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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 topical kind of learning calculated only for the Meridian of Westminister-Hall, and reacheth no further than Dover.

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..."

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. But in fact lawyers do assume the duties of statesmen as a function 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, whereas (being accustomed to take fees) they will underhand project delinquents, and their concealed estates with tricks and devices."

2. Blackstone, Commentaries, I, 49.


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 knocked the brick-hat, but it took off his hat. He is said to have been murdered, thereupon, "You see now, if I had been an upright judge, I had been slain." Campbell's "Lives of the Chief Justices," 11, 66.
the manufacturer liable. Nevertheless, the court in reality departed from precedent and imposed on the manufacturer such phraseology, the court held the defendant to be liable, saying, "Practically, he must know it is fit or take the consequences if it proves destructive." A very similar illustration is the decision in Chysky v. Drake Bros. Co. 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 whosoever should eat the cake that it was wholesome. Now a "warranty" is generally considered to be a contract. 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. 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. 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 epiphenal 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.

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.

In People v. Williams, for other example, the court held a certain statute to be unconstitutional, although in McCray v. United States 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 incompetence 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. Hackner's Appeal is a good illustration although not precisely an example. The legal question was whether or not a certain power had been properly exercised.
not but feel a little quessy 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."

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 caliph 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 opporuntine 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, somewhat 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.

21. "I recognize without hesitation that Judges do and must legislate, but they can do so only interstitially; they are confined from molecular action." So, Pex. Co. v. Jennis, 244 U. S. 585, 521.