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Alexander Holtzoff

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ALEXANDER HOLTZOFF*

AS EDITORS OF A LEARNED LAW REVIEW you are scholars interested in the theoretical aspects of jurisprudence. The law as a body of doctrines and principles governing the rights and liabilities of members of society and their relation to each other and to the state, is a science, not necessarily logical and symmetrical, or even well rounded, but nevertheless a science. On the other hand, enlightened application and practical administration of the law is much more than a science; it becomes an art. Because of your devotion to the law as a science, my remarks on this occasion will be directed to a few of its theoretical phases.

I have taken as my topic for this discourse, "The Vitality of the Common Law in our Time". At the outset of this discussion, it seems desirable to fix a few bearings as starting points, even at the risk of recalling some matters that are simple and well known. The common law of England, supplemented by equity, forms the basic core of Anglo-American jurisprudence. It was brought to this continent by the English colonists. It grew and developed in a manner different from that of the other great system of Western law, namely, Roman law, which in its more modern form has become known as the civil law, in contra-distinction to the common law.

Common law has been molded over the centuries by judges, step by step, growing from one specific case to another. As a controversy came before a court for decision, the judge determined what should be the rule of law to govern its disposition and applied that principle to the facts. Each decision created a precedent for future cases. As new cases were brought before the courts, varying in salient facts from those confronted in prior controversies, the judges had the function of adjusting or formulating modifications or ad-

* Judge, United States District Court for the District of Columbia.

vances on doctrines previously enunciated. A principle of law is derived from the ruling on the facts of the case. It is not the judge's discussion that constitutes the law. The principle to be deduced from the case is the conclusion distilled from the final disposition on the facts. Any exposition of the views of the court outside of this orbit becomes dictum and may be interesting and entitled to respect, but it is no part of the law.[1] The rules evolved by this process become embodied in the law and are followed in subsequent cases, on the principle known as stare decisis, which is one of the fundamental bulwarks of the common law.

Thus the common law has been built up by progress from case to case. The analytical process by which it has evolved in the course of centuries is a triumph of inductive logic. I shall not enter upon a discussion of the long-standing disagreement between the fundamentalists, who adhere to the view that judges "find" the law, and the realists, who contend that judges "make" law. As is often the case in differences of opinion, there is a modicum of truth on each side. Lord Mansfield, in fashioning the law merchant, was actually finding the law, for he ascertained the customs and the usages of the merchants of the city of London of his day, and gave legal sanction to these practices by his decisions. Nevertheless, it is not to be doubted that more often, a judge determines on the basis of former precedents, social needs, and a sense of justice, in cases of first impression, what the governing rule of law should be. A judge may make law by building on prior material and may at times even modify it in the light of new requirements and changing conditions.[2] His function of formulating law is, however, limited in the sense that he may not suddenly bring about far-reaching and drastic changes in basic theories, or adopt a novel approach or a new fundamental alteration in rights and liabilities. He proceeds gradually, one step at a time.

Mr. Justice Holmes expressed this thought very lucidly, when he said:[3]

> 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. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.

In this respect law formed by judges differs drastically from law enacted by legislators. Judges proceed gradually, as actual cases are presented to them. They build on precedents by following, applying, distinguishing,

[1] See the discussion of Chief Justice Marshall in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 398 (1821), emphasizing the distinction between actual decisions and dicta, and more recently Lord Halsbury in Quinn v. Leathem, [1901] A.C. 495, 506.

[2] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 45, 112, 116 (1921); THE GROWTH OF THE LAW 73 (1924); 3 POUND, JURISPRUDENCE 557 *passim* (1959).

[3] Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (dissenting opinion).

modifying them or engrafting exceptions. On the other hand, legislators are not restricted in this manner. They have the choice of either enacting detailed modifications in existing law, or proceeding without regard to prior legislation and making extensive changes, or even introducing new methods and novel approaches. For example, the substitution of the workmen's compensation system based on the principle of insurance and compensation for injuries incurred in the course of employment irrespective of fault for the common law doctrine of master and servant, under which the former was liable only in case his negligence caused the servant's injuries, was an innovation that could not have been brought about by judicial decisions. It required legislation to abandon and depart from earlier concepts and adopt a new scheme. Another, perhaps less striking, illustration is the enactment of the Federal Tort Claims Act[4] by which the United States waived its sovereign immunity and with certain limited exceptions, submitted itself to suit for torts committed by its employees in the course of employment, in the same manner as a private employer.

Once a statute is enacted by the legislature, it is rigid. The rule prescribed by it cannot be changed, except by subsequent action of the legislative body. By contrast the common law has the virtue of flexibility and capacity for continuous adjustment to shifting conditions and changing needs. Judges have it in their power by judicial decision in individual cases to make necessary modifications as time progresses. This process never stops or ends. As Mr. Justice Cardozo remarked in his inimitable picturesque style, "the inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. It must have the principle of growth."[5]

The law, whether it be judge-made or enacted by the legislature, must be an expression of the popular will, in the sense that it must be suitable to existing conditions and responsive to the sentiments and demands of the people. It was said by Mr. Justice Holmes that, "the first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."[6] He also made the oft reiterated observation that "the life of the law has not been logic: it has been experience."[7] Law must be in harmony with public sentiment. Otherwise, as was remarked by the eminent English jurist Allen, "sovereign legislation is sovereign only in name, and will soon cease to be even that."[8]

These views are not limited to votaries of the common law. They express the nature and essence of law generally. The renowned continental jurist

[4] Ch. 753, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).
[5] CARDOZO, THE GROWTH OF THE LAW 18 (1924).
[6] HOLMES, THE COMMON LAW 41 (1881).
[7] *Id.* at 1.
[8] ALLEN, LAW IN THE MAKING 430 (7th ed. 1964).

Savigny referred to "the spirit of a people living and working in common in all individuals which gives birth to positive law."[9]

The law slowly and gradually, almost imperceptibly at times, adjusts itself to the requirements caused by alterations in social and economic conditions of life. It follows necessarily that the law changes only after new needs become crystallized and, therefore, it must follow rather than lead. Holmes remarked that, "It cannot be helped, it is as it should be, that the law lags behind the times."[10] If, however, the law tarries too far to the rear of the progress of events, it does not adequately fulfill its true function. On the other hand, the law departs from its purpose if it undertakes to march in advance of public opinion. As social and economic conditions change and take a new form, as the requirements of life present new needs and as public opinion makes new demands, the law must follow. Leadership must be vested in those who influence public opinion and those whose activities affect the social and economic life of the people. There have, indeed, been occasions when the law tried to proceed in advance of public opinion and in some of these instances it has been confronted with difficulties for that very reason. A graphic and vivid illustration is the ill-fated prohibition amendment. The public did not want it and was not ready for it. It failed. There have been times when the law has tried to overcome such obstacles and struggled through a period of travail while waiting for public opinion to come abreast of it. Difficulties were confronted, because the law stepped out of its true function.

The basic purpose of law, whether it be judge-made or enacted by the legislature, is to accord justice to everyone. Mankind strives to reach this ideal. The limitations and fallibility of human nature, however, at times render impossible the fulfillment and the complete attainment of this noble goal and this lofty aim. The law is not an end in itself, but a means and an instrument for achieving justice. Man has an innate passion to do what is fair and just. The expression and fruit of these yearnings may be called natural law. Mr. Justice Cardozo said that, "The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence."[11] To be sure, at various times and in different stages of history, there may be disagreements as to how this ideal should be reached. Then the judge or the legislator steps in.

Today law enacted by the legislature occupies a far greater portion of the field of private rights and liabilities than was the case in the formative centuries of the common law. We have already recalled that workmen's com-

[9] 1 SAVIGNY, A SYSTEM OF MODERN ROMAN LAW 12 (1867).
[10] HOLMES, COLLECTED LEGAL PAPERS 294 (1920).
[11] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66 (1921).

pensation has been removed by statute from the common law of master and servant. The law of real property, derived originally from feudal tenures, has been drastically modified from time to time by legislative codes. The law of domestic relations has become largely statutory. The law regulating commercial paper and its concomitants has been formulated into statutory form, based very largely, however, on the law merchant. Other similar illustrations may be cited. The fact remains that by far the larger part of the law governing private rights and liabilities still lies in the field of common law. For example, the law of contracts, except as it affects commercial paper and sales; the law of torts, with the exception of workmen's compensation, which was carved out of it; and the doctrines and principles of equity, all remain in the field of judicial decisions; and are, fortunately, in the same malleable state capable of being adjusted in conformity to the changing requirements of society as they ever were.

Shortly before the turn of the century, a prominent member of the District of Columbia judiciary made the following observations:[12]

> The chief attribute of the common law has ever been its flexibility, its power of expansion and adaptation to the changing needs and circumstances of a complex civilization, advancing under the influences of learning, discovery and invention. While sudden and radical changes in its rules should only be wrought by legislative power and not by the courts, yet these should not adhere to the applications of the principles made in other days under circumstances and surroundings which may have completely changed, bearing the reason of the old rule with them.

We are now brought to a more intensive and elaborate consideration of the question to what extent the common law still maintains its attribute of flexibility and its quality of adaptability to changing needs and circumstances and, thereby, preserves its vigor and vitality. There has been a wholesome tendency in numerous branches of the common law to ameliorate the harsh results of some of its rigid rules, and to introduce, bit by bit, some humanitarian qualities in situations where they appear requisite. The law is gradually increasing its regard for the rights of individuals. The modern trend has been in that direction, with but few exceptions here and there. This disposition has been more marked in the United States than in England, because in this country the effect of precedents is less binding and controlling. Without any attempt at being exhaustive, a few glances at some recent advances may be illuminating.

The law of contracts has become more solidly crystallized and exhibits per-

[12] Shepherd, J. in Utermehle v. McGreal, 1 App. D.C. 359, 368-69 (1893), *rev'd on other grounds sub nom.* MacGreal v. Taylor, 167 U.S. 688 (1897).

haps less need for adjustment and change than some of the other branches of the common law. It may be of interest, however, to observe that the doctrine of duress, both from the equitable and legal standpoint, as a means of avoiding a contract, is in the process of being drastically modified. There has been a departure in recent years from the old common law concept that duress was restricted to the exertion of physical force against a person or property. Pressure of other types is now recognized as constituting duress. The term "economic duress" has come into being.[13]

Statutes have very largely superseded the common law in the field of real property. Yet certain aspects of reciprocal rights and liabilities of a vendor and vendee of land and buildings and of an owner and an invitee, are gradually being modified. Because of its origin and history, the common law accorded to the owner of real property a special status and surrounded him with immunities that are obsolete, or at least obsolescent, in modern times. Orginally he was not liable for damages caused by any defect in the construction of a building owned by him, after he had parted with title to the property. There are glimmerings of a change flashing before our own eyes. Some authorities now indicate that a builder may be liable for damages for personal injuries sustained as a result of defective construction caused by his negligence. The right to recover damages in such an instance has been applied in favor of both a vendee and an invitee.[14] In several jurisdictions, it has been held that a vendor of real property is liable to a vendee and to an invitee for injuries caused by a concealed or latent defect in the freehold, the existence of which the vendor had failed to disclose.[15]

The law regulating domestic relations has become largely statutory. Some aspects of it, however, still remain in the field of judicial decisions. A striking example is found in the principles governing custody of minor chilren. The emphasis has shifted from the rights of parents to the rights of the child. Instead of determining, as used to be the case, who has the legal right to the custody of a child under particular circumstances, the test has gradually become, what is best for the welfare of the child, and the problem is resolved accordingly.[16] In other words, it is the child, not the parent, who

[13] See Walsh-Healy Act, 49 Stat. 2036 (1936), 41 U.S.C. §§ 35-45 (1964), for legislation designed to enforce economic guidelines in government contracting; for judicial recognition of the term "economic duress," see Hazelhurst Oil Mill & Fertilizer Co. v. United States, 70 Ct. Cl. 334, 42 F.2d 331 (1930) and Alloy Products Corp. v. United States, 157 Ct. Cl. 376, 302 F.2d 528 (1962).

[14] Caporaletti v. A-F Corp., 137 F. Supp. 14 (D.D.C. 1956), *rev'd on other grounds*, 240 F.2d 53 (D.C. Cir. 1957).

[15] Kilmer v. White, 254 N.Y. 64, 70, 171 N.E. 908, 910 (1930); Pharm v. Lituchy, 283 N.Y. 130, 27 N.E.2d 811 (1940); McCabe v. Cohen, 294 N.Y. 522, 63 N.E.2d 88 (1945); Palmore v. Morris, 182 Pa. 82, 90, 37 Atl. 995, 999 (1897) (dictum); United States v. Inmon, 205 F.2d 681, 684 (5th Cir. 1953).

[16] See, *e.g.*, Bartlett v. Bartlett, 221 F.2d 508, 511 (D.C. Cir. 1954); Boone v. Boone, 150 F.2d 153 (D.C. Cir. 1945).

has rights. In referring to this subject we are of course departing from the realm of the common law and entering the province of equity. Nevertheless, this topic is pertinent to the present discussion an an induction of the broadminded and humanitarian direction in which the law generally is travelling.

It is in the domain of the law of torts that we find the most potent and vigorous ferment that has been going on for some time and is still in progress. It seems appropriate to devote some attention to a few of the phases of this branch of the law, in which this development appears. We shall deal first with some aspects of the law of negligence. There the modern tendency is strongly in the direction of protecting and extending the rights of an individual who has been injured as the result of the negligence of another person.

For many years, a charity, such as a charitable hospital, was immune from responding to suits for damages for personal injuries caused by the negligence of its employees. The underlying theory was that the assets of a charity constituted a trust fund for the fulfillment of the purposes for which it was created and, therefore, should not be diverted to some other use. The difficulty with this doctrine was that it left an injured party unprotected and without redress. Some years ago various jurisdictions in this country began to abandon the old rule and to subject charitable organizations, such as hospitals, to liability to suit in tort. Among the jurisdictions that were leaders in this movement was the District of Columbia.[17] Others have followed this lead, one by one, and more are being added to the list almost annually. Only recently Illinois joined the procession.[18]

Among the characteristic traits of the American people, is a special fondness for children and a thoughtful and benevolent regard for their welfare. This commendable attitude is reflected in the doctrine that has been developed in this country, known as the "doctrine of attractive nuisance". It had its origin about ninety years ago in a decision of the Supreme Court.[19] Because of the fortuitous circumstances that the facts in the progenitor of this doctrine comprised a railroad turntable, this decision and the group that have followed it, have become known as the "turntable cases". The doctrine grew and spread gradually with the result that it is now recognized in a majority of the states.[20]

Changing conditions of life by ineluctable logic lead gradually to corre-

[17] President & Dir. of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942).

[18] Darling v. Charleston Community Memorial Hosp., 33 Ill. App. 2d 326, 211 N.E.2d 253 (1965).

[19] Sioux City & Pacific R.R. v. Stout, 84 U.S. (17 Wall.) 657 (1873).

[20] A summary of the history of the doctrine is found in McGettigan v. National Bank, 199 F. Supp. 133 (D.D.C. 1961), *rev'd on other grounds*, 320 F.2d 703 (D.C. Cir. 1963).

sponding modifications in the law of negligence. The flight from the farm to the city and the vast growth of urban population, which made man less self-sufficient and more dependent on organized society for his daily necessities; the stupendous growth in the number of automobiles plying the streets and highways; the concentration of manufacture and distribution of commodities of various types, from automobiles to food packages under brand names on a nation-wide basis, all lead to changes in the pace and mode of life and require significant and vital readjustments in many rules of law in the field of negligence. The common law has closely followed in the wake of these developments.

The rigid common law rule that there can be no contribution between joint tortfeasors has become largely outmoded and unsuitable to contemporary life. Too many actions for damages for personal injuries involve more than one culpable defendant. To place the entire financial burden on one party at the choice of the injured plantiff is markedly unfair and inequitable. The situation is graphically silhouetted by numerous automobile collision cases in which two or more drivers are partly at fault. In many jurisdictions the old common law rule has been abandoned and contribution between joint tortfeasors is now permitted in various forms.[21] In some, the modification was attained by judicial decisions as a change in the common law, thus vindicating its vitality. For example, the District of Columbia has been in the forefront of jurisdictions that have introduced contribution between joint tortfeasors as a modification of the common law, rather than by legislative action.[22]

The doctrine which entirely bars a plaintiff in a negligence action from recovery if he is guilty of contributory negligence, has given rise to many problems, especially with the gigantic growth of motor vehicle traffic. It was obviously necessary to alleviate the rigor of the rule that precluded any plaintiff guilty of contributory negligence from recovering damages, irrespective of the degree of the defendant's negligence. Otherwise a person who was guilty of contributory negligence would be treated practically as an outlaw and could be run down or struck by a motor vehicle with impunity, no matter how negligent its driver might have been. It was manifest that such an outcome was abhorent and intolerable and some amelioration of the law was indispensable. The result was the development of the beneficent doctrine, known by the picturesque appellation of the doctrine of "the last clear chance." This doctrine has had a dynamic growth in recent years and is a vital part of the law of negligence today.[23]

[21] See, *e.g.*, VA. CODE ANN. § 8-627 (1950); KY. REV. STAT. ANN. ch. 412.030 (1963).

[22] George's Radio, Inc. v. Capital Transit Co., 126 F.2d 219 (D.C. Cir. 1942); Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949); Davis v. Broad Street Garage, 191 Tenn. 320, 232 S.W.2d 355 (1950); Duluth, M. & N. Ry. v. McCarthy, 183 Minn. 414, 236 N.W. 766 (1931).

[23] See a discussion of the rule in Fleming v. Ayoud, 206 F. Supp. 860 (D.D.C. 1962).

The most important and far-reaching series of changes in the law of negligence is being brought about at this very time as the result of the development of modern methods of centralized manufacture and large scale distribution of articles in every day use, of innumerable miscellaneous types from food packages to automobiles. The inception of this departure is to be found in an opinion of Mr. Justice Cardozo, written for the New York Court of Appeals in the celebrated case *MacPherson v. Buick Motor Car Co.*[24] It will be recalled that in that case the manufacturer of an automobile was held liable for damages for personal injuries sustained by an ultimate consumer as a result of a defect in the mechanism of the vehicle. The court enunciated the doctrine that a person who places a dangerous instrumentality into circulation is liable to anyone who sustains any injury as a result of any defect in its construction or assembly. Innumerable ramifications were gradually generated and radiated from this decision. A lack of privity of contract was at first often a stumbling block. Technical distinctions were occasionally drawn in the early stages of the new development based on a differentiation between a cause of action for breach of warranty and one sounding in tort for negligence.

The principle of the *MacPherson* case was first extended to food and beverages generally sold by a storekeeper in packages or containers in which he receives it at wholesale from the original producer or middleman. The doctrine was also applied to medicines, cosmetics and other similar articles. It is now spreading to articles of merchandise generally, on the theory that a manufacturer, producer or distributor impliedly warrants the fitness of the product for the purpose for which it was intended. The case is practically one of absolute liability.

Most jurisdictions are gradually abandoning the requirement of privity of contract in such cases, since ordinarily the injured party is an ultimate consumer who has had no direct relation with the producer, manufacturer or distributor, but who purchased the commodity at a retail establishment. The original distinction between an action based on breach of warranty and one founded on negligence is becoming obliterated. This far-reaching transformation of an important aspect of the common law is taking place in our own day. It is necessitated by changing conditions of life. Yet we are so close to it that at times we are unable to observe it in its proper perspective.

Still another important step taken by the common law in recent years is the creation and recognition of a new right, which orginally was not known to the common law, namely, the right of privacy.[25] It has been at times

[24] 217 N.Y. 382, 111 N.E. 1050 (1916).

[25] Judicial recognition of a right to privacy was first advocated in 1890 by Samuel D. Warren and Louis Brandeis, 4 HARV. L. REV. 193 (1890). The right, found either in common law or statute, has been passed upon by almost all of the states. New York, Oklahoma, Utah and

pointedly described as the right to be let alone. Specifically, as recognized by law, it is a right not to have one's photograph disseminated and a right not to have articles published concerning one's private life and comprising events that are not in the public domain. It may be interesting to note that an early recognition of the existence of such a right is found in a decision rendered about forty years ago by a trial court of the District of Columbia.[26] It was first authoritatively enunciated in 1905 by the Supreme Court of Georgia.[27] New Jersey followed three years later, and other jurisdictions have gradually adopted the new doctrine. It may be said to have become a part of the common law of this country.[28]

Strangely enough, while generally the trend of development in the law of torts has been in the direction of extending and enlarging the privileges of private individuals and safeguarding and protecting them against invasion by others, the exact opposite has taken place recently in connection with the law of libel. These are developments of the past few years. The area of privileged communications has been expanded to include public utterances of policy-making federal officials when making statements concerning the activities of agencies over which they preside.[29] This development not only constitutes a modification of the law of libel, but is an encroachment on the basic philosophy of Anglo-American jurisprudence in respect to the responsibilities and liabilities of public officers. It has been the rule from time immemorial that a public officer is just as liable as anyone else for damages for torts committed by him, even if this occurs in the course of the performance of official duties. In this respect the doctrine of the common law has been drastically different from that prevailing in civil law countries.

Still another very recent modification in the law of libel is the introduction of a new principle that a high-ranking public official who is in the public eye may be criticized with impunity, even to the extent of making false statements of fact concerning him and that he may not maintain an action for libel because of such attacks, unless he can prove actual malice.[30] This decision is based on the right of freedom of speech guaranteed by the first amendment to the Constitution of the United States. In that respect it relates to constitutional law, but its consequence is also to modify the law of

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Virginia have enacted such statutes. In Griswold v. Connecticut, 381 U.S. 469 (1965), the Supreme Court recognized the right to privacy as constitutionally guaranteed.

[26] Peed v. Washington Times Co., 55 Wash. Law Rptr. 182 (1927).

[27] 122 Ga. 190, 50 S.E. 68 (1905).

[28] For a brief summary of the history of the doctrine, see Peay v. Curtis Publishing Co., 78 F. Supp. 305 (D.D.C. 1948).

[29] Barr v. Matteo, 360 U.S. 564 (1959); Howard v. Lyons, 360 U.S. 593 (1959). Only four members of the Court concurred in the opinions of the Court, and there may be a question whether they actually represent the law.

[30] New York Times v. Sullivan, 376 U.S. 254 (1964).

libel to that extent. It may be remarked that on this point the law of the United States and the law of England part company. England lays much greater emphasis and attaches much more weight to the law of libel than is done in this country.[31] For example, while since World War II jury trials in civil actions have been practically abolished in England, an exception is made for cases of libel and slander, in which trial by jury still prevails. The explanation given for this seeming anomaly is that while most civil actions involve merely money, actions for defamation relate to honor and reputation and, therefore, are on a higher plane.

The vitality of the common law manifestly has not been impaired. As ever it continues to maintain its chief attributes, its flexibility and its capacity for expansion and adaptation to the changing needs and altered circumstances and surroundings of a complex civilization. Its vigor as a living force continues to permeate it.

It is unabated. The common law has not become petrified. It does not stand still. It continues in a state of flux. Its ever present fluidity enables it to meet and adjust itself to shifting conditions and new demands. It is a leisurely stream that has not ceased to flow gently and continuously in its proper channel, at times gradually and imperceptibly eroding a bit of the soil from one of its banks, and at other times getting rid of and depositing a bit of silt. Repose is not its destiny.

[31] For a discussion of the English law of libel and slander, see Wade, *Defamation*, 66 L. Q. REV. 348 (1950).