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There is an astounding scarcity of clear definitions of property. Most of them run into sentence after sentence of description, citation and classification, stopped only by the heading of a new chapter—and not by completion of the idea. Now, where the subject is new, or so vast that it exceeds the capacity of the human mind, at its present stage of development, definition by description is the part of wisdom and chaste scholarship. But this is not true of property. The concept of property is an ancient one, and far from being of a size or shape incapable of entering the human mind, it was actually formed there. "It belongs not to physics, but to metaphysics: it is altogether a creature of the mind."[1]

Let us examine a type case, the definition of property contained in Sullivan's excellent little compendium of business law:[2] "Property is the right which one man has to hold or dispose of certain lands or chattels[3] as he may see fit, to the exclusion of all other persons." "Property is *the* right:" What right?—"to hold or dispose?" No; the essence of "the" right which you have in the suit of clothes you are wearing is not that of keeping or selling them "as you may see fit"; your property in those clothes is a right, or better, a set of rights, of use and enjoyment; including the rights to "hold" and to "dispose" and many others. Property, then, is a right or set of rights—"which *one man* has" . . . . No; a corporation, which is a person (by convention, by law) but which is not a "man", may possess property, and so may looser associations, to which the law does not delegate the attributes of personality, e. g., partnerships. Let us cancel the phrase *one man*: Property is a right or set of rights—so far, we are secure; but it remains to characterize, or better to differentiate, these rights. We might say, Right of use and enjoyment, of exclusion, of disposal—all are pertinent; but to come directly to the point, it seems that the idea of exclusion is the differentia; the idea of disposability and that of use and enjoyment,

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[1]Jeremy Bentham—*Principles of the Civil Code*—Part 1, Chap. VIII.

[2]J. J. Sullivan—*American Business Law*—1st Ed. 1909: p. 267.

[3]In the third edition, "real and personal estate" has been substituted for "land and chattels," a distinct improvement, marking perhaps a victory over the stiffest difficulty in achieving the concept of property, the common difficulty of detecting the separatness of an object and rights in that object—of seeing that property is those *rights* and not the object itself.

though perhaps not essential, are important. You have property in the suit of clothes you are wearing; your property is not the suit of clothes, but the rights you have in it—all possible rights of use and enjoyment, except those that have been specifically withdrawn by due process of law—not alone, "the right to hold or dispose." Exclusion is the life essence of property. It is their exclusiveness that differentiates those rights which are property from those that are not. Under certain conditions you have the right to vote, but it is not a property right: it is not exclusive. None of those fundamental, generic rights to life, liberty and the pursuit of happiness can be called property: they too, are common rights. But your right to build a house on a piece of land held by you in fee, is property; a subdivision or segment of the more inclusive right in fee. Your right to build a house on land that another holds in fee is also property. A right you have obtained of crossing another's land is, under certain conditions, property, and a net deduction to his property, a net deduction to the *exclusiveness* of his rights of use and enjoyment in that land. But if everyone obtains the right to cross that land, your right ceases to be property: it becomes a common right. Only exclusiveness is destroyed: exclusion, therefore, is the essential notion in the concept of property. *Property is a right, or set of rights, of exclusive use, enjoyment and disposal.*

Now, as to the origin of property, Blackstone says: "In the beginning of the world, we are informed by Holy Writ, the all-bountiful Creator gave to man 'dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth on the earth.' This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been stated by fanciful writers upon this subject."[4] And Bentham writes: "In the primitive state, had not men a natural expectation of enjoying certain things—an expectation derived from sources anterior to the law? Yes: they have had from the beginning; there have always been circumstances in which a man could secure by his own means the enjoyment of certain things: but the catalogue of these cases is very limited."[5]

From these views we must conclude that the concept of property in all its perfection is from the beginning of things, and that any revision of it must, therefore, have been in the nature of modification. But modern thought upon the evolution of the concept of property has drifted far from this conclusion. Professor Ely voices the general

[4] *Commentaries on the Laws of England*,—Book II, Chapter II.
[5] *Principles of the Civil Code*,—Part I, Chapter VIII.

opinion when he says: "The right of private property . . . has not always been so extensive or exclusive as at present."[6] Further on, however, he says, "But the modern State is continually placing limitations and restrictions on the right of private property,"[7]—which puts him more in line with the view of the evolution of property that we are about to present.

It is not difficult to see how opinion regarding the evolution of property has swung into the false channel in which it is now running—nor to see how the notion developed that property, throughout the ages, has risen steadily and majestically and is even now at, or only slightly beyond, its zenith.[8] Simply, the essentially subjective nature of property has been lost sight of. Students of property have seen objects of property (wealth) increasing—and at an increasing rate. Not only has man by his own direct effort and his indirect effort, manifolded through the use of machinery, increased at an accelerating rate objects of property, but the silent, irresistible force of scarcity has added enormously and spontaneously to the category of wealth (objects of property). Land which was useless has become valuable; land which was free has become enclosed. And here it is important to bring out as sharply as possible that free land is not common land; a free fishing ground or a free water supply is not a communistic matter. In primitive times, nearly everything was free, or rather freely accessible, but it was not communized. In the beginning, everything was not, as many modern students of property insist, held in common. Simply, there was so much of most things, and man's knowledge of their possibilities so small, that there was no thought of ownership. For a thing to be commnnized, or held in common, it must first become an object of economy, wealth; and then be made equally accessible to all.

Objects of property have increased enormously, but property is an essentially subjective matter; the concept of property has constantly decreased.

Property exists apart from its object: "A piece of cloth which is actually in the Indies may belong to me, whilst the dress which I have on may not be mine. The food which is incorporated with my own substance may belong to another, to whom I must account for

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[6]R. T. Ely—*Outlines of Economics*—3rd Edition, 1916: p. 21.

[7]Op. cit.: p. 23.

[8]"The tendency is toward an increasing public interest in private property, but no tendency whatever is discovered towards an abrogation of the right, and this is clearly the drift of the decisions of American courts."—R. T. Ely, *Property and Contract.* (It is, however, quite possible that when Professor Ely says there is "no tendency whatever toward an abrogation", he is still not denying a sharp and widespread curtailment.)

its use."[9] So important is this idea of the separability of property and its object, and so elusive is it, that it will perhaps bear one further illustration:—The journal you hold in your hand is yours; you have the right to use and enjoy it, to the exclusion of all other persons. Your property however, is not the journal, but the rights you have in it. Were the magazine itself property, part ownership would involve parting the magazine. In reality, part ownership means that you have *certain rights* (property), that some other person has *certain rights* (property), in the same object. Either of these sets of rights may be further subdivided; then all may be reassembled in one person: or the whole right may be extinguished—so mutable is property.

Older than incorporation, older than marriage, older than contract, older than religion—property is man's oldest institution: the right to use and enjoy to the exclusion of others is an expression of the instinct of self-preservation, and therefore as old as life itself.

'Primitive communism' is a myth. Overwhelming evidence points to its antithesis, primitive individualism, with an intense and violent sense of property—an instinct that antedates the appearance of man.[10] Caribou may graze contentedly together, but only when there is wide pasture of so nearly equal quality that no part is worth claiming. Several hippopotami may bathe peaceably in one stream, but let that stream dry up, only a small pool remaining, and you will see in it one huge hippopotamus, enjoying exclusive bathing privileges. Finally, who will dispute the completeness of the property right of she-bear in her cave?

Students of property have long held an opposite view, maintaining that 'Everything was at first held in common,'[11] or 'In the early stages of society the concept of private property is absent.'[12] This view of private property would be correct were the fortress-village stage of human development really primitive, for in this isolated and by no means primitive instance, some—though far from all—property was communized. But this one fear-engendered kind of huddling is no more important in the evolution of human usage than are the whale and bat instances in the general biologic flow. The driving of one whole species of mammals into the mother waters and of another into that exclusively reptilian domain, the air, may be considered—

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[9]Jeremy Bentham—*Principles of the Civil Code*, Part I, Chap. VIII.
[10]C. Letourneau, *Property, Its Origin and Development*—1901 Chapter I.
[11]Op. cit.: p. 365.
[12]E. R. A. Seligman, *Principles of Economics*—1924: p. 125. (The *Law* of property was perhaps absent—unless common law in its nebular form, common usage, is meant—but the *concept* of private property was anything but absent.)

are considered—purely sportive back-eddies in the widening flow of kinds.

Objects of primitive property were few, but it is a mistake to say, "The concept of private property is absent"[13]—or even slightly developed. It is a mistake to say that the stone axe of a primitive chieftain, the only stone axe for miles around, was less of property, or even less property than a modern steamship. Property is a subjective matter.[14] Objectively, property was indeed inconsiderable in primitive times; but subjectively it was far more important than today. So sharp and clear was the concept of property that much (if not all) of man's belongings were buried with his body. That this nearly universal custom of primitive peoples was purely altruistic, that it came solely from a desire to provide the departed with equipment for a life to come, is a one-eyed view, a view that lacks perspective. More in accord with collateral facts is the explanation that a man's scant possessions were buried with him because they were *his*—so completely of him that they might possibly work a subsequent user harm.[15] When Mr. Robert Dollar dies, his steamships will not be buried with him, nor any of his belongings; the concept of property has been sharply whittled down.

Property, then, was not built up to its present height from zero. To the contrary, its present level was reached by constant falling—and still it sinks.

Evolutionists find an additional hoop for their barrel in embryology; anthropologists and social-psychologists see one in the apparent connection between the mental history of mankind and that of a present-day pre-adult. Our theory of a direct relationship between the growth of civilization (and intelligence) and the expunging of the harder lines of private property finds similar reinforcement:—A very

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[13]Loc. cit.

[14]For may not any property relationship be altered, or even destroyed, without the slightest alteration or destruction of object or objective attribute? The war amendments to the American Constitution destroyed no black men; but they wiped out completely property in human beings.

[15]Blackstone contended that according to the principles of natural law, property terminates upon the abandonment of possession; the most universal and effectual way of abandoning property is by the death of the occupant; all property must, therefore, cease upon death. "But . . . the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition of it at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased." 2 Blackstone, 9–12. Many American courts have concurred in this view: Burroughs v. Housatonic RR., 15 Conn. 129 (1842); Crane v. Reeder, 21 Mich. 73 (1870); State v. Hamlin, 86 Me. 495 (1894). See also 2 Schouler, Wills, 5th ed., sec. 1090; 1 Woerner, American Law of Administration, 3rd. ed., 564.

small boy has a sense of property that is not soft. It is bounded by straight, hard lines and the corners are very sharp. Sister may not have his drum—not even for a little while. She may not beat it, not even if she lets him hold it. May she tap it just once? No!.... An older boy owns a baseball, a bat and a glove. The boy next door wants the bat—not the ball and glove, just the bat. No—he may not have the bat. The neighbor's boy pleads for the ball. No, he may not have the ball. Well then, just the glove? Again: No! With age and experience this propertied young man learns that he can profit by conceding some of his rights. And this whittling down of his concept of property progresses with years.

With the inception of intelligence and ability to measure sacrifice against corresponding gain, the institution of private property begins to lose its pinnacles and corners. And with every age and year, it wears smoother, rounder, smaller.

The past one hundred years have brought an on-rush of civilization; the concept of private property has shrunk proportionately. The division of labor, that most fundamental and universal influence in social evolution, is an insatiable solvent of property. The inescapable concomitants of any division of task are co-operation and co-ordination; before them, exclusive rights of use and enjoyment must by necessity give way.

Escheat, the taxing power, eminent domain, the police power—especially the last three—are sledges that have struck away whole slabs of the gibraltar of private property, making incessant and increasing inroads.[16] And then there is the erosive effect of that less definite, but none the less real, drift in the general evolution of law, working toward the building up of what Dean Pound calls "the social interest."[17]

A farm, let us say, has been in your family for many generations. Over the week-end, you may have your friends for a clay-pigeon shoot, but not a live-bird shoot, though your father might. Suppose you have a race-course on the place; you may not set up betting booths, though your grand-father had that right. If a member of your family dies, you may not bury him on the place, but your great-grand-father might. If you raise rye, you may not build a still

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[16]*T. M. Cooley—Principles of Constitutional Law*, 3rd Edition: p. 346. Cooley makes this more general and inclusive statement of the principles governing the reducing process: "When an article either intrinsically or by the use to which it is put becomes prejudicial, the law may withdraw from it the attribute of property, and then any one may be at liberty to destroy it. When anything becomes a nuisance, the party incommoded may destroy it if the nuisance cannot otherwise be abated; and if the public are incommoded, the right to abate is general."

[17]Roscoe Pound—*The Spirit of the Common Law*—1921: p. 184-9.

to make your rye into whiskey, though your great-great-grand-father had this right. These are rural examples of amended rights of use and enjoyment in land—all made under one power, the police or general-welfare power. But it is in urban property rights that this power has wrought its greatest havoc; and everywhere, the powers of taxation and eminent domain have made even larger inroads.

You own a city lot, and you decide to put up a frame building on it. No, you may not; the law forbids because it would increase the fire hazard of your neighbors. Well then, it will be of brick, a loft building. No; loft buildings are not permitted in that section of the city. Then you will build an apartment house, eighteen stories high. No; buildings of more than six stories are forbidden in that zone!

In the same city you own a large section of water front, all on deep water; you own and operate many docks and piers; but they are not adequate to the needs of the city. The Board of Trade tells you that the city's life depends upon adequate port facilities, and urges you to furnish them. No, the docks and piers you have now do not pay—you will not build more. The next chapter is a sad one. The power of eminent domain is raised, a titanic lever. You and your property are pried apart. The city takes the property, and gives you a 'fair consideration'. Never will that water front again be private property.

Objects of private property have multiplied throughout the ages. And in spite of modern abrogations of the property right in certain objects, the number of objects in which the right of property remains, is still increasing; but the scope and fullness of the right itself—which *is* property—that has been everywhere curtailed.

"Right is correlative to duty," says Professor Gray.[18] And though this may sound trite to the philosopher, it is to the student of the law of property a refreshingly clear characterization of the modern drift. Everywhere, by judicial decision and by statute, lines are being drawn that give to the features of private property, the aspect of trusteeship. The almost majestic irresponsibility of the ancient right of property is fast waning.

Property is a right. As old as life, it is however wholly conventional—an artifice, an arrangement. Its purpose, its meaning, its end is to stimulate social, especially economic, activity. Where other motives, the desire to serve, the desire to emerge, the desire for activity itself—where these and other incentives work better, private property has been and will be further modified. Where the growing complexity

[18] J. C. Gray—*The Nature and Sources of the Law*—1909: p. 9.

and activity of society demand a more flexible arrangement, there too, property has been and will be further modified.[19]

You own property. Your rights are less than those your father enjoyed in similar objects; his rights were less than those of his father. Your son's rights will, in turn, be less than yours. Private property, the oldest and, at first, the most uncompromising of social institutions, tends to diminish in force and in scope with the growth of civilization.

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[19]Roscoe Pound—*The Spirit of The Common Law*—1921: p. 185, 186 . . . In his next chapter, or lecture, Dean Pound (referring back to loc. cit.) says: "First we noted the growth of limitations on the use of property, of limitations on exercise of the incidents of ownership. To the nineteenth-century way of thinking the question was simply one of the right of the owner and of the right of his neighbor. Within his physical boundaries the dominion of each was complete. So long as he kept within them and what he did within them was consistent with an equally absolute dominion of the neighbor within his boundaries, the law was to keep its hands off. For the end of law was taken to be a maximum of self-assertion by each, limited only by the possibility of a like self-assertion by all. . . . But suppose we think of law not negatively as a system of hands off while individuals assert themselves freely, but positively as a social institution existing for social ends. . . . The moment we put the matter in terms of social life rather than of abstract individual will, we come to the result to which the law has been coming more and more of late throughout the world."