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THE METHOD OF THE COMMON LAW

In the English as in other systems law exists in two main forms: Legislation or the positive enactments of a legislature, to be found in the Statute Books and Judiciary Law or the pronouncements by judges in previous cases, to be found in the Law Reports. Judiciary law is known as the Common Law and is law judicially declared as opposed to law legislatively enacted. Legislation is formally superior to common law in that it may supersede or reverse the law as declared by the judges but it is nevertheless subordinate to it in that legislation requires authoritative interpretation as a condition of its application and it is the judges who interpret it. Six lines of a statute may suffice to state or alter the effect of sixty decisions; but on the other hand it often happens that sixty decisions are necessary to interpret a six line statute.

In other systems deliberate attempts are made to subordinate the judiciary law by the enactment of complete codes of law, e.g. Quebec, but even in such systems it has been found that judicial interpretation is so frequently necessary that a body of judiciary law grows up which, in practice, becomes equally important. In Anglo-American countries the chief form is still the customary law, as found in the decisions of judges, declaring and applying it or interpreting statute law, which decisions are of themselves of binding effect for the future.

I shall attempt today to give you in brief outline an account of the nature and functioning of the judicial process in the common law.

One further remark - I come to expound and not to glorify the common law. Indeed I shall not hesitate to reveal its defects, some of which will

shock you into doubt as to whether such an unsystematic and formless system can work at all; but the answer to such doubt is that it does work, at least as well as other more logical and coherent ones.

I desire to recall to your minds some of its characteristics of growth. These characteristics are merely elements in a traditional technique.

"The traditional technique is the most characteristic element in any system of law. It is this element which unifies the laws of England and Canada and America and Australia, which binds the law of today to that of Blackstone's time, and even to the law of mediaeval England. It is this element which differentiates the legal system of English-speaking countries from the system which obtains in the rest of the world by derivation from Rome. It is his possession of this technique which makes it possible for the lawyer to effect results with what would otherwise be a bewildering mass of legal precepts".

This traditional technique of the English Common Law is to be found in the fact that it is a system of Case-law wherein the essential principles of prior decisions govern the determination of subsequent disputes; and that it is a system also of judge-made law.

This doctrine of the binding force of decided cases is qualified by the existence of a hierarchy of courts, so that a given court is bound only by the decisions of courts of higher or co-ordinate authority, in addition, of course, to being bound by its own previous decisions. A more important qualification is, that it is not that the previous decision of a court is binding as to the exact facts there in question, but that the principle or rule enunciated by the court and applied to that factual situation becomes

an accepted principle of law available to the decision of similar sets of facts and capable of extension and modification so as to afford a rule for the decision of cases not precisely similar. It is not the decision but the ratio decidendi which is binding; i.e., "that part alone...which consists of the enunciation of the reason or principle upon which the question before the court has really been determined". In a word, it is the formulation of a rule of law, as necessary to the decision of a particular case, and the recognition of the binding force of that rule in the determination of future cases, which constitutes the basic principle whereby continuity and certainty are obtained in the common law.

From the fact that the common law is Case-law certain consequences flow:

(a) It is a system of specific rules evoked by particular cases. It does not result in the formulation of very general principles; for the process of generalization is only carried far enough to cover the case in hand.

(b) It is a law of great bulk and variety and practicality because to be found in thousands of volumes of reports of actual cases.

(c) It tends to the multiplication of minute and subtle distinctions in order to invoke or avoid the authority of earlier cases; to the development of inconsistent principles and to the accumulation and persistence of archaic precedents.

(d) It rests on the authority of the past rather than the needs of the present.

(e) It tends to rigidity - to mechanical application of settled rules. There is a loss of capacity to give abstract justice in individual cases.

(f) It strives after and does attain certainty. This is one of its most praised qualities - its Predicability. That is, that the law which will be applied to a given situation may be predicted, by reference to that which was enunciated in a similar situation; because the judge in the case in hand, will be bound to apply the rule enunciated by his predecessor. But the certainty attained is not certainty of substance in the sense of known rules so much, as a certainty of manner of application, a certainty produced by the application of a known and unfform "technique".

Experience teaches however that this certainty or predicability is rather illusory; for past and present situations are rarely identical, and there is room for error, both in the understanding of the old rule and in its application to the new case. Only an incorrigible optimist, for instance, can find anything certain in the law of negligence or trade combinations.

The difficulty of making an accurate prediction may be indicated by the fact that over 100 cases appear in the Canadian Annual Digest as having been reversed or overruled in 1932.

(g) It has the capacity of growth. Old rules are capable of subdivision and extension and adaptation to suit changing conditions. It has supplied answers to the problems raised in periods of differing social, political and economic organization and conditions. But, owing to the limitations inherent in the authoritarian nature of the judicial

process, this can only be carried so far, and often leads to a confession of impotence to avoid the application of a settled but admittedly unsuitable principle. The law sometimes finds itself in a blind alley from which only legislation can extricate it and set it on a new path. For example, the present law of contributory negligence, (as to which we have the testimony of Atking L.J. that "nothing is now more difficult than to direct a jury with regard to contributory negligence in an ordinary collision case").

(h) The law is often out-of-date. It "lags behind public opinion". The views of judges are apt to correspond to the opinions of "the day before yesterday".

Since a pronouncement remains binding until overruled by a superior court in an essentially similar case, rules which are felt to be of doubtful validity, or inconvenient, or definitely wrong, persist in full vigour, until such time as a similar situation is presented to a superior Court. That is, the correction of errors or the setting of doubt at rest waits on litigation. The wait is often a long one. Thus in 1849 there was formulated the doctrine that a passenger in a vehicle was so identified with the negligent driver thereof, that he could not recover against the negligent driver of another. It was not until 1888 that the House of Lords was given the opportunity to repudiate the doctrine. A similar rule attributing to an infant the contributory negligence of a person in charge of him, though of doubtful status, persisted from 1858 until 1932.

(l) It is necessarily incomplete. It is entirely fortuitous when, if ever, a given point arises for judgment and only such points as have arisen have been determined. Accordingly, its growth is uneven, because

of this dependence upon "the casual exigencies of litigation to determine what parts of it shall be filled up and what left incomplete" and so "all kinds of curious little questions receive elaborate answers, while great ones remain in a provoking state of uncertainty".

From the fact that the common law essentially is Judge-made certain results flow:

The official theory may be expressed in three propositions:

(a) The law grows by logical deduction from existing precedents;

(b) there is always in existence, explicit or implicit, in these precedents a principle applicable to any conceivable case;

(c) the judges never make or invent new law but merely declare what always has been the law.

This theory is a pious fraud - a pure fiction, one to which every court does lip service. Every proposition is untrue.

As to (a) the process is not one of deduction from general propositions to specific, except in a very minor sense. For it is clear that the law did not in England begin with general principles; that such principles of wider application as it has, were mere formulations of some common ground implicit in a group of specific cases, were the result of analysis and synthesis; and that in many fields of the law we have few pervading general principles; for example, it is doubtful today whether a single principle of liability underlying our law of torts can be discovered

analytically. All rules of law are not, of course, equally restricted; but, wide or narrow, they have been quarried from the terms of previous judgments.

"In the continental law we start with the principles and the cases are mere applications of them. In the English law we start with the cases and get at the principles, if we can, afterwards, by a process of induction".

As to (b) the theoretical completeness of pre-existing law and (c) the fiction that judges declare but do not make law, it is enough to say that many instances abound of actions, remedies, and rules which had no ancestors; of gaps which were filled by bold judicial legislation. Thus, to take only a single example, in Collen v. Wright, (1857) a remedy was given in favour of a person to whom an agent had innocently misrepresented his authority by the fictional implication of a warranty of authority notwithstanding the protests of Cockburn, C.J. who declared that the doctrine was "altogether novel", that not even "a hint" of it was to be found in the books, and that the court was not "justified in introducing such a remedy by the mere fiat of a judicial decree".

Every judicial decision involves a syllogism. The judgment requires the discovery and formulation of a rule of law (major premise); ascertainment of the basic facts which call for the application of the rule (minor); and the conclusion arrived at by the application of that rule to those facts.

The doctrine under discussion requires that there be in the previous decisions somewhere the rule which can be applied to the facts.

It may not be there in the form of a previous formulation but, whether explicit or implicit, there it must be. "In theory (the common law) fills all gaps in the legal system. No judge can turn away a suitor on the ground that the law makes no provision for his case".

Very often the process is simple - the case calls merely for the application of a rule already established. Thus in a recent case Swift, J. said: "There is nothing novel about the principles of law which I am now about to apply. They were stated, and stated very clearly, as far back as the year 1584". Less often no such rule exists but it is implicit in a rule expressly formulated or in a series of rules or cases and reveals itself on examination. So far the official theory is correct.

But often there are no rules definitely applicable and the court must find its major premise by analogy to some rule existing in an entirely different subject. Or, it may be, by generalizing a series of unconnected rules, as was done in the classic judgment of Rylands v. Fletcher when several specific rules of liability without fault, which in Wigmore's terms had "wandered about, unhoused and unshepherded in the pathless fields of jurisprudence were met by the master mind of Blackburn who co-ordinated them all in their true category".

The truth seems to be, that in every case, in which a judge does not merely parrot an old rule, he is in a sense making law by the very act of formulating one which differs from the old. But apart from this there are cases of deliberate law making, in which not even the formal adherence of the judges to the fiction, and their reference to older decisions, can disguise the fact that they have not merely applied old principles but have created new ones.

In the M'Alister Case in 1932 the House of Lords, while in terms only declaring the law as to the liability in tort of a manufacturer to a consumer of his product, did reverse a whole current of authority and in effect silently enunciated a new rule. Again in 1919, in Bourne v. Keane, Lord Birkenhead began his judgment by saying "Your Lordships cannot escape the duty of overruling decisions which have been treated as binding for generations". And this the House of Lords did in holding a bequest for masses for the dead not to be void.

In short, the common law is one of reliance on decided cases, wherein the difficulty is to reconcile the requirements of certainty with the vital principle of growth; and wherein old rules are modified and extended to yield newer ones to suit developing conditions, and wherein, when that process is ineffective, the judges make new rules though always pretending that they are merely applying old ones.

It is paradoxical that the fictional certainty and completeness of the law and the merely declaratory function of judges should be so insistently asserted; for it is chiefly in those instances where there is an absence of controlling authority that the law takes its greatest strides, and it is chiefly because judges do make law that it is enabled to keep so nearly abreast of modern needs. "Judge-made law" is not a term of reproach but a recognition of a fact and of a merit. The great justification of the English system is precisely this: that while lacking certainty of substance and chained to the past it has yet combined the requisites of stability and vitality more successfully, perhaps than any other.

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