

THE STANDARDIZING OF CONTRACTS

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THE STATUS-TO-CONTRACT THEORY QUESTIONED

Ever since Sir Henry Maine wrote his *Ancient Law* (1861) it has been a commonplace among jurists—and some who are not jurists—that “the movement of progressive societies has hitherto been a movement from status to contract.” The formula has generally been gratefully accepted as a very useful summary of many phenomena encountered in legal history. Usually, its original meaning is extended so as to embrace within the concept of “status” the immediate or the remote results of agreement. Now and then the formula has been modified or limited,¹ or exceptions to it have been noted;² then the universality of the doctrines began to be questioned;³ and finally its applicability to Anglo-American law has been categorically denied. In Dean Roscoe Pound’s latest contribution to his forthcoming *Sociological Jurisprudence* we read:

“But Maine’s generalization as it is commonly understood shows only the course of evolution of Roman law. It has no basis in Anglo-American legal history, and the whole course of English and American law to-day is belying it unless, indeed, we are progressing backward.”⁴

The issue framed by this flat contradiction is one of fact. Viewed as an event in the history of Anglo-American juristic thought, this rejection of a fundamental concept in current jurisprudence is no mere academic quibble. The position taken by Dean Pound seems an essential part of the groundwork of his sociological jurisprudence. Thus, he remarks upon the significance of

“the legislative development whereby duties and liabilities are imposed on the employer in the relation of

¹ Thus, Edward Jenks in *Law and Politics in the Middle Ages* (1897) speaks of “Caste and Contract.” See Chapter VII.

² E. g. by William G. Miller, *Lectures on the Philosophy of Law* (1884) 73, quoted in 30 HARV. L. REV. 219.

³ Sir Frederick Pollock’s Note L to Chapter V of Maine’s *Ancient Law* (1906).

⁴ Roscoe Pound, *The End of Law as Developed in Juristic Thought* (1917) 30 HARV. L. REV. 219.

employer and employee, not because he has so willed, not because he is at fault, but because the nature of the relation is deemed to call for it."⁵

It is not only "significant"; it represents "the settled tendency of the present." For such statutes the new jurisprudence bespeaks "the sympathetic judicial development which all statutes require in order to be effective." The new school denies the soundness of the historical views of those courts that have been talking of freedom of contract in such matters.

THE DOCTRINE APPLICABLE UNTIL MAINE'S DAY

Now what is the fact? Is there indeed "no basis in Anglo-American legal history" for the status-to-contract theory as generally understood? Its original application was to personal relations derived from or colored by the powers and privileges anciently residing in the family. Is it not true that the relation of master and servant was originally—and still is nominally—a domestic relation? And whether the nineteenth century was out of line with the common law or not, is it not a fact that it has made of this relation a contractual one? "Employer" and "employee" (words having reference to the contract) now seem more appropriate terms than the older "master" and "servant" (words having reference to status).⁶ What of the relation of principal and agent? Historically, the making of this relation has not depended on contract. Hence, persons incapable of making contracts are still competent to become agents. But in the living law of the last century this relation, too, has veered from status to contract. The naïve statement in many text books and judicial opinions that "agency is a contract" is evidence of the tendency, if not of the law.⁷ Perhaps even the marriage relation has been made somewhat subject to contract law, at least on the property side; though, of course, here we should expect

⁵ *Ibid.* Cf. Roscoe Pound, *Liberty of Contract* (1909) 18 YALE LAW JOURNAL 454.

⁶ Thus, 26 Cyc. 968: "The relation of master and servant arises only out of contract."

⁷ 2 C. J. 432, Agency as a Contract, quotes *Cullinan v. Garfinkle* (1906) 114 App. Div. 509, 512, 99 N. Y. S. 1119, 1121: "Agency is a contract, and like other contracts, it is essential that the minds of the parties should meet in making it." Cf. the outline and treatment of the subject in Evans, *Agency* (1878) Chap. II, being entitled "The Parties to the Contract."

more conservatism, and marriage must still be considered a status.⁸ But when we leave the family circle and turn from the original application of the formula to its possible applications "as it is commonly understood," it becomes difficult to comprehend what is meant when we are told that the generalization has no basis in Anglo-American legal history. Holmes has shown the fact, whatever the reason, that the law of bailments was originally a law of status, and that the nineteenth century has stretched contract law so as to make a contract even of a gratuitous bailment.⁹ Perhaps here the change is in the theory of the law rather than in the law itself; but what shall we say of the law of landlord and tenant? Beginning in status as indicated by the terms still used—though "lessor" and "lessee" are displacing them—it has progressed to the point where every letting is an *agreement of lease*. A lease was formerly a conveyance of property, an instrument of status.¹⁰ We can even localize the point where *assumpsit* was allowed alongside of debt in the collection of rents.¹¹ Turn to the history of *assumpsit*.¹² The early tradesman was there sued as tradesman and not as a contracting party. We may lament this progress and blame all our ills upon it,¹³ if we will, but the fact remains that most business relations have become contractual relations,¹⁴ and—at least until Maine's day—all business relations had shown a tendency in that direction. In the law of negotiable instruments, the peculiar rights and liabilities of the parties were connected with the status of being a trader until Lord Holt declared that the "gen-

⁸ A score or more of our states have statutes declaring marriage "a civil contract," having reference rather to the inception of the relation than to its incidents. Cf. Sheldon Amos, *The Science of Law* (1880) 217: "It is obvious from this investigation, as has been already indicated, that marriage has a tendency to glide into a mere contract." Even in guardianship, the element of consent now plays an important part.

⁹ O. W. Holmes, *The Common Law* (1881) Lecture V.

¹⁰ The current definitions of a lease shift between the ideas of a conveyance and of a contract. For a collection of them see 24 Cyc. 894.

¹¹ For the Elizabethan cases showing the transition, see 2 Gray's *Cases on Property* (2d ed.) 571 ff.

¹² Cf. James Barr Ames, *The History of Assumpsit* (1888) 2 HARV. L. REV. 1, 53, reprinted in 3 *Select Essays in Anglo-American Legal History* (1909) 259-303.

¹³ Cf. Edward A. Adler, *Business Jurisprudence* (1914) 28 HARV. L. REV. 135, 147 ff. See my note in 23 JOURN. POL. ECON. 553, 554.

¹⁴ *Ibid.* 555.

tleman" who signed a negotiable document became *ad hoc* a trader.¹⁵ The basis thereafter was agreement. But more significant, because deeper, than the changes in particular branches of the law, has been the development of the general theory of implied contract. This is illustrated in the history of possessory liens. The presence or absence of a lien has come imperceptibly to depend on the implied contract. Of course, the terms of the implied contract are to be sought in usage; but there was a time when usage merely dictated a list of bailees whose status entitled them to liens of one kind or another without the mediation of any theory of implied contract.¹⁶

Maine was, of course, no prophet. He could not foresee the twentieth century tendency of our law to go back to the *Year Books*, but as a shrewd observer of the tendencies about him, he was unsurpassed. At least, with reference to his status-to-contract generalization, whatever limitations we shall have to insert, whatever exceptions we shall be forced to engraft on the rule, we must—however reluctantly—dissent from the view that it was a mere Romanism with "no basis in Anglo-American legal history." Here is poetic justice, indeed. Maine, who falsely accused Bratton of foisting Roman law on his unsuspecting countrymen, is now charged with having foisted Roman jurisprudence on his still unsuspecting countrymen!

THE PRESENT TENDENCY A REACTION

Still, if Maine's observations of the past were correct, the present tendency is clearly a reaction in the opposite direction. Dean Pound enumerates, besides the instance of the workmen's

¹⁵ *Witherly v. Sarsfield* (1687) 1 Shower 127, *sub nom. Sarsfield v. Witherly*, Carthew 82.

¹⁶ As Ames explains *Chapman v. Allen* (1632) Cro. Car. 271, the existence of the lien depended on the absence of a contract. In 1794 Lord Kenyon said that liens were either by common law, usage, or agreement. *Naylor v. Mangles*, 1 Esp. 109. A few years later (1806) in *Rushforth v. Hadfield*, 7 East *224, *230, one of the judges said *arguendo*, "And it is admitted that the question . . . was properly left to the jury, . . . if the usage for the carriers . . . were so general as that they must conclude that these parties contracted with the knowledge and adoption of such usage." Usage is brought under the head of agreement. It is only one more step to say (as is done *e. g.* in 25 Cyc. 663) that liens can be created only by a contract express or implied, and to look upon the lien given to an innkeeper by a wrongdoer as an exception based on public policy.

compensation acts, those of public service companies, insurance, and surety companies. We may add many other cases, not only those in which the statute book says "any contract to the contrary notwithstanding," but also those in which it prescribes the terms of a relation only in the absence of a specific agreement to the contrary. In fact, because of the constitutional limitations which we inherit from the days of freedom of contract,¹⁷ the second class of provisions is still the more important check on the tendency that seemed to be making every contract a law unto itself. In ordinary transactions, people cannot or will not stop to make special agreements "to the contrary." Therefore, they find themselves governed by the statute with its prescribed insurance policy, its prescribed bill of lading, warehouse receipt, stock-transfer, negotiable instrument, articles of partnership, its prescribed type of sale. When the question arises whether title has passed to a buyer, they will find the answer in the mechanical

¹⁷ Some of the greatest legal battles of the day are being fought over statutory collisions with the principle of freedom of contract. The issue was clearly put by one of the more conservative judges: "In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto." Yet "this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the state as contained in its statutes." Peckham, J., in *Allgeyer v. Louisiana* (1897) 165 U. S. 578, 591, 17 Sup. Ct. 427, 432, 41 L. Ed. 832, 836. Just how far courts will go in their respect for such public policy is a question of degree, depending in the final analysis on the trend of the times towards status or contract. The recent tendency to extend the police power in defiance of the idea of liberty of contract is well illustrated in Professor Felix Frankfurter's paper on *Hours of Labor and Realism in Constitutional Law* (1916) 29 HARV. L. REV. 353. To the decisions there enumerated should be added, perhaps as a climax, *Bunting v. Oregon* (April 9, 1917) 37 Sup. Ct. 435, which he succeeded in saving from a reversal in a divided Supreme Court. Other interesting contributions to the literature of the "apologetics of the police power" in this connection are: Ernst Freund, *Limitation of Hours of Labor and the Federal Supreme Court* (1905) 17 GREEN BAG, 411; *Constitutional Limitations and Labor Legislation* (1910) 4 ILL. L. REV. 609, 622; Learned Hand, *Due Process of Law and the Eight-Hour Day* (1908) 21 HARV. L. REV. 495; Roscoe Pound, *Liberty of Contract* (1909) 18 YALE LAW JOURNAL 454; Edward S. Corwin, *Social Insurance and Constitutional Limitations* (1917) 26 YALE LAW JOURNAL 431. Several interesting papers in the recent periodicals touch on the subject in connection with the Adamson law and the Supreme Court's decision upholding it.

rules of the code for the ascertainment of their "intention," a constructive intention. The effect is a making of contracts in wholesale lots, just as we now make corporations in wholesale lots. A practical check on the individuality of contracts, if not a theoretical limitation on the freedom of contract, and a standardization of legal relations, are the net results.

DEGREES OF STANDARDIZING OF RELATIONS

After all, the question is not so much one of status and contract as it is of a broader classification that embraces these concepts: standardized relations and individualized relations.¹⁸ In what Maine calls status, that is, the ancient family relations, or caste, the rights, privileges, powers and immunities (and the correlative duties, limitations, liabilities, and disabilities)¹⁹ were thoroughly standardized. In ascertaining them, the peculiarities of the individual agreement of individual members of society were irrelevant. But so are many of the peculiarities of an agreement ignored in later stages of society where a formal contract of this or that type results in a more or less standardized relation. Here, we include not only the early Roman forms of sale and the old English conveyances of land, but marriage, the taking up of the feudal relation at other stages in the law, and the purchase of a standard insurance policy to-day. The point of likeness is that a relation results in which the details of legal rights and duties are determined not by reference to the particular intentions of the parties, but by reference to some standard set of rules made for them. In origin, these relations are, of course, contractual; in their workings, they recall the *régime* of status. Maine's original statement has reference to a classification on the basis of origins. His argument applies—and is generally applied—to a classification of relations on the basis of their workings. In this sense, the difference between status

¹⁸ This formula includes more than status and contract relations. Relations arising *ex delicto* are more or less "standardized" too. In periods of strict law, the individual fault plays a smaller part in the creation of liability than it does in periods of equity—but this is another, though a parallel, story.

¹⁹ I am gratefully adopting Professor Wesley N. Hohfeld's eight fundamental legal conceptions. See *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE LAW JOURNAL 16, and (1917) 26 YALE LAW JOURNAL 710. I have made but one verbal change: "limitation" instead of "no-right."

and contract is not one of kind, but one of degree; and in this sense there has clearly been a long-enduring tendency in English law from status to contract, and—in the last two generations—an equally distinct veering back to status. I now quote Dean Pound, perhaps with an unintended stressing:

“It is significant that progress in our law of public service companies has taken the form of abandonment of nineteenth century conceptions for doctrines which may be found in the *Year Books*.”²⁰

It is, indeed, significant, not “that the nineteenth century was out of line with the common law”—for we cannot indict a century to save the reputation of a theory—but that the twentieth century is witnessing a reaction back to status. And this is not the first time that the seismograph of history has made such a record, nor the first time that it has been ignored as an exception. That medieval hardening of relations known as feudalism was also, in its beginnings, a progress from contract to status. And those whose philosophy of history is a belief in the gradual development of liberty through the principle of contract have been forced to regard feudalism as a pause in human progress, an armistice in the war between two opposite ideas, status and contract—at best, a compromise, an exceptional, disturbing element in their whole scheme.²¹ Perhaps if we were able to go back to what we accept as standard family relations, we should find their basis, too, in the hardening of individual practices into rules. Perhaps even back of caste there was a progress from the individual non-standardized conduct to the standardized. In other words, legal history has room not merely for one single line of progress in one direction or the other, but for a kind of pendulum movement back and forth between periods of standardization and periods of individualization.

THE CYCLES OF LEGAL HISTORY

I have elsewhere attempted to develop another of Maine's generalizations—that of Fictions, Equity and Legislation—by tracing not only their occurrence, but their recurrence in cycles.²²

²⁰ 30 HARV. L. REV. 219.

²¹ Cf. Edward Jenks, *Law and Politics in the Middle Ages*, 310.

²² “*The Law*” and the *Law of Change* (1917) 65 U. OF PA. L. REV. 659, 748.

It seems that once every millennium or so the laws of a people tend to become hardened, its ways standardized. Between successive crystallizations or codifications, the instrumentalities of change enumerated by Maine are resorted to in the order named. This order is by no means the result of chance. Each instrumentality is connected with a particular point of view: fictions with word-study, the first treatment to which a code is naturally subjected; equity with the study of principles, a kind of revolt that comes with the realization that life has progressed too far since the last codification to permit us to find in the words of the code an adequate expression of the law of the times; legislation, with a desire for conscious amendment in which the pretense that the new rule is in the code, either explicitly or implicitly, is given up. When the code becomes overburdened with new material, the time is at hand for a new code, and another cycle begins. Within historic times Roman-continental law has gone through two cycles and part of a third;²³ Jewish law has completed four cycles and part of a fifth;²⁴ Anglo-American law has gone through two cycles. A brief survey of the cycles in Anglo-American history may help us determine the connection, if any, existing between the recurring of the formal instrumentalities of change and the recurring of periods of the relative emphasis of status.

THE CYCLES OF ANGLO-AMERICAN LEGAL HISTORY

The dividing line between the two cycles in Anglo-American legal history falls about 1290. Though no code in the modern sense is compiled, codification is in the air.²⁵ Edward I, the English Justinian, has brought back from the home of his father-in-law, Alphonso the Wise, the compiler of *Las Siete Partidas*, a plan which his lawyers try hard to execute. A deluge of revisions of Bratton is the result. Besides the books called Britton and *Fet Assever* which pretend to speak in the king's name, there are the *Summae* of Hengham, the *Fleta*, and the

²³ *Ibid.* 670.

²⁴ *Ibid.* 674.

²⁵ John Selden, *Dissertatio ad Fletam*, and Francis Morgan Nichols' *Introduction* to Britton (1865) have not yet been superseded for their accounts of this period. F. W. Maitland's *Introduction* to the Selden Society's edition of *The Mirror of Justices* (1895) and Dr. George E. Woodbine's account of Bratton MSS. throw considerable light on the activities of the period.

long-lost (apparently rediscovered) book that Gilbert of Thornton was ordered to make. There appeared even a parody on such books, *The Mirror of Justices*. But the true crystallization of English law was in the series of writs that was being closed.

Tracing these writs backward to their source, we find a generation of legislators giving them their final touch in the first part of Edward's reign. There are the two Statutes of Westminster, the Statute of Bigamy, the Statute of Gloucester, the Statute of Mortmain, the Statute of Merchants, the Statute of Winchester, the Statute of *Quo Warranto* and the Statute of *Quia Emptores*. The purpose of these statutes, to fill in the gaps of English law, is best illustrated in that section of the second Statute of Westminster, which urges the chancellor to make new writs in new cases resembling the old ones. It is quite apparent from this statute and from the fact that so little use was made of it, that the ability of English law to develop on the basis of magisterial application of general principles had been exhausted. The barons had objected to new writs in 1258, and by 1272 the last of the important writs had been made.

The period of writ-making, the beginnings of which we see in Glanvil and the highest point of which we find in Bratton, though not generally called a period of equity, bears, as Jenks has pointed out,²⁸ a greater resemblance to the praetor's edict of ancient Rome with its lists of formulae, than do the vague processes of the early days of our generally recognized equity. We can literally see law growing when we pick up a writ of the year 1205 and find in the margin "*Hoc breve de cetero erit de cursu*" scrawled in a contemporary hand.

What preceded the growth of law by the making of new writs? It was an era of legal fictions. The great Norman kings with all their power had to stoop to this indirect method of tampering with the people's law. The Conqueror himself pretended to be the King of England by virtue of that law. He promised the people of London the advantages of all the laws that they had enjoyed in King Edward's day. His followers in their charters likewise promised "*leges Edwardi reddere*"—to give back the laws of King Edward the Confessor, an unwritten but still a tough code. The fictions by which the king's court extended its jurisdiction are well known. The king's peace became all important, and on the theory that this king's peace was involved, the

²⁸ *English Civil Law* (1916) 30 HARV. L. REV. 1, 16.

king gradually took jurisdiction, not only over the criminal law, but also over possession in civil law. It was not so easy to extend the fiction to cases involving questions of ownership as distinguished from possession. Consequently, possession has always been nine points of the law, the triumphant royal law, of England. So completely was the work of transformation done in the comparatively short cycle between William I and Edward I that the English lawyer of to-day who ventures beyond Domesday Book finds himself in a strange land indeed.

From Edward's day forward, on the other hand, we have no difficulty in discerning the continuity of English law. Beginning at our turning point, we have the *Year Books*, those notes of the happenings in court from term to term that gradually acquired a position of dignity and authority in the eyes of the profession. The *Year Books* have a crystallized law to deal with. They are, in the main, technical expositions of the words and letters of this law. We no longer hear "no wrong without a remedy"; we are more apt to find "*damnum absque injuria*"—harm inflicted without the violation of any technical legal rule. The only instrumentality at hand for the improvement of law is the legal fiction. It is used to give the court jurisdiction in many cases not originally contemplated in writs, especially cases involving title to property.

From the fourteenth century to the end of the eighteenth, but particularly in the middle of this period, the second of Maine's instrumentalities is at work—equity. The chancellor's office at the beginning of the period is concerned rather with petitions of grace and the bestowing of boons on loyal subjects of the king than with the improvement of the law; and at the end of the period, in the days of Hardwicke and Thurlow, it is collecting precedents and formulating doctrines. The middle of the period is the time when with "conscience" as a key-word, equity is most potent in supplementing the law. And the spirit of equity is not confined to the chancellor's chambers; for even in the courts of law, the formulation and application of general principles is going on apace, and commentators begin to work out the principles that underlie the godless jumble. Littleton—even if he did not write the most perfect book that mankind has ever produced, as Coke would have us believe—did bring order out of chaos. Coke spawned maxims, but he did it in an unconscious endeavor to make principles out of rules. Holt and Mansfield borrow from the general understandings of men to enlarge the

law. Blackstone, the greatest of commentators, states the sum total of this law so satisfactorily that even the mighty wrath of Bentham seems impotent to awaken his countrymen to the need of further change in the law. Then comes an end to the possibility of extensive growth by the administration of general principles. Equity is entrusted to the keeping of the most deliberate of conservatives, the Earl of Eldon. To him equity is a system as rigid as the law itself.

In the 1800's, both in England and in America, the ordinary means for the improvement of law and for keeping it abreast the times has been legislation. Of course, legislation had been used sparingly throughout the equity period. But prior to the nineteenth century it was looked upon as something exceptional, called forth either by a great upheaval to sweep away accumulated evils, as under Henry VIII and in the Commonwealth, or by a desire to check evil practices discovered from time to time, as in the days of the Restoration. In the last hundred years, on the other hand, legislation has come to be a normal, continuing, part of the government's business. To-day our legislators are pouring it forth in greater quantities than ever before.

There are signs that we are reaching the end of this legislative activity. Not only do we hear persistent outcries against "too many laws," but we are already making rapid progress in the work of codification. What has been done here and in England in the law of partnership, negotiable instruments, sales, warehouse receipts, bills of lading, criminal law, pleading and various other branches suggests that we may expect more and more of the authority of the digest to be transferred to the code. Whether with the code before us we shall lose our habit of tampering with private law at every session of the legislature and turn again to literalism and to fictions as they have done in Germany remains to be seen. In one branch of law which, for political reasons, was codified a century or more before the period of general codification into which we are passing, we have already followed this very course. Constitutional law in this country has heretofore been almost exclusively word-study. It has brought with it its crop of fictions.²⁷ We may to-day be ready for equity so far as the interpretation of the Constitution is concerned. May not the broader view of principles that Professor Frankfurter calls "realism" and Dean Pound "sociolog-

²⁷ 65 U. OF PA. L. REV. 672.

ical jurisprudence" be the appeal from the text to common sense, from the letter to the spirit, from *jus strictum* to equity? "If," says Professor Frankfurter, "the point of view laid down in this case²⁸ be sedulously observed in the argument and disposition of constitutional cases, it is safe to say that no statute which has any claim to life will be stricken down by the courts."²⁹

STATUS LAW ACCOMPANIES CODIFICATION

If, now, we glance over these periods of Anglo-American legal history with standardized and unstandardized relations in mind, three places stand out as centers of standardizing, of status, we may say. They are the period of Domesday Book, the period of King Edward's *Quo Warranto* inquests,³⁰ and, so far as we can foresee, the period we are entering upon. Our "franchises" are not being catalogued, but our land titles are being registered, our business relations defined, our contracts made for us, our right to engage in ever so many kinds of business made the subject of a state license. Our partnerships, more or less contractual, are being displaced by uniform corporations organized under general laws: and corporate powers are purely affairs of status, though there was a time when even these looked more like matters of contract between the state and the incorporators. Our rights are rapidly being converted into types of rights, just as in the day of Edward I the remedies of Englishmen were types of remedies. The remedies seemed the more important then, though we naturally speak of the situation in terms of rights. But rights and remedies are obverse and reverse of the same coin; the standardizing of relations and the crystallization of law are aspects of the same movement. There is nothing surprising, then, in the fact that the periods of the codification or

²⁸ *People v. Schweindler Press* (1915) 214 N. Y. 395, decided under the influence of *Muller v. Oregon* (1908) 208 U. S. 412.

²⁹ (1916) 29 HARV. L. REV. 366. Cf. the conclusion of Edward S. Corwin's paper on *Social Insurance and Constitutional Limitations* (1917) 26 YALE LAW JOURNAL 443: "In other words, constitutional 'rigorism' is at an end."

³⁰ I have purposely avoided the convenient word "feudalism" here to cover the status law of the middle ages. It is true that its typical product, the manor, placed every man in some kind of status. But this did not spring into existence spontaneously, nor was it uniform throughout Europe when it did appear, save in this, that it represented a high degree of standardizing of relations.

crystallization of the law coincide with the extreme points reached by the pendulum in the direction of standardizing. The pendulum swings across the diameter of the cycle.

INDIVIDUALITY OF CONTRACTS FOSTERED BY EQUITY

Conversely, the periods of greatest individual liberty in the shaping of contracts and of relations in general lie somewhere between these periods of standardizing. The nineteenth century witnessed the end of a long period of this kind. For its beginnings, we must go back at least to the 1600's, to the days when even one's relations with the government were sought to be reduced to contract rather than status; to the creation of *indebitatus assumpsit*; to the days when the chancellors invented specific performance to take the place of cut and dried remedies, and when they sought in the actual meeting of free minds rather than in the form of the contract the basis of their adjudications.³¹ This ignoring of forms is the triumph of the contract principle within the history of contracts.³² Where the few types of relations that the law can conceive of are found inadequate, equity permits of endless variety through its creature, the trust. We reach the end of the swing away from status when we find equity dealing with each case on its own merits, refusing even to recognize precedents,³³ as against law dealing with cases by

³¹ Of course, there are decrees of the chancellor that seem to prohibit certain classes of contract, just as there is legislation that tends to establish freedom of contract. Such legislation simply formulates the spirit of the pre-statutory period, as in the case of our constitutions. And the attitude of the chancellors who abhorred forfeitures and penalties as well as contracts made under undue influence is quite reconcilable with their endeavor to get at the substance and ignore the form of the contract. It must be remembered, for example, that in law, the mortgage was an instrument for the creation of a status—an estate upon condition—and that the chancellors practically resolved it into a contract.

³² We may see a parallel case in the consensual contract, developed under the Roman praetors, as contrasted with the older business with copper and scales, which it effectually supplanted—though we can no longer say with Savigny and Maine that the one grew out of the other. A corresponding development in Jewish legal history is suggested in 65 U. OF PA. L. REV. 757.

³³ The beginning of precedents in equity is illustrated in a colloquy referred to in John William Wallace, *Reporters* (4th ed.) 23, 303. *Vaughan*, C. J., "I wonder to hear of citing precedents in matters of Equity; for if there be Equity in a case, that Equity is an universal truth, and there can be no precedent in it . . . *Bridgman*, Ld. Keeper, "Precedents are very necessary and useful to us."

classes. If we would seek another period of triumph for the contract principle in English law, we must go back to the days when writs were forming, to the beginning of the thirteenth century. There are found donees of land changing their status by the use of the word "assigns".³⁴ At this point, the various forms of Jewish gages were being invented and freely introduced. And here, strangely enough, even in government a sort of precursor of the social contract theory was suggested in the wresting of Magna Carta from King John, and poorer charters from better kings. Thus, equity periods are connected with the impetus from status to contract, as strict law is with a movement in the other direction. Neither is a "progressing backward."

SOCIAL ENFRANCHISEMENT THROUGH STATUS LAW

The movement toward status law clashes, of course, with the ideal of individual freedom in the negative sense of "absence of restraint" or *laissez faire*. Yet, freedom in the positive sense of presence of opportunity is being served by social interference with contract. There is still much to be gained by the further standardizing of the relations in which society has an interest, in order to remove them from the control of the accident of power in individual bargaining. The new school of jurisprudence has a great work before it in educating the courts. It must, indeed, dispel the fear of status as an archaic legal institution which we have outgrown. It will not be compelled, however, to unteach what little the courts have learned directly or indirectly from Sir Henry Maine, or to unmake history. It will, on the contrary, simply be moving along with the current of legal development in resorting to status as an instrument at this particular time for the further enfranchisement of those to whom freedom of contract has become a mere mockery. Freedom of contract is not synonymous with liberty, nor is status slavery. But we must remember that the knife can cut both ways. In the last period of *jus strictum*, say the 1300's, status law was being used to drive laborers to their work; now it is looked to to force employers to a realization of their social duties. It then practically created a maximum wage; to-day it is the messenger of a minimum wage. The law that compelled a man to work at the trade that he had learned is not so different in principle from one that would have a man learn the trade at which he proposes to work. Thus, either law may create the status of

³⁴ 2 Pollock and Maitland, *op. cit.* 13, 14 n. 1, 311.

being a plumber. Something like a trader's status may be restored. Regrating, engrossing and forestalling may once more become commercial crimes of the first order, and a *justum pretium* may be tried in spite of all the demonstrations of the orthodox economists to the contrary. We are indeed going back to the principles of the *Year Books* in the law of public service, and who can say where the boundaries of public service will finally be drawn? Social legislation may not stop at supervision; the state may take over many of our private enterprises. But when juristic thought and practice are thoroughly socialized, will the great end of law be accomplished, and the sociological theory be the last word on jurisprudence? Or will a reaction set in, whereby our new statutes will be ground to powder by legal fictions and reconstructed by equity—until the law will seek to serve each man according to his need once more?³⁵

³⁵ The causes that contribute to the predominance of one or another of the schools of jurisprudence in different times and places are the subject of a study by the present writer entitled "A Marshalling of the Schools of Jurisprudence" scheduled to appear in *HARV. L. REV.*, January, 1918.