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Departure from Precedent

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DEPARTURE FROM PRECEDENT

"'WITH the death of the reason for it, every legal doctrine dies.' * * * The fact that the reason for a given rule perished long ago is no just excuse for refusing now to declare the rule itself abrogated, but rather the greater justification for so declaring; and if no reason ever existed, that fact furnishes additional justification. The doctrine of *stare decisis* does not preclude a departure from precedent established by a series of decisions clearly erroneous, unless property complications have resulted and a reversal would work a greater injury and injustice than would ensue by following the rule."

This quotation is taken from *Thurston* v. *Fritz*, 91 Kan. 468, wherein the Supreme Court of Kansas, with but one dissenting voice out of seven, held that dying declarations are admissible in civil as well as in criminal cases. Furthermore, the court declared:

> "The rule admitting and the rule restricting [dying declarations to criminal cases] are entirely court made, and when the reason for this restriction to cases of homicide ceases, if it ever existed, then such restriction should likewise cease."

From these excerpts, it is submitted that the following is a fair deduction, or, perhaps, merely a restatement in slightly modified language: The Supreme Court of Kansas has gone on record as willing to overturn any common-law principle which, upon examination, proves to be based on reasons which are inadequate, or on no reason at all, except when property rights would be disturbed.

For this purpose, it may be proper to classify common-law rules broadly into three classes, namely: (1) those which rest on sound reasons; (2) those which rest on inadequate reasons; and (3) those in reference to which reasons pro and con are about evenly balanced.

As to those which rest on sound reasons, it would unquestionably be considered impertinent to cite an example. The law of torts, perhaps, comes as close as any branch of the law in resting on a firm foundation of reason. But though many common-law doc-

trines have attained the ideal of the perfection of reason, it would be impossible for the most expert statistician and jurist to say just what percentage of the sum total of common law principles has reached the pinnacle on which Coke and Blackstone seemed to perceive the whole body of English law.

As to the second class of rules, namely, those based on inadequate reasons, certainly any critical mind trained in the law will, on a moment's reflection, recall not a few, the number depending on the radical or conservative temperament of the individual. This second class may be subdivided into principles resting on reasons which have ceased to operate—in other words, reasons which have become obsolete, and those which, while often supported apparently by a flood of reasons, will be found on closer inspection to be unsupported by any reasons which can withstand the dry light of the logician. Instances of reasons which have ceased to function may be readily gathered in the field of the domestic relations, owing to the radical changes in the education and attitude of society towards married women.[1]

It is this second subdivision of the second class which presents the most interesting field for speculation. The limits of space forbid any exhaustive discussion of such cases about which, it must be admitted, plenty of room for differences of opinion exists. In only too many instances, however, the modern teacher of law finds himself confronted with the same perplexities as the teacher of geography in ancient days. The earth is flat and rests on a man's shoulders. The man stands on a turtle. "But, teacher, what does the turtle stand on?" There is nothing left to do but spank the inquisitive child for his impertinence. A release of a debtor by the creditor does not release the surety, if the creditor expressly reserves his rights against the surety. Why? Because such a release is construed to be a limited covenant not to sue. What of it? Well, a limited covenant not to sue cannot be pleaded in bar of an action on the original obligation, but a release can be so pleaded. Why? We have now reached the realm of the impertinent. Why do contracts not under seal require consideration? Why do not two reciprocal offers equal an offer and an acceptance? Why cannot the man who captures the burglar without having pre-

[1] See Harrington v. Lowe, 73 Kan. 1.

viously heard of the reward offered for such capture recover the reward? Is he not more praiseworthy than the sordid person who works solely for pay? Why do letters of acceptance alone ever take effect from the time they are mailed? How do they differ from letters containing offers or letters revoking offers? While I am not prepared to say that the answers which the common law gives to the above questions are incorrect, might not a good argument be made today on the other side and with splendid reasons to back it?

The cases just enumerated, like the effect of the release of a debtor with express reservation of the creditor's rights against the surety, wherein the rule of law may be found to be supported by inadequate reasons, should be distinguished from those doctrines which, while apparently supported by highly technical reasons, are really grounded on firm foundations which may not be evident on the surface. Thus, take the Rule in Shelley's Case. Possibly, in most cases, it has carried out the actual intention of the testator or grantor. When he said, "To A for life and remainder to his heirs," he may have intended a fee simple for A. The words "for life" and "remainder" are probably no less technical verbiage to a lay mind than the word "heirs." So, also, take the highly fanciful maxim that an accord without satisfaction is void. If I agree with X that, if he paints my house, we will "call it square" on that hundred dollars he promised to pay me for a horse which I sold him, why should I not be permitted to sue him for the purchase price of the horse if he fails to paint my house? Does not the old maxim about an accord also carry out what was probably the understanding of the parties? Hence, in all cases, before rejecting a doctrine because it is apparently unsupported by reasons which satisfy us, is it not well to see if we cannot discover a sounder reason than is generally given in support of the doctrine which we contemplate throwing into the discard? Doubtless, the old and fanciful reasons were often merely the mask or plumage of the more solid substance which lay underneath and which we must now take pains to uncover. The articles of legal antiquarians are often fascinating. Doubtless they are generally, if not always, written by persons who first learned much of the law of their own day and then started to read legal history backwards. In such cases, the task of the writer is

often left incomplete, possibly from necessity. He carries us back one or two stages, and increases without satisfying our curiosity. The plot only thickens. He gives us the reasons for present rules, but the reasons which he succeeds in unearthing are often as mysterious as the principles themselves. Getting down to bed rock is often as difficult in legal history as in a city built on sand. The people of olden days had good thinking caps, but we cannot always get their point of view.

The last class of rules which I have enumerated, namely, those in which the reasons pro and con are pretty evenly balanced, are not negligible. Where one of two innocent parties must suffer by the fraud of a third, one might think that the only fair and just thing to do many times is to split the difference and divide the loss. But the courts seem powerless to adopt the suggestion, except in rare cases, as in admiralty. What is the result, in such cases as that of the fraudulently issued bill of lading or of the negligent bank correspondent who lets the debtor escape? Sharp conflicts of authority and hosts of dissenting opinions, to say nothing of 5-to-4 decisions. So, also, take the case of the anomalous endorser prior to the general enactment of the negotiable instruments code. Why were there not two, but a dozen lines of authority? Simply because there was about as much to be said for one position as another.

In the light of the foregoing premises, is it not evident that, if all common law rules are to be reëxamined in the light of cold reason, a very considerable portion of our law hangs today in the balance? Furthermore, the question may be asked in all seriousness, not merely whether it is practicable or expedient, but whether it is even possible to cut loose from tradition and precedent and establish our law upon a basis which shall be purely logical? Regardless of what may be the case in the field of pure mathematics, we certainly cannot ignore the vast room for differences of opinion in the field of social relations. It may be illogical to exclude dying declarations in civil cases, but not in criminal cases. Well, what of it? The following topic might furnish interesting material for a debate between two groups of law students: Resolved, that the Supreme Courts of the United States, and of each state, should adhere to the practice of the House of Lords in never reversing its judicial decisions.

If we are not prepared to accept the test of reason as to the basis of departure from precedent, but are, nevertheless, willing to allow the courts the privilege of reversing their decisions, upon what basis can such reversal ever be predicated? Here is my answer When it is quite clear to the court that the interests of society will be benefited considerably more than injured by departure from precedent, in such cases only is such a departure desirable. In other words, the test is social utility, not reason or logic. It is the pragmatic one, how will it work in society? Not, is it logical?

It may be contended that these two theories are the same, because social welfare will be best promoted by a logical code of law. Now I will confess that this raises two perplexing questions which I am not prepared to answer. Though, doubtless, in the course of ages, society will be best served by a strictly logical code of laws, who can tell us how soon the angel Gabriel expects to toot his horn on things terrestial? If we have aeons yet ahead of us and are thorough converts to the doctrine of mundane preparedness, then today seems to be the time to make the shift. But this leads us to our second question, how much does the present generation owe to posterity? Are we morally bound to cast ourselves at once on a sea of uncertainty for the sake of people of whom we shall even see but few, merely because they are going to be our descendants?

Aside from the vague speculations in the previous paragraph on the question of the future of society, it is obvious that in many instances a precedent, no matter how illogical and arbitrary, becomes, in the course of time, like beauty, "its own excuse for being." It is not a case of following precedent for precedent's sake, but for society's sake. Members of the legal profession, to say nothing of laymen learned in the law, become accustomed to settled principles and regulate their conduct accordingly. And, in the opening words of Justice Benson, dissenting, in *Thurston* v. *Fritz*, "The rule that dying declarations are only admissible where the death of the declarant is the subject of the investigation is settled as firmly in the jurisprudence of this state as any rule can be which is not established by constitution or statute." Probably no lawyer would attempt to name any principle of the common law better settled than the one in question. Hence, it is submitted that such a principle should be overturned only when the good of society will

be promoted thereby, taking into account the fact that laws which are settled and certain are one of society's most priceless assets, and that even unfairness, as the old maxim goes, is, often at least, preferable to uncertainty. In the earlier days, when parliament met but rarely, and the calling of such meeting was little short of a mobilization of troops to engage in civil war, there was great reason for resort to fictions, equity, and the various back-door methods of changing the law. But today, with frequent sessions of the legislature, is not the departure from judicial precedents less necessary? Moreover, the test of social utility is involved in the language of the majority of the court as quoted at the beginning of this article, namely, that the rule of *stare decisis* does not preclude a departure therefrom, "unless * * * a reversal would work a greater injury and injustice than would ensue by following the rule."

Perhaps it may be advisable to examine *Thurston* v. *Fritz* a little more closely. Stated in its very lowest terms, the facts and decisions were these: R conveyed a farm to F. F insisted that the purchase price agreed upon was much less than was claimed by T, who, as administrator of R, sued F to recover the purchase price. At the trial, counsel for the plaintiff offered in evidence a signed statement made by R shortly before his death and signed in the presence of several witnesses. The action of the trial court in rejecting the document as evidence was held to be error by the Supreme Court. Justice Benson dissented, *inter alia*, on the ground that the mouth of the survivor having been closed by statute, where the adverse party is the personal representative of the deceased person to the transaction, the dying declaration of the deceased should not be admitted, in the interest of equality. Justice Benson might also have mentioned the fact that depositions may be taken and introduced by either side in a civil action, though only by the defense in criminal cases.

The majority opinion is based primarily on criticisms of the rule excluding dying declarations in civil cases by Professor Wigmore in his work on EVIDENCE. The court also criticizes the prevailing rule as being "entirely court made," and gives preference to the authority of Professor Wigmore to earlier decisions of its own. Moreover, Professor Wigmore, in Section 1436 of his work, criticizes the exclusion of dying declarations from civil cases as a "heresy

of the present [nineteenth] century which has not even the sanction of antiquity." Truly, a new day is dawning in American jurisprudence if a rule of law is open to criticism because it is "entirely court made," if text writers, however learned, are to be followed instead of court decisions, and nineteenth century law is to be dubbed parvenu. We have been taught for ages that the glory of the common law is the fact that it is built, precedent upon precedent, like the coral wreaths, or a brick house, and that the common law, unlike the Roman law, gives preference to precedent rather than the writings of jurists. As to nineteenth century precedents lacking the sanction of antiquity, I insist that I, too, know the stuff whereof after-dinner speeches at meetings of bar associations are made, about the ancient and venerable character of the common law. But take any collection of leading cases, or case-book, or list of ruling cases in almost any branch of the law, and subtract from it all decisions dated 1800 or later, and see how many you have left! I know that the germs of the present day principles can be found in the old cases, just as every acorn may contain, potentially, a giant oak. But it would be rather difficult to predict the exact dimensions of the tree from the acorn before the tree actually grows. How much did Blackstone say or know about agency, partnerships, corporations, constitutional law, or even contracts as we understand those subjects today? At all events, *Thurston* v. *Fritz* tends to raise the dignity and importance of the legal scholar, and perhaps, even on the test of social utility, time will vindicate its position. The most that many a legal scholar has hoped for has been the making of an impression on law students, changes through legislation, the acceptance of his notions where the law is not clear or has not been passed upon by the courts. To be able, in addition, to pull over some old pillars, Samson-like, is indeed an accomplishment.

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