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SOME NOT SO LOST CAUSES OF ACTION*

by

Roger J. Traynor**

ONE OF the least dramatic but most interesting problems of the appellate process is more readily stated than answered: What can an appellate court do about seemingly simple cases that threaten to give bad law a new lease on life if they are decided on the basis of precedents that are ill-suited now to govern, sometimes because they were ill-conceived at the outset? Such precedents are more likely to blight the so-called routine cases than the exceptional case of first impression, and hence the blight is more likely to go unnoticed.

There are records in abundance of dramatic victories or lost causes in the law, as in other fields. Still, the recorders, intent on red-letter days of triumph or black-letter days of disaster, have too often neglected the outcome of a controversy in court whose more than transient significance was lost on them because it was not blatantly dramatized by raging purple polemics in the briefs or royal purple perorations in the opinion.

The significance of such a controversy is not lost upon the judge, however, who must pay close heed to it when it arises within his own court. He, at least, can bear witness to its noteworthy effect on the law, comparable to a geological change that takes place without any attention-getting earthquake. A judge's account need not be less useful because it inevitably bears the imprint of his own bailiwick. Hence, I could readily subsume my own table of illustrations under the heading of "California Cases I Have Known," justifying whatever provincialism attends thus speaking from experience on the ground that experience is the best teacher. Moreover, provincial experience may have cosmopolitan repercussions in this mobile country of fifty jurisdictions with many problems in common as well as a common language.

The cases have been within my province in a double sense, for in the main they are cases I have been called upon to resolve, a task comparable to putting a puzzle together so that at last it looks all of a piece. The reader will see as we examine them how puzzling they can be and how variously they can riddle the would-be simple solution that offers itself so deceptively as a ratio decidendi. All too often the elusive law that is supposed to govern the facts is on a rampage threatening to span the distance as a crow or a plane flies from Texas to California.

The recollection of such cases may serve as a lesson to any lawyer. However formidable the forces that would deter him, he should not abandon a cause of action as a lost cause if he has reason on his side.

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* This article served originally as the most recent in a series of annual lectures in tribute to Robert G. Storey, Dean Emeritus of the Southern Methodist University School of Law. In his introduction the author acknowledged Dean Storey's achievements in bringing "so much honor to the law throughout this country and throughout the world."

** A.B., Ph.D., J.D., LL.D., University of California; LL.D., University of Chicago; LL.D., University of Utah; LL.D., Boston College, Chief Justice, Supreme Court of California.
We can begin with the most rudimentary example of a not so lost cause of action, a cause at last won in California though it had long been deemed lost, given the force of precedent against it. No one had troubled to note that the precedent was grounded in a dim view of one statute and the oversight of another. I have come to think of this nearly lost cause as a prime example of the consequences of original sin in the law. Consider the original rule and then see what you think of Father Time as a reason for hollowing it.

The original rule, though probably not unjust in the fact-context of the original case, served to foster in subsequent cases a backward reading of a code provision governing contracts that do not make time of the essence. The 1898 court held that a purchaser of real property who defaults on a single installment must forfeit all his payments. The court's opinion evinced a fin de siècle weariness, for it ignored another relevant code provision against forfeiture. That weariness continued into the twentieth century, leaving its imprint on successive cases for more than fifty years. The Glock rule, as it came to be called after the original case, developed into a glockenspiel of such repercussions that it became a favorite source of bar examination questions. The main thing to remember for a passing grade was to answer the question irrationally, consonant with prevailing law. When time was of the essence, the smell of forfeiture pervaded the atmosphere.

In 1949 there came before the Supreme Court of California the first of a trilogy of cases that became the undoing of the flat metallic bars of the glockenspiel. By the forties the population rush westward was on, and real estate prices were trending upward. It was hardly possible to overlook the evils of forfeiture. The court reviewed the case of buyers who had made a down payment of $700 in 1941 on a house costing $5,450. They made regular payments with 6 per cent interest for 57 months. They made permanent improvements exceeding $3,000. Then, during an illness, two of their checks were dishonored. There was evidence that they were unaware of such dishonor until they received notice of forfeiture from the seller. They promptly tendered certified checks for the amounts due, but the seller refused to accept them, insisting on a return of the property and a forfeiture of all that the buyers had paid.

Father Time's precedents were against the buyers, and so were the magic words. The contract specified that time was of the essence. Nevertheless it seemed high time to reread the precedents, and not by gaslight, and to ruminate just what was so magical about an essence, particularly when there was no magic answer to the question: Time is the essence of what?

A rereading of the precedents recalled the plaintive inquiry of Madame X to her Latin lover as to how she looked, and his brutal reply that she looked all right by candlelight. The Glock precedents had looked bad even with lights dimmed. In full glare, they compelled a pronouncement of their demise. So we gave judicial articulation to the neglected code provision against forfeiture in this opinion:

When the default has not been serious and the vendee is willing and able to continue with his performance of the contract, the vendor suffers no damage by allowing the vendee to do so. In this situation, if there has been substantial part performance or if the vendee has made substantial improvements in reliance on his contract, permitting the vendor to terminate the vendee’s rights under the contract and keep the installments that have been paid can result only in the harshest sort of forfeitures. Accordingly, relief will be granted whether or not time has been made of the essence.

These words should not send shock waves through a new generation of lawyers. Lest you become sanguine that all is well, however, I need only remind you that in this age as in any other, any re-examination of the law encounters chronic resistance of two sorts. There is the passive resistance of inertia, the very human disposition to let bad enough alone. There is also the active resistance of diehards who regard precedent itself as a magic word to conjure up veneration, regardless of whether a precedent has outlived its usefulness, regardless even of a precedent’s original sins of commission or omission. There are still endless problems in need of such comment as a scholar ventured some years ago on the Glock problem:

The law, while looking with righteous abhorrence on forfeitures . . . yet has been reluctant to intervene with affirmative relief or to formulate any consistent principle condemning the validity of cut-throat provisions which . . . involve forfeiture. Although the law will not assist in the vivisection of the victim, it will often permit the creditor to keep his pound of flesh if he can carve it for himself.

Even the first cautious assault on the Glock rule encountered resistance, though it was no more than a preliminary advance in a series so circumspect in approach as later to be described with scholarly approval as the method of one who “warned, then reformed, then refined.” The first step was to preclude forfeiture against an innocent purchaser willing to go ahead with the contract. There was a refinement in the following year: we permitted forfeiture of the down payment of a purchaser who had willfully breached his contract, to the seller’s damage. At the same time we took care to distinguish the situation of a defaulting purchaser who could show that there was no damage to the seller, and could therefore claim restitution to preclude the seller’s unjust enrichment.

In the next year such a situation materialized. We allowed restitution of the down payment of $2,000, less expenses, to a purchaser who repudiated his contract to buy for $18,000, upon a showing that the seller had promptly sold the land to another for $20,000. Our decision involved a reconciliation of several code sections, the total effect of which operated to preclude forfeiture that would unjustly enrich another. We noted how irrational it was to tolerate such forfeiture against a purchaser who had

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9 Ballantine, Forfeiture for Breach of Contract, 5 Minn. L. Rev. 329, 341 (1921).
made partial payment, when a purchaser who breached his contract before making any payment could escape penalty altogether.

A handful of scholars such as Corbin helped pave the way for these decisions. The wonder is that there were not more. The tolling of the bells for Glock was also expedited by the fortuitous circumstance that a trio of appropriate cases arose in three successive years. Rarely is there so orderly a procession in the motley parade of cases.

More often than not, in the variegated field of unjust enrichment, a single case has posed a perplexing problem, in a context of inept or inadequate precedents, that must be definitively resolved in a single step. At the outset it may be far from certain whether the plaintiff has a not so lost cause of action, given the inimical magic words of aging precedents. A judge skeptical of such words may find himself taking a new and searching look at such ancient statutes as the Statute of Frauds. He has no quarrel with the historical premises of a statute that honors certain transactions only if they are in writing. When it was enacted, men of property were men of the land, over which hung the long feudal shadow. It was appropriate that transfers of land, once solemnized by livery of seisin, should thereafter be solemnized by a sealed writing scrolled out with a quill pen. It was particularly appropriate in an age when people had only some thirty years in which to live and arrange their affairs before death. The Statute of Frauds looks immutable on its ancestral premises.

It looks less than immutable when we realize how relatively durable people have become, how relatively transient now is their relation to the land. Thus in 1952, when many people had survived two world wars that had shattered their earth and there were portents of more blasting to come, the pen might still have been mightier than the sword, but it was giving way here and there in everyday affairs to audio-visual communication. Conceivably a man's promise might have legal significance even though he did not solemnize it with writing. We confronted this possibility in 1952 in California in a situation wherein A conveyed real property to B in reliance on B's oral promise to hold the property in trust for A. In a context that suggested a confidential relationship, B broke the promise. We had to reckon with a line of cases that denied the remedy of a constructive trust because there was no actual fraud or no confidential relationship. We had to reckon with the curious duality in our legal thinking that enables us to see the actionable wrong of direct injury to another's property and disables us from visualizing the consequences of breaking a promise regarding such property.

Our analysis, proceeding from that of scholars long preoccupied with this duality, led us to the cases that afforded at least the remedy of specific restitution to those who had parted with purchase-money or rendered services in reliance on an unenforceable oral promise to convey real property. From there we advanced to the theory that one who conveys in reliance on an...
oral promise of another to hold in trust can invoke specific restitution to preclude the unjust enrichment of the other, when the latter's course of conduct has made plain his awareness that the property had been given him in trust.

The Statute of Frauds can operate still more harshly in protecting one who breaks a promise to devise real property to another in exchange for the latter's services. Situations arise where an action for breach of contract or restitution in *quantum meruit* cannot make the plaintiff whole. An award of back pay would not be restoration to one who had prospected and developed a mine on the promise of a share thereof. Such ventures cannot be reduced to hours and skills measurable by time and motion formulas; the one who thus engages himself has cut himself off from other opportunities that cannot be recaptured.

Inevitably, this problem arose before the Supreme Court of California in the case of *Monarco v. Lo Greco.* In 1926 Christie Lo Greco, aged 18, decided to leave the home of his mother and stepfather, Carmela and Nat- ale, and seek an independent living. They persuaded him, however, to stay with them and participate in a family farm enterprise, then worth $4,000. They orally promised him that if he stayed home and worked, they would keep their property in joint tenancy so that it would pass to the survivor, who would leave it to Christie by will. What happened thereafter is recorded in the opinion:

Christie remained home and worked diligently in the family venture. He gave up any opportunity for further education or any chance to accumulate property of his own. He received only his room and board and spending money. When he married and suggested the possibility of securing some present interest to support his wife, Natale told him that his wife should move in with the family and that Christie need not worry, for he would receive all the property when Natale and Carmela died. . . . The venture was successful, so that at the time of Natale's death his and Carmela's interest was worth approximately $100,000.11

Or so it seemed. Shortly before his death, however, stepfather Natale had secretly arranged conveyances to terminate the joint tenancies and had executed a will leaving all his property to a grandson in Colorado. The latter received the property after probate and brought an action for partition, relying on the Statute of Frauds to defeat enforcement of the oral promise on which Christie had relied in devoting his life to the farm for twenty years. The grandson argued that no assurance had been given Christie that he would be protected from the operation of the Statute of Frauds, and therefore he should not be protected.

We refused to let the grandson invoke the Statute of Frauds. To do so, we reasoned, would result not only in unconscionable injury to Christie but in unjust enrichment to the grandson, who should no more than his ancestor Natale reap the rewards of Christie's labor. On this double basis the court invoked the doctrine of equitable estoppel and imposed a con-

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10 35 Cal. 2d 621, 220 P.2d 737 (1950).
11 Id. at 622, 220 P.2d at 739.
structive trust on the grandson.

Thus in two cases involving broken oral promises, what once might have been deemed lost causes under the Statute of Frauds found their way to a rational outcome. The court advanced to solutions that it reasoned out as appropriate to the problem in its modern context. In the first case it moved the property back to the rightful owner through the remedy of specific restitution. In the second, it moved the property forward to the rightful taker through the remedy of a constructive trust.

I once took a retrospective view of such equity cases in a piece called "Unjustifiable Reliance." It was directed at those who are on the ready to invoke the magic words, justifiable reliance, whenever it suits their purpose, regardless of whether there has been any real reliance, let alone justifiable reliance. Nevertheless, the essay also took note that these magic words have a legitimate place in the law, particularly in property and contract cases that are their most natural habitat. The facts of a contract case afford a lively illustration of the legal problem of reliance. They also illustrate the thesis that a seemingly lost cause may not be lost at all. I remember how lost it seemed to me until I witnessed its triumph in a majority opinion with which I disagreed.

The facts added up to a remarkable triangle. There was the usual Jack and the usual Jill. The unusual third party, however, was a shop that sold mink coats. These three managed to produce a merry-go-round of reliance dizzy enough to stagger the soberest judge. One early spring day Jack squired Jill into the shop, where she soon lost her heart to a handsome mink coat. The price, said the shop, was $5,000. He'd buy it, said Jack, for $4,000. Not a dime less than five, said the shop. Not a dime more than four, answered Jack. Faced with this impasse, Jill reckoned fast. After all, a whole mink coat was better than none. Out of Jack's hearing, she assured the shop she would pay the difference, and persuaded it to sell to Jack ostensibly at his price. The ruse worked like a charm. Jack signed the sale-slip, probably convinced he had won a hard bargain. The shop then delivered the coat to him. He promptly delivered it to Jill, with appropriate words of gift.

The very next day Jill paid the shop the difference in price, as she had agreed. She then left the coat to be monogrammed, that she might henceforth be clothed with the indicia of ownership. The shop was unaware that in the past twenty-four hours there had been grave damage to her delicate relationship with the donor. There is no known way of ringing such changes on saleslips.

Then the fur began to fly. Later in the day Jack stormed into the shop, declaring that he had revoked his gift, that the coat was his, and that he would pay the $4,000 only if the shop delivered it to him. This the shop refused to do. Thereafter, Jill marched in and demanded that the coat be delivered to her. When the shop again refused, offering instead to refund the $1,000 she had paid, Jill sued for conversion. The shop then filed a cu-
rious "Cross-Complaint in Interpleader," demanding affirmative relief against either or both of the other sides of the triangle. It was willing to deliver to either, on assurance of payment in full, but it had to be one or the other. It wisely knew that neither Jack nor Jill would regard a divided mink coat as better than none. As for the shop, it preferred money to mink. When Jack sought to rescind the contract, it demanded enforcement of his promise to pay $4,000 for a coat whose quality was not in dispute. It was a going concern, not a warehouse for mink returned by gentlemen customers. The law of contracts was at stake. The burning issue was whether a shop that had secretly agreed with a girl to expedite a sale to her escort could justifiably rely on its contract of sale with him.

The trial court refused to believe that but for the secret side agreement, Jack would not have bought the coat. His offer to pay no more than $4,000 might well encourage a helpful girl to pave the way for him to pay just that and thus realize his dream of a hard bargain. The trial court found that it was not too likely that the spirit of giving a $5,000 mink at a cost of $4,000 would be extinguished by knowledge of the enterprising scheme that facilitated the execution of the gift.

Moreover, counsel at the trial made it clear that what troubled Jack was not Jill's connivance with the shop, but her alleged dalliance with others:

[H]e told her in effect that if she wanted to reciprocate his affection and would give up running around with other men and give them a chance to see whether or not they might be able to mature their affection, he would be very pleased to give her suitable gifts, a token of his esteem and regard. . . . [O]n the very evening of this gift. . . . [he] became confronted with the reality that the young lady wasn't telling him the truth about things, she wasn't keeping appointments and on the contrary was misleading him about her plans . . . and when that realization came upon him he felt that he wanted to interrupt the giving of the gift.\(^\text{14}\)

Despite the trial court's findings, justifying enforcement of the sales contract between the shop and the purchaser, the plot grew thicker. On appeal, Jack sought a reversal, apparently on the theory that the shop was fraudulent in not advising him that he was getting more for his money than he had bargained for. A knowledgeable lamb had closed the gap between a bullish offer and his bearish counter-offer, making the latter acceptable. Plainly he did not rue his bargain with the shop until his friend allegedly broke whatever bargain she made with him in return for suitable tokens of esteem. Counsel suggested that she could not justifiably rely on mink as a gift. There was a distinct implication that such a token of esteem could be reclaimed whenever there was a change in the esteem.

And once reclaimed, what to do with the mink? It was caught in a vicious triangle. Since Jack had wrongly appraised the future with Jill, he now retroactively evaluated the transaction with the shop. He succeeded on appeal in persuading a majority of the court that he could justifiably rely on rescission as a remedy against the shop that had unbeknownst to him given him the best of a good bargain.

\(^{14}\)Id. at 614, 226 P.2d at 348.
The contrary view I took has only the fleeting life of a dissent:

It was for the trial court to determine whether [he] was a man of such temperament that he would have preferred having [her] get along without the fur coat to accepting her contribution toward its purchase. He declared his love for her, expressing the sentiment several times that he wanted to give her a fur coat. She was 'very much in love with the coat and wanted it badly.' It was important to him that the woman he loved possess the coat; it was important to her to possess it. Her contribution enabled him to fulfill his wish and hers at a price he was willing to pay. Since they were both fur-coat-minded, it is a reasonable inference that he would not have risked disturbing the relationship between them by depriving her of the coat because she was willing to contribute toward its purchase.

Counsel at the trial made it clear that [he] sought recission of the sale because [she] failed to live up to his expectations. This failure can in no way be attributed to [the company]. Its coat was of sound quality and came up to [her] expectations. The court properly rejected [his] offer of proof of his expectations and disappointment. Not only were they no concern of [the company], but no issue was raised in the pleadings regarding his arrangements with [her].

Nevertheless even a dissenter can resign himself to the contrary majority opinion. The law's tolerance of sales promotion can be sorely tried by sales so consummated.

The question of whether reliance is justifiable puts legal reasoning to the test, whether the contract deals with mink or with more down-to-earth matters. When the down-to-earth paving bid of a subcontractor raised the question in my state," it soon became apparent that the few precedents on comparable problems offered no ready solution to the instant case.

Consider the facts in the context of case law, and ask yourselves at the outset whether you would have appraised the plaintiff's case as a lost cause or not so lost. Be warned at the outset, however, that you will not pave your way to an acceptable opinion with good intentions; you must stand ready at every step of the way to explain why no other way will do.

Be warned, because the facts are so simple that you may wonder how they could possibly prove baffling to a court. A subcontractor submitted a bid to a contractor to do paving for some $7,000. The contractor relied thereon in drawing up his own bid, which was accepted. The subcontractor then revoked his bid and refused to do the paving for less than $15,000. The contractor, despite his best efforts to mitigate damages, succeeded only in engaging another subcontractor to do the paving for nearly $11,000. The contractor accordingly sued the first subcontractor for damages.

It is just such innocuous facts that beget the most diabolic questions of law. No matter what your status as a lawyer, whether a senior partner or an apprentice, you would find no Shephard to guide you surefootedly from the facts to the law. Of course you would be taking a second look at the facts with the second sight of a lawyer; but then your troubles would really begin. There was no evidence that the defendant offered to make his bid irrevocable in consideration of plaintiff's using in the computation of his own bid the figures that the defendant had submitted. Rarely can one

15 Id. at 614-15, 226 P.2d at 347-48.
count on defendants to plan their activities so providentially as to expedite
the invocation of an appropriate magic word like irrevocability.

If the subcontractor had not made an irrevocable bid, was there a bi-
lateral contract binding on both parties? The answer to that was “No.”
What then remained of the subcontractor's bid, in legal terms? The evi-
dence indicated that it was reasonable for plaintiff contractor to rely on
the defendant subcontractor's bid, and that he did not delay accepting that
bid after being awarded the general contract, in the hope of getting a
lower bid. Still, the subcontractor had made no promise to hold his bid
open, though neither had he reserved the right to revoke.

Did it end the problem to say that the subcontractor's bid was an offer
for a bilateral contract? Or was that only the starting-point of the prob-
lem? What would you do if you said that the subcontractor's bid was an
offer for a bilateral contract, period, and questions kept bobbing their
heads? The subcontractor's offer for a bilateral contract had much in com-
mon with an offer for a unilateral contract. As to a unilateral contract, the
theory had already developed that "the main offer includes as a subsidiary
promise, necessarily implied, that if part of the requested performance is
given, the offeror will not revoke his offer" and that the consideration
rendering this implied promise enforceable is the part performance."

The theory implied that an offer emerges to the point of no return as
an enforceable quid for a given quo, even though the parties never literally
struck a bargain. As with many another construction in the law designed
to preclude injustice, this theory of implied promise is ingeniously con-
tained within conventional terminology, the shorthand of magic words.
Whatever its orthodox language, this implication of promise was contrived
to give effect, not to a considered bargain, but to the justifiable expecta-
tions of the parties. It thus tacitly opened the way for a shift in emphasis
from the language of bargain and consideration, the speech of pepper-
corn, to the language of reliance as a basis for implying an enforceable
subsidiary promise not to revoke an offer. The real significance of part
performance is not that it may be construed as consideration in the con-
ventional bargain sense to render enforceable an implied promise, but that
it can be identified realistically as one form of reliance.

Was it not then possible for other forms of justifiable reliance likewise
to call up an implied promise and render it enforceable? We advanced to
the analogy, in the offer for a bilateral contract such as the subcontractor’s
bid, that reasonable reliance resulting in foreseeable prejudicial change
in position affords a compelling basis also for implying a subsidiary prom-
ise not to revoke. We could not equate this form of reliance with bar-
gained-for consideration as the reliance evinced by part performance had
been equated. It was plaintiff's reliance that served to make the subcon-
tractor's offer irrevocable, even though there was no consideration in the
sense of bargain, "in the sense of something that is bargained for and given
in exchange."18

17 RESTATEMENT OF CONTRACTS § 45, comment b (1932).
18 1A A. CORBIN, CONTRACTS § 194, at 192 (1963).
Our analysis brought us sharply against the question-begging word, *consideration*. Once again, we had been compelled to consider what we mean by a magic word. We could understand anew the words of Professor Corbin, in his great work on contracts, that "the reasons for enforcing informal promises are many, that the doctrine of consideration is many doctrines, that no definition can rightly be set up as the one and only correct definition, and that the law of contract is an evolutionary product that has changed with time and circumstance and that must ever continue so to change."  

So it proved with the case of reliance upon a paving bid. The solution of that case combined the theory of implied promise in section 45 of the *Restatement of Contracts* with the theory of promissory estoppel or reliance set forth in section 90. If in the process of evolution the peppercorn suffered one more diminution of status, few would dispute that it had long evinced no sign of growth other than growing tinier.

Even as some things in the law have been growing tinier, some formerly hardly visible people in the law have grown enough to provoke comment, not all of it scholarly. Among them are women, a small but nonetheless significant majority of our people. At long last, but only in this century, they have obtained the right to vote, the right to work in many places once denied to them, the right not to work more than eight hours a day in many occupations, and even the right to make their own contracts. There is no end in sight to their rising expectations. They seem to be able to tend to their business affairs as well as they once tended the stove, and many of them are now buying their own minks, without any consideration for bargains.

It was only a matter of time that the law would recognize that such new freedoms must be attended by new responsibilities. Others may describe how far their jurisdictions have gone in this respect. I shall summon only one illustration from my own, and you may agree that this no longer lost cause should not have remained lost so long.

Once again a *fin de siècle* case was the root of the trouble. In 1889 the rule was established that when spouses conspire only between themselves, they cannot be prosecuted for conspiracy. The rule was a direct descendant of the common-law fiction that a husband and wife are one person, a fiction fostered by Blackstone. The supposed merger precluded their prosecution for conspiracy, which requires two or more persons.

There was no orderly procession of cases, as in the problem of forfeiture, to compel re-examination of the rule, and so it survived by default. Seventy-five years went by. Then, in 1964, the People appealed from an order of the trial court dismissing a charge that a husband and wife had conspired to violate the Corporations Code and to commit grand theft. The People were not persuaded by the argument that a husband and wife

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18 1 Id. § 109, at 489.
19 People v. Miller, 82 Cal. 107, 22 P. 914 (1889).
20 1 BLACKSTONE, COMMENTARIES *442; 2 BLACKSTONE, COMMENTARIES *433.
SOME NOT SO LOST CAUSES

should be granted immunity in the interest of their domestic harmony. Nor were the People persuaded that a husband and wife could put their heads together to criminal purpose and still be assured immunity under the fiction that spousehood was a merger in which the wife disappeared as an entity.

The court likewise was not persuaded. It noted that the law posed no threat to the domestic harmony of the spouses in lawful pursuits. It added that “[i]t would be ironic indeed if the law could operate to grant them absolution from criminal behavior on the ground that it was attended by close harmony.” The court also renounced the supposed merger of spouses in spousehood, declaring: “The fictional unity of husband and wife has been substantially vitiated by the overwhelming evidence that one plus one adds up to two, even in twogetherness.”

One marginal note speaks volumes about Texas. In 1905, a Texas court looked askance at the rule that a husband and wife cannot be prosecuted for conspiracy and rejected the rule outright in 1942, coming in second after Colorado’s judicial rejection in 1920. Since then, the rule has also been rejected by Illinois and by the United States Supreme Court. Texas may take pride in the fact that for a long time it was a lone star in questioning the fictional merger of husband and wife as stranger than the truth.

Even today the battle for the duality of twogetherness is far from won. It is taking longer to end the adverse consequences of such original virtue as fictional oneness than to end the adverse consequences of such original sin as we noted earlier in the forfeiture cases.

Having taken the jump from California to Texas, we now travel back again, not for provincial reasons, but to take sight from a strategic location of some not so lost causes in conflict of laws. The French have a euphemistic term for it, private international law, that shifts the emphasis from conflicts to solutions whose repercussions may be felt around the nation or even around the world. However designated, this branch of the law appears to intimidate many. A few years ago, in an essay on conflicts, I used hardy language at the outset to encourage the reader’s consideration. It was amazing to discover later that the editors, apparently in terror of the subject, had substituted their own opening sentence, which reads “Conflict of laws is one of the most hazardous of subjects, and it is with hesitation that I approach it.”

A judge must disown such uncharacteristic words; if he hesitated before hazardous subjects, he would be lost. Whoever reads beyond that pale and

94 Id. at 881, 395 P.2d at 895, 40 Cal. Rptr. at 847.
95 Id. at 880, 395 P.2d at 894, 40 Cal. Rptr. at 846.
97 Marks v. State, 144 Tex. Crim. 105, 114, 164 S.W.2d 690, 692 (1942).
98 Dalton v. People, 68 Colo. 44, 47, 189 P. 37, 38 (1920).
102 Id.
trembling sentence, no brainchild of mine and unfit for adoption, will come upon quite different words. "There is no problem so extraordinary," I wrote, "as to defy thinking about the ordinariness underlying the extra. It may hearten you to know that here and there judges have come to notice that conflict of laws, far from huddling in esoteric passes, exists for anyone to see in many a mundane situation that never even comes to court because no lawyers happen to be about with seeing eyes."

Obviously there can be no case law without cases. Even when cases did arise, the briefs in the main brought little enlightenment to the courts beyond the pitch-white of the first Restatement of Conflict of Laws, whose unrealistic rules were akin to little fences that supposedly insured a place for everything, and everything in its place.

It is not easy for a judge thus bounded by a Restatement and the restating briefs to see for himself how things really are. Actually things were in a state—whichever state could be most readily boxed into the magic words of the Restatement. For all their authority, however, the magic words crazed the far from numerous decisions. Though no one is born baffled in conflict of laws, most have achieved bafflement early or have had it thrust upon them. Baffling, said the judges;^{34} baffling, said the lawyers; swamp, said the professors;^{35} and Echo answered, lex loci.^{36}

Echo's answering service was of supreme simplicity, but not less confounding for that. It evinced little concern to develop fair and rational answers comparable to those developing in other branches of the law. For all the outward stability of lex loci conclusions, all was turmoil inside the premises. Still, unfamilarity bred consent. Conflicts seemed far enough removed from the ordinary life of the law that few were heard to say, though a few did say it,^{37} that the premises were unsound.

Things went from bad to worse as boundary lines proved to be cobwebs. More and more people packed up their troubles in one state and unpacked them in another. More and more workers and enterprises looked for green in faraway fields. If they were hurt along the way, they might be still more deeply hurt in court. In the depressing case of Cuba Railroad Co. v. Crosby,^{38} in 1912, an injured plaintiff's cause was lost on the ground that it was governed by the law of the place of the tort. By 1956, time had marched on. In Walton v. Arabian American Oil Co.^{39} an injured plaintiff's cause was lost because he failed to prove that it was not lost under the law of the place of the tort. When time marched on, it did not stop for any wounded who could not carry in their burden of proof the nuggets of lex loci delicti. There were erratic results. The nuggets could be as heavy as boulders. They could also be of lighter weight, though they might still prove troublesome to carry.

^{33} Id.
^{34} See, e.g., B. Cardozo, The Paradoxes of Legal Science 67 (1928).
^{38} 222 U.S. 473 (1912).
^{39} 233 F.2d 541 (2d Cir.), cert. denied, 352 U.S. 872 (1956).
Still, there was a plaintiff injured far from home who came into court with a cause that was not lost. The time was 1953; the case was *Grant v. McAuliffe.* Two cars had collided in Arizona. All parties were residents of California. Plaintiffs, the driver of one car and his two passengers, sued the administrator of the estate of the driver of the other car, who died of his injuries. California permitted the survival of tort actions; Arizona did not. Under the policy of California, damages for personal injuries were compensatory. Its survival statute implements that policy by subordinating the interests of the decedent’s heirs, legatees, devisees, and creditors to the interests of the injured person. California contacts were more than sufficient to give the state an interest in applying its policy. Not only were the parties residents of California, but the decedent’s estate was being administered in California.

The Supreme Court of California parted with the Restatement by expressly rejecting the law of the place of wrong. It applied California law and allowed recovery. Had it mechanically invoked the law of the place of wrong, it would have made an exception to the local law. To do so would have defeated a legitimate interest of the forum state without serving the interest of any other state. Even though Arizona had a policy giving preference over injured claimants to heirs, legatees, devisees, and creditors of an estate, there was no indication that it had any contact with the case other than the fortuitous occurrence of the accident in Arizona, hardly sufficient to give it an interest in the application of its policy.

In this light, there was no real conflict of laws in the case. Now it became apparent that the wooden rules of *lex loci delicti* compelled distorted reasoning in terms of spurious conflict. As in the Cabinet of Dr. Caligari, one saw lunacy at last in what had appeared to be eminently sane. It was not the plaintiffs alone who had suffered injury and then been denied redress. The law, too, had suffered.

*Grant v. McAuliffe* broke the spell of magic words, though it had the clumsiness of a pioneer breaking through a facade and entering upon a derelict area with no clear directions as to where to begin the clearing. At the time, the choice was between a clumsy clearing or none. It would have been pleasant indeed to write a perceptive opinion of new vistas while someone else did the clearing. It seemed, however, that most everybody had a previous engagement to coast on the Cuban railroad.

Confusion was worse confounded in a conflict-of-laws problem that involved family relationships. Soon after the *Grant* case, such a problem arose in *Emery v. Emery.* An accident in Idaho involved California domiciliaries. A car overturned as it was being driven by a boy, under his father’s direction. His two sisters were injured, and they sued their father and their brother. Normally there would have been liability under the laws of either Idaho or California, given the findings of gross negligence. There remained the question of immunity as between family members. The court determined first that California law governed the capacity to sue

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40 41 Cal. 2d 819, 264 P.2d 944 (1953).
and to be sued. Thereafter it set precedents in domestic tort law. It held that an unemancipated minor may sue his parent for a willful or malicious tort. It held that one sibling can likewise sue another.

Once again it bears noting that we can hardly take such rules for granted. Some ten years ago when the court established them, it was impelled to elucidate why the orthodox rules were not tenable. In answer to the argument that parental immunity from suit is essential to parental discipline, the judicial opinion observed that a parent's wide discretion in discipline does not include the right willfully to inflict personal injuries beyond reasonable limits. In answer to the argument that actions against siblings or parents would disrupt family harmony, the opinion observes that an uncompensated tort is not likely to preserve the peace of the family. One by one the opinion dealt with an array of arguments of more sound than reason, arriving at last to the rules that won the day for the children.

This children's crusade in torts overshadowed the preliminary problems as to conflict of laws. Not long after, there arose a case involving a conflict pure and complicated as to adults.43 There was the sound of music in the air, martial music. One could almost hear a crash of cymbals denoting the clash of conflicting laws. Two groups of musicians attacked the validity of collective bargaining contracts that included trust agreements between their employers and their collective bargaining agent, the American Federation of Musicians. The gist of their complaint was that the Federation, in violation of its duty as an agent and in fraud of their rights, contracted with the employers to have certain royalty payments and payments for re-use of motion pictures on television paid to a trustee for specified trust purposes rather than directly to the employee musicians. Plaintiffs viewed these payments as wages that could not be diverted to the trust. They contended that the national officers of the Federation arranged the trust to maintain their hold over the affairs of the Federation and to perpetuate themselves in office.

There was personal service on the trustee in New York. Was it sufficient to give the court in California jurisdiction to adjudicate his right to receive payments under the contracts?

It was one thing to reduce the issue to these simple words and quite another to resolve it in tune with orthodox pronouncements that made such a big thing of in rem. In a mobile society where more and more property becomes intangible, the distinctions between in rem and in personam become stranger and stranger. Though a liberalized interpretation of the due process clause now affords state courts an enlarged jurisdiction over non-residents with the requisite minimum contacts, state statutes that prattle of in rem or impose dated tests continue to plague the courts.

Plaintiffs had asked for a declaratory judgment that would have the effect of terminating the trustee's interest in the trust res, namely, the employers' payments into the trust, contending that the payments should go to the musicians. There were enough contacts with the state to justify in

personam jurisdiction under the due process clause. Under the local statute, however, the court had jurisdiction only over the employers and the Federation of Musicians, but not over the trustee. Could there then be jurisdiction quasi-in-rem to decide between the interests of the plaintiffs and trustee in the intangible property in question? Could the trust res be deemed “property in the state” under a statute governing actions relating to local real or personal property in which a nonresident defendant claims an interest?

The court noted that in actions involving intangibles it could take jurisdiction for some purposes without personal jurisdiction over all the parties. It seemed as irrational to resolve the problem by assigning a fictional situs to intangibles as it would be to pin a tail blindfolded to a non-existent donkey. Instead, the problem was recognized as one of jurisdiction over persons and property. It was resolved in terms of the interacting elements of the parties’ contacts with the forum state, the interests of the states concerned in the outcome, and the pervading concept of fair play to all parties.

All of the parties had substantial contacts with California, the forum state. Plaintiffs were residents of California. The payments in question allegedly represented their wages for work in California. The major elements of the transaction were in California. The trustee had brought himself into this essentially local transaction by accepting the trust. Under conventional choice of law rules, California law would govern the question whether plaintiffs’ wages could be diverted to the trustee.

California afforded an eminently convenient forum. Fairness to plaintiffs demanded that they be able to reach the fruits of their labors before they were removed from the state. The defendant employers and the defendant Federation of Musicians were within the personal jurisdiction of the court. Fairness to them demanded a final adjudication of the conflicting claims of the plaintiffs and the trustee.

It would hardly have been realistic to hold that in light of the trustee’s absence, there could be no declaratory judgment that would terminate his interest. Plaintiffs could then still have asserted that the employers’ payments to the trustee would not discharge their obligation to plaintiffs. Moreover, they could have asserted that the Federation of Musicians would likewise be independently liable for damages for breach of its fiduciary duty. The employers would then have been subject to multiple actions, one by the plaintiffs and the other by the trustee, with the attendant risk of double liability.

The case graphically illustrates that even when a court has jurisdiction under the due process clause, it may be hampered by a local statute. The statute precluding a personal judgment unless the defendant was a resident at the time of suit ruled out the possibility of a judgment against the trustee that would hold him liable for a breach of trust or compel him to make an accounting. At most, the court could determine only his interest in the trust res under another statute authorizing the determination of a nonresident’s interest in property in the state.
Plainly the legislature did not regard a judgment under this statute as a personal judgment such as was precluded by the other statute. Yet such a judgment would affect the rights of persons as any judgment does, and the jurisdiction question is not allayed simply by regarding the proceeding as in rem. The case demonstrated the need for realistic tests to determine jurisdiction.

Insofar as courts remain given to asking “res, res—who's got the res?,” they cripple their evaluation of the real factors that should determine jurisdiction. Only when they give up the ghost of the res will the gap narrow between the tests of jurisdiction and the tests of forum non conveniens. Once these begin to converge, they would tend to absorb choice-of-law tests. Such an outcome would be in the interest of rational law, for the state whose law controls is the one whose courts would normally be best qualified to interpret and apply it.

The not so lost causes we have sketched illustrate that no man can put asunder fact and law. Though an appellate judge is regularly haunted by the question of whether the facts before him constitute the whole truth, his legal reasoning necessarily proceeds from those facts. Sometimes the most difficult facts are the indisputable ones, such as an inept or inadequate statute that plainly means its foolishness. Since statutes now constitute the bulk of our law, it is more important than ever that their drafting evince brain as well as brawn. So great is the force of habit, however, that the watchbirds of the law, the scholarly commentators, have hardly begun to train their eyes on the legislative process as they traditionally have on the appellate process. I have summed up the consequences elsewhere as “The Unguarded Affairs of the Semikempt Mistress.” 45 The need is urgent for a signal corps that will take note of these unguarded affairs. Only thereby can we minimize the risk that good causes will be lost in court for lack of a nail in a statute of ponderous horsepower.

We noted at the outset the abundant discussion on the great legal issues of the day, including constitutional questions of historic dimension. This brief survey has concentrated instead on less dramatic cases, for the orderly resolution of all cases is essential to the rational development of the law. By definition, the towering landmarks that mark the victorious causes are few in number. There might be none in the realm of reason we call the law, if there were not also many other markers along the way.