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LORD HARDWICKE AND THE SCIENCE OF TRUST LAW

The proximity of the second centennial of Lord Hardwicke’s acceptance of the Great Seal makes this year an opportune time in which to keep alive the memory of this remarkable judicial codifier, by re-examining the lasting imprint made by him upon the equitable jurisprudence of England and the United States. Lord Campbell has described him as “the man universally and deservedly considered the most consummate judge who ever sat in the Court of Chancery—being distinguished not only for his rapid and satisfactory decision of the causes which came before him, but for the profound and enlightened principles which he laid down, and for perfecting English Equity into a symmetrical science.”¹ In the words of Chancellor Kent: “The present wise and rational system of English equity jurisprudence owes more to him than perhaps to any of his predecessors.”² Lord Birkenhead has written that many of his judgments have become “embodied in the very structure of Equity and are followed every day in confident reliance upon their inherent justice.”³ But the distinctive significance of his contribution to the Anglo-American legal world lies in his reduction of the justice-concept of English Chancery to approximately fixed principles.⁴ On February 21st, 1737, he became Chancellor.⁵ From then on, he labored indefatigably to forge those positive precepts which in his estimation would best externalize the traditional philosophy of Chancery.

¹ 6 CAMPBELL, LIVES OF THE LORD CHANCELLORS (1874) 73.
² 1 KENT, COMMENTARIES ON AMERICAN LAW (14th ed.) 494.
³ BIRKENHEAD, FOURTEEN ENGLISH JUDGES (1926) 158.
⁴ See 6 CAMPBELL, op. cit. supra note 1, at 227. He there states that Lord Hardwicke was the “finisher and almost the author of the immortal Code of Equity to which his name might justly be attached.”
⁵ 6 CAMPBELL, op. cit. supra note 1, at 107, n.
Every phase of equitable jurisdiction felt the magic of his juristic touch. But it was the law of trusts, most important division of equity jurisprudence, at that time, which afforded him his greatest opportunity to display his genius. It is an unusual coincidence that the advent of the Hardwicke bicentennial comes in a period characterized by a renaissance of trust law which aims at systematization. Within the past few months, important and epoch-making works on this branch of jural science, particularly the Restatement of the American Law Institute, have made their appearance. In so far as they have had for their purpose the introduction of a greater degree of systematical certainty with respect to the law of trusts, they are the logical culmination of the judicial achievement of the great Hardwicke. Strangely enough, too, this is a jural era in which lawyers are debating the wisdom of uniformity of state laws, and the advisability of an institute of legislative science which will facilitate and hasten the codification of American law. This is also reminiscent of the days of Hardwicke. But that is not all. Jurists are today much concerned with the nature of the judicial process, re-evaluating the worth of *stare decisis*, in the domain of both public and private law, and stressing the necessity of a creative judiciary. But are not these the very questions which confronted Chancery when Lord Hardwicke became Chancellor?

The uniqueness of Lord Hardwicke's imperishable work in the realm of trust law is due to the application of a juristic philosophy which, after successive stages, reached its maturity in the seventeenth century, to specific cases, in accordance with a systematic methodology, so as to make such law

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6 For example, the exhaustive seven-volume work on Trusts and Trustees by Professor Bogert, and a treatise on Spendthrift Trusts by Professor Griswold.


8 See Kocourek. Project of an Institute of Legislative Science, 20 Am. Bar Ass'n Jour. (1934) 468.

scientific. This philosophy had been slowly but surely emerging through several centuries. It was originally based upon a theosophical natural law ideology for which the juridical economy of England is indebted to Thomistic ecclesiastics.\(^\text{10}\) It was later enlarged by a reliance upon a pragmatic metaphysics, which resolved an actually existent \textit{res} into the duality of the legal and equitable estate.\(^\text{11}\) It was eventually rounded out by Lord Nottingham who added the element of a judicial logic, which was to relate to more or less determinate legal premises.\(^\text{12}\) The philosophy of trust

\(^{10}\) Chancery was the offspring of a neo-scholastic idealism. This latter in turn was the expression of a Thomistic tenet which insisted upon integrating philosophy and theology, or at least the theodicy of a personal Deity, and which accomplished this by the \textit{formula} of a natural law perceivable by reason. Belief in the existence of such a law which set up a norm or standard of human conduct was inescapable once it was admitted that there was a personal God, a divine Lawgiver, Who was concerned with the actions of men. The early ecclesiastical Chancellors thought that it was consistent with belief in a revealed Word which stressed, among other things, a golden rule, for them to translate moral and ethical rights into juridical rights, enforced by the State, through its tribunals, when it was reasonable thus to summon political sovereignty to the aid of morals, and when the violation of such ethical rights involved proprietary consequences affecting the common good.

\(^{11}\) Although a moral and Deistic ideal had necessitated the exercise of an equitable authority apart from the Common-Law tribunals, and although the scholastic theory of the natural law had impelled the early Chancellors to assume jurisdictional powers over certain relationships, still further recourse to philosophy was necessary. The subtleness of philosophy was required to reconcile the Common Law's continuing control of the \textit{res} with Chancery's necessary participation in such control, for an \textit{in personam} moral authority would be futile if the \textit{res} could not thereby be affected. The aim of Chancery was to act ultimately upon the \textit{res}, even though proximately the Chancellors were making effective an ethical ideal against the person, \textit{i.e., in personam}. Ethical idealism was thus supplemented by a pragmatic metaphysics. It was imperative that Chancery work out an equitable theory of property. The actualistic \textit{res} must not be under the exclusive control of the Common Law. In the realm of fiduciary relationships, therefore, recourse to this metaphysical device which divided the \textit{res} into a legal and equitable estate proved advantageous to the Chancellors. An actualistic \textit{res} thus became a metaphysical duality. The initial trust philosophy of Chancery was, therefore, a fusion of natural-law ethics and utilitarian metaphysics.

\(^{12}\) In the middle of the seventeenth century, Chancery had been taunted by accredited Common-Law authorities because it had not sooner followed the principle of \textit{stare decisis}. Selden's aphorism is well-known, namely, "Equity is a roughish thing. For law we have a measure... equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a Chancellor's foot." See 1 Holdsworth, History of English Law (1926) 467 ff. That Chancery was beginning to follow the doctrine of \textit{stare decisis} at the time of Lord Nottingham appears from the case of Cook v. Fountain, 3 Swans. 585, 591 (1672). In this
law, therefore, was not fundamentally influenced by Lord Hardwicke. His was the task to formulate objective, positive precepts in accordance with this juridico-philosophical idealism which he inherited from the era which preceded him. But in emphasizing the necessity of the syllogistic technique, and of obtaining his original major premises, for the most part, from the Common Law, Lord Hardwicke revealed a masterful grasp of the possibilities latent in the marvellous judicial heritage which he had received. Briefly, then, that historical phase of Chancery which began with Lord Hardwicke was principally characterized by a continued adjustment of positive rules to a specific legal philosophy, by the reconciliation of the mentality of the utilitarian legal encyclopedist with that of the natural law jurist, by the balancing of the claims of Chancery and the Common law, respectively, to juristic leadership in eighteenth century England, and by the fabrication of a science of trust law, by a process of systematization.

Prior to an examination of the *modus operandi* underlying Lord Hardwicke's creation of a science of trust law, it may be interesting to speculate concerning his jurisprudential outlook. Certainly he seems to recognize an externally existing natural law of some sort, for he was guided by "the reason of the thing." The whole tenor of his Chancellorship was toward the effectuation of immutable principles of justice by a definite, yet elastic positive law. This was to be done in the light of contemporary social and economic con-

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<sup>18</sup> See 1 Woodhouselee, Memoirs of the Life and Writings of Lord Kames, Lord Hardwicke's Letter to Lord Kames (1807) 239, 246, 248. At 246, Hardwicke writes: "In our courts of equity general rules are established, as far as it has been judged the nature of things would admit . . ." The letter was written on June 30, 1759. See 6 Campbell, *op. cit. supra* note 1, at 231.
ditions. In his efforts to balance the equity of the individual against that of society, he displayed a teleological conception of law, which apparently brings his work in line with the fundamentals of Thomism. Fortunately for the history of Chancery, Lord Hardwicke was not influenced by that group of juristic subjective intuitionalists which took an abstract view of justice, and which, according to Sir Henry Maine, was making itself felt intellectually in mid-eighteenth century English legal circles. Concerned with law in action, he instinctively responded to the exigencies of the times, sensing the necessity of an immutable justice, yet realizing the essential flexibility of equitable rule, conscious of at least the metaphysical unity of Law and Equity.

Standing out pre-eminently in the golden age of Chancery, it was the extraordinary prerogative of Lord Hardwicke to make momentous decisions concerning the extent to which the ordering doctrines of *stare decisis* and *aequitas sequitur legem* should be allowed to operate in the fashioning of the equitable pattern. These were to be the mechanistic devices for the construction of the equitable system, but they were to be subordinated to the commanding ethico-sociological

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15 See Maine, *Ancient Law* (World's Classics ed. 1931) 37. It was there stated that “particularly at the middle and during the latter half of the eighteenth century, the mixed systems of jurisprudence and morals constructed by the publicists of the Low Countries (Netherlands) ... from the Chancellorship of Lord Talbot to the commencement of Lord Eldon’s Chancellorship ... had considerable effect on the rulings of the Court of Chancery.”

The pre-Reformational ideal of a natural law, which represented the starting point of equitable trust philosophy, had been realized through the agency of positive precepts laid down by the Chancellors, but these rules had never been considered as the natural law, according to the Thomistic conception. In the seventeenth and eighteenth centuries, two conflicting interpretations of the non-theosophical (non-neo-scholastic) natural law grew up, one based on subjective intuitionalism, and the other on the possibility and desirability of stating the natural law in code form. Lord Hardwicke’s contributions reveal that he did not agree with either of these two latter views. Thomism also rejects these two views.
ideal of conscionableness.\textsuperscript{16} These twin controls were to be employed to determine rules which when systematically applied would measure claims put forward in the average case since it was thought that justice would in this way be best served. But Lord Hardwicke did not favor an encyclopedization of equitable norms which would have the effect of putting natural \textit{aequitas} in a straight-jacket. While he sought to make trust precedent conform generally to Common-Law doctrines, yet he believed that this identification was not to be an end in itself. The confinement of the judicial discretion which was the inevitable result of the doctrine of \textit{stare decisis} was not to be complete according to Lord Hardwicke.\textsuperscript{17}

As it was never the purpose of Chancery to overthrow Common-Law rules, Lord Hardwicke maintained, except in so far as this was necessary for the accomplishment of its special aims, it was usually desirable for Equity to follow the Law. This was in particular true in reference to proprietary principles.\textsuperscript{18} These had been early laid down by the Common Law before the birth of the Chancery court. Hence Lord Hardwicke doubted whether Chancery had the authority or power to generate a set of fundamental proprietary concepts different from those which prevailed at Law.\textsuperscript{19} Juridic necessity, coupled with the conviction that the common good would be jeopardized by conflicting and competing jural conceptions of property, impelled him to preserve

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\item \textsuperscript{16} According to Lord Hardwicke, positive precepts were not to be immutable, for this would elevate the legalistic above the moralistic.
\item \textsuperscript{17} See 1 Holdsworth, \textit{op. cit. supra} note 12, at 468.
\item \textsuperscript{18} Thus see Garth v. Baldwin, 2 Ves. Sen. 646, 655 (1755). See 7 Holdsworth, \textit{op. cit. supra} note 12, at 73, referring to the fuller report of Hopkins v. Hopkins, 1 Atk. 581 (1738), printed in Cholmondeley v. Clinton, 2 Jac. & W. 18 n. b.

Even in the first decade of the eighteenth century, Lord Cowper had been of the opinion that as a general rule trusts were to be governed by the same conceptions and were within the same rational limits as legal estates, for if similar principles of property did not obtain in both branches of the English juristic system, there would be the utmost uncertainty. This trend of equitable construction was a maxim. See: Watts v. Ball, 1 P. Wms. 109 (1708); Banks v. Sutton, 2 P. Wms. 700, 713 (1732); Philips v. Phillips, 1 P. Wms. 35 (1701).
\item \textsuperscript{19} See 6 Campbell, \textit{op. cit. supra} note 1, at 114.
\end{itemize}
one uniform rule and measure.\textsuperscript{20} Though favoring the separation of Law and Equity,\textsuperscript{21} Lord Hardwicke evidently fore-saw that the merger of the two was a future possibility, so that the increasing unity of England’s legal order in the eighteenth century must be encouraged. In the eighteenth century, as Professor Holdsworth has pointed out,\textsuperscript{22} not only was Chancery following the Law, but the Common Law in turn was becoming more and more equitized.

Very early in his Chancellorship, Lord Hardwicke made it plain, namely, in the case of \textit{Hopkins v. Hopkins},\textsuperscript{23} that he intended to support that equitable precedent which held that trust estates should be governed by the same rules of property as legal estates. This precedent was to be found in numerous cases, for example, the \textit{Duke of Norfolk’s Case},\textsuperscript{24} where Lord Nottingham had denied Chancery’s authority to establish different property rules from those which prevailed at Law, and \textit{Bale v. Coleman},\textsuperscript{25} where Lord Harcourt stated that the devise of a trust must be interpreted according to the legal effect of the words. Other adjudications may be cited to indicate that at the time of Lord Hardwicke, the equitable ideal of justice was being realized largely through Common-Law precepts, such as that of \textit{Tuffnell v. Page},\textsuperscript{26} 1740, where he maintained that it was a general, settled rule that Equity followed the Law, and \textit{Newcoman v. Bethlem Hospital},\textsuperscript{27} 1741, where he declared that he would not sanction proprietary principles in Chancery which contravened the Law. He was advocating the general similarity of trust and legal es-

\textsuperscript{20} 6 CAMPBELL, \textit{op. cit. supra} note 1, at 114. For a full account of the gradual modification of Equity see, 5 HOLDSWORTH, \textit{op. cit. supra} note 12, at 336 ff. and 6 HOLDSWORTH, \textit{op. cit. supra} note 12, at 668 ff.

\textsuperscript{21} See WOODHOUSELEE, \textit{op. cit. supra} note 13, at 242.

\textsuperscript{22} 7 HOLDSWORTH, \textit{op. cit. supra} note 12, at 74, 75.

\textsuperscript{23} West. T. Hard. 606, 619, 621 (1738-39).

\textsuperscript{24} 3 Chan. Cas. 28 (1682).

\textsuperscript{25} 1 P. Wms. 142, 145, 2 Eq. Ca. Abr. 309, 311 (1711).

\textsuperscript{26} Barn. C. 9, 13, Dickens 76, 2 Eq. Ca. Abr. 236, pl. 25 (1740).

\textsuperscript{27} Amb. 8, 12, 13 (1741).
tates as late as 1750, in the case of *Garth v. Cotton.*\(^28\) Indeed his steadfastness to the general maxim, *aequitas sequitur legem*, was brought out in *Garth v. Baldwin,\(^29\) determined at the close of his Chancellorship. He had always, therefore, relied upon this doctrine.

It was the opinion of Lord Hardwicke that this general similarity between equitable and legal estates should extend to such aspects of the trust as its limitation, transfer, devise, descent, and escheat, and to the rule against perpetuities and the operation of fines and recoveries. Soon after he became Chancellor, he wrote:\(^30\)

"... limitations of trusts of terms of years, conditions, and contingencies annexed to them, springing trusts to arise upon the same term, are always professed to be governed by the same rules as the like limitations of the term itself would be at common law."

It was stated in *Portsmouth v. Evingham,\(^31\) 1750, that "equity is to follow the same rule the law does as to the limitation of legal estates." To quote from his opinion in *Garth v. Baldwin,\(^32\) 1755:

"The principle, I go upon, is what I went upon in *Bagshaw v. Spencer* [1 Ves. Sen. 142 (1748)]; it is this principle, and not departed from before or since, that in limitations of a trust either of real or personal estate to be determined in this court, the construction ought to be made according to the construction of limitations of a legal estate... with this distinction, unless the intent of testator or author of the trust plainly appears to the contrary; but if the intent does not plainly appear to contradict and over-rule the legal construction of the limitation, it never was laid down... that the legal construction should be over-ruled by anything but the plain intent."

An examination of his decisions reveals that Lord Hardwicke endeavored to harmonize the rules pertaining to fiduciary and legal estates with regard to transfer and alienation. Numerous examples may be given. Thus, in 1739, he

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\(^28\) 1 Ves. Sen. 546, 556 (1750).
\(^31\) I Ves. Sen. 430, 436 (1750).
explicitly decided, in the case of *Hopkins v. Hopkins*, that a *cestui que trust* enjoyed the same power of alienation or disposition over his equitable estate or interest as if it had been legal. That a *cestui que trust* during the period of Lord Hardwicke might exercise his power of disposition by instruments and solemnities such as were employed by the owner of the legal estate was evident from such adjudications as *Addlington v. Cann*, 1744, and *Jones v. Clough*, 1751. In the former of these cases, it was held that one might no more dispose of a trust of land than he might of the legal estate in such property, under the Statute of Frauds, without certain solemnities.

In *Marlborough v. Godolphin*, 1750, Lord Hardwicke ruled that Chancery had no greater latitude in the construction of wills, as a general rule, than a court of Law. Trust estates were to descend after the manner of legal estates, whether they were customary, as Borough English or Gavelkind, or otherwise, to judge from such cases as *Fawcet v. Lowther*, 1751. This movement toward greater identification of Law and Equity under Lord Hardwicke may be further illustrated by his statement that there should be an escheat of a trust estate, just as there was of a legal estate, under certain circumstances, although the contrary view had prevailed prior to his time. Writing by way of *dictum* in *Fawcet v. Lowther*, he expressed the opinion that since all the land in England would eventually be in trust, the doctrine of escheat would disappear, if there was no escheat of a trust. Finally, he maintained in the cause of *Hopkins v.*

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34 3 Atk. 141, 151 (1744).
35 2 Ves. Sen. 365, 366 (1751).
36 3 Atk. 141 (1744).
37 2 Ves. Sen. 61, 74 (1750).
Hopkins,\textsuperscript{40} 1738, that the principles of property and convenience held in the same manner with respect to trusts as to legal estates to prevent perpetuities.

It was the view of Lord Hardwicke that the effects of fines and recoveries by tenants in tail of trusts should be the same as they would have been had the estates been legal rather than equitable. In Hopkins v. Hopkins,\textsuperscript{41} 1738, he confirmed such seventeenth century precedent as Goodrick v. Brown,\textsuperscript{42} and such early eighteenth century cases as Banks v. Sutton,\textsuperscript{43} and Penne v. Peacock,\textsuperscript{44} when he declared that a tenant in tail of a trust might bar his issue by fine, and that such a tenant, with remainders over, might dock the remainder by a common recovery. Illustrative of the fact that, during Lord Hardwicke's Chancellorship, the effect of a fine was the same in Equity as it was at Common Law upon a legal estate is the case of Willis v. Shorall,\textsuperscript{45} 1738. Similar rules applicable to the barring of entails, therefore, were to obtain in both jurisdictions.

By the first part of the eighteenth century, barring in Equity might be accomplished by a fine or common recovery,\textsuperscript{46} but it was not certain that this was the only method, although it was settled that no third way was open at Law.\textsuperscript{47} Until Lord Hardwicke's decision in the case of Kirkham v. Smith,\textsuperscript{48} 1749, that a tenant in tail of a trust with remainders over might bar these remainders only by means of a recovery, the point was doubtful. He there held\textsuperscript{49} that a tenant in tail of a trust estate with remainders over could not by will or settlement bar the remainders without a recovery.

\textsuperscript{40} Op. cit. supra note 23, at 621.
\textsuperscript{41} Op. cit. supra note 23, at 621.
\textsuperscript{42} 1 Chan. Cas. 49 (1664).
\textsuperscript{43} 2 P. Wms. 700, 713 (1732).
\textsuperscript{44} Cas. T. Talbot 41, 43 (1734).
\textsuperscript{45} 1 Atk. 475, 476, West. T. Hard. 584, 586 (1738).
\textsuperscript{46} Willis v. Shorall, 1 Atk. 475, 476, West. T. Hard. 584, 586 (1738).
\textsuperscript{47} See 7 Holdsworth, op. cit. supra note 12, at 148.
\textsuperscript{48} 1 Ves. Sen. 258, 260 (1749).
\textsuperscript{49} Amb. 518, 519 (1749).
In that adjudication, he declared in reference to the argument that a lease and release should be sufficient to bar the entail of a trust: "It never was so determined, and I hope never will." Thus a measure of restriction equivalent to that demanded by the Common Law was imposed upon tenants in tail of trusts. But he stated in Radford v. Wilson, 1754, that a common recovery was never necessary to bar an equitable estate tail in copyholds. He there wrote: "I am of opinion that an equitable estate tail in a copyhold will be barred by surrender in the lord's court." It was held, moreover, in Robinson v. Cuming, 1739, that an equitable recovery would not bar a legal remainder. Chancery in this period would not allow an unjust fine to be levied by beneficiaries who were thereby attempting to defeat the equitable rights of creditors. In Pomfret v. Windsor, 1752, it was adjudged that a fine levied by a beneficiary could not affect the legal estate because he was merely a tenant at will to his trustee, so there could be no disseisin in such an instance upon the trustee, and that a fine by beneficiaries who were in possession, and non-claim, where the legal estate was in trustees, would not bar an equitable charge though more than five years had elapsed, if the result would be contrary to justice.

II

But a synthesis of Lord Hardwicke's decisions indicates that his acceptance of the theory that there should be a correspondence between legal and trust estates was subject to several exceptions. Thus in Hopkins v. Hopkins, 1738, he suggested that the general principle of similarity did not

51 3 Atk. 815 (1754).
52 Radford v. Wilson, op. cit. supra note 51.
53 1 Atk. 473, 474 (1739), sub. nom. Robinson v. Comyns, Cas. T. Talbot 164.
54 2 Ves. Sen. 472, 481, 482 (1752). See 7 Holdsworth, op. cit. supra note 12, at 149.
always apply. He pointed out that an “abundance of acts are sufficient to pass the trust or equitable interest which would not pass it at law.”56 He stated that when the court of Chancery found the rules of law right, it would follow them, but then likewise it would go beyond them.57 Although he generally favored Equity’s adoption of Common-Law tenets, still he defended Chancery’s exclusive authority over trusts,58 and the application of distinctive rules in the exercise of such jurisdiction.59 He declared in Harvey v. Aston,60 1738, that “all trusts are to be judged and only to be judged by the rules and maxims of a Court of Equity.”

Variations between the rules of the Common Law and those of Chancery, in the era of Lord Hardwicke, for the most part, were frequent relative to trusts and frauds. It was held, for example, in Man v. Ward,61 1741, that in particular instances only, when fraud was charged by a bill, or in cases of trusts, Chancery refused to confine itself within the strict precepts of the Common Law, but for the sake of justice weighed the merits of the case to ascertain the fraud, or to learn the actual intention of the trust or use declared in the deed or will.62 In regard to trusts, the rulings of the Common Law were not to be controlling, first, when the intent of

56 See Carte v. Carte, 3 Atk. 174, 179 (1744), Ridg. t. H. 210, 228.
57 See Paget v. Gee, Amb. 807, 810 (1753).
58 In Morris v. Burrows, West. T. Hard. 242, 246 (1737), Lord Hardwicke placed Chancery’s exclusive jurisdiction over trusts on the ground that only in an equitable tribunal might the necessary directions be given for the proper carrying out of fiduciary relationships. Several years later, in Willis v. Brady, Barn. C. 64, 68 (1740), he stated that the Common Law had no power over trusts. Again, in Sturt v. Mellish, 2 Atk. 610, 612 (1743), he emphasized Chancery’s exclusive right to decide cases which involved the application of the law of trusts. See Holland, THE ELEMENTS OF JURISPRUDENCE (13th ed. 1924) 251, n. 1. It was his opinion in Hubert v. Parsons, 2 Ves. Sen. 261, 262 (1751), that trusts were not to be governed by the precepts of the ecclesiastical court. See Symson v. Turner, 1 Eq. Ca. Abr. 383 (1700); 3 Bl. COMM. 439.
59 See Amb. 807, 810 (1753).
60 West T. Hard. 350, 366 (1737).
61 2 Atk. 228, 229 (1741). See VINOGRADOFF, COMMON SENSE IN LAW (Home University Library ed.) 219, where he states that there is an essential difference of method between Equity and Law which makes it substantially impossible for Chancery to follow a Law technique.
62 2 Atk. 229 (1741).
the settlor plainly was contrary to the legal construction; secondly, when no dangerous proprietary consequences in the social order would follow from Chancery's rejection of the view of the Common Law, and when Chancery's distinctive position was more conducive to natural justice; and thirdly, when the rules of the Common Law allowed estates to be obtained tortiously.

According to the decisions of Lord Hardwicke, there was to be no legal interference with Chancery's effectuation of the intents of settlors, when this was conceived of in a particular case as a moral and ethical duty. Of course, the intent of a settlor who meant to have Chancery set up a competing system of property concepts would not be sustained. The superior equity of public policy and of the body politic had to be recognized. But dangerous social and juristic results would not follow if Chancery occasionally deviated from the Common Law, in carrying out a settlor's intention, which would have been thwarted if borrowed Common-Law tenets had been adopted in the particular case. Thus Chancery of the Hardwicke epoch continued to carry on its ancient tradition that faith must be kept, and intentions carried out. Lord Hardwicke made it plain that under the proper circumstances it was Chancery's duty to sustain a settlor's plain intent.

Obviously since Lord Hardwicke was greatly influenced to make Equity follow the law because he was convinced that the institution of private ownership, under the capitalistic system, demanded certainty and hence but one basic system of property law, and that grave public evils would otherwise ensue, assurance that no hazardous proprietary consequences would result in the English Land Law and in society, from a

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63 Lord Harcourt had tended to subordinate the dogma of intent by stating that there should be a presumption of the consistency of the intents of settlors and testators with the rules of law. See Bale v. Coleman, 1 P. Wms. 142, 145, 2 Vern. 670, 2 Eq. Ca. Abr. 309, pl. 14, 472, pl. 1 (1711).

64 See FISHER, BIOGRAPHICAL SKETCH OF MAITLAND (1910) 71, cited by Hohfeld, Relations between Equity and Law (1913) 11 Mich. L. Rev. 537, 545.

65 Man v. Ward, op. cit. supra note 61, at 229.
variation by Equity from a particular rule of law justified his taking an independent position, in the event that this was more consonant with the spirit of Equity. Chancery might take a distinctive view, therefore, when the result would not be subversive of the Law. He believed with Lord Bacon that "chancery was ordained to supply the law, and not to subvert the law." 68

In the case of Hopkins v. Hopkins, 67 1738, Lord Hardwicke mentioned variations between the fiduciary and legal estates, first, in regard to ouster, and secondly, with respect to merger. There 68 he expressed the view that Chancery would not allow a trust estate to be gained directly by disseisin, abatement, or intrusion, though these wrongs might be perpetrated against the trustee, and as a result, the cestui que trust might be affected. A trust estate might not be obtained tortiously as long as the trustee or trustees continued in possession of the land. He pointed out, moreover, that though there were numerous instances where there might be mergers of legal estates, yet courts of equity never allowed "mergers of trusts where the legal estate continued in the trustees, but have been against the merger, if the justice of the case required it." 69

III

Not only did Lord Hardwicke generally follow the substantive holdings of the Common Law in his creating the science of trust law, but he also utilized its most characteristic method, namely, the technique of stare decisis. He fully

66 6 Campbell, op. cit. supra note 1, at 114.
68 West. T. Hard. 621, 622 (1738).
69 In Hopkins v. Hopkins, op. cit. supra note 23, at 622.
appreciated “the advantage of general rules in restraining caprice as well as corruption, and in letting the world know how civil rights are defined and will be adjudicated.” It was the repeated recurrence to these rules at the time of Lord Hardwicke which enabled him to fulfill his mission of equitable scientist. The difficulty connected with the administration of all law, which results from the occasional conflict between adjudication according to specific, written rules, and judgment in conformity with natural justice, or to employ the terminology of certain modern jurists, “justice without law” challenged his genius. But he placed the greater emphasis upon the necessity of uniformity in the judging process.

The theory that the Chancellor should be allowed to exercise his discretion even in disregard of the precedents which had been created by predecessors or by the Common Law was still paramount at the time of Lord Hardwicke. This was no more than the eternally necessary recognition of the epikeia character of Equity, which must sometimes depart from general, set rules when justice demands this in the particular case. But paradoxically in this era, the discretion of the Chancellor was being curtailed by previous decisions. Indeed this was true as early as the Chancellorship of Lord Nottingham. The extent to which Chancery

70 6 Campbell, op. cit. supra note 1, at 232.
71 See Paget v. Gee, op. cit. supra note 57, at 810.
72 See: 1 Holdsworth, op. cit. supra note 12 at 468 ff; Chaplin v. Chaplin, 3 P. Wms. 229, 234, 2 Eq. Ca. Abr. 384, pl. 9a, 385, pl. 11a (1733). In Chaplin v. Chaplin, Lord Talbot wrote that “he took it to be settled that the husband should be tenant by the curtesy of a trust, though the wife could not have dower thereof; for which diversity, as he could see no reason, so neither should he have made it; but since it had prevailed, he would not alter it.” Sir J. Jekyll declared in Banks v. Sutton, 2 P. Wms. 700 (1732), cited in 2 Eq. Ca. Abr. 383, that “he could not but wonder how it ever came to be thought that a tenant by the curtesy was entitled to relief in equity, more or farther than a dowress . . . therefore if any distinction is to be made, dower (one would think) ought to be preferred to curtesy.” In 1706, it was stated in Otway v. Hudson, 2 Vern. 585, that “the widow of the cestui que trust of a copyhold estate ought to have her free bench or widow’s estate, as well as if the husband had had the legal estate in him.”
was adhering to the doctrine of *stare decisis* in the periods of Lords Nottingham and Hardwicke may be illustrated by the manner in which they felt bound to follow the anomaly that curtesy, but not dower, should be allowed out of a trust estate, although they expressed personal objection to such a view.

Strong precedent confronted Lord Hardwicke in support of the doctrine that dower should not be allowed out of a trust estate. That he did not agree with this general tenet appears from what he wrote in *Casburne v. Inglis*, 1737, namely,

"How it [this rule] came to be settled at first is of a different consideration, and perhaps it may be hard to find out a sound reason for it; but it is safest to follow and adhere to that which has been settled and established."

Accordingly he was holding in 1742 that it was an established principle that a widow was not dowable out of a trust estate. In *Ryall v. Rowles*, 1749, 1750, he stated that a "widow is not entitled to a dower out of a trust estate; which obtained at first without being attended to."

Previously he had expressed the opinion that:

"When any dissatisfaction has been expressed concerning any of the determinations, it has generally been at the denying of dower to the wife, not at the allowing an estate by the curtesy to the husband; and if any alteration was to be introduced, the nearest way, in my humble apprehension, to attain the mere right, would be to allow the wife to have dower of a trust estate, not to disallow the tenancy by the curtesy of the husband."

Here was an approval of the methodology of *stare decisis*, therefore, which meant the rejection of a Common-Law rule,

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73 Note 72, *supra*.
74 Lord Hardwicke agreed with both Sir J. Jekyll and Lord Talbot who did not favor the distinction which equitable precedent has built, namely, that there should be curtesy out of a trust but not dower.
76 Thus see Godwin v. Winsmore, 2 Atk. 525, 526 (1742).
77 1 Ves. Sen. 348, 357 (1749-1750).
78 Casburne v. Inglis, West. T. Hard. 221, 231 (1737).
and a dictate of natural equity, for there was an admission that there was no ethical justification for the position which Chancery had assumed.

Occasionally Lord Hardwicke favored a difference between the rules pertaining to trust and legal estates, respectively, when strongly entrenched precedent in Chancery was available to show that Equity had early decided not to follow the Common Law. True enough, the maxim of *aequitas sequitur legem* had induced Chancery to imitate the Law in allowing curtesy out of a trust estate. But it was not sufficient to overcome the effect of Equity's allegiance to the theory of *stare decisis* in the matter of dower. In this respect, therefore, there was an ironical competition between those two fundamental modes of juridical thought which Lord Hardwicke so brilliantly coordinated in creating and organizing the instrumentality through which justice was to be expressed. This was ultimately due to the fact that no dower had been recognized in regard to a use, though it had been allowed out of a legal estate. Later Chancery rules were influenced, therefore, by the older principles which governed uses prior to the Statute of Uses. As to curtesy, however, the technique of *stare decisis* was subordinated, after this statute, to the philosophy of making equitable principles resemble those favored by the Common Law.

Dower was allowed out of equitable estates as if they were legal in England by the Statute 3 & 4 Will. IV, c. 105 (1834); but dower was there abolished by Statute in 1925, and a share of the deceased's estate substituted. In the United States dower may be had out of equitable estates, generally, of which the husband dies seised, in jurisdictions where dower still obtains.
82 See 7 Holdsworth, *op. cit. supra* note 12, at 73.
83 27 Hen. VIII, c. 10 (1535).
84 Thus it was held in Sweetapple v. Bindon, 2 Vern. 536 (1705), that a husband was entitled to curtesy in the equitable interests of his wife. In Otway v. Hudson, 2 Vern. 583, 585 (1706), it was adjudicated that the husband should be "tenant by the courtesy of a trust, as well as of a legal estate." A similar
Equity permitted a husband to obtain an estate by the curtesy out of his wife's trust estate of inheritance, notwithstanding the fact that curtesy had not been allowed out of the estates which were held to her use.  

IV

The fruits of his Chancellorship were evidence that a natural-law jurisprudence is consonant with a scientific approach to law, and that it may be relied upon for the efficient satisfaction of contemporary social needs. Today when jurists are claiming that legal science demands the abolition of the medievalism of a natural law and contending that it must not be fettered by the chains of an immutable justice it is well to pause and hearken back to the lesson which is contained in the pages which were written by Hardwicke. He was a legal scientist who did not identify science with mere factualism, but who transcendentialized the results arrived at by the empirical process of induction into the generality of principles, testing their validity through the opposite dialectics of deduction with respect to the rational implications of a natural law. It was his skill in reconciling opposites, and in adjusting the respective needs of the legal and social orders that harbored the secret of his lasting greatness.

view was expressed in 1708, in Watts v. Ball, 1 P. Wms. 108, cited in 2 Eq. Ca. Abr. 727, pl. 2, n. In that case, Lord Cowper, after declaring that in general the same rules were to apply to both trust and legal estates, stated that by way of a particular instance a husband should be tenant by the curtesy out of a trust estate on the same terms as if it had been a legal estate; otherwise great uncertainty would prevail. See: 7 Holdsworth, op. cit. supra note 12, at 73; Jenks, op. cit. supra note 81, at 220; 1 Maddock, op. cit. supra note 38, at 272, n.

85 A husband might be a tenant by the curtesy of a trust in Chancery, but two conditions must be fulfilled, first, the wife must have the inheritance, and, secondly, there must be a seisin of the freehold during the coverture. See 3 Atk. 695, 711, 1 Ves. Sen. 298, 307 (1749).

The work of Lord Hardwicke, therefore, whether viewed from the standpoint of the legal historian, philosopher, or encyclopedist is outstandingly significant in the realm of trust law. Let us not forget the debt which we as lawyers owe him in laying the foundation of trust science, upon which subsequent generations of legalists were enabled to erect what has come to be the glory of our juristic tradition. The modern American jurist should remember with gratitude that the science of Equity which was the out-growth of a unique philosophy and a distinctive reaction to an already existing legal system, namely, the Common Law, would have had a different history and evolution if the master hand of Hardwicke had not woven the strands of judicial decision into the indestructible fabric of equitable jurisprudence. Without his vision and balance, the science of trust law might never have attained its present stature. The significance of this science is discernible in the enormous part which the trust has played upon the stage of social and group enterprise, in the present extreme emphasis which is being placed upon it by legal scholars, and in its future potentialities with respect to the solution of organization problems.

Let us at this time, standing as we are upon the threshold of a memorable anniversary, make known to the whole legal world the far-reaching significance of that crucial span of almost twenty years covering the Chancellorship of a judge who was peerless in the judicial technique, supreme in his ability to sense the full import of the opportunities given him for creative interpretation, and unerring in his use of legal logic. Let us now attest and acknowledge the supremacy of his Chancellorship so that lawyers of the future who will witness other centennials of the delivery of the Great Seal to Lord Hardwicke may understand and know the reverence which this age feels toward him. How splendidly has he been eulogized in these words:
"His decisions have been, and ever will continue to be, appealed to as fixing the limits, and establishing the principles, of that vast juridical system called EQUITY, which now, not only in this country and in our colonies, but over the whole extent of the United States of America, regulates property and personal rights more than the ancient Common Law." 87

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