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Judicial Statesmen

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JUDICIAL STATESMEN

Important Part Played by Decisions in Development of Law and Necessity for Training in Socio-Economic Science to Fit Lawyers as Safe Guides for Our Social Future

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KNOWLEDGE of the Common Law "doth no way conduce to the making of a statesman. It is a confined and topicall kind of Learning calculated only for the Meridian of *Westminister-Hall,* and reacheth no further than Dover. Transplant a Common Lawyer to Calice, and his head is no more usefull there than a Sun-dyal in a grave." So an anonymous individual placarded England, some three hundred years ago, in protest against the election of lawyers to Parliament.[1]

It is unquestionably true, today, that knowledge of the common law—in its customary connotation of precedent—does not in and of itself make a statesman. It contributes thereto, but it does not accomplish the end. Statesmen are pilots of the ship; they are the lookers-ahead, conceptors of what ought to be. They shift the course to avoid an evil or attain a good. They change old laws and make new laws when the welfare of their people so requires. They must know conditions as they are; they must determine whether to retain them or to change them. They direct the future from a knowledge of the present and the past.

But the essence of the common law has been a doctrine of theoretical immutability. "Common Lawyers" are not ordinarily supposed to direct the course of events, but merely to predict its direction from the route marks of the past. Theoretically, at least, they determine the continued course of the ship from observation of its wake. Their prevailing philosophy is that of *semper idem.* It is "an established rule to abide by former precedents,... because the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any judge to alter or vary from..."[2]

Hence to learn the formal common law is not necessarily to learn the needs of social conditions and the science of change, even though its various rules were originally the effect of social needs. Rather, it was, in the exaggerated though picturesque charge of North Carolina's chief justice, "to invoke the spirits of long departed fools;" to travel in search of a rule from Coke to Croke, and from there to the Dome Books; to go from *Ignotum* or *Ignotius* in the inverse ratio of philosophy and reason only to reach eventually some barren source of pedantry and quibble.[3]

Knowledge of the common law, therefore, required learning in the black-letter Latin and the Norman-French in which long dead decisions had been written. Imagine, for instance, an unlettered student searching for the common law in such phraseology as this:—"Richardson, C. S. de C. B. at assizes at Salisbury in Summer 1631, fuit assault per Prisoner la condemne pur Felony;—que puis son condemnation ject un Brickbat a le dit Justice, que narrowly mist. Et pur ceo immediately fuit Indictment drawn pur Noy envers le Prisoner, et son dexter manus ampute et fixe al Gibbet, sur que luy mesme immediatement hange in presence de Court."[4]

The common law has required learning also in Anglo-Saxon and in German, that principles might be carried to remote sources and compared with others. Above all, of course, it required knowledge in general of what preceding judges had decided and had said. It required also a certain forensic ability, skill in dialectics, and ingenuity, as Bacon says, "to beat over matters, and to call up one thing to prove and illustrate another."

But formal knowledge of the common law, as a law of precedent, did not require, nor in a very prevalent philosophy does it now necessitate, any knowledge of that science of actual conditions included in so-called economics, sociology, criminology and the like. For that reason, the learning which went with mere knowledge of the common law *was* too topical in itself to accomplish the making of a statesman and it still is so.

This is equally true of course of knowledge of medicine or of automobile repairing or of any other "confined and topicall" kind of learning. No such technical education is in and of itself sufficient to the needs of real statesmanship. But doctors and boiler-makers and other men of a topical learning do not ordinarily undertake the work of statesmen. They may on occasion be elected to fill such a position, but they do not assume the function as an integral part of their profession. In theory, lawyers have been in the same category. They were not supposed to be statesmen, except by special appointment. Therefore, the allegation that they were not educated as statesmen, while true enough, was after all not particular condemnation. Even today lawyers are theoretically not statesmen because of their profession, and they are not necessarily educated as statesmen.

But in fact lawyers do assume the duties of statesmen as a function of their profession. Unconsciously, perhaps, and unpretentiously always, lawyers are constantly remoulding the old rules of law and making new rules to meet the changing needs of social and economic conditions. They, the

1. John Cooke, "Vindication of the Professors and Profession of the Law." (1646.) He also complained that "Lawyers, being a bold and talkative kind of men, will intrude themselves into the Chairs in all Committees, where (being accustomed to take fees) they will underhand protect delinquents, and their conceiled estates with tricks and devices."
2. Blackstone, Commentaries, I, 69.
3. Clark, "Some Myths of the Law," 18 Mich. L. Rev. 26.
4. Parenthetically, it may be said that le dit justice possessed a sense of humor despite his tolerance of the language of the law. He ducked the brick-bat, but it took off his hat. He is said to have remarked, thereupon, "You see now, if I had been an upright judge, I had been slain." Campbell's "Lives of the Chief Justices," II, 20.

lawyers of today—because they are the motivating force behind the judges and of them are the judges —are in fact and indisputably legislators.

If one doubts this fact, let him look at the decision in Parks v. Pie Co.,[5] wherein the court imposed on manufacturers of food an arbitrary responsibility for its wholesomeness, regardless of fault. The defendant company was a manufacturer of pies. The plaintiff had purchased a pie, not from the company itself, but from a grocer who sold it in the course of business. The plaintiff was injured by some toxin in the pie. He sued the packing company, in tort, for damages. If he had shown any negligence on the company's part, the case would have been simple and clearly within the long established rules of precedent.[6] But there was no showing of any negligence whatever on the part of the defendant. On the contrary there was undisputed evidence of great care on its part. On these facts there was no judicial custom of precedent which made the manufacturer liable. Nevertheless, for the sake of what it considered to be public policy, the court held the defendant to be liable, saying, "Practically, he must know it is fit or take the consequences if it proves destructive."[7]

A very similar illustration is the decision in Chysky v. Drake Bros. Co.[8] Here the plaintiff had been injured by biting on a nail embedded in a piece of cake manufactured by the defendant. She had not bought the cake from the defendant, but from an independent dealer who had himself purchased outright from the defendant. There was, therefore, no contractual relation between the parties. The court held the manufacturer liable, on the theory that he had "warranted" to whomsoever should eat the cake that it was wholesome. Now a "warranty" is generally considered to be a contract.[9] In this view of it there could not possibly have been a warranty by the defendant to the plaintiff because there was no contract relation between them. There is, however, a line of decisions which, treat a warranty as a statement of fact on which, if false, an action for deceit will lie.[10] In this sense there might have been an implied warranty by the manufacturer. But whichever theory is followed, the courts have fairly consistently held that a warranty is personal to the buyer and cannot be taken advantage of by a sub-purchaser.[11] The fact is obvious, therefore, that in holding the manufacturer liable, even though they used a well recognized phraseology, the court in reality departed from precedent and imposed on the manufacturer such a responsibility as they believed public policy to require.

Thus the courts have impaled the manufacturer upon two new points as it were. One is a novel proposition of liability without fault, the other an epithetical recasting of the old doctrine of warranty. The old rules are changed. Now, if the manufacturer escapes the pragmatic proposition that he is liable as *"insurer"* of his products, he is still held on the proposition that his is a peculiar "warranty" which runs not only to his promises, but to all the world as well.[12]

Further illustration is found in the answers to the question whether manufacturers can legally control the price at which their goods shall be resold by dealers. Recently the Supreme Court flatly reversed its previous rulings in this regard and held that such control was not legal. They upset their earlier rule because their conception of *public policy* so required. The supreme court of New Jersey, however, even after this action of the United States Supreme Court, took a different view of what public policy required and declared such control to be legal.[13]

In People v. Williams, [14] for other example, the court held a certain statute to be unconstitutional and void. Later on the court gained some knowledge of actual conditions and an insight into public needs, and in People v. Schweinler Press[15] it used this knowledge as a cause for reversing its earlier decision and held a similar statute to be valid.

Recently, a district court[16] declared a federal tax, destructive of goods produced by child labor, to be unconstitutional, although in McCray v. United States[17] a similar tax destructive of colored oleomargarine was upheld. To some extent, though indirectly, the later decision is predicated upon sociological conditions.

The decisions for which Chief Justice Marshall is so justly lauded were not decisions pointed out to him by precedent. They were judgments of policy. Had a man of different experience and other ideals been chief justice—a Jeffersonian, for instance, believing in states' rights and popular control—the subsequent history of this nation might have been utterly different. But it was not Marshall the "common lawyer," deeply versed in precedent and trained in law, who thus directed the course of the nation. It was Marshall the statesman, reacting to his own personal experience with the incompetency of state governments and the injustice of popular opinion.

Examples of this sort of judicial legislation may be multiplied indefinitely if one so desires.

Many more changes in law, that is to say in judicial custom, are made by judges, actually, but under cover of mouth honor to the old rule. Hacker's Appeal is a good illustration although not precisely an example.[18] The legal question was whether or not a certain power had been properly

5. 93 Kan. 334; L. R. A. 1915 C 179

6. As to the right of a remote buyer to sue the manufacturer for negligence, see 15 Mich. L. Rev. 672; 18 *id.* 436, 711.

7. Compare this with Mr. Justice McKenna's, "It seems to me to be of the very foundation of right—of the essence of liberty as it is of morals—to be free from liability if one is free from fault." Arizona Copper Co. v. Hammer, 39 Sup. Ct. Rep. 553. This was the basis of the decision in Ives V. So. Buffalo Ry. Co., 201 N. Y. 271.

8. 182 N. Y. S. 459.

9. "A warranty, therefore, being a contract, requires, like all other contracts, a consideration to support it." Benjamin on Sales, 7th ed., p. 663. Welshausen v. Parker Co., 83 Conn. 231. "without a contract there can be no warranty." Jackson v. Watson & Sons [1909], 2 K. B. 193.

10. Ames, History of Assumpsit, 2 Harv. L. Rev. 8. Johnson v. McDaniel. 15 Ark. 109; Ives v. Carter, 24 Conn. 392; Carter v. Glass. 44 Mich. 154.

11. Nelson v. Armour Packing Co., 76 Ark. 352; Tomlinson v. Armour Packing Co., 75 N. J. L. 748; Roberts v. Anheuser Busch Assn., 211 Mass. 449; Prater v. Campbell. 110 Ky. 23; Crigger v. Coca Cola Co., 132 Tenn., 545; Smith v. Williams, 117 Ga 782; Gearing v. Berkson, 223 Mass. 257.

Contra, a recent tendency in line with the Chysky case, Mazetti v. Armour & Co., 75 Wash. 622; Ward v. Morehead City Sea Food Co., 171 N. C. 33; Catani v. Swift & Co., 251 Pa. 52.

12. As to the development of the implied warranty of Wholesomner, which is itself a judicial creation to meet social needs, see 18 Mich. L. Rev. 316.

13. See 19 Mich. L. Rev. 265.

14. 189 N. Y. 131.

15. 214 N. Y. 395.

16. George v. Bailey 274 Fed. 639. The opinion ignores the McCray case and rests the decision on Hammer v. Dogenhart, 247 U. S. 251, which was obviously a pragmatic conclusion.

17. 195 U. S. 27, discussed in 6 Mich. L. Rev. 277.

18. 121 Pa. 192.

exercised. The will creating the power required it to be exercised by an instrument signed and "sealed." The writing by which it was alleged to have been exercised was signed, but had no seal—*in any conventional definition of the word.* There was, however, following the signature, a small pen mark one-sixteenth of an inch long such as the signer had used to indicate a period in other parts of the instrument. It had previously been held in other states that nothing was a "seal" unless it were an impression in wax.[19] Even Pennsylvania had held that at least a "scroll" was necessary.[20] The court greatly desired to give effect to the instrument, but it could not declare a seal unnecessary, because the will creating the power expressly required a seal. The court therefore gave mouth honor to the requirements of the will, actually disregarded it, and declared the small, adventitious pen mark to be a "seal." The real reasons as given was that the world has outgrown the necessities of an age when seals were of practical importance. The court could not openly and frankly disregard the obligation—not of the law, in this case, but of the will—so it evaded it in fact, by pretense, on the justification of changed sociological conditions.

Not all of this judicial change in rule is so sudden as in the examples given. In fact, most of it is slow. As Mr. Justice Holmes remarked, judges being precluded from making law by molar action do it by molecular action.[21] The important fact, however, and the point here stressed, is that they do change old rulings and make new ones, and they do it for pragmatic reasons, out of regard of changing economic and social conditions.

It may be argued that these unprecedented decisions are technically and accurately not legislation, but that they are only judicial application of long established fundamental principles to new economic and social facts. Rylands v. Fletcher, [22] for instance, declared a principle of liability without fault. It may be said that Yost v. Pie Co. was only an application of that doctrine to new business conditions. The writer is willing to grant this for the sake of argument. But whether these decisions be considered legislation, determination of public policy, or the application of existing principles to new facts, the question raised is the same.

Can the public policy be so wisely determined, or the social factor be so soundly evaluated by an intelligent man *not* trained in the social sciences, as by an equally intelligent man who has been trained in the theories by which sound public policy is deduced and the real needs of social and economic conditions are judged?

One may, of course, take the arbitrary position that there is nothing to the alleged social sciences; that the welfare of the community is wholly a matter of empiricism and that any intelligent man is as competent to act upon the physical facts as is any other man howsoever trained. Certainly it has been something of a fashion to doubt the real worth of all but the "natural" sciences. "One can not but feel a little queasy when he uses the expression 'social science,' because it seems as if we had not yet got anywhere near a real science of man." "Aristotle's treatises on astronomy and physics, and his notions of 'generation and decay' and of chemical processes, have long gone by the board, but his politics and ethics are still revered."[23]

But if this argument be sound, what becomes of "law" in the sort of decision under discussion? There is not the law of precedent behind them for they are, openly or covertly, without any precedent,—decisions justified by "public policy." If then it be insisted that there are no rules for ascertaining what constitutes public policy, if there is no social science from which it can be deduced, if it truly be, as may be urged, altogether a matter of personal, individual opinion, then these are indisputably decisions not based on law or rule of any sort, but resting wholly in the will of the judge who renders them. They can no more be judgments according to law than were those of the cadis of Haroun al Raschid. This may not be undesirable under the circumstances, but at least the fact must be fairly faced.

On the other hand, however, it is not at all impossible that much lack of social and economic progress and much evil therein are due wholly to the very idea that such progress can properly be left to mere intelligent and opportune empiricism. Lack of study and training in scientific theory concerning these matters may account for many of the existing evils. The same author from whom the last quotation was taken goes on to say, "Human affairs are in themselves far more intricate and perplexing than molecules and chromosomes. But this is only the more reason for bringing to bear on human affairs that critical type of thought and calculation for which the remunerative thought about molecules and chromosomes has prepared the way."

If in fact there is anything in socio-economic science which can aid a judge in properly applying old principles to new facts, if there are laws by which to adjudge the wisdom of one social relation or another, if there is any guide to proper legislation in the data collected—and who is prepared flatly to deny it?—that science is essential, imperative learning for those who assume to guide the progress of the commonwealth.

The moral, therefore, is simple. Knowledge of the law of precedent and statute may possibly equip lawyers to fill their own purses, but it alone does not fit them to serve the public in the way that their profession requires them to serve. It gives them but a partial and imperfect background for judgment and sound statesmanship. Hence, somewhere in his education, for the sake of the public whom he assumes to serve, every lawyer must be trained in that further knowledge which is requisite to safe guidance of our social future.

19. Warren v. Lynch, 5 Johns. (N. Y.) 239.
20. Duncan v. Duncan, 1 Watts (Pa.) 322.
21. "I recognize without hesitation that Judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular actions." So. Pac. Co. v. Jennsen, 244 U. S. 205, 221.
22. L. R 3 H. of L. 330.
23. Robinson, Mind in the Making, p. 7.
24. The writer personally believes that a lawyer who does not himself understand the theories by which public policing is properly determined, or the standards by which the effect of social factors is to be weighed is not equipped to predict and persuade judicial action sufficiently for even his own financial success.