American Legal History – Russell

JAMES KENT, *COMMENTARIES ON AMERICAN LAW*, 2d. ed, I (New York: O. HALSTED, 1832).

OF REPORTS OF JUDICIAL DECISIONS

Having considered the nature and force of written law, and the general rules which are applied to the interpretation of statutes; we are next to consider the character of unwritten, or common law, and the evidence by which its existence is duly ascertained.

The common law includes those principles, usages, and rules of action, applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. According to the observation of an eminent English judge, statute law is the will of the legislature in writing, and the common law is nothing but statutes worn out by time; and all the law began by consent of the legislature.

This is laying down the origin of the common law rather too strictly. A great proportion of the rules and maxims which constitute the immense code of the common law, grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the application of the dictates of natural justice, and of cultivated reason, to particular cases. In the just language of Sir Matthew Hale, the common law of England is "not the product of the wisdom of some one man, or society of men, in any one age; but of the wisdom, counsel, experience, and observation, of many ages of wise and observing men." And his further remarks on this subject would be well worthy the consideration of those bold projectors, who can think of striking off a perfect code of law at a single essay. "Where the subject of any law is single, the prudence of one age may go far at one essay to provide a fit law; and yet, even in the wisest provisions of that kind, experience shows us, that new and unthought of emergencies often happen, that necessarily require new supplements, abatements, or explanations. But the body of laws, that concern the common justice applicable to a great kingdom, is vast and comprehensive, consists of infinite

particulars, and must meet with various emergencies, and therefore requires much time, and much experience, as well as much wisdom and prudence, successively to discover defects and inconveniences, and to apply apt supplements and remedies for them; and such are the common laws of England, namely, the productions of much wisdom, time and experience."

But though the great body of the common law consists of a collection of principles, to be found in the opinions of sages, or deduced from universal and immemorial usage, and receiving progressively the sanction of the courts, it is, nevertheless, true, that the common law, as far as it is applicable to our situation and government, has been recognised and adopted, as one entire system, by the constitutions of Massachusetts, New-York, New-Jersey, and Maryland. It has been assumed, or declared by statute, with the like modifications, as the law of the land in every state. It has been decided, that even English statutes passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country.

The best evidence of the common law is to be found in the decisions of the courts of justice, contained in numerous volumes of reports, and in the treatises and digests of learned men, which have been multiplying from the earliest periods of the English history down to the present time. The reports of judicial decisions contain the most certain evidence, and the most authoritative and precise application of the rules of common law. Adjudged cases become precedents for future cases resting upon analogous facts, and brought within the same reason; and the diligence of counsel, and the labour of judges, are constantly required, in the study of the reports, in order to understand accurately their import, and the principles they establish. But to attain a competent knowledge of the common law in all its branches, has now become a very serious undertaking, and it requires steady and lasting perseverance, in consequence of the number of books which beset and encumber the path of the student, The grievance is constantly growing, for the number of periodical law reports and treatises which issue from the English and American press, it is continually increasing; and if we wish to receive assistance from the commercial systems of other nations, and to become acquainted with the principles of the Roman law, as received and adopted in continental Europe, we are still in greater danger of being confounded, and of having our fortitude subdued, by the immensity and variety of the labours of the civilians. It is necessary that the student should exercise much discretion

and _____ in the selection of the books which he is to peruse. To encounter the whole mass of law publications in succession, if practicable, would be a melancholy waste or misapplication of strength and time.

Lord Bacon, in the aphorisms annexed to his treatise *De augmentis Scientiarum*, speaks of the necessity of a revision and digest of the law, in order to restore it to a sound and profitable state, whenever there has arisen a vast accumulation of volumes, throwing the system into confusion and uncertainty. The evils resulting from an indigestible heap of laws, and legal authorities, are greate and manifest. They destroy the certainty of the law, and promote litigation, delay, and subtilty. The professors of the law cannot afford the expense and time necessary to collect and study the volumes, and they are obliged to rely too much on the second-hand authority of digests--*ipse advocatus, cum lot libros polegere et vincere non possit, compendia sectatur--glossa fortasse aliqua bona.* The period anticipated by Lord Bacon seems now to have arrived. The spirit of the present age, and the cause of truth and justice, require more simplicity in the system, and that the text authorities should be reduced within the manageable limits; and a new digest of the whole body of the American common law, upon the excellent model of Comyn's Digest, and executed by a like master artist, retaining what is applicable, and rejecting every thing that is obsolete and inapplicable to our institutions, would be an immense public blessing.

A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favour of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and their contracts by it. It would therefore be extremely inconvenient to the public, if precedents were not duly regarded, and pretty implicitly followed. It is by the notoriety and stability of such rules, that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy, and to trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal of a few,

and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law. . . .

But I wish not to be understood to press too strongly the doctrine of *stare decisis,* when I recollect that there are one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it. Lord Mansfield frequently observed, that the certainty of a rule was often of much more importance in mercantile cases than the reason of it, and that a settled rule ought to be observed for the sake of property; and yet, perhaps, no English judge ever made greater innovations and improvements in the law, or felt himself less embarrassed with the disposition of the elder cases when they came in his way, to impede the operation of his enlightened and cultivated judgment. His successor, Lord Kenyon, acted like a Roman dictator, appointed to recall and reinvigorate the ancient discipline. He controlled or overruled several very important decisions of Lord Mansfield, as dangerous innovations, and on the ground that they had departed from the precedents of former times, and disturbed that land-marks of property, and had unauthorizedly superadded equity powers to a court of law. "It is my wish and my comfort," said that venerable judge, "to stand *super antiquas vias*. I cannot legislate, but by my industry I can discover what our predecessors have done, and I will tread in their footsteps." The English courts seem now to consider it to be their duty to adhere to the authority of adjudged cases, when they have been so clearly, and so often, or so long established, as to create a practical rule of property, notwithstanding they may feel the hardship, or not perceive the reasonableness of the rule. There is great weight in the maxim of Lord Bacon, that *optima est lex, qua minimum relinquit arbitrio judicis; optimus judex, qui minimum sibi*. The great difficulty as to cases, consists in making an accurate application of the general principle contained in them to new cases, presenting a change of circumstances. If the analogy be imperfect, the

application may be erroneous. The expressions of every judge must also be taken with reference to the case on which he decides; we must look to the principle of the decision, and not to the manner in which the case is argued upon the bench, otherwise the law will be thrown into extreme confusion. The exercise of sound judgement is as necessary in the use, as diligence and learning are requisite in the pursuit, of adjudged cases.

Considering the influence of manners upon law, and the force of opinion, which is silently and almost insensibly controlling the course of business and the practice of the courts, it is impossible that the fabric of our jurisprudence should not exhibit deep traces of the progress of society, as well as of the footsteps of time. The ancient reporters are going very fast not only out of use, but out of date, and almost out of recollection. The modern reports, and the latest of the modern, are the most useful, because they contain the last, and, it is to be presumed, the most correct exposition of the law, and the most judicious application of abstract and eternal principles of right to the refinements of property. They are likewise accompanied by illustrations best adapted to the inquisitive and cultivated reason of the present age. But the old reporters cannot be entirely neglected . . . .

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