions as to the law of the future. It is concerned with the past. But, if history is to be something more than mere antiquarianism, it should be able to originate suggestions as to the best way in which reforms in the law might be carried out so as to make it conform with present needs. The doctrine of consideration has, as we have seen, its strong points. Its weakness is that it is inadequate as the sole test of the

[32] [Holdsworth, *op. cit.*, vol. 8, pp. 29-30.]

[33] [Holdsworth, *op. cit.*, vol. 7, p. 45.]

[34] This must of course be a condition precedent in any body of contract law; for a good and recent instance where an agreement was held to be unenforceable on the ground that no such intention existed, see *Balfour* v. *Balfour*, [1919] 2 K.B. 571; and cp. *Rose and Frank Co.* v. *Crompton and Bros*,. [1923] 2 K.B. 261, [1925] A.C. at p. 454, where it was held that the agreement of the parties was not enforceable because they had expressly negatived an intention to create any legal obligations; note also that exactly the same principle has been applied by Tomlin, J., to the creation of a trust, *In re Falkiner*, [1924] 1 Ch. 88; in fact in equity this principle has long been recognised, see *Lord Walpole* v. *Lord Oxford* (1797), 3 Ves. at p. 419; *Maunsell* v. *Hedges*, (1854), 4 H.L.C. 1039; *Jorden* v. *Money* (1854), 5 H.L.C. 185.

[35] [Holdsworth, *op. cit.*, vol. 8, p. 45.]

validity of simple contracts. The true remedy, therefore, is not to scrap it, but to reduce it to a subordinate place in the English theory of contract. This, it seems to me, could be done, and at the same time a great simplification could be made in the English law of contract, if a short Act were passed which (1) abolished the differences between simple and specialty contracts;[36] (2) repealed s. 4 of the Statute of Frauds and s. 4 of the Sale of Goods Act.[37]; and (3) provided that all lawful agreements should be valid contracts, if the parties intended by their agreement to affect their legal relations, and *either* consideration was present, *or* the agreement was put into writing and signed by all the parties thereto. By making these changes we should get a body of law which would be easy to apply, and would allow a greatly increased freedom of contract. The need for proof that the parties to the contract intended to affect their legal relations would be satisfied; proof of the existence of the contract would be facilitated; and, at the same time, full effect could be given to the intention of persons who wish to enter into contractual relations.

The recommendation made towards the end of the passage just quoted seems to me worthy of very serious consideration.

7. I have suggested one change in the law of sale of goods in the repeal or reformation of the clause of the Sale of Goods Act corresponding with s. 17 of the Statute of Frauds. It is of course outside of the scope of this paper to suggest mere verbal improvements in a statute such as the Sale of Goods Act, which on the whole is very well drawn. But there is one change in the law of sale of goods, which was suggested by the late A. H. F. Lefroy in a paper read before the Ontario Bar Association in 1918 and published under the title "Flaws in the Common Law."[38]

In modern times the application of the principle *caveat emptor* has been very much limited in certain circumstances by implied conditions that goods shall correspond with description or sample or both, that goods shall be merchantable under the description, or that goods shall be reasonably fit for the particular purpose for

[36] Something like this has already been affected in the law as to the administration of assets by 32, 33 Victoria c. 46; *Re Samson,* [1906] 2 Ch. 584.

[37] It might be necessary to reconsider other statutes which impose restrictions of form; the rule that the contracts of corporations must be under seal would not necessarily be affected, but they would cease to be specialty contracts.

[38] In 38 Canadian Law Times, 169 ff., and 54 Canada Law Journal, 131 ff.

which they are required. But apparently it is still the law that a man may sell diseased pigs, knowing of their condition, and at least if he says that he gives no warranty, he is entitled to compel payment of the price or resist an action for the return of the price. This was decided in *Ward* v. *Hobbs*,[39] and when the buyer's counsel, in despair, argued that his client had bought pigs, and had received a mass of typhoid, the House of Lords told him in effect that "pigs is pigs"—pigs dying from typhoid are still pigs, and he was getting exactly what he contracted for, with all its faults, as the contract said. Is not this carrying the principle *caveat emptor* a little too far?

I am not quite sure what the appropriate remedy should be—whether something like article 1522 of the Civil Code of Lower Canada should be adopted, providing for a warranty against latent defects,[40] or whether the doctrine of *laesio enormis* or gross wrong (applicable in Roman law to goods as well as land, but limited in modern French law to land), should be introduced to give relief to a buyer who receives something worth less than half of the contract price. But whatever the remedy, the pig case strikes me as quite shocking.

And I wonder if much more could be said in favour of Anson's illustration, based on *Smith* v. *Hughes*:[41]

> A sells X a piece of china. X thinks it is Dresden china. A knows that X thinks so and knows that it is not. The contract holds. A must do nothing to deceive X, but he is not bound to prevent X from deceiving himself as to the quality of the article sold.

In expounding this part of the law to students I am obliged always to say "you understand that I am teaching law, not morals."

8. Again, with regard to the law of sale of goods, several cases in bankruptcy have drawn attention to the rights of revendication and resiliation which unpaid sellers in Quebec have, as compared with the right of stoppage in transitu in the other provinces. See, e.g., *Re Hudson Fashion Shoppe*,[42] in which an Ontario court, having decided that the contract was made in Quebec, held that the Quebec seller was entitled to assert in an Ontario bankruptcy the rights conferred by the Civil Code of Lower Canada.

[39] 1878, 4 App. Cas. 13.
[40] See *Samson et Filion* v. *Davie*, [1925] S.C.R. 202.
[41] 1871, L.R. 6 Q.B. 597.
[42] 1925, 58 O.L.R. 130.

The question of the relative merits of the rights of an unpaid seller under the Sale of Goods Act and the Civil Code respectively is one which deserves serious consideration.

9. Another defect of the common law, to which Mr. Lefroy drew attention in the paper which I have already mentioned, is the unlimited freedom of testamentary gift regardless of the claims of the testator's family. "If a man be of sound disposing mind he is at liberty, however wealthy he may be, to leave his family destitute, and devise and bequeath his whole estate to a home for lost dogs, save only, in Ontario but not in England, a wife's right to dower in his freehold lands." Roman law recognized no such liberty, nor do the modern laws of France, Italy, Spain, Germany, Austria, Louisiana, Porto Rico, Mexico, Chile, and Argentina.[43] Article 913 of the Code Napoléon provides that "a man may dispose of only one-half of his property by gift *inter vivos* or by will if he leaves a legitimate child surviving him. If he leaves two children he may dispose of only one-third. If he leaves three or more he may dispose of only one-fourth."

A philosophical exposition of the English doctrine is to be found in a paragraph of the judgment of Cockburn, C.J., in *Banks* v. *Goodfellow*,[44] a paragraph which concludes as follows:

> The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole a better disposition of the property of the dead, and more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.

It is interesting to note that in those cases in which the common law rule has been modified by legislation, the tendency has been, not to adopt a "stereotyped and inflexible" limitation such as Cockburn, C.J., considered open to objection,[44a] but to confer upon

[43] I quote Mr. Lefroy's list without pursuing the matter further.

[44] 1870, L.R. 5 Q.B. 549 (a leading case as to testatmentary capacity), at pp. 563-564.

[44a] An exception is the Manitoba Statute, 1919, c. 26, s. 13, (Consolidated Amendments, 1924, c. 53, s. 13), under which a widow is entitled to at least one-third of her husband's net estate.

a court a discretionary power to make an allowance to the widow or other dependants of the testator.

In New Zealand it is provided by the Family Protection Act, 1908, that where a person dies leaving a will without making adequate provision therein for the proper maintenance and support of the wife, husband or children of the testator or testatrix, the court may, at its discretion, order that such provision as it thinks fit shall be made out of the estate.[45]

In Alberta, if a man dies leaving a will by the terms of which his widow receives less than if he had died intestate, the court may on the widow's application make such allowance to her out of her husband's estate as may seem just and equitable in the circumstances.[46]

10. In the next place I approach with some trepidation the law relating to husband and wife.

Blackstone, vol. 1, p. 442, says:

> By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of the husband; under whose wing, protection and cover, she performs everything.

(I wonder whether Lady Blackstone revised or approved this passage.)

Blackstone continues,

> Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties and disabilities, that either of them acquire by the marriage - - - - -.
>
> If the wife be injured in her person or property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own; neither can she be sued without making the husband a defendant.

I venture to doubt whether even in Blackstone's time the unity of husband and wife was *in practice* so perfect that a wife acted

[45] See *Allardice* v. *Allardice*, [1911] A.C. 730; cf. the Testator's Family Maintenance Act, R.S.B.C. 1924, c. 256, s. 3: In *re McAdam*, 1925, 35 B.C.R. 547, [1925] 4 D.L.R. 138.

[46] R.S.A. 1922, c. 145; *Drewry* v. *Drewry*, [1916] 2 A.C. 631; *McBratney* v. *McBratney*, 1919, 59 Can. S.C.R. 550; cf. R.S.S. 1920, c. 73, ss. 24 ff.; In *re Baker Estate*, 1919, 13 Sask. L.R. 109.

always only under the "wing, protection and cover" of her husband, but in any case we are familiar with the legal revolution effected by the Married Women's Property Acts. What I desire to draw attention to is some curious exceptions which remain to the modern statutory rules which make two persons of husband and wife.

(a) Notwithstanding the provision of the Married Women's Property Act of 1882, that "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a *feme sole,* and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or against her," it was held by the House of Lords, by a majority judgment, in the case of *Edwards* v. *Porter,*[47] that a husband remains liable for his wife's post-nuptial torts. The earlier conflicting decisions in England, Canada and Australia are reviewed in an article by Mr. R. W Shannon, K,C.[48] It seems desirable that the husband's vicarious liability, imposed by the common law, should be removed by statutory amendment, except to the extent of any property belonging to his wife which he acquires or becomes entitled to from or through his wife, as is provided in British Columbia by R.S.B.C. 1924, c. 153, s. 27. Strange to say, R.S.O. 1914, c. 149, s. 18, which is identical with the British Columbia statute, was repealed by Ontario Statutes, 1926, c. 44, s. 16.

(b) Another anomalous survival of the old doctrine of the legal unity of husband and wife is to be found in the rule that husband and wife alone cannot be conspirators. Two persons are necessary for the crime of conspiracy.

(c) Again, husband and wife are so far regarded as one person that the making of a defamatory statement concerning a third person by a husband to his wife or by a wife to her husband is no publication,[49] although it would seem that in some instances it might be a very effective way of procuring subsequent publication.

II. I had noted for discussion two further matters, but the fact that I have already detained you too long may serve as an

[47] [1925] A.C. 1.
[48] In 4 Canadian Bar Review, p. 567 (October 1926).
[49] Gatley on Libel and Slander, pp. 99-100, citing *Wennbak* v. *Morgan and Wife,* 1880, 20 Q.B.D. at pp. 637, 639.

excuse for my not devoting as much space to them as, I think, they deserve.

The first matter involves the general question: "How far an act may be a tort because of the wrongful motive of the actor"—to quote the title of an essay by James Barr Ames.[50]

I propose, however, to direct your attention to merely one phase of this question, namely, whether a man should be allowed to exercise a right of property malevolently, merely to injure his neighbour.

For example, one wrong which an English court has held to be right is that which the defendant committed in *Mayor, etc. of Bradford* v. *Pickles*.[51] He, being the owner of lands near the plaintiffs' waterworks, sank shafts in his own land for the alleged purpose of draining certain beds of stone, but really, as the plaintiffs alleged, for the purpose of intercepting the water percolating underground through his land and thus making it necessary for the plaintiffs to buy his land for the protection of their own supply of water. It was held that as the defendant was entitled to sink the shafts his motive in doing so was immaterial, and it was stated as a legal proposition that no use of property which would be legal if due to a proper motive can become illegal if it is prompted by a motive which is improper or even malicious.

An analogous wrong which a man may commit lawfully is to erect a so-called "spite-fence," that is to say, a man may lawfully erect an abnormally high fence or wall at or near the boundary of his property, even though he does not require it to protect the privacy of his own property, for the sole and malevolent purpose of cutting off his neighbour's light or view.[52]

These two examples raise the general question whether a man should be allowed to exercise his so-called rights of property in a spiteful or abusive or anti-social manner. The maxim *sic utere tuo ut alienum non laedas* is glibly recited as a principle which prevents a man maintaining a nuisance on his land to the annoyance of his neighbours, or makes him liable for the consequences if he brings or collects on his land anything likely to do mischief if it

[50] 18 Harvard Law Review 411 (April, 1905); cf. another essay by Ames, entitled Law and Morals in 22 Harvard Law Review 97 (December, 1908). Both essays were republished in Ames, Lectures on Legal History and Miscellaneous Legal Essays, Cambridge, Mass., 1913, pp. 399, 435, and again in Selected Essays on the Law of Torts, Cambridge, Mass., 1924, pp. 1, 150

[51] [1895] A.C. 587.

[52] *Capital and Counties Bank* v. *Henty*, 1882, 7 App. Cas. 741, at p. 766.

escapes. But why should the principle be applied so arbitrarily and spasmodically?

Ringwood, Outlines of the Law of Torts, 5th ed. 1924, p. 204, says:

> In considering cases of nuisance as between owners of adjoining houses, the court will consider whether the defendant is using his property reasonably or not. If he is not using it reasonably, if he is using it for purposes for which the building was not constructed, the plaintiff may be entitled to relief.[53] It is reasonable for a music teacher, unless restrained by covenant, to give music lessons in his own house, but it is not reasonable for the next-door neighbour to cause loud and discordant noises to be made for the purpose of annoying such teacher.[54]

But why make a man liable for unreasonably using his land for the purpose of injuring a neighbouring music teacher, and let Mr. Pickles go scot-free when he digs in his land for the purpose of injuring his neighbour the corporation of Bradford? Each man might be said to be exercising a right of property malevolently and abusively. Why should a man be liable merely because the law labels what he has done as a nuisance, and not liable if the injury takes some other form which has not yet been labelled as a tort?

I think that we have another example of the spasmodic application of what ought to be a general principle, in the famous conspiracy cases—*Allen* v. *Flood*,[55] and *Quinn* v. *Leathem*.[56] In the former we find Lord Herschell approving the principle of *Mayor of Bradford* v. *Pickles*, while in the latter we find Lord Shand distinguishing the former case in a single sentence, on the ground that in the former case the purpose of the defendant was to promote his own trade interest, which he was entitled to do, even though he injured his competitors, while in the latter case the purpose of the defendants was "to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests."

The general subject is discussed[56a] in an article by C. K. Allen entitled Legal Morality and the *Ius Abutendi* in 40 Law Quarterly

[53] *Sanders-Clark* v. *Grosvenor*, [1900] 2 Ch. 373; *A.-G.* v. *Cole*. [1901] 1 Ch. 205.
[54] *Christie* v. *Davey*, [1893] 1 Ch. 316.
[55] [1898] A.C. 1.
[56] [1901] A.C. 495; see also *Sorrell* v. *Smith*, [1925] A.C. 700.
[56a] See also a paper read by Mignault J., before the Canadian Bar Association: Proceedings, 1926, at pp. 140 ff., 5 Canadian Bar Review, at pp. 10 ff., (January, 1927).

Review 164 (April, 1924) from which I extract the following passages:

> Pp. 166-7: In [the United States of] America, judicial practice has varied a good deal with regard to the abusive exercise of rights such as those connected with fences and surface or percolating water. In some States the erection of "spite-fences" merely to annoy a neighbour is disallowed by the Courts, and in Massachusetts it is forbidden by statute. Though the decisions are not unanimous, the general tendency seems to be that "a principle of reasonable use has superseded the old and narrow idea that the owner of the surface might do as he pleased."[57]
>
> In French law great battles have been waged upon this subject, and French legal opinion seems to be evenly divided concerning the juridical basis of l'abus du droit.[58] According to one view, every legal right carries in itself its own limitation, and involves a *duty* to use the right properly and innocently. "Là où apparait l'abus cesse le droit."[59] The objection urged against this theory is that it makes the standard of legal right too variable and capricious, because it leaves too much to subjective judgment.[60] Accordingly the opposing school holds that the theory of "abuse of right" means only that a right which was thought to be unlimited is declared by judicial decision to be in fact limited.[61] The *intent to injure* upon which the first school insists as the source of liability, is irrelevant;[62] the Court merely says that this act which was supposed to be rightful was in fact wrongful, and that damages must be paid accordingly.
>
> P. 174: It is not often that our law of torts deals avowedly, as in the cases just cited, with the purely moral aspects of "wrongfulness." In modern law principles of liability are con-

[57] Pound, The Spirit of the Common Law, p. 185. See also H.L.R. ix. 549, and xxv. 197.

[58] There is an extensive literature on l'abus du droit, well summarized in Planiol, Traité élémentaire du droit civil, ii. 280. See also Josserand in Dalloz, Jur. Gen. 1908, 2.73; Saleilles, Théorie générale de l'obligation, 1890, p. 347 (the later edition is not available to the writer); Esmein in Sirey, Recueil, 1878, I. 17; Gény, Méthode de l'interprétation, § 173; Charmont in Rev. Trimestrielle, 1902, p. 113.

[59] Josserand loc. cit.

[60] 'Mais qui serait Juge de cette mesure (de l'équité)? Et qui ne voit qu'il se cache sous ces vérités de haute morale une source d'arbitraire et l'empiétement contre la propriété?'—Saleilles, loc. cit.

[61] Planiol, loc. cit.

[62] For a discussion of the same problem, now becoming acute, in English theory, see Russell, J., in *Sorrell* v. *Smith*, [1923] 2 Ch. 32. (The judgment of Russell J., was reversed by the Court of Appeal, [1924] 1 Ch. 506, and that of the Court of Appeal was affirmed by the House of Lords, [1925] A.C. 700).

cerned more with compensation for damage done than with ethical tests of conduct. There are numerous ways in which one man may become liable to another without any degree of moral guilt. For this reason it has become the fashion to divorce the law of torts entirely from any general principles of moral culpability. Not infrequently we are warned against the attempt to "rationalize" the law of torts. Actions in tort, we are told, are simply the products of certain forms of procedure. There is no such thing, if one may coin the expression, as a "tort in gross." Liability simply means that the Courts, in certain circumstances, acting on certain precedents, will grant certain remedies. The law of civil wrongs, viewed in this light, is not susceptible of jurisprudential analysis: it is merely a catalogue.

12. Lastly, I venture to suggest that the common law should be amended so as to give protection to interests of personality, as distinguished from interests of substance and property.

Some concrete examples will make the matter clearer.

In 1902 the New York Court of Appeals decided the case of *Roberson* v. *Rochester Folding Box Co. and others.*[63] The complaint alleged that the Franklin Mills Co., one of the defendants, was engaged in the manufacture and sale of flour, and that without the knowledge or consent of the plaintiff, the company, knowing that it had no right so to do, printed and circulated about 25,000 likenesses or portraits of the plaintiff. I should explain at this point that the plaintiff was a good looking girl, apparently of unusually modest and retiring disposition. Above the portrait were printed the words "Flour of the Family," and Kenny, in his Select Cases on the law of Tort, p. 364, solemnly explains that this was a pun on "Flower of the Family."

Underneath the portrait in large capital letters were the words "Franklin Mills Flour" and in smaller letters "Rochester Folding Box Company, Rochester, N.Y." and upon the same sheet were other advertisements of the flour of the Franklin Mills Co.

These 25,000 likenesses of the plaintiff, thus ornamented, were conspicuously posted and displayed in stores, warehouses, saloons and other public places. The plaintiff did not complain that she was *libelled* by this publication of her portrait. On the contrary, the portrait was said to be a good one, and was recognized by friends

[63] 171 N.Y. 538

of the plaintiff and other people, with the result, as she alleged, that she was greatly humiliated by the scoffs and jeers of persons who recognized her face in the advertisement, and her good name was attacked causing her great distress and suffering both in body and mind, so that she was made ill and suffered a severe nervous shock, and was confined to her bed and compelled to call in a physician—suffering damages; as she alleged, in the sum of $15,000. She asked for an injunction and damages. The defendants demurred, and on appeal the action was dismissed.

The Court of Appeals drew attention to an article entitled "The Right to Privacy" by Samuel D. Warren and Louis D. Brandeis (the latter now a judge of the Supreme Court of the United States),[63a] in which it was maintained that the analogies of the law involved the recognition of a principle of "inviolate personality"—one result of which would make it a tort—akin to a breach of copyright—to publish, even truthfully and without malice, any written or pictorial representation of anything that is not of public interest(as measured by the extent of the defence of fair comment in cases of defamation): for example a private citizen's "personal appearance, sayings and acts and his personal relations, whether domestic or otherwise."

The Court of Appeals, however, in a majority judgment, said:

> Examination of the authorities leads us to the conclusion that the so-called "Right of Privacy" has not as yet found an abiding place in our jurisprudence; and as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law."

As Kenny remarks, the same view would probably be taken in England. In *Monson* v. *Tussauds Limited*,[64] in which the plaintiff complained of the public exhibition of a wax effigy of himself, his counsel did not suggest that his case could be rested on any more general ground than that of libel. "In my judgment," said Horridge, J., in *Sports and General Press Agency* v. *"Our Dogs" Publishing Co.*,[65] "no one possesses a right of preventing another person from photographing him; any more than he has a right of preventing another from giving a description of him (provided that the description is not libellous or otherwise wrongful)."

[63a] 4 Harvard Law Review 193 (December, 1890), republished in Selected Essays on the Law of Torts (Cambridge, Mass., 1924.)

[64] [1894] 1 Q.B. 671.

[65] [1916] 2 K.B. 880, at p. 884.

The most recent case is that of Charlie Chaplin—of which Mr. St. John Ervine writes in the *Spectator* for the 28th of May, 1927, in part as follows:

> Mr. Charles Chaplin lately complained of a cinema merchant who, without a by-your-leave, had prepared a moving picture of his early life. The matter, I believe, is to be brought before the courts, and therefore I may not say anything about it, except this, that when Mr. Chaplin's complaint was published, someone asserted that he had no legal right to resent the invasion of his privacy. This person did not believe that Mr. Chaplin or anyone else had the right to prevent a cinema merchant from making a film about him and exhibiting it for profit wherever he pleased. The assertion sounds sensational, but it may be sound in law.
>
> Newspapers claim that they have a right to publish anyone's photograph even if the original of the photograph objects to its publication. I have no knowledge of the law, and I neither affirm nor deny this claim; but I do know that newspaper editors habitually behave as if they had a lawful right to publish photographs without the knowledge of the photographed or even against their wish. The invasion of privacy is so commonly made now that some newspaper men openly assert that they have the right to enter a man's house and make enquiries about him if, by any chance or misfortune, he becomes "news." There seems to be no decency which certain papers will not outrage in the interests of "news," and private sorrow or trouble is not safe from their impertinent questions. I remember, a few years ago, that the relatives of a man on whom an inquest was to be held passionately protested before the coroner against the way in which reporters with notebooks and cameras pushed their way into their house and afflicted them with enquiries. When a man of some note lately became dangerously ill his distracted wife was obliged to have her telephone disconnected because she was rung up about once every half-hour by reporters enquiring how he was. "It was as if," she said, "they were saying, 'Isn't he dead yet?'" - - - -
>
> A young girl, under twenty, who is known to me, engaged herself to marry a notable young man occupied in public affairs. The engagement was subsequently broken. Here, one would have thought, was an occasion when prying for "news" might not be done; but, some editors thought otherwise, and a crowd of

reporters descended upon this girl at a time when she was probably feeling unhappy, to enquire why she was not going to marry the man to whom she had been engaged!

That seems to me to be a matter of a strictly private nature, and I think the girl's parents would have been justified if they had thrown the reporters into the street—although of course, it is not the fault of the reporters but of the news editors who sent them. What are called "gossip pages" have now become common in many newspapers, and these pages are made up of contributions from all sorts of people, professional and amateur journalists. The mania for printing paragraphs about private persons has become so virulent that people are almost afraid to speak in company, lest someone present will immediately hurry off to a newspaper office and sell a paragraph about them for half a crown or five shillings - - - -.

The general result of all this gossip is that a man is obliged to submit to some invasion of his privacy lest he should suffer worse wrong. People permit themselves to be photographed for picture papers because, if they decline to pose, the camera-man will "snap" them when they are unaware of his presence, and he will not be too careful about "snapping" them in a becoming attitude. There is, it seems, no remedy. A man has no rights in his own face.

The moral of all this is, I submit, that the common law should be changed so as to give a man or a woman rights in his or her face, personal appearance, sayings, acts, and personal relations, subjects to some such reservation as has been already suggested in favour of the public interest.

The suggested right to privacy is of course only a phase of the broader suggested right of inviolate personality, which would include the right of freedom from insult or from duress. This subject has been discussed by Mr. Roscoe Pound in an article entitled "Interests of Personality." [66]

The interests of personality which the law ought to secure are classified by Pound under three headings (1) the physical person, (2) honour (reputation) (3) belief and opinion. He points out that

> while the law secures the interest of the individual in his honor at least as soon as his interest in his physical person, when

[66] 28 Harvard Law Review 343, 445 (February-March, 1915), republished in Selected Essays on the Law of Torts (Cambridge, Mass., 1924.)

presently it distinguishes between injuries to the person and injuries to honor or reputation, it moves very slowly in protecting feelings in any respect other than against insult or dishonour. Three steps might be noted. At first only physical injury is considered. Later overcoming the will is held a legal wrong; in other words, an individual interest in free exercise of the will is recognized and secured. Finally the law begins to take account of purely subjective mental injuries to a certain extent and even to regard infringement of another's sensibilities.

But if I do not stop now, you will, I am sure, suggest that the law should be amended so as to recognize the right of an audience not to be bored beyond endurance. For that reason, and not for lack of material, I bring my paper to an end.