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I recently heard Ed Godfrey discuss the difficulties of writing for publication. One of those difficulties, he said, was the courage it took—accepting for oneself the presumption (or was it presumptuousness?) that you had something worth adding. The task is especially daunting when it involves a public assessment of Justice Godfrey's judicial performance in the very area that has comprised his primary teaching subject over the years, the law of property. Nor is the difficulty lessened when part of the task is to relate those judicial contributions more broadly, yet meaningfully, to the person Ed Godfrey is.

One of my earlier memories of Ed Godfrey comes from a faculty meeting in the early 1970s. In the midst of one of those always insightful faculty discussions of curriculum, Ed gruffly wondered whether anyone was still teaching students how to "parse a case" in the good old-fashioned way, earning your legal knowledge by mastery of the relevant details.

While his emphasis on the "parsing of cases," the mastering of detail, is to me a fundamental characteristic of Ed Godfrey, it is inherently connected to a broader vision. More recently we had a conversation in which he described to me a book he was reading about the role of chaotic behavior in the operation of systems,[1] and, with some wonderment, the argument therein that a bird's moving wing on Pluto necessarily affects the rest of the universe. Details are important because they are essential to understanding the whole; they are, indeed, themselves a part of the whole.

Ed Godfrey's breadth of interests and vision encompasses far more, though, than simply an enlarged view of the scope of legal issues and the ordinary mechanics of the law. It includes history, philosophy, science, art, music, literature, and bridge—the panorama of human experience. His reading of *Chaos* is itself but one example. Indeed, shortly after the same faculty meeting in which he spoke of "parsing the cases," he sat listening to his beloved Schwarzkopf singing Wagner. His 1993 Annual Alumni Dinner address,

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1. JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE (1987).

"Getting Along with Nietzsche,"[2] surveyed the past 80-150 years of music, art, philosophy, politics, law, and social change and related it all to the ethics of padding one's billable hours.

But one of the most notable characteristics of Ed Godfrey, and made all the more remarkable by those others, is that he is just so naturally himself, real and without pretension. What he seeks to do are simply the tasks before him. What he seeks to understand, in the details and in broad vision, is that which is relevant. And the purpose is to do things the way they should be done and to make them meaningful in the most concrete and straightforward way. What else *should* a person do, you might expect to hear him wonder, and why pay tribute to someone for doing what he should do anyway?

What Archibald MacLeish once said of Felix Frankfurter applies as well to Ed Godfrey: despite his enormous public and personal accomplishments, his greatest achievement is the person he is for those who know him.[3] That naturalness of "who he is" has consistently manifested itself through his time as Dean of the Law School, in his life as a teacher, and in his relationships with colleagues and friends. His unheralded but strategic assistance over the years has aided, no doubt, far more students than we can guess. Nearly twenty years ago he delivered to the Maine Law School graduates of 1976 the most appropriate commencement address I have ever heard. After modestly expressing his genuine appreciation for their "invitation to say goodbye," he proceeded to compress into three double-spaced pages a remarkable compendium of sage, if wry, comment and advice, closing unabashedly with a love sonnet invoking the irrevocability of having been loved—presumably by the graduates, their predecessors, and all of us.

All of these characteristics—the attention to detail, the breadth of vision, the naturalness of his concern for those with whom his life and responsibilities intersect—are reflected as well in the decisions and in the content and the style of the opinions he wrote for the court.

I. The Most Important Thing a Judge Should Do

This section could as well be called "Reading Deeds and Walking the Line." Over a quarter of the Godfrey "property case" opinions (more than any other single category in this area) deal with deed descriptions: finding the boundaries described, or supposedly described, therein. What more appropriately rigorous exercise for a

2. Edward S. Godfrey, Getting Along with Nietzsche, Address Before the University of Maine School of Law Alumni Annual Dinner (Nov. 6, 1993), *in* U. Me. Law Sch. Alumni Quarterly, No. 50, Winter 1993.

3. Archibald MacLeish, *Felix Frankfurter: A Lesson of Faith*, 1966 Sup. Ct. Rev. 1, 4.

parser of words and cases than figuring out a deed's legal description and laying it out on the face of the earth? Such cases ordinarily give little opportunity for great contributions to the development of law.[4] (Indeed, it can be a significant achievement just to get through some of them.)

The contribution that Ed Godfrey's opinions do reveal in these cases, however, is probably the most important kind of contribution that a judge can make: a careful, intelligent, and sensitive consideration of the respective, individual disputes of the parties. What can be learned from them is that which can be learned from examples of the highest standards of analysis, from examples of a judge fulfilling his responsibilities both to the parties and the law, whatever confusing complexities the cases may present. Such a contribution, consistently performed over the years, should not be underestimated; it is what every party has a right to, what honest litigants want, and what the legal system fundamentally assumes.

The last of these deed cases, *Proctor v. Hinkley*,[5] decided a few months before Ed Godfrey left the bench, stands as a culmination of the model. The parties were abutting owners who derived their respective titles from a common grantor. The Hinckleys owned their lot through a 1942 deed to a described portion of the grantor's land. Proctor had his by a subsequent conveyance of the remaining portion, expressly excepting the previously conveyed Hinkley lot. The crucial issue was the description and location of the Hinkley lot, a relatively small parcel on the westerly shore of Sheepscot Lake.

The disagreement was over the location of the western and southern boundaries. Both the northwest and southwest corners were described by specific monuments, namely "to a stake and a stone," as well as by specific distance calls. The southern line ran "east" to the high water mark and then to the low water mark of the lake shore.

When the parties' surveyors attempted to lay the deed description onto the unshaven and wrinkled face of the earth, however, the situation became, quite frankly, impossible. There was an apparent inconsistency between the distance call and a questionably identifiable monument at the northwest corner, another distance inconsistency between that corner and the missing southwest monument, an apparent absurdity in applying the compass direction going east on the

4. Any area, of course, will eventually present questions affecting the direction of legal development. One of the deed description cases did present a new question as to the use of referees to resolve cases on summary judgment motions, where there can be no question of any material factual dispute. Hedberg v. Wallingford, 379 A.2d 126 (Me. 1977). Recognizing that the primary purpose of such referrals is to deal with complex factual inquiries, and finding that the referee in that case had acted within the scope of the reference order and had not based his report on the resolution of any disputed factual issues, the court approved the limited use of referees where special expertise would be appropriate and helpful. *Id.* at 127-28.

5. 462 A.2d 465 (Me. 1983).

southern line, and the inherent difficulty of determining at the time of the parties' 1977 surveys what the original high and low water marks were in 1942. Both surveyors had struggled with the difficulties. The evidence had been extensive and conflicting, as one might expect in light of the wages of time on human memory and the influence of self-interest on the recollections of disputing parties.

But Ed Godfrey (with the court and, no doubt, his law clerk) went out (figuratively, of course) and "walked the line" to assure that even an impossible situation would ultimately be decided, to the extent possible, by a careful, sensitive and proper application of the law. Boundaries are, after all, important to those who claim them, despite so many well documented failures to properly delineate them.

Starting with the first deed call at the low water mark on the east end of the northern line, he went westerly and found that the referee's location of the disputed "stake and stone" monument in favor of the Hinkleys was based on sufficient evidence to establish the northwest corner (prevailing, of course, over the inconsistent distance call). A stake at the southwest corner, even though not the original monument, was also sufficient to serve as the missing one, but only because the referee had found there was a previous agreement by the parties, which was supported by competent evidence, although disputed by Proctor.

On the other hand, the "nail" fixed by the Hinkley's surveyor as a "monument" to set the low water mark and thereby, somehow, the southeast corner could not legally serve as a monument, any more than the same surveyor's (ultimately irrelevant) "pin near the hemlock tree" could serve to locate the northern high water mark: to serve as a monument the marker must be mentioned as such in the deed. And no one had presented any competent evidence to show where the low water mark was, a finding that was crucial to establishing the southern boundary (as well as the eastern boundary that ran along the low water contour of the lake).

The court thus upheld the referee's establishment of the western line but had to send the case back to determine the southern boundary, which presumably could be done only after hearing further evidence.

In the midst of the court's even-handed loyalty to the careful and proper application of law even in such an impossible dispute, the sense of angst is evident:

> It is obvious that the referee, faced with a set of poorly drawn conveyances, did his best to bring this litigation to a sensible and fair conclusion. It is regrettable that his definition of the parties' common boundaries must be partially undone because of technical error when the only practical result is to leave unsettled the ownership of a few square feet of terrain having

> little economic value. This court urges counsel for both parties to try to persuade their clients to enter into some practical but formal and recordable agreement locating the boundary line in question.[6]

The court—and especially the justice responsible for the opinion—also had labored hard, with the best, though limited, tools available to an appellate court, toward the goal of properly resolving this dispute between the individual litigants.[7]

It is unnecessary to walk the line in the other deed description cases in order to make the point. The pattern is consistent throughout.[8] Appropriate deference is accorded to the fact-finder, yet the discussion demonstrates such a thorough examination and understanding as to belie any doubt that the court's scrivener understood the record and cared deeply about the proper outcome. These opinions reveal, as well, an intuitive perception fundamental to sound legal analysis: relevant basic legal concepts are recognized and understood, laying clear the various parts of a picture that might otherwise, and often would, be wrong or confused.[9]

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6. *Id.* at 473.

7. Having come through even more evidentiary and analytical complications than I have outlined in my simplified summary, the court, in a rather sardonic footnote, wryly noted its gratitude that the lot's extension to the low water mark avoided yet another issue: the need to "invoke the complicated rules" concerning the division among coterminous owners between the high-water and low-water marks. "At least *that* problem is not raised by the terms of this conveyance." *Id.* at 473 n.7. I.e., the problems already present were sufficient to the case.

8. *See* Rodrigue v. Morin, 377 A.2d 476 (Me. 1977); Hedberg v. Wallingford, 379 A.2d 126 (Me. 1977); Bailey v. Look, 432 A.2d 1271 (Me. 1981); Dumais v. Gagnon, 433 A.2d 730 (Me. 1981). *See also* McMullen v. Dowley, 418 A.2d 1147, 1149-51 (Me. 1980) (turning on issues of adverse possession, but illustrating the same careful attention to the attempted parsing of the deeds).

9. A notable example is the unraveling and reweaving of the interrelated reformation, restitution, breach of covenant, and estoppel by deed issues in Dumais v. Gagnon, 433 A.2d 730 (Me. 1981). A mutual mistake had been made by describing in the deed a parcel on the northwest end of highway frontage rather than on the intended southeast end. *Id.* at 733-34. The grantee had entered onto the intended, rather than the described parcel. *Id.* at 734. A subsequent deed conveyed the grantor's remaining land to another grantee, specifically excepting the parcel previously conveyed. When the mistake came to light, the two grantees engaged in an exchange of deeds to correct the record, for which the second grantee required and was paid $1,500 by the prior grantee. *Id.* at 735. The common grantor filed a suit for reformation of the first deed. The first grantee sided with the grantor on reformation and sought restitution of the $1,500. The second grantee (who had notice, but not actual knowledge of the mistake and who had suffered no harm in reliance on it) counterclaimed for breach of the warranty covenants. *Id.* at 735-36, 738. The court held that once reformation had been granted restitution followed, since the reformed deed itself was correct, making the exchange of "corrective" deeds irrelevant and unnecessary. *Id.* at 736-37. The reformed deed also vitiated any breach of warranty in the second conveyance, since the deed, once reformed, kept the mistakenly granted southeast parcel with the grantor and, through estoppel by deed, automatically conveyed that ownership to the subsequent grantee. *Id.* at 737 n.1.

II. THE REASONED MOVEMENT OF THE LAW

Ed Godfrey's own uniqueness precludes any characterization as simply the product of a particular time. Yet he could not help but be influenced by the traditional common law view of a judge's role in a democratic system. As classically put by Justice Cardozo, the role of a judge is to develop the law interstitially,[10] moving it forward to meet changing needs and perceptions, but within the dual parameters of deciding individual cases, with their broader law-making implications, while respecting the established precedents and the expressed legislative will. This does, indeed, describe those Godfrey opinions that deal with such opportunities for moving the law forward in the property area. That task is, in fact, complementary to the task of deciding cases through a thorough, intelligent, sensitive, and craftsman-like approach.

Immediately before his appointment to the Court in 1976, Ed Godfrey was serving as chief consultant to the Maine Probate Law Revision Commission, which was then in the beginning stages of thoroughly reexamining that entire area of Maine law. Its comprehensive package of substantive law reforms, modeled extensively on the Uniform Probate Code, was enacted by the Legislature in 1979 but did not generally become effective until the beginning of 1981.[11] Most of the Godfrey term thus occurred during the period of transition between the law-to-be-reformed and the effective date of the eventual reformation.

One case that can serve as an example of the Godfrey approach, *Staples v. King*,[12] involved an apparent attempt to defeat a surviving spouse's elective share through inter vivos conveyances—a major area of probate law reform that had not been clearly resolved in Maine law.[13] Shortly before his death, the decedent set up several revocable trusts in favor of a child and two grandchildren, retaining substantial powers during his lifetime as trustee. After his death, the surviving widow challenged the trusts as illusory and invalid as testamentary will substitutes. The probate court had granted the beneficiaries' motion to dismiss for failure to state a claim.

Old Maine case law expressly established that one could disinherit one's spouse by depleting one's estate through inter vivos transfers as long as it was done through complete gifts,[14] but not if it consti-

10. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

11. P.L. 1979, ch. 540, § 53 (effective January 1, 1981).

12. 433 A.2d 407 (Me. 1981).

13. MAINE PROBATE LAW REVISION COMMISSION, REPORT OF THE COMMISSION'S STUDY AND RECOMMENDATIONS CONCERNING MAINE PROBATE LAW, 69 (1978); UNIF. PROBATE CODE, §§ 2-201 to 2-207 (1975) (the "augmented estate").

14. Lambert v. Lambert, 117 Me. 471, 104 A. 820 (1918).

tuted a fraudulently illusory transaction.[15] The latter protective doctrine, however, never had been applied to revocable trusts, which generally were held to be a valid means for transferring trust property. The Maine statute protecting against spousal disinheritance had replaced common law dower with the spouse's "rights of descent" and by its terms applied only to property that was owned by the decedent at his death.[16] That statute had been replaced by the Uniform Probate Code's "augmented estate" concept, which no doubt would have equitably protected the surviving spouse in this case. The new code, however, had not yet become effective at the time of the transactions or the decedent's death.

Another problem lay in the nature of one of the challenges to the transactions' validity: that they were "testamentary" in nature and thus violated the formal execution requirements of the Statute of Wills. Modern views generally favor upholding commonly used "will substitutes" as simpler, more practical, and less expensive means of transfer at death. The traditional doctrine of "testamentary" transfers had been largely rejected on that basis by the provisions of the new Probate Code.[17]

The Godfrey opinion's analysis steered the court safely between the Scylla of mechanical adherence to the spousal nonprotection precedent and Charybdis's invitation to revivify the testamentary invalidity doctrine. Going beyond a mere extension of the "fraudulently illusory" doctrine to revocable trusts, the court took the opportunity to adopt the modern approach of *Newman v. Dore*,[18] that protects a spouse against inter vivos spousal disinheritance when the trust settlor has, for all practical purposes, retained the ownership of the trust property, whether or not the intent is to disinherit, and even though the trust would be generally valid for other purposes. The Godfrey analysis used the same statute that failed to provide explicit protection as support for the general policy of spousal protection, and cited the new Probate Code as confirmation of the court's specific application of that policy.[19]

Such development is, of course, guided primarily by sound considerations of policy, designed to keep the law in touch with current

15. Brown v. Crafts, 98 Me. 40, 56 A. 213 (1903); *see also* Wright v. Holmes, 100 Me. 508, 513, 62 A. 507, 509 (1905) (a mere device or contrivance retaining use and dominion of property by donor so as to be fraudulent).

16. ME. REV. STAT. ANN. tit. 18, § 1057 (West 1964) (repealed by P.L. 1979, ch. 540, § 24-C, effective Jan. 1, 1981).

17. ME. REV. STAT. ANN. tit. 18-A, § 6-201(a) (West 1981).

18. 9 N.E.2d 966 (N.Y. 1937).

19. "It would be irrational to allow a married person to circumvent the statute by simply refraining from making a will and, instead, executing trusts which appear to deplete his estate but which reserve for himself, in effect, the benefits of owning the trust property." Staples v. King, 433 A.2d at 411 (Me. 1981); *see also id.*, n.4 and accompanying text.

conditions and with the reality of those whom the law is meant to serve. Yet it can occur only when a court is perceptive enough to both recognize the opportunity and see the possibilities suggested by the cases and the statutes that present it.

There are, to varying degrees, other examples of such interstitial development in the Godfrey property law opinions. *Estate of McNeill*,[20] written shortly before his leaving the bench in 1983, adopted the *Restatement* rules designed to honor the intent of the donor of a power of appointment, under standards set forth for that purpose. The court did so by giving effect to an attempt to exercise a testamentary power through a will that did not fully meet the statutory execution requirements. In *Vanasse v. LaBrecque*,[21] involving the validity of the title of the purchaser of real estate from an executrix under an allegedly defective license to sell, a Godfrey opinion steered the court away from an artificial and sterile exercise in jurisdictional analysis and did so over a strong and extensive dissent by former Chief Justice Dufresne.

A favorite Godfrey chestnut—estates and future interests—afforded an opportunity to adopt a "reasonable time" limitation for breach of a condition in a defeasible fee simple that had been conveyed to a religious society.[22] Relying on traditional property law policies concerning forfeiture and the proper construction of conveyances, and looking to the similar approach in other states, the court concluded that since there was "no precedent to the contrary in Maine, we deem it correct to apply here the principle of construction established in other jurisdictions and supported by common sense."[23]

In its law of adverse possession, Maine has long been saddled by a judicially adopted requirement that, in order to gain title by adverse possession through the running of the statute of limitations, an adverse possessor, even though honestly but mistakenly believing the land to be his, must have had an intent to claim the land even if he had known that it was not his.[24] This unique Maine doctrine has

20. 463 A.2d 782 (Me. 1983).

21. 381 A.2d 269 (Me. 1977).

22. Independent Congregational Soc'y v. Davenport, 381 A.2d 1137 (Me. 1978). The case also includes an enlightened and common sense unitary reading of the series of deeds conveying the smaller parcels that made up the whole, each deed containing slightly varying versions of the defeasing conditions.

23. *Id.* at 1140. The case is also noteworthy for the savory statement that, although the question of "reasonable time" was normally a question of fact for the trial court, "[I]n this particular case, however, as a matter of law after a century and a half, a reasonable time has passed." *Id.*

24. *See, e.g.*, Preble v. Maine Central R.R. Co., 85 Me. 260, 27 A. 149 (1893).

been roundly criticized on a number of grounds[25] and has recently been abolished by statute, at least as to boundary disputes.[26]

One approach to encouraging reform in this area by a court so firmly steeped in this anachronistic rule would be to emphasize the central issue of possession: Was there an adverse possession that would give the landowner an action and thereby start the running of the limitations statute?[27] Insofar as they go, all three of the Godfrey opinions dealing directly with adverse possession do indeed focus essentially on the issue and nature of possession. The first case, *Clewley v. McTigue Farms, Inc.*,[28] dealt with whether adverse possession had been broken by a period of non-occupancy, thereby making it not "continuous." The court held that possession had not been interrupted, notwithstanding the lack of continuous physical presence on the premises. The second case, *McMullen v. Dowley*,[29] likewise focused its analysis on the nature of the required possession in the conventionally accepted way.[30]

In a suggestion that is not intended to be faint praise, one of the contributions that also must be attributed to the Godfrey adverse possession opinions is what they do *not* do. Consciously or otherwise, they generally avoid gratuitous elaboration on the various elements of adverse possession law and of thereby further entrenching the increasingly mechanical nature of so much of the jurisprudence in this area.[31] The last of his adverse possession trio, in fact, may

25. Those grounds include: ignoring the statutory bar on possession actions; unrealistically requiring proof of an intent that is unlikely to have existed and hard to establish reliably; penalizing the good and honest while rewarding the wicked and deceitful and even tempting the honest to lie; creating problems of professional ethics; and adding to the basis for a public perception that "the law is a ass." (*See* CHARLES DICKENS, OLIVER TWIST ch. 51: " 'If the law supposes that,' said Mr. Bumble . . . 'the law is a ass—a idiot.' ").

26. ME. REV. STAT. ANN. tit. 14, § 810-A (Supp. 1994).

27. *See* 3 AMERICAN LAW OF PROPERTY § 15.3, at 765 (Casner ed. 1952); Brand v. Prince, 324 N.E.2d 314, 316 (N.Y. 1974) ("Reduced to its essentials, [the elements of adverse possession] mean[ ] nothing more than that there must be possession in fact of a type that would give the owner a cause of action . . . against the occupier throughout the prescriptive period.").

28. 389 A.2d 849 (Me. 1978).

29. 418 A.2d 1147 (Me. 1980).

30. In order to decide whether the cutting that took place sufficed to constitute "possession" of the northern lot, it is necesssary *and sufficient* to inquire whether the actual use and enjoyment of the lot by Smith and his successors amounted in kind and degree to the use and enjoyment to be expected of the average owner of such property.

Id. at 1152 (emphasis added) (citation omitted).

31. The same cannot be said for the Godfrey opinion in a case involving the creation of easements by prescription, Pace v. Carter, 390 A.2d 505 (Me. 1978), where the court went out of its way to expressly reaffirm prior Maine precedent requiring "acquiescence" by the servient owner, although that traditional doctrine, based on the fiction of a "lost grant," has widely been discredited as confusing, misleading, and counter to the now generally adopted modern analog between adverse possession and prescriptive easements.

have the happy distinction of being the only case in all of adverse possession law to not even routinely recite those elements.[32] In this area at least, a judge can rightly be applauded for simply "doing no harm."

III. CONCLUSION

Advances made in the law through the opinions of one justice in one term in one limited area such as the law of property are not likely, of course, to define an overall architecture of doctrine. The opinions a justice writes may well not reveal his full influence on the work of the court. Nor are the influences of the other justices easily deciphered, if at all, for their effects on the opinions another justice writes. So it must be in this case.

Yet the opinions do show something of the kind of justice Ed Godfrey was and its relationship to the person he is. He parsed the cases, but with a broader vision of why it was to be done, and done that way, and with the same kind of human awareness and unearned humility that makes him who he is—which seems to be the thing that guides him in all of his endeavors and relationships.

Indeed, he had no reason to enjoin upon the 1976 graduates the irrevocability of having been loved. In Ed Godfrey's case, such irrevocability is inherent.

32. Discussing the issue of adverse possession, Godfrey's opinion simply states, "On the issue of adverse possession, the evidence of record adequately supports the determination of the trial justice that Castle Hill completely failed to establish its possession of the disputed land." Richards Realty Co. v. Inhabitants of Town of Castle Hill, 458 A.2d 753, 754 (Me. 1983).