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THE COMMON LAW AND STATUTES

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The most fundamental phenomenon in the legal history of the countries living under the common law, during the last one hundred years, is not the partial modernization of real property law; nor the recognition of separate property rights in married women; nor even the transformation of the rules of pleading; nor the creation of a host of new misdemeanors, by which it is attempted to force upon the individual citizen a course of conduct not always in consonance with prevailing habits and *mores*. All these changes are of great importance and, with the partial exception of the last-named, generally in accord with the social and economic developments of the century. A far more radical change, however, is found in the gradual substitution, still going on, of statutory for customary rules in private law.

The same period has seen on the continent of Europe and in Latin America the substitution of great, comprehensive codes for a multitude of partial statutes, with the Roman Law in the background as a subsidiary source where specific legislation failed. In the common-law countries, attempts at codification have not been absent; and with regard to some branches, like criminal law, pleading and practice, and commercial paper, statutes amounting to partial codes are now in effect almost everywhere. In a few jurisdictions, there is even a civil code, and a superficial glance would mislead one to think that such a body of written law as exists, for instance, in California, is analogous to the codes of France or Germany. It is the purpose of this article to call attention to the juridical difference between the body of statutes, codified or not, which exists in the United States or the British Empire, and the written law of other Western countries.

That difference, in a nutshell, may be stated as follows: In the common-law countries, the customary law, defined and developed by the courts, is the foundation on which the legal edifice is reared. All statutes, large and small, whether called codes or not, are but modifications of the customary law and must be interpreted with a constant regard to this underlying foundation. It is true that the codes of California provide expressly: "that the codes are not amendments of existing law, but an independent statement of the law of the state."¹ Yet these provisions have for the most part remained ineffective, for reasons that will appear below.

In the so-called civil-law countries, the relation between statutes and other forms of law are precisely the opposite. There, every statute or

¹ Calif. Civil Code, sec. 4.

rule analogous to a statute, from the most comprehensive code to the pettiest regulation, is an original statement of the law on the subject to which it relates. Unwritten law may indeed modify the written in particular instances, but only as under the English system a special custom may modify the general ones. It always remains an exception, usually confined to the narrowest proportion which a reasonable interpretation may give to it, and the very existence of a custom has to be proven under exacting conditions. Whoever under this system asserts a right is expected primarily to cite the precise section of a statute on which it is based. Even where, before the modern codes, such a statute covering his case was absent and he relied on the Roman Law as a subsidiary source, he was in many jurisdictions required to cite the precise passage in the Justinian Code or the Gloss, which was held to be of the same nature as a statute. Invariably the statute is the rule, every other form of law the special exception.

From this difference in the character of the written law under the two great Western systems flow consequences which both the legislator and the interpreter of law should bear clearly in mind, if they would avoid mischief.

The most far-reaching of these consequences was, historically, the establishment in England of the binding nature of precedent, while elsewhere the prior decision of a court has theoretically only the weight inhering in its own reasonableness, and practically, the further effect that an inferior court will go contrary to the holding of an appellate court only if it is very confident that its own reasoning will convince the latter of having been in error. An attempt to trace the origin of the rule of *stare decisis*, and the causes which made it prevail in England but not on the European continent, would lead us too far afield; but we may briefly show the incompatibility of the rule with any rule making a statute the statement of jural principles independently of preëxisting law.

The principles of legal interpretation are the subject of perennial debate in the "civil-law" countries, and the discussion had been particularly lively during the last two decades before the great war. One may adhere to the traditional task of finding "the will of the legislator"; or he may believe that a statute is but the expression of social needs shaping themselves quite apart from legislative volition, and that consequently the interpretation should change as social needs are modified. In either case, however, the process of interpretation should be an analysis going as deep as the complete elucidation of the statute requires, and this process should be repeated as often as necessary. Under the common law the task of interpretation is simpler. Sooner or later, the inquirer will find a binding precedent. Some court, on a former occasion, has analyzed the statute and enunciated the result. Unless that result is plainly wrong, we need not,

indeed we must not, go behind it. All we have to do is to accept the precedent and see whether it applies completely to the case at bar or whether it requires modification in view of a novel state of facts.

A method such as this is admirably fitted for a system of law mainly customary. For a legal custom is simply a manner of conduct habitual to the members of a community to such an extent that it would be unreasonable to expect a person one deals with to act otherwise. When a court declares such a habit a binding legal rule, although there is no precedent found in the books, he simply recognizes a social fact. The next time the question is raised, it is no longer necessary to repeat the investigation of the social facts. We are now satisfied with the legal fact, called a precedent, which we shall follow as a definite rule of conduct. When this system arose in the English courts, almost the entire law consisted of such customs; statutory modifications, although by no means wholly absent, were not frequent and important enough to raise in the legal consciousness of the country a doubt whether the practice of following precedent was equally adapted to the interpretation of written laws.

At the present day, statutory rules have outgrown those of the common law, if not in fundamental importance, yet in the frequency with which the courts are called upon to apply them. The question, however, whether the system of binding precedents is a fit instrument for the interpretation of such a system is hardly ever raised. The authors of the California Civil Code² probably did not even dream that such a doubt could be raised. If they had been conscious of its possibility, they would likely have been content to leave their code a very comprehensive amendment of the common law, without adding the declaration that it was an independent statement of the law of the state. For as long as the system of following precedent remains intact, such a declaration must remain futile. From the first, the California Codes, like the partial codes of other states, have been interpreted as amendments of the common law, and as long as precedents are binding no other mode of interpretation is practicable. That is true because the very first time a code section came before the courts for interpretation they felt themselves bound to stop all further investigation, into either logical considerations or underlying social facts, the moment they discovered a previous judicial statement of either the one or the other. The precedent, moreover, is not ordinarily the first case decided regarding the subject-matter, but the last link of a chain of decisions each based on a preceding adjudication, until behind the very earliest "leading case" the social fact at last appears; but the social fact not of the time when the code section was adopted, but perhaps of many centuries ago. Such a process is clearly not the

² This code is an adaptation of the Field code which failed to become a law in New York.

interpretation of an independent statement of the law, but the interpretation of a statute in the light of the stage reached at that moment in the judicial development of the common law.

Nor is this merely theoretical distinction. It has had exceedingly important practical effects on the growth of law in England and the United States, as a brief glance at the authorities will illustrate.

In days when there was but little legislation, especially in the domain of private law, and people perhaps had a tendency to look askance at such innovations, a maxim grew up and became a legal commonplace, according to which "acts in derogation of the common law are to be construed strictly." In this abstract form, the maxim is hardly an accurate statement of the law as laid down in the decisions. An early and more precise enunciation is found in a case arising as long ago as the time of Queen Anne: "Statutes are not presumed to make any alteration in the common law, further or otherwise than the act does expressly declare."³ And a little further on the court continues:

"Therefore in doubtful cases we may enlarge the construction of acts of Parliament according to the reason and sense of the law-makers, expressed in other parts of the act, or guessed, by considering the frame and design of the whole."⁴

The same principle is expressed in a different and less lucid form by Sutherland:

"The best construction of a statute is to construe it as nearly to the rule and reason of the common law as may be, and by the course which that observes in other cases,"⁵

a formulation highly approved by the United States Circuit Court of Appeals.⁶

A very good modern statement is found in an Illinois case:

"It is a general rule in the construction of statutes that they are not to be construed as changing the common law farther than by their terms they expressly declare."⁷

³ *Arthur v. Bokenham* (1708, Eng. C. P.) 11 Mod. 148, 150.

⁴ *Ibid.*, 161.

⁵ Sutherland, *Statutory Construction* (1891) sec. 290.

⁶ *Cumberland Telephone & Telegraph Co. v. Kelly* (1908) 87 C. C. A. 268, 160 Fed. 316.

⁷ *Davis v. Abstract Construction Co.* (1905) 121 Ill. App. 121, 129. The rule is also well expressed in *Rosin v. Lidgerwood Mfg. Co.* (1903) 89 App. Div. 245, 247, 86 N. Y. Supp. 49: "The general rule is that an intention to change the rule of the common law will not be presumed from doubtful statutory provisions; the presumption is that no change is intended, unless the statute is explicit and clear in that direction." For further cases, see *Burnside v. Whitney* (1860) 21 N. Y. 148; *Brown v. Rouse* (1904) 116 Ill. App. 513; *Tompkins v. First National Bank* (1892, Sup. Ct.) 18 N. Y. Supp. 234; *Austin, Jr., v. State* (1883) 71 Ga. 595; *State v. Graham* (1882) 38 Ark. 519; *Jordt v. State* (1869) 31 Tex.

Most of these cases are directed against a too narrow application of the maxim of strict construction, which some courts and many attorneys, where it suits the interest of their clients, are tempted to try. To arguments of this kind, a court of high standing has given an excellent answer: "We are to understand then, that the Legislature intended to change the rule."⁸ However, whether the application is rigid or liberal, the very existence of the maxim implies that the courts will look on a statute, not as upon an isolated piece of law-making, but as becoming an integral part of the whole body of the law, as soon as it is enacted. Still more convincing evidence is derived from the class of cases, in which the courts have read into statutes provisions not expressed in so many words, in order to bring them into consonance with the general tendencies of the common law. Such provisions are especially those very general principles which constitute fundamental justice. Thus, where a statute making certain acts larceny omitted to say that such acts have been committed with criminal intent, this fundamental principle of modern jurisprudence was supplied by the court.⁹ At times, very special and even technical provisions of the common law may be similarly read into the text, where the ends of justice are promoted thereby. At a meeting of the rate payers lawfully called for the purpose, it was decided that the Local Board should establish a public library in the town of Wimbledon. Two of the rate payers demanded a "poll," that is, the opening of a regular voting place, where all those privileged might deposit a ballot. The statute required merely a majority vote of those "then present," and the chairman refused a poll. Thereupon the Board refused to establish a library, and upon *mandamus* the court held that the common law required a poll whenever a voter demanded it, and no proper vote had been taken.¹⁰ In another case, the statute provided that whenever a dock or other harbor work was injured by a vessel, the owner should be liable, except where the ship was in charge of a compulsory pilot. It was held by the House of Lords, that in a case where the ship was driven upon the dock by a violent gale, without negligence, the statute did not mean "to punish an innocent ship owner for an act of God," and read into the text a provision that the owner must have been negligent, in order to incur the liability.¹¹

571; *Schooner Enterprise* (1810, C. C. 2d) 1 Paine, 32, Fed. Cas. No. 4499; *Waterliet Turnpike Co. v. M'Kean* (1844, N. Y. Sup. Ct.) 6 Hill, 616; *Melody v. Reab* (1808) 4 Mass. 471; *Andrews v. United States* (1842, C. C. 1st) 2 Story, 202, Fed. Cas. No. 381.

⁸ *Reed v. Goldneck* (1905) 112 Mo. App. 310, 86 S. W. 1104.

⁹ *Bradley v. People* (1885) 8 Colo. 599, 9 Pac. 783.

¹⁰ *The Queen v. Wimbledon Local Board* (1882) 8 Q. B. D. 459.

¹¹ *River Wear Commissioners v. Adamson* (1877) 2 A. C. 743. For other cases, where unexpressed rules of the common law were read into statutes, see *Box v.*

Obviously, no such supplying of additional provisions by the court would be possible, if statutes were "an independent statement of the law of the state." In the civil law countries, such "gaps in the law" have often been a serious difficulty. The adherents of the theory that it is the only business of the court to ascertain the will of the legislator from his expressed words, have generally stood helpless, and grave miscarriages of justice have resulted therefrom. The opposite school, especially in its most modern form of the believers in "free legal adjudication" ("*Freirecht*"), seek to extricate themselves from the dilemma by a very liberal search into the social facts, so that sometimes they seem to state rather what the law ought to be, than what it actually is. Apparently, we have here one of the features in which the common law system has an advantage over that of the continent.

Another, even more conspicuous series of cases, where the merely amendatory nature even of the most elaborate statutes has been of great importance in the development of the law, has not worked so advantageously to fundamental justice and sweet reasonableness. When the New York Code of Civil Procedure was first adopted, it is notorious that many judges were opposed to the new system. They therefore tended to avail themselves freely of the principle that the common law remains unchanged unless an amendment is plainly provided. The new code spoke of forms of action, which were abolished, without giving definitions. In this connection, the court said, where an action was before it which under the old system might have been either trespass or case:

"The causes of action in case are perfectly preserved under the code, although the form of prosecuting the particular action is abolished, as it was before the code."¹²

In other words, the court looked on the new system of pleading not as something new and independent, but as merely amending the common-law rules. Proceeding on this principle, and perhaps, in some cases, applying it more strictly than the true rule, as discussed above, would warrant, the courts made the reforms intended by the new procedure something far less complete than the legislature had intended. Other states, notably Wisconsin, which had adopted codes of procedure similar to that of New York, encountered the same oppo-

Lanier (1903) 112 Tenn. 393, 409, 79 S. W. 1042; *Riggs v. Palmer* (1889) 115 N. Y. 506, 511, 22 N. E. 188; *Harrison's Appeal* (1880) 48 Conn. 202; *Allen v. McPherson* (1847) 1 H. L. 191; *Perry v. Strawbridge* (1908) 209 Mo. 621, 108 S. W. 641, and cases there cited.

¹² *Howe v. Peckham* (1851, N. Y. Sup. Ct.) 10 Barb. 656, 659. The statement quoted was made *arguendo*; the decision hinged on another matter and was unquestionably correct.

sition in their courts. Thus it came about that even to-day, seventy years after the nominal abolition of the common-law pleading, most American states still have a procedure far more technical or "formalistic" than either England or any of the "civil-law" countries.

From all this it is to be concluded that statute law in England and the United States is something very different from the written law of other countries. It has been said, occasionally, that under the civil law, principles are found in the statutes, while with us we find there at most their applications. The statement is hardly true, at least in this bald form; for many of the changes in the common law, brought about by modern legislation, are clearly expressions of legal principles as well as their applications. As representative of many other instances, we may cite the various employers' liabilities acts, which certainly establish the principle that modern industry is a social process instead of an individual act, and that therefore its inherent risks must be as equitably as may be divided among those who participate in the process.

However that may be, it seems likely that the transition from customary to statutory law has made tremendous strides and is still actively going forward. Taken by itself, statutory law, that is law consciously and purposely adopted to meet social needs as they arise, is certainly a higher stage of legal development than customary law, even in the highly refined form represented by our system of binding precedent. Not a few of us may look forward to a time when with us, as with most other Western nations, practically all law shall be statutory. We should bear in mind, however, that in such an eventuality we shall have to consider seriously whether we shall not be obliged to give up the rule of *stare decisis*, an idea which to most American lawyers will come as a tremendous shock. As shown above, this rule prevents the construction of laws simply in the light of logic and the surrounding social facts. It interposes a set of adjudications, which may or may not be in accordance with such considerations, but which are stubborn facts in no wise to be evaded. Every time a precedent construing a statute has been established, it prevents to that extent all real inquiry into the meaning of the law. As long as we have behind the written text the whole body of the common law, no serious mischief can arise. For then the great principles of justice, firmly imbedded in legal custom and adapted to the permanent needs of society, are able to save the statute from the many imperfections which necessarily attach to all written laws, on account of the ignorance, the lack of skill, and the passions of legislators. Take away this underlying common law, and still prevent the courts, by the necessity of following precedent, from interpreting all statutes with the liberality needed to keep them in harmony with social needs, and you bring about a crisis such as our law, and the civilization it preserves, has never yet had to encounter.