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"THE DEAD HAND OF THE COMMON LAW"

In the November number of this Journal¹ there appeared a very suggestive article by Mr. Justice Young of the Supreme Court of New Hampshire entitled "The Law as an Expression of Community Ideals and the Lawmaking Function of Courts." The essential soundness of the fundamental doctrine therein maintained,² substantially indi-

¹ (1917) 27 YALE LAW JOURNAL, 1.

² That the views of the present writer are in essential harmony with those of Mr. Justice Young is made fully apparent in "The Law and the Judges" (January, 1914) 3 YALE REVIEW, 234. One or two minor differences may be indicated in passing. The law is indeed an expression of *community* ideals; but this truth is in no wise dependent upon the fiction that the community is an "entity with a mind of its own," a so-called "general mind." (27 YALE LAW JOURNAL 15.) Such a fiction is to be avoided. Again, the rules adopted by a community do not always "limit individual freedom of action." (*Ibid.* 7, 8.) They may amount to a grant of such freedom. Suppose I tell my neighbor that he may walk across my lawn. If he exercises this privilege I will have no right against him. The legal declaration of his privilege and of my no-right is as

cated by the title, has been admitted by many jurists,³ in spite of some disapproval and dogmatic assertion to the contrary.⁴ In their actual decisions, the courts daily demonstrate its soundness, and not infrequently a written opinion makes an express admission indicating a consciousness of the court's function as a lawgiver.

In *Rosen v. United States*,⁵ decided January 7, 1918, the Supreme Court held that a witness was not disqualified by the fact that he had

much a rule of law as was the previously applicable rule that he should *not* walk across my lawn.

³ Austin, 2 *Jurisprudence* (3d ed.) 655 denounced "The childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing . . . from eternity."

Sir Henry Maine (*Ancient Law*, 3d Am. ed., ch. 2, p. 31) says: "The fact that the old rule has been repealed, and that a new one has replaced it, eludes us, because we are not in the habit of throwing into precise language the legal formulas which were derived from precedents, so that a change in their tenor is not unusually detected, unless it is violent or glaring. I shall not now pause to consider at length the causes which have led English lawyers to acquiesce in these curious anomalies. Probably it will be found that originally it was the received doctrine that somewhere, *in nubibus* or in *gremio magistratum*, there existed a complete, coherent, symmetrical body of English law, of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances."

Professor Theodore W. Dwight in his introduction to Maine's *Ancient Law* (3d Am. ed., p. xi) said: "Sometimes fiction affects the law without consciousness on the part of the judge. Instances of this are given by Mr. Maine. At other times, the judiciary cover their intent to alter the law with a thin and transparent veil of fiction."

"The whole of the rules of equity, and nine-tenths of the rules of common law, have in fact been made by the judges." Mellish, L.J. in *Allen v. Jackson* (1875) 1 Ch. D. 399, 405.

For similar statements, with application in particular instances, see Bohlen, *Cases on Torts*, 185, note 3; Terry, *Leading Principles of Anglo-American Law*, secs. 10, 11; 3 Bentham, *Works*, 223; Rafael Altamira, 1 *Cont. Leg. Hist. Series*, 699; Pomeroy, *Equity Jurisp.* sec. 69; Baldwin, *American Judiciary*, pp. 73-77; 1 Street, *Foundations of Legal Liability*, 498; Lefroy, *Judge-made Law* (1904) 20 *LAW QUART. REV.* 399.

⁴ Lord Kenyon was seldom a conscious innovator. In *Ellah v. Leigh* (1794) 5 T. R. 682, he said: "I do not think that the courts ought to change the law, so as to adapt it to the fashion of the times." Again, in *Bauerman v. Radenius* (1798) 7 T. R. 668, he said: "It is my wish and my comfort to stand *super antiquas vias*: I cannot legislate; but by my industry I can discover what my predecessors have done and I will servilely tread in their steps." That he was not always so "servile" is indicated in *Goodisson v. Nunn* (1792) 4 T. R. 761, where he went squarely *contra* to the former cases, saying: "The old cases cited by the plaintiff's counsel have been accurately stated; but the determinations in them outrage common sense."

Bentham, while fully admitting its existence, lost no opportunity of sneering at "judge-made law" (*e. g.* 3 *Works*, 223, 280-283; 5 *id.* 374 n.), a term greatly liked by Austin, but one which he would not adopt because Bentham had made it "smack of disrespect." (Austin, *op. cit.* 549.)

⁵ 38 Sup. Ct. 163, discussed in 27 *YALE LAW JOURNAL* 573.

been convicted of forgery. There is no doubt that such a conviction was formerly a disqualification at common law and by the law applicable in the Federal courts. No Federal statute has ever specifically changed this former rule. Further, in 1851, the court held that the competency of witnesses in criminal trials in the United States courts must be determined by the rules of evidence which were in force in the respective states when the Judiciary Act of 1789 was passed.⁶ After showing that the states have now all departed from this former rule of disqualification, either by statute or by judicial decision, and that such departure is based upon sound policy, Mr. Justice Clarke says: "we conclude that the dead hand of the common-law rule of 1789 should no longer be applied." It may be surprising to some to see the common law referred to as a "dead hand" and to see it deliberately disregarded by our highest court; but the fact is that the living hand of the present judge does not write like the dead hand of the judges of 1789 or 1851. It may be regarded as a sign of the times that only two justices dissented in this case.

In the recent case of *Bowman v. Secular Society*,⁷ where the pre-existing rules of law were obviously abandoned by the English House of Lords, only one judge was so conservative as to dissent. Lord Finlay, L. C. dissented, saying: "It can never be the duty of a court of law to begin by inquiring what is the spirit of the age and in supposed conformity with it to decide what the law is." Of this dissenting opinion Sir Frederick Pollock⁸ says that it "has no worse fault than that of being a century out of date."

In *Southern Pacific Co. v. Jensen*,⁹ Mr. Justice Holmes said: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."¹⁰ This statement indicates the limits of judicial legislation within which the courts usually stay. The judge will not ordinarily lag much behind the *mores* of society in its forward march; but he dare not advance *much* ahead of them either. At least, he dare

⁶ *United States v. Reid* (1851, U. S.) 12 How. 361.

⁷ [1917] A. C. 406. This case holds that it is not illegal to give money for the promulgation of doctrines opposed to Christianity. It will doubtless be pleasing to the shade of Thomas Jefferson, who spoke with indignation of "the most remarkable instance of judicial legislation that has ever occurred in English jurisprudence, or perhaps in any other. It is that of the adoption in mass of the whole code of another nation and its incorporation into the legitimate system, by usurpation of the judges alone." He was referring to the supposed attempt of various judges to make Christianity and the Bible a part of the common law. See his preface to Jefferson's Reports (Va.).

⁸ 33 LAW QUART. REV. 302.

⁹ (1917) 37 Sup. Ct. 524, discussed in 27 YALE LAW JOURNAL 255.

¹⁰ It may be noted that it is by motions such as these that the most thoroughgoing changes are effected; it is they that make law look fantastic when it is "a century out of date."

not lay down a new rule in direct conflict with the prevailing opinion of the community. Thus, in the case of *Union Trust Co. v. Grosman*,¹¹ where it appeared that the legislature of Texas had not yet empowered a married woman to bind herself to pay the debts of her husband, Mr. Justice Holmes said: "If the statutes have not gone so far as to enable a woman to bind her separate property or herself in order to secure her husband's debts, they prohibit it, and no argument can make it clearer that the policy of that state is opposed to such an obligation. It does not help at all to point out the steps in emancipation that have been taken, and to argue prophetically that the rest is to come. We have no concern with the future. It has not come yet."

This language indicates that in the particular case the court thought that the time had not come for judicial legislation. The *mores* of Texas in respect to the status of married women would not justify it. In *Rosen v. United States* and in *Bowman v. Secular Society* it was otherwise.

That the law of the present is what the judges would now decide and not what they have decided in the past has been clearly stated by Mr. Justice Holmes. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." In *Hansen v. Grand Trunk Ry.*,¹² the Supreme Court of New Hampshire, in a case where it became necessary to determine the law of Ontario, said: "The question to be determined as a fact by the trial judge is not wholly what has been held in some earlier Canadian cases, but what would be held if the present suit had been brought in that jurisdiction." This is the very same determination that must be made in cases involving the law of the local jurisdiction. Of course, we know very well that the past decisions of the courts will generally have a controlling weight in making this determination. In such cases the "dead hand" prevails because the living hand follows the copy.

It has been argued that judicial legislation is much inferior to parliamentary legislation in that it must always operate retroactively, while the latter may and generally does operate only *in futuro*.¹³ When a judge lays down a new rule he does so for the purpose of determining the legal result of a *past* transaction, and a plausible claim of injustice can be made where a party to the action is penalized by virtue of a rule never previously formulated. Even if injustice may occasionally be done, assuming some non-existent (or at least undemonstrable) absolute and eternal standard by which to judge, such supposed injustice is largely unavoidable in human administration. Parliamentary (as well as judicial) legislation has never been and cannot

¹¹ (1917) 38 Sup. Ct. 181.

¹² (1917, N. H.) 102 Atl. 625.

¹³ See Austin, *op. cit.* 673; 5 Bentham, *Works*, 477.

be made so clear that he who runs may read—much less understand. We must be content that our action shall be judged in accordance with a statute the very existence of which may have been unknown to us and in accordance with a meaning that is to be determined *ex post facto* by the judge.¹⁴ Who can be regarded as blameworthy for not knowing what laws have been enacted by the numerous and industrious legislatures? We cannot take time enough to read the mighty statute books and we cannot rely upon their indexes.

Even if statutes could be kept few enough to be known and clear enough to be understood, they must ever fail to determine multitudes of cases arising for decision. Only an omniscient legislator can provide in advance for all future cases.¹⁵ That parliamentary legislation is best that is founded upon and a codification of the previous “interstitial” and “molecular” legislation of the courts.¹⁶

A very large part of legislation must always be *ex post facto* and it is this sort of judicial legislation that gives satisfaction. In spite of occasional outcry, it *works*. It may sometimes be difficult to decide a concrete case after it has occurred, but it is far easier than to decide it in advance in the form of a general rule. By this process we get better law, law more nearly in harmony with prevailing custom and desire and with the *justice* of the present day. A litigant is less likely to be surprised and pained by a decision based upon rules thus established than he is by decisions based upon statutes. Judicial rules, in new cases as well as in old cases, are drawn from the *mores* of society as the judges know them; and they are stated anew in each case with specific reference to a case the facts of which are historically complete. The litigant will not be greatly surprised at the *mores*, because his daily life is ordered by them and he has helped, generally unconsciously, to make them.

The change and growth of law by such judicial action can never be avoided. In this respect it is immaterial to what sort of tribunal the judicial function is delegated. It may be called a court of law or of equity or of admiralty, a merchants' court or a board of arbitration.

¹⁴ The French legal historian, Brissaud, in 1 Cont. Leg. Hist. Series, 299, says: “One fact is universally recognized and inevitable, namely, that the application of the law by the judiciary furnishes a thousand opportunities to modify the rule of law, and that sometimes the judge even succeeds in paralyzing the will of the legislator.” See also Baldwin, *American Judiciary*, 83, 84; 3 Bentham, *Works*, 280–283; Austin, *op. cit.* 678.

¹⁵ Austin (*op. cit.* 686) thus quotes Lord Mansfield: “Cases of law depend upon occasions which give rise to them. All occasions do not arise at once. A statute very seldom can take in all cases. Therefore the common law that works itself pure by rules drawn from the fountains of justice, is superior to an act of parliament.”

¹⁶ Austin (*op. cit.* 681) says: “The judiciary law is, as it were, the *nucleus* around which the statute law is formed.”

In all alike the judicial function is legislative as well, and with nothing less would we be content.

A. L. C.

TESTAMENTARY POWERS OF APPOINTMENT AND THE DOCTRINE OF
INCORPORATION BY REFERENCE

Can a will be so drawn as to provide that a power of appointment created by it may be effectively exercised by a person who does not survive the testator? This unusual and complex problem was presented to the New York Court of Appeals in *In re Fowles' Will* (1918, N. Y.) 118 N. E. 611.¹

In contemplation of sailing on the *Lusitania* Mr. and Mrs. Fowles executed their several wills. By his will Mr. Fowles made his wife donee of a power of appointment and provided: "In the event that my said wife and myself should die simultaneously or under such circumstances as to render it difficult or impossible to determine who predeceased the other, I hereby declare it to be my will that it shall be deemed that I shall have predeceased my said wife, and that this my will and any and all of its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife." Mrs. Fowles by her will attempted to exercise the power of appointment. Husband and wife were lost at sea May 7, 1915, with the destruction of the ill-fated vessel. There was nothing to show that either survived the other. Hence the question arose whether the attempt by Mrs. Fowles to exercise the power was effective.

Two rules of law were claimed to stand in the way: (1) the principle that a power created by will lapses if the donee of the power dies before the donor's will becomes operative by his death;² and (2) the rule (in force in New York and Connecticut) which forbids a testator to incorporate by reference extrinsic documents testamentary in character and not executed by the testator in accordance with the statutory formalities.³ All of the judges admitted the validity and applicability of the first principle. But a majority of the court held that Mr. Fowles had expressed by the provision above quoted the intention to avoid the consequences of a lapse of the power, and that such intention should be given effect by incorporating into his will those terms of Mrs. Fowles' will by which she attempted to exercise the power.⁴

¹ The case in the lower courts is reported in *In re Fowles' Will* (1916, Surr.) 95 Misc. 48, 158 N. Y. Supp. 456; *In re Fowles' Will* (1917, App. Div.) 163 N. Y. Supp. 873.

² Authorities are cited in the opinion.

³ For an analysis and criticism of the New York cases see article by Stewart Chaplin, *Incorporation by Reference* (1902) 2 COLUMBIA L. REV. 148; also Comment in (1904) 14 YALE LAW JOURNAL 226.

⁴ In speaking of the rule against incorporation by reference, Cardozo, J.,