

American Legal History – Russell

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THE LAWS AND LAWYERS OF NEW YORK

Address delivered at Buffalo, October 13, 1886.

Gentlemen: If a stranger were to ask any one of us where he could see the laws of New York, what answer should be given him? He might be shown the seventeenth section of the first article of the Constitution, which declares:

"Such parts of the common law and of the acts of the Legislature of the colony of New York, as together did form the law of the said colony on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the Congress of the said colony, and of the Convention of the State of New York in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which have not since expired, or been repealed or altered, and such acts of the Legislature of this State as are now in force, shall be and continue the law of this State, subject to such alterations as the Legislature shall make concerning the same. But all such parts of the common law, and such of the said acts or parts thereof as are repugnant to this Constitution, are hereby abrogated; and the Legislature, at its first session after the adoption of this Constitution, shall appoint three commissioners, whose duty it shall be to reduce into a written and systematic code the whole body of the law of this State, or so much and such parts thereof as to the said commissioners shall seem practicable and expedient. And the said commissioners shall specify such alterations and amendments therein as they shall deem proper, and they shall at all times make reports of their proceedings to the Legislature, when called upon to do so; and the Legislature shall pass laws regulating the tenure of office, the filling of vacancies therein, and the compensation of said commissioners; and shall also provide for the publication of the said code, prior to its being presented to the Legislature for adoption."

And he might also be shown the twenty-fourth section of the sixth article as it stood before 1870:

"The Legislature, at its first session after the adoption of this Constitution, shall provide for the appointment of three commissioners, whose duty it shall be to revise, reform, simplify, and abridge the rules and practices, pleadings, forms, and proceedings of the courts of record of this State, and to report thereon to the Legislature, subject to their adoption and modification from time to time."

He would then ask, Where can I see this common law of the last century, these colonial statutes, these resolutions of Congress and Convention adopted in the first fervor of the Revolution, and these acts of the Legislature of the self-constituted State? He would be referred, for the first class, to thousands of volumes of decisions of the courts of England (there were then no reports of decisions of the courts of this State); for the second, to the journal of the provincial Congress and to the great public libraries; and for the third, to one hundred and thirty volumes of statutes. There are really five classes:

"I. Such parts of the common law as were in force on the 19th of April, 1775, and had not expired, been repealed, or altered between that time and the establishment of the present Constitution, January 1, 1847.

"II. So much of the colonial legislation as was in force on the same day, 19th of April, 1775, not afterward expired, repealed, altered, or repugnant to the new order of things.

"III. The resolution of the Colonial Congress in force on the 20th of April, 1777, not expired, repealed, altered, or thus repugnant.

"IV. The resolution of the Colonial Convention, in force on the same day, not afterward expired, repealed, altered, or thus repugnant.

"V. Such acts of the Legislature of the State as were in force January 1, 1847, all of course subject to such alterations as the Legislature might afterward make."

A similar provision was contained in both the previous Constitutions, except that the first designated the common law as "the common law of England," mentioned part of the "statute law of England and Great Britain," as having force here, and made no mention of the resolutions of the Colonial Congress or

Convention. It will thus be seen that the changes in "the common law," or "the common law of England," whichever it may be called, made after the 19th of April, 1775, to the present time, are not included in the category of the laws, or, in other words, that the Constitution does not mention the decisions of our own courts since that historic 19th of April, 1775. What is the meaning and what the effect of this strange omission? Every lawyer can mention many instances in which our courts, on questions of common law, have departed from the precedents of the colonial days. What warrant had they for this departure? None whatever, unless they thought that they knew the law of England better than did English judges, or that they had the right of making and changing the law as they went along, despite the Constitution which gave them all their power.

Need I say more to show the confusion into which our law had fallen when the Constitution of 1846 went into effect, nor of the urgent need there was for the twenty-fourth section of the sixth article, and the concluding portion of the first? If, now, the stranger should ask what has been done under these provisions, he would have to be told that under the sixth article codes of civil and criminal procedure were framed and submitted to the Legislature thirty-six years ago; that the civil procedure was adopted only in part, and was afterward so swollen and distorted as to be hardly recognizable, and to make many think it rather a hindrance than a help to the dispensation of justice; that the criminal procedure after a struggle of thirty years had become a law and was working well; and that under the first articles political, civil, and penal codes were prepared and submitted to the Legislature more than thirty years ago, but that only one of them, the penal code, had been enacted, and that only after a struggle of fifteen years; that the civil code had been twice rejected by the Assembly and thrice passed by it, on two occasions receiving the assent of the Senate but failing to obtain the approval of the Governor; and that the political code had never received any attention from the Legislature! If he were then to ask where is that "common law" to be found which formed the law of the colony of New York on the 19th of April, 1775, he might be truly answered that, though many pretend to know, nobody does really know; but he might be shown some thousands of volumes, resting upon the shelves of half a dozen of our largest libraries, and informed that this common law was there. Can a better answer be given to the inquirer than the answer just given? Have we not here a truthful description of the condition of our laws? Who is to blame for it, and who suffers by it? The lawyers are to blame, and the people suffer. For a measure of the suffering we have but to look at the crowded

calendars, the long delays, the weary suitors, the burdensome expenses, the appeals from court to court, the frequent reversals, the new trials, the frequent miscarriage of justice. How, then, do we get on? You know very well. We have from 200 to 250 judges in the State, counting the surrogates and county judges, but not counting the justices of the sessions or the justices of the peace. Whenever a controversy comes before any of these 200 or 250, they, of course, decide it as best they can. What the best is may be inferred from the following statistics, taken from a report made in the summer of 1885 to the American Bar Association on the delay and uncertainty in judicial administration. The last volume then published of the reports of our Court of Appeals, the ninety-seventh, contained 79 decisions, of which 38 were reversals. The judges cited in their opinions 449 precedents, of which 353 had been made in New York, 56 in England, Scotland, and Ireland, 8 in our Federal courts, 7 in Massachusetts, 4 in Pennsylvania, 3 in Vermont, 2 in Connecticut, 2 in New Hampshire, 2 in California, 2 in Minnesota, 2 in Alabama, and in New Jersey, North Carolina, Kentucky, Florida, Virginia, Indiana, Maine, and Iowa, 1 each. A single case reported in that volume 97 shows that the counsel on the two sides cited 285 decisions, of which 125 had been made in New York, 61 in England, 2 in Ireland, 4 in Pennsylvania, 4 in North Carolina, 4 in Massachusetts, 2 in New Hampshire, 2 in New Jersey, 2 in Kentucky, 2 in the Federal Courts, and in Maine, Vermont, Iowa, and South Carolina, 1 each. The number of cases mentioned in this volume as cited by counsel was not counted, but those in volume 88 were counted on the occasion of an address delivered in 1883, and they amounted to 5,037, cited, be it remembered, as precedents, for the Court of Appeals to follow, if it chose. The thirtieth volume of Hun's "Supreme Court Records" contains 169 cases reported in full or in part, of which 75 were reversals, while there is also a list of 464 other cases not reported, of which 127 were reversals. This volume shows the work of five months.

So much for the laws of our good State. What, then, is to be said of the lawyers? The first observation to be made is that the number is excessive, in proportion to the population. Exactly how many there are I can not say, because there is no general and authentic list, and the number has to be gathered from the rolls of the Supreme Courts in the several districts, or from the court calendars in the different counties. I have not been able to get all of these, but from those I have, and they are from all the counties but four or five, and from rough estimates for the rest, I think there must be something like 11,000 in the whole State, of whom from six to seven thousand have offices in

the city of New York. France, with a population of 40,000,000, has 6,000 advocates, about 1,250 *avoués* and 1,150 notaries, all of whom do the work of attorneys and counselors with us. Germany, with a population of 45,000,000 has 5,000 advocates, and if the proportion of the others is the same as in France, 2,000 of these, so that the proportion of lawyers, including *avoués* and notaries, to population, is in France, 1 to 4,762; in Germany, 1 to 6,423; in New York, 1 to 455!

The next observation to be made concerns the character of the profession. It is a common remark that its character is not as high as it was once. I do not assent to this estimate. English literature from time immemorial has teemed with scoffs at attorneys: on the stage they have always been represented as fraudulent tricksters; Dickens has made Dodson and Fogg immortal as types of experts in chicane; and in our state, so long ago as 1818, a statute was passed indirectly imputing to lawyers the practice of buying claims with intent to bring suits upon them, and prohibiting such purchases in future. Could anything worse be said or done for us now? Our ranks appear to me to contain a large proportion of high-minded, honorable men, and as many persons of ability and learning as it ever had, in proportion to the whole number of members. Any one who listens to the arguments of leading advocates will be slow to admit that there has been a falling off in vigor of intellect, in power of reasoning, or in richness of learning. The increase of numbers can hardly make the average lower than it used to be, though it may increase the number of those who ought not to be in the profession. Undoubtedly there is an unusual rush of young men, but they are generally better trained in the science of the law than beginners were in the old days, a change due in great measure to the law schools. The lessening in public estimation, if lessening there be, which nevertheless I am slow to admit, must be due to the struggles of competition, an unseemly solicitation of business sometimes to be seen, the lack of discipline over the small minority of unworthy members, the indifference of a majority to reforms in the law itself, and last, not least, to the champertous agreements into which too many venture. A late report made to the American Bar Association suggests publicity as a remedy for the last evil; that is to say, the making it necessary to disclose the agreement in court before the trial, at the peril of defeat if not disclosed.

The duties of a lawyer are threefold, one to the State, of which he is a citizen, and from which he receives the high privileges of his calling; another is to the

courts, before which he exercises his functions; and the third is to his clients. If I were to give my opinion of the way in which these several duties are performed, I would say that fidelity to clients is scrupulously observed, so far at least as that they are never betrayed. In my own practice, long and varied as it has been, I do not remember more than two instances in which I thought that a lawyer betrayed his client. I do not think, however, that we as a body do all we can to lighten the burden which the law or its administration lays upon suitors. The particulars and the reason of this criticism I will explain hereafter. Our duties to the State, in respect of the general obligations of citizenship we perform, as well at least as any other class of our fellow citizens. There is among us, I believe, a less proportion of breaches of trust and of other illegal or scandalous acts. But in respect of our duty to improve the laws of the State and their administration I am sure that we are greatly in fault. As for our duties to the courts, they are in general well performed. Proper respect for the judges, deference to their just authority, and sincerity in professional intercourse, are maintained, with the exception, perhaps, of excuses for delay offered too often, and for reasons too slight.

I pass now to the consideration of those faults, not of commission but of omission, for which I think we deserve to be reproached. If we have not done those things which we ought to have done, we have assuredly "left undone those things which we ought to have done." Things left undone are the disuse of obsolete and uncouth words, phrases, forms and technicalities at variance with the simplicity and directness in business of our modern life; the reform of discipline, delays in judicial administration, and the condensation, simplification, and general diffusion of a knowledge of the law itself. To begin with language. Turn to the last volume of Reports of the Court of Appeals, the 101st. In every case the opinion of the court is set forth at the top of page after page as "per" a particular judge. Why "per"? Is not "by" just as good? Though not a great matter in itself, here is an example of the tenacity with which so many of us cling to the barbarisms of a forgotten age. Our legal literature is full of blemishes like this or worse. The wonder is that, instead of being apologized for as a bad habit, the practice is frequently defended as justifiable, and a departure from it is treated as an enormity. The civil code prepared for this State has been denounced, over and over again, for having what is called a novel and repulsive nomenclature. Novel and repulsive indeed! "Beneficiary" is substituted for "*cestui que trust*," a change recommended by Story and by the revisors of our statutes so long ago as 1830. I could mention other instances, but this is enough. When the Legislature appointed the practice

commission, it directed the commissioners to provide "for the abandonment of all Latin and other foreign tongues, so far as the same shall by them be deemed practicable." They thereupon recommended that the same of the writ of *certiorari* be replaced by that of the writ of review, *mandamus* by mandate, "*ad quod damnum* by assessment, and that the writ of habeas *corpus* might be known also as the writ of deliverance from imprisonment. These suggestions of change were received with derision by nearly the whole profession, and to this day the jargon of a scholastic time makes part of the common speech of a profession which prides itself on its learning and culture! If these things were, however, to be passed over as matters of taste, the language of deeds, bonds, mortgages, and other documents, which the lawyer prepares and the citizen uses daily, is a substantial grievance. Chancellor Kent in his commentaries sixty years ago gave the following as a good conveyance of land: "I, A. B., in consideration of one dollar to me paid by C. D., do grant to C. D. the lot of land (describing it). Witness my hand and seal." What lawyer has ever used it? I have now before me a deed of land and a penal bond, such as are used every day. The deed begins with these words: "This indenture, entered into, made, and concluded this first day of May, in the year of our Lord one thousand eight hundred and eighty-six, by and between A. B., party of the first part, and C. D., party of the second part, witnesseth," and without the description, but with the full covenants, contains nine hundred and fifty words, eight hundred and sixty of which are superfluous. Why the words "entered into, made, and concluded"? Would not the one word "made" do just as well as the five words used? Then why the words "by and between"? Would not "by" express just as much? If the deed is made "by" the two parties, it is made "between" the two. Go through the document, and you will find the same verbosity throughout. Take now the penal bond, which I will copy entire, thus:

"Know all men by these presents, That I, A. B., am held and firmly bound unto C. D. in the sum of ten thousand dollars lawful money of the United States of America, to be paid to the said C. D., his executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators firmly by these presents. Sealed with my seal, dated the first day of May, one thousand eight hundred and eighty-six. The condition of the above obligation is such, that if the above-bounden A. B. or his heirs, executors, or administrators, shall well and truly pay or cause to be paid, unto the above-named C. D., his executors, administrators, or assigns, the just and full sum of five thousand dollars, on or before the first day of May, which will be in the year one thousand eight hundred and ninety, and the

interest thereon, to be computed from the first day of May, one thousand eight hundred and eighty-six, at and after the rate of six per cent per annum, and to be paid half-yearly on the first days of May and November in each and every year, until the just and full sum of five thousand dollars with interest as aforesaid has been fully paid, then the above obligation to be void, otherwise to remain in full force and virtue."

Now, supporting a penal bond to be the proper form of an obligation for the payment of money, which it is not and has not been for more than a hundred years, there are here one hundred and forty-three superfluous words, out of the two hundred and thirty-eight which shine and sparkle upon the face of the glaring instrument. Let us eliminate those which are unnecessary. "By these present," "held and firmly," "lawful money of the United States of America, to be paid to the said C. D., his executor, administrators, or assigns; for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents," "the above-bounden," his heirs, executors, and administrators," "well and truly," "or cause to be paid," "unto the above name C. D., his executors, administrators, or assigns the just and full sum of," "which will be," "to be computed from the first day of May, one thousand eight hundred and eighty-six," "and after," "on the first days of May and November, in each and every year, until the just and full sum of five thousand dollars with interest as aforesaid has been fully paid," and "otherwise to remain in full force and virtue." More than half of the instrument is thus seen to be an idle jingle. Yet this form of contract is in common use, is kept probably in every lawyer's office, and is used by some of them many times a day. It is not this form alone that is so faulty. Many, perhaps most of those that I used to see in my practice, contained the expression "his heirs, executors, and administrators" after the name of a contracting party. Every lawyer of any sense knows that for the last hundred years and more every man's contract bound his estate, and it is as idle to say so in the contract as it would be to set out passages from the Revised Statutes. The stereotyped phrase for work, not long ago, and perhaps even yet in some quarters, was "work, labor, and services." Instead of a single word there must be a jingle; for money paid, it must be "money paid, laid out, and expended"; for money had, "money had and received"; an act done pursuant to a statute must be done "under and in pursuance of," and so on to the end of the series. Well, some may ask, What harm comes of it all? Many of the forms are printed, they have been long in use, and are well understood. You might as well ask, What harm comes of taking a long road, when you have a short one? I will tell

what harm comes of this iteration and reiteration, this use of unnecessary phrases, this endless jingle of words, "this superfluity of naughtiness." They beget and confirm our dreadful habits of verbosity; they make the young lawyers think that these words and phrases mean something, and thus teach falsehood; they lead the minds of old and young to run in grooves; they encumber, and, because they encumber, they tend to hinder, obscure, and confuse; they make it necessary to write, read, and record in the course of a year millions upon millions of useless words, all of which cost a great deal of time and a great deal of money. Bonds, for instance, are copied or described in mortgages; the mortgages must be recorded; and, when a foreclosure takes place, the contracts are commonly set forth in the pleadings; all lead to fees, and the fees are burdens laid upon the shoulders of the borrowers. The patience with which the people who pay for these things and are furthermore hindered by them is phenomenal.

The legal profession of New York is not alone in its adhesion to the old forms to which their education has attached them. So long ago as the 8th and 9th of Victoria, ch. 119, an act of the British Parliament was passed to encourage short forms of deeds. A deed without covenants was expressed in about a hundred words, the covenant of right to convey in nineteen words instead of eighty, that for quiet enjoyment in twelve words instead of one hundred and twenty-three, freedom from incumbrances in four words instead of one hundred and six, further assurance in twenty-two instead of three hundred and eight, and the covenant against the grantor's own act in eighteen words instead of eighty six; in short, a deed with all these covenants in one hundred and seventy-five words was to suffice instead of nine hundred and upward as theretofore. I am told that the old forms continue, nevertheless, to be used. The use of private seals to authenticate contracts is a relic of barbarism, which serves only to show how the children of this generation love to wrap themselves in the swaddling-clothes of their ancestors. Seals, did I say? Pretense of seals I should have said, not the reality. To use the seal is an act of folly; to make an excuse for it is folly heaped on folly. In those barbarous ages, when writing was an accomplishment rarely learned, the seal was the next best thing, and so it was used. Everybody now writes, and nobody, or next to nobody, needs to use a seal; so we write our names, and for a pretense make a sign, which we call a seal. In this State it is a little piece of paper stuck to another piece of paper. In some other States it is only a scrawl. Rights are made to depend on this folly; and yet we call ourselves civilized, the most civilized generation of all the ages!

Let us pass on to our next great need, which is discipline strong enough and searching enough to reach all who have signed the rolls of attorneys or counsel. In some of the States, especially in those of New England, the discipline of the profession is in the hands of the profession itself. Not so with us. Here the work of discipline is in the hands of the courts alone. The profession has no organization as a body, and hence no control over all its members; individuals can if they choose complain to the courts, just as any individual citizen can make complaint to a magistrate or a grand jury of an infraction of law, but there is no prosecuting officer and no arrangement for concerted action, except in those counties where a Bar Association has been formed, and these are inadequate, for the reason that they include few members of the profession in proportion to the whole number. The remedy which I would suggest is a Bar Association in every county, which every lawyer should become a member of on his admission to practice, and expulsion from the association should be expulsion from the bar, unless reversed on appeal to the court.

The third great need of our profession is the will coupled with power to lessen the present delay and uncertainty in judicial administration. I put delay and uncertainty together, because they are closely related, and a remedy for one will involve a remedy for the other. And when I mention power as coupled with the will, I mean legal power, power conferred by law. I am, indeed, of the opinion that the will must lead to the power, because our profession, by its numbers and influence rightly exerted, is able to bring all the reforms which are needed to make the administration of justice easier, cheaper, and more certain.

When two years ago a committee of the American Bar Association sent out a circular to the members of their profession in the different States asking information about the prevalent delay and uncertainty, an eminent member of the bar of this State answered that he "should say that the average length of a defended lawsuit from its beginning to its end in the court of last resort, could not be much less than five years. Some cases occupy a good deal more time." Is not this a grave reproach? You must be satisfied, as must all who think much about it, that if the bar of this State had the will they would find a way to remove this reproach. The report mad