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Our Changing Common Law

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FROM the time of Sir Edward Coke, who is said to have established the supremacy of the common law, and even before his day, the common law system has ever been in the process of reformation. In the evolution of our jurisprudence it has experienced something of the ebbs and flows that have marked the recessions and the advances of the English speaking people during the last six hundred years. At some points it has been nullified or superceded, at others it has been modified, but the general movement has been toward development and extension to meet the changing social and economic requirements of the people whom it served. These extensions have touched, and to some extent remolded, every branch of our law. So comprehensive has been the movement, and so permeating has been its influence, that no one has essayed to produce a treatise covering the broad field of our changing common law, yet your president makes bold, though probably unwisely, to discuss under the limit of time necessarily imposed here this difficult and limitless subject. It is obvious that only the broadest general principles can be here considered. The nature of the subject does not permit of colorful or entertaining treatment, but its imminence and importance call for present thought and attention.

There must be omitted a consideration of the customs, usages and traditions out of which the common law had its birth, and the origin of the administrative means by which these customs, usages and traditions were crudely made operative; the influence of other systems of jurisprudence on the creation and destiny of our own; and the history of the substantive and procedural law which are at once interesting to the lawyer and helpful to him in trying to measure the extent and wisdom of the numerous changes now in the process of the making. The history of the rapid and startling changes in the development of the common law throughout the centuries from the time of Glanville to this day would give us a broader perspective and understanding in viewing the more rapid innovations of the present decade.

Professor Wigmore has shown that, aside from the innumerable customs, rules and decrees which were devised for the regu-

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lation of the affairs of some peoples of lesser consequence in the history of the world, there have been established within historical times sixteen legal systems. Of those sixteen, eight remain today, and of these eight, three systems, the Mohammedan, the Romanesque and our own, the Anglican, cover the greater part of the world's population. The Anglican, being the youngest of them all, has had the experience of all that has gone before upon which to draw for its guidance.

From his study of these systems, Professor Wigmore concluded that the growth and perpetuation of a legal system depend on the development and survival of a highly trained professional class to administer it, and, if that premise be correct, we may conclude that from the days of the English Inns of Court down through the time of the increasingly efficient universities and our colleges of law with their highly trained faculties, has come a learned class of professional men that will be able to preserve our system and make it adaptable to such necessities as society may in the future require, if it be granted that other conditions necessary to its growth and perpetuity be present.

It is of interest that we observe as a basis for this discussion the conceptions of the common law as defined by some of our learned jurists and commentators. The United States Supreme Court said in the case of *Kansas v. Colorado:*

> " . . . the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes."[1]

Kent in his *Commentaries* defines the common law as including those principles usages, and rules of action applicable to the government and security of persons and property which do not rest for their authority upon any express or positive statute or other written declaration, but upon statements of principles found in the decisions of the courts, and, he says, it embraces that great body of unwritten law founded upon general custom, usage, or common consent, and based upon natural justice or reason.

A Minnesota court has said simply that "the common law is the legal embodiment of practical sense."[2] One definition, given by a Mississippi court in the case of *Yazoo & M. V. R. R. v. Scott,* and which well measures up to a popular and modern conception, says:

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[1] 206 U. S. 46, 97, 27 S. Ct. 655, 51 L. Ed. 956 (1907).

> "The common law . . . while, in most respects, the 'soul of reason', is not always arrived at by an application of the rules of logic, for its basis in the last analysis is nothing more or less than expediency. . . ."[3]

A definition that will be approved by many, given by a Florida court in the case of *Quinn v. Phipps,* is that the common law is "a method of juristic thought or manner of treating legal questions worked out from time to time by the wisdom of mankind. It is a doctrine of reason applied to experience."[4]

The only literature of the law, as recorded by the great writers, has not only pointed out the history and the status of the law in the writers' times, but it has by criticism and analysis indicated to some extent the trend of the future development of the law.

We do not include with these sound analysts and far seeing legal minds some of the recent prolific writers who have been denominated by Karl N. Llewellyn, Professor of Jurisprudence, of Columbia University, as "Jurisprudes". We are thinking of the great writers who have consolidated the gains of the common law, who have pointed out that which in time became archaic; those who viewed sensibly and appraised wisely the values of rights secured, whose sound perception enabled them to understand that rights of men may change with varying social and economic conditions, and that the remedies of the law must be made to synchronize with basic variations of the relations of men, but whose perspective was broad enough to refuse to be led into error by temperamental trends and abstractions. Glanville in the twelfth century, Bracton in the thirteenth, Fortescue in the fifteenth, Coke and Littleton in the early seventeenth, Blackstone in the eighteenth, Kent in the nineteenth, Holmes in the twentieth, and others in their times, have restated, clarified, refined, and made adaptable this "legal embodiment of practical sense" in the most rapidly developing civilization of all recorded time, so that we are not surprised that Justice Stone has said that one of the striking phenomena of the development of the common law is the ever accelerated speed with which its boundaries have been extended, and its content multiplied and refined. While in this effervescent period there is found many places an inclination to rely less on precedent and to break

[2] Sullivan v. Minneapolis & R. R. Ry., 121 Minn. 488, 494, 142 N. W. 3, 45 L. R. A. (N. S.) 612 (1913).
[3] 108 Miss. 871, 881, 67 So. 491, L. R. A. 1915E 239, Ann. Cas. 1917E 880 (1915).
[4] 93 Fla. 805, 824, 113 So. 419, 54 A. L. R. 1173 (1927).

the continuity of the common law with the past, we may well ponder the wisdom of the words of Coke when he said, "Let us pursue our ancient authors, for out of the old fields must come the new corne."

In the strict sense we have no federal common law, but it has been observed that the very language and terms of the United States Constitution tie it to the common law, and in the case of *Kansas v. Colorado,* decided in 1907, it was said that "The language of the Constitution . . . could not be understood without reference to the common law."[5]

That it is the basis of jurisprudence in all of the states, excepting Louisiana, is indicative of the general satisfaction with which our people have received its administration. That its course throughout its history has been beset by numerous attempts to supersede it and that it has survived to this day bespeak its utility and its adaptability in administering the litigious and jurisprudential affairs of a people whose social and economic life has gradually become more complex and difficult of orderly regulation.

What have been the nature and effect of these attempts made to supersede the common law?

As has been pointed out by Dean Pound and others, in the sixteenth and seventeenth centuries there was a movement to supersede it by a public law drawn on Romanist lines, conceived in terms of centralized absolute royal authority and administrative supremacy. Also in the seventeenth, in the eighteenth and in the early part of the nineteenth centuries there was a movement to reject reported judicial experience as a guide to judicial determinations. Later in the nineteenth century there was an advocacy of the system and refined academic conceptions of the modernized Roman law, while during the same time there was a rapid growth of impinging legislation. In the present century in the United States there have been two notable movements designed to change the operation of the common law system. The one is the recent reversion to the ancient union of administrative and judicial functions of government. The crude and sometimes cruel system of governmental administration existing prior to the development of the common law system recognized no incongruity and no injustice in combining the accusatory and the judicial powers in one authority, but we may in this connection recall that Holmes has shown that the original purpose or motive promoting litigation was revenge — not justice or reimbursement. The modern adminis-

[5] 206 U. S. at p. 95.

trative tribunals and agencies are rapidly extending their jurisdiction over both subject matter and persons and are at the same time resisting efforts being made to bring their acts and proceedings within the realm of the sound judicial review and control deemed by many to be necessary, if our system of jurisprudence is to be maintained. Mr. Justice Stone has said:

> "Perhaps the most striking change in the common law of this country, certainly in recent times, has been the rise of a system of administrative law, dispensed in the first instance through authority delegated to boards and commissions composed of non-judicial officers."

Peoples who have adopted and lived within and by our common law system have become free. Their rights and institutions have been secure, and yet we hear today some saying in substance and effect that there is a greater measure of security to be had by reverting to that union and multiplication of powers from which it was thought that men and their governments had escaped long ago.

The other notable movement in this century which constituted an attack upon judicial determinations and the supremacy of the law was the effort, now fairly well spent, to control the decisions of the courts by the recall of judges in order to support popular clamor or to meet the political expediency of the moment. Efforts by pressure groups and those having the power of appointment to office to influence trends and constructions by the courts, other than by ethical and educational processes, constitute direct assaults upon the common law system and are alarming in the light of experience and history.

These attempts to supersede the common law and these attacks upon it have had much influence upon the course, nature and extent of its development, and in addition to these direct attempts at supersession, other influences of immeasurable weight have operated to speed its progression or to direct the course of its development. These other influences are the written texts, encyclopedias, annotations, our legal literature, general reference works, commentaries, and restatements, and greater than all of these has been the outburst of reforming legislation, which in the time of Edward I in the latter part of the thirteenth century gave us the Statute of Westminster, among others, and in the last century has given us innumerable statutes on innumerable subjects, and has set up new rights and remedies and destroyed or modified others. Though the age of legislation in its modern sense covers but a very small

part of our legal history and many of our statutes have been merely declaratory of the common law, the greater part of them have been remedial, with many of them containing, as has been said before me, a lawsuit in every word.

It may be said that these legislative and other changes moving so rapidly before us are not of the common law — that the common law in this country consists only of that which we adopted from the mother country and the judge made law developed since that adoption, but widening our perspective so as to cover the longer eras in juristic thinking and development, we observe that these innovations by construction and adaptation gradually became a part of our system.

As a case in point in West Virginia where legislation on the subject of the assignability of bills and notes determined by judicial decision a question relating to the common law doctrine of champerty, I quote you the language of part of the opinion of Judge Haymond in the Supreme Court of Appeals case of *Graham v. Graham:*

> "It is claimed by the counsel for the appellant that the said agreement C is void, because it amounts to champerty, and he referred the court to the 4th book of Blackstone, side page 135. The doctrine laid down by Blackstone upon this subject has been very much modified by statute in this State. For instance, as to the assignment of causes in action, or a thing one hath the right to, but not the possession. By our law notes and single bills are assignable, and the assignee may sue in his own name. And accounts are also assignable, and real estate to which a person hath the right, but not the possession, may be sold and conveyed."[6]

Excepting the younger members of the bar, the lawyers here present have lived within the period of the substantial remaking of the law of torts with particular reference to the rights and liabilities of employer and employees. You are the first generation of lawyers to have attempted the application of laws governing hours and wages, though the Statute of Labourers in 1351 did attempt to regulate the disorganized labor market following the scourge of the Black Death; you are the first in America to advise clients respecting requirements as to sanitary conditions of employment, as to fair trade practices, the requirements of law in selling coal upon the market, the rights of numberless pensioners, the bulk sales law, the obligations upon the payers of income taxes, in-

[6] 10 W. Va. 355, 384 (1877).

heritance, gift, social security, gross income, sales, privilege, and other new forms of taxes, and some of you are among the first to deal with laws relating to the rates of public utilities and laws effecting other innovations.

More and more the liberties of the individual and minorities are giving way to the demands of the majorities. Property as well as personal rights are day by day being modified by statutes and court decisions, and particularly by findings of administrative bureaus. In the main, it may be said that many of these changes were but the normal and necessary growth of our system of jurisprudence. It has been said that the rise of equity was but a great change in the common law, and that the equities of today become the laws of tomorrow. Hale said that he regarded equity as a part of the common law. These transitions sometimes appear more startling during their formative period than in retrospection, but there is an all-important distinction to be made between normal and necessary growth of the law on the one hand and immature conceptions of growth and planned supersession of the system on the other.

Past time and events have shown that where justice should be done and wise conclusions reached, there should be calm deliberation — not haste. It will be so in the future. Mr. Justice Holmes wrote, "The man of action has the present, but the thinker controls the future."

We are now living, legislating, litigating, deciding in a hurry. Recognizing that some of our administrative agencies have fairly well served in their fields, we have indiscriminately turned to administrative procedure in order to accomplish an end in a rush. The importance of obtaining an exact result and the means of reaching it seem to be of less consequence in this era of haste than the popular demand for action and speedy results. Accelerated action is the desideratum. We should not then be surprised to read in a leading article on the subject of the changing rights of the American citizen, published in July, 1939, the language: "The best governed state is not the state that is governed least; it may be the state that is governed most."[7]

It will be understood that these observations relate to changes being effected in our law and procedure during times of peace, and

[7] Matherly, *Changing Rights of the American Citizen* (1939) 38 SOUTH ATLANTIC QUARTERLY 284.

not to the necessities that may arise from the exigencies of a national emergency.

Mr. Justice Stone has said:

> "We need to be reminded too that in the construction of statutes establishing administrative agencies and defining their powers there is little scope for the ancient shibboleth that a statute in derogation of the common law must be strictly construed."

We have long held to the doctrine that there are three classes of statutes to be strictly construed, namely, penal statutes, statutes in derogation of common right, and statutes in derogation of the common law, but Sedgwick in his *Construction of Constructional and Statutory Law* brands such restrictive construction as "delusive and fallacious".

In addition to the evolution of the new rights that we have mentioned, the most significant trends in long established common law doctrines, considering them very generally, are the inclination to break away from the doctrine of precedent, the failure to hold consistently to the ideal of the supremacy of the law, and the tendency to depart from the right of trial by jury. The overruling of precedent is becoming much more frequent, and numerous published articles attacking the doctrine of *stare decisis* are appearing. It is being widely advocated that the new practice of administrative agencies in disregarding the rules of evidence and the procedure known to the common law is necessary and wise in view of changing social, governmental and industrial conditions. Though some of these innovations have been of revolutionary proportions and consequence, it is the changes effected by construction and reversals of precedent by our courts that probably are of the greatest interest and significance to the members of the legal profession and those interested in the future of our system. Many states are rapidly moving toward the restriction or elimination of the right of trial by jury and the new rules of civil procedure adopted by the federal courts are in harmony with this movement.

The innovations thus far mentioned, excepting as to the relaxing of the doctrine of *stare decisis,* are influences arising from without the field of the common law considered in its more restricted sense as judge made law. Within that field, however, lie the source and explanation of the growth of the principles of the common law and the demonstration of their adaptability to the fluxible status of our restless and highly industrialized people.

It has been said by the Tennessee Court of Appeals that the principles of the common law slumber in their repositories until the occasion which calls for their exposition arises.[8]

The Right Honorable Lord Wright of Dudley, Master of the Rolls, has observed that "The common law is a living organism."

The flexibility of the common law was concisely expressed in the opinion of the United States Supreme Court in the case of *Hurtado v. California,*[9] decided in 1884, wherein it was said:

> ". . . we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our 'ancient liberties.' It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.
>
> "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. Sir James Mackintosh ascribes this principle of development to Magna Charta itself. To use his own language:
>
> > " 'It was a peculiar advantage that the consequences of its principles were, if we may so speak, only discovered slowly and gradually. It gave out on each occasion only so much of the spirit of liberty and reformation as the circumstances of succeeding generations required and as their character would safely bear. For almost five centuries it was appealed to as the decisive authority on behalf of the people, though, commonly so far only as the necessities of each case demanded.' "[10]

Because of the significance of the statement and its source, I quote again somewhat at length from an opinion of the United States Supreme Court, written by Mr. Justice Sutherland, in the case of *Funk v. United States,*[11] the following:

> "It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion, it may have become, leaving to Congress the responsibility of changing it. Of

[8] Jacob v. State, 3 Humph. 493, Ann. Cas. 1913E 1251 (Tenn. 1842).
[9] 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884).
[10] 110 U. S. at p. 530.
[11] 290 U. S. 371, 54 S. Ct. 212, 78 L. Ed. 231 (1933).

course, Congress has that power; but, if Congress fail to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the question, is it not the duty of the court, if it possess the power, to decide it in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past? . . . That this court and the other federal courts, in this situation and by right of their own powers, may decline to enforce the ancient rule of the common law [the rule which denies the competency of one spouse to testify in behalf of the other in a criminal prosecution] under conditions as they now exist we think is not fairly open to doubt. . . .

"The final question to which we are thus brought is not that of the power of the federal courts to amend or repeal any given rule or principle of the common law, for they neither have nor claim that power, but it is the question of the power of these courts, in the complete absence of congressional legislation on the subject, to declare and effectuate, upon common law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced. It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions."[12]

Our West Virginia Supreme Court of Appeals in the case of *Currence v. Ralphsnyder,* has followed the general trend and has said in the opinion written by Judge Hatcher, concerning a certain line of decisions, "That line of cases follows the common law, and is not persuasive on us, as this Court is committed to a more liberal view."[13]

The common law lawyer holds firmly to his faith in the rule of precedent, but it is generally recognized that the rule is not an unyielding one. Sir William Holdsworth and others have taken the position that judicial decisions are but evidence of the law which, they say, is sometimes misrepresented by bad precedents which must be corrected. In commenting on the view of Holdsworth, Mr. Justice Stone has said that bad precedents must yield to the better reason and that this qualification of the rule of *stare decisis* will enable us to reach the golden mean between the extreme of flexibility and the extreme of rigidity and ultimately to achieve a system which, though adaptable to the changing needs of a changing society, is not without symmetry and continuity.

[12] 290 U. S. at pp. 381-383.
[13] 108 W. Va. 194, 198, 151 S. E. 700 (1929).

The judge is constantly enlarging the field of the common law by applying the old principles to new situations and by restricting such principles at one point and extending them at another, and underlying the most liberal decisions of our courts will be found something of the rules, the concepts, the standards and principles of the common law.

That this remolding process is constantly and surely shaping and determining the destiny of our system of jurisprudence is clearly apparent to the legal profession and is sufficiently pronounced to be generally recognized by some historians. James Bryce in his *American Commonwealth* says:

> "The Supreme Court has changed its color, i.e., its temper and tendencies, from time to time according to the political proclivities of the men who composed it. . . . Their action flowed naturally from the habits of thought they had formed before their accession to the bench and from the sympathy they could not but feel for the doctrines on whose behalf they had contended. . . . The Supreme Court feels the touch of public opinion. Opinion is stronger in America than anywhere else in the world and judges are only men."

In contemplating this appraisement by a historian of good repute and the meaning of the rapidly growing changes in the law of our system, we may recall for our consideration the observation of Justice Oliver Wendell Holmes when he said: "The life of the law has not been logic; it has been experience."

In jurisprudence, as elsewhere in life, we can rely with a greater degree of certainty upon experience than upon over refined abstractions or the popular demands of the hour. Experience has shown that the two common law doctrines of due process and supremacy of the law have afforded for our people the greatest measure of protection of their individual rights and that they are the means whereby public justice is assured. Probably all members of the bar would accept this statement as irrefutable. If so, we can do no less than devote ourselves seriously to the maintenance of these doctrines, and to that end we may best serve by effecting sound reformations of the tenets and practices of the common law which have become archaic or insufficient for present needs and by vigorously resisting all ill-advised innovations of the law. The legal profession has not sought or desired to synchronize the changing of the law with the transmutations of political movements or with temporary social trends. Greater stability than that is required in a system of jurisprudence. The profession has sought

to synchronize the growth of the law with the enduring needs of a growing people.

Of greatest influence in shaping the course of the common law and in determining whether it shall live to better serve us or whether it shall be superseded, are our judges. While it is expected that the conclusions reached by judges will reflect to some extent the training, the environment and the intellectual and spiritual bent of the man personifying the judge, the judge who would permit political expediency or other ulterior considerations to override his solemn duty is doubtless the most dangerous of all the enemies of the common law system.

We are certain that in the development of the common law such judges have been extremely rare and that only a few have not been worthy of the encomium of Plucknett upon Bracton of whom it was said that while he was constantly in his government's judicial service, he took no part in partisanship, serving all impartially. Departure from that high, but indispensable, standard could quickly result in the loss of all progress made through the centuries in the common law system.

The legal profession recognizes that the law is not an exact science having attained its full stature and complete efficacy, but that it is a growing one — indeed, a social science; that a perfect administration of justice by the courts has not been attained; that corrections of errors in precedents must be made; that there must be an extension of legal principles to meet and serve an expanding civilization, and that avoidable delays must be prevented, but they believe there is no gainsaying that if there be injustices and insufficiencies arising under the present well guarded judicial system, these injustices and insufficiencies may be expected to increase many fold if the safeguards of the common law be removed or made too elastic.

There is upon us a special responsibility and duty to our fellow countrymen to try to point out the grave dangers that lie in the abandonment of the anchorage that the supremacy of the law has afforded us throughout the storms of our past national life, and to do all that may be done to impress upon them the truth that life has produced no better guide for the future than the experiences of the past.

Out of the tyranny of government, the immature, prejudiced and emotional decisions of rulers, and out of the ambitions and weaknesses of men, arose the necessity and occasion for the de-

velopment of the common law. Its primal function to protect the rights of free men from the rapacity of individuals and of government has been very well performed. Remembering that the moral codes and the precepts of the Bible are a part of the common law, and remembering that the obligation is always upon us to see that the law and its remedies are made commensurate with the needs of our growing civilization, there arises for solution the difficult problem of deciding how far a sound system of jurisprudence can go toward socializing the law and the institutions of a people without yielding the essential stability and uniformity that make it sound and certain. In changing a system let us remember that the seeming needs of the moment may not prove to be the certain needs of tomorrow.

There is the oft told story that because of the opinion given by Bacon to King James I to the the effect that the judges of King's Bench had improperly permitted a question relating to the King's prerogative to be raised without suspending the trial to first inquire the pleasure of the Crown, Chief Justice Coke and his associate judges were summoned before the King and asked if they ought not stay such a proceeding. After the associate judges had answered "Yes, yes, yes," Coke replied in immortal language, "When the case happens, I shall do that which shall be fit for a judge to do."

May our devotion to our faith in the supremacy of the law be no less constant and enduring.