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SOME ASPECTS OF THE PROBLEM OF LAW SIMPLIFICATION *

A little more than a year ago, Sir John Salmond, whose contributions to the science of jurisprudence entitle his opinions to respect wherever English law is practiced or studied, delivered a notable address before this Association. He concluded his remarks with these words: [1]

Through centuries of slow development we have gathered together the materials for the greatest system of law that the world has ever known. Is it too much to hope that we are now approaching the end of that long era and that we are ready to build up these materials into a stately monument of perfect form which will endure forever as one of the great contributions of this century to the cause of truth, justice and civilization?

That, in a sentence, is the problem which is slowly but surely and insistently pressing upon our profession for solution. A generation ago the suggestion that we should seriously consider any substitute for the traditional method of developing and systematizing our law by judicial decisions, corrected or supplemented by occasional, more or less haphazard legislation, would have been accorded the scant courtesy of mildly derisive opposition. But what then seemed impossible or improbable has already been transferred into the realm of the probable and those who appraise the tendencies which give substance and direction to our legal development and who view the future with discerning eye already see the problem of law simplification as one which is not only inevitable but immediate.

What has contributed most to this change in our attitude, although it is by no means the most important factor in the problem, is the growth of the legal literature which under our system is the authoritative source of our knowledge of legal rules and doctrines; statutes and the reports of judicial decisions. During the last twenty years the bar has begun to be conscious of the steadily growing burden which the increase of statutory law and the multiplication of precedent is placing upon it. But lawyers as a class have allayed any uncomfortable apprehensions as to the future, which may now and then obtrude themselves, by the complacent acceptance of the ingenious devices for digest-

* The substance of this paper was delivered before the Association of the Bar of the City of New York, on February 8, 1923.

[1] See (1922) 22 Columbia Law Rev. 197, 208.

ing and finding the law as offering a real solution of their difficulties. But every new citator, every new digest, every new compilation which we eagerly seize upon to lighten our labors, comes, like Banquo's ghost, to confront us with the disquieting reality that the common law system of precedent which our forbears have cherished for some ten centuries cannot continue indefinitely to develop solely through the medium of reported decisions. Let him who deludes himself with the belief that we can go on making and studying law and briefing cases by the same methods which have prevailed through the long history of the common law, face frankly the simple facts with respect to the growth of our legal literature.

When James Kent began, just a century ago, the lectures which ripened into his *Commentaries*, he lamented the "multiplicity of law books" as "an evil that has become intolerable." Yet Kent's law library, assuming that it was complete with reference to all American reports and statutes, would at that time have embraced about 180 volumes of American reports and less than one-third that number of American statutes. A law library, correspondingly complete, at the present time would have upon its shelves about 18,500 volumes of reports and about 5,500 volumes of statutes. My mathematical friends tell me that, at the same rate of progression, a law library correspondingly complete one hundred years hence, assuming that we had buildings in which to house it, would reach the stupendous proportions of 1,850,000 volumes of reports and 550,000 volumes of statutes. There is of course reason to hope that the rate of increase in reports and statutes will not be as rapid in the next century as the last, and that instead of an increase represented by an ascending curve we may proceed at more nearly a level rate at approximately the present increase of about 350 volumes of reports and 250 volumes of statutes per year. If we should succeed in stemming the flood of law books to that extent, another century would see a good working library for an American lawyer containing something like 100,000 volumes of reports and statutes and something more than half that number in fifty years. To this, of course, would be added a suitable number of digests, text-books and treatises.

Can it be supposed that in the next century or fifty years or even twenty-five years from now, lawyers and judges will be able by individual or indeed by any effective coöperative effort to extract day by day from such a mass of legal literature, the rules and principles which shall guide the conduct of clients and litigants; or if such a laborious process were possible, that the result of it would be a system of law adequate to the needs of a progressive and enlightened people? To hope that such a mass of precedent can be penetrated even with the aid of digests and glossators or that there could be extracted from it any harmonious and workable legal doctrine is to disregard the teachings of experience and to indulge, Micawber-like, in the illusion that something, we know not what, will turn up to remedy the growing difficulties of our situation.

But the problem of simplifying our law in its statement and in its mechanism is due not alone or principally to the volume and character of its litera-

ture. It is one which is inherent in the nature of the common law and the method of its creation. The common law doctrine of precedent, whereby the judicial decision not only determines the rights of litigants who invoke it, but becomes the authoritative source of legal precepts to govern future cases, is at once the secret of its strength and the source of some of its weaknesses.

Its rules and doctrines, unlike those of other systems, are forged between the hammer and anvil of opposing counsel in the judicial settlement of actual controversies. They are wrought to fit the very facts which call for the application of legal rules and inspire that creative spirit which more than in any other system has dominated the common law. Hence it is that in the course of its long history and experience the common law has developed, by its method and in the substance of its precepts and doctrines, a technical excellence and a capacity to adapt itself to new situations which have given to it an extraordinary vitality—a vitality which has enabled it to spread its influence over a large part of the civilized globe and is enabling it today to supplant other systems of law whenever it comes into conflict with them.

But any system of law in which legal rules are always created *ad hoc* must at its best lack form and symmetry. Its development is not systematic, its precedents which collectively are its substance, because of the very method of their creation, lack a foundation of scientific and philosophical generalization on which all systems of law must ultimately rest if they are to endure and do their appointed work. In its less favorable aspects the common law of the twentieth century carries a burden of judicial precedents, the accumulation of centuries of case law, too many of which, viewed philosophically, are out of harmony with the great body of its precepts and doctrines and which in practice do not always harmonize with present-day social needs.

The inadequate presentation of the judicial controversy by counsel, the faulty analysis of the legal problem involved, the failure to interpret history accurately, the failure to appreciate the social and economic significance of facts or the relation of law itself to social well-being, or any one of many other influences which may affect adversely the judicial declaration of law, may result in a precedent which falls measurably short of that wisdom which should guide the development of law through the generations to come. Still more often we find the courts creating precedent apparently logical, in accord with history and experience, and in harmony with the social and economic trend of the times, so far as they are recognized or understood. Yet after a generation or two, when it is difficult or impossible to retrace the steps of our judicial law making, we discover that the precedent is in conflict with the fundamental social forces which must ultimately find their expression in law. In either case the legal anachronism once lodged in the body of the common law becomes a new center for the development of legal precept and doctrine which case law can never quite overtake or control. Forthwith, there begins the long and painful struggle of the common law to adjust the conflicting demands of the doctrine of *stare decisis* to the demands of logical system or of social need and convenience or both. For every precedent, which is out of harmony with law,

viewed as a system, and with the social aims which it is the object of law to promote, begets an almost endless progression of litigation. Those favored by it or by its implications will always seek to take advantage of it by bringing their cases under its protecting aegis. Those adversely affected will endeavor to persuade the courts to draw the line of judicial decision so that their cases will fall outside the sphere of its influence. The frank overruling of precedent, for reasons well understood, is rarely resorted to. Often the evil consequences of the anomalous precedent are recognized too late to accomplish more by way of judicial decision than its limitation on the basis of more or less arbitrary distinctions of fact; and it either persists, perhaps for centuries, a prolific source of litigation and inharmonious legal development, or it is ultimately repealed by legislation not infrequently so crudely drawn as to germinate, in turn, a fresh crop of litigation. That, in brief, is a process which has played a large part in the story of the development of the common law for some eight centuries. One has only to devote himself to the task of organizing the curriculum and planning the field of study in a modern law school, or to examine the attempted simplified statements of the law in modern digests and encyclopedias, to realize how extensively the effort of the student of law must be devoted to the investigation of the anomalous and the exceptional, or to understand how it is that our law defies classification, or how relatively few doctrines of the common law there are which are free from the confusion of conflicting authorities. One finds examples at every hand. A misinterpretation of *Chapman* v. *Allen*[2] by the Court in *Judson* v. *Etheridge*[3] and in *Jackson* v. *Cummings*[4] led the English courts to declare that the agister was not entitled to a lien to reimburse him for the keep of animals entrusted to his care. Viewed either as a matter of logic or of practical utility or convenience, one would find it difficult to discover any convincing reason for denying a lien to the agister and at the same time upholding it in the case of artisans, wharfingers, factors, packers, warehousemen and in numerous other instances, as the common law found a way of doing. Nevertheless, we went on for two centuries continuing to litigate over and over again the question whether the agister was entitled to the lien, until at last statutes intervened authorizing such a lien.[5]

In *Stokes* v. *Stokes*[6] the New York Court of Appeals laid down broadly the doctrine that neither party to a contract is entitled to specific performance of it unless the other is likewise so entitled. Such a doctrine was not only inconsistent in principle with a number of earlier cases but it was actually not necessary to the decision in the *Stokes* case. A logical implication of the doctrine laid down in that case, however, was that one could not have specific performance against a defendant who, by his contract, had waived his right to specific performance against the plaintiff; and it was so held in *Wadick* v. *Mace*.[7]

[2] (1632) Cro. Car. 271.
[3] (1833) 1 C. & M. *743.
[4] (1839) 5 M. & W. 341.
[5] See Ames, *Lectures on Legal History* (1913) 158, (1887) 2 Harvard Law Rev. 53, 62.
[6] (1896) 148 N. Y. 708, 43 N. E. 211.
[7] (1908) 191 N. Y. 1, 83 N. E. 571.

Another implication was that the promisee in a unilateral contract could not have specific performance of his contract since the contract called only for an act on the part of the promisee who was not himself bound by the contract, and it was so held in *Levin* v. *Dietz*.[8] Another implication was that the assignee of a contract for the purchase of an article not readily obtainable in the market, who had not assumed performance of the contract, could not compel its performance even though he tendered the purchase money and submitted himself to the jurisdiction of the court, alleging willingness and readiness to perform; and it was so held in *Dittenfass* v. *Horsley*.[9] Another implication was that no option for the purchase of land which called for a tender of purchase money by the vendee as a means of exercising his option to purchase would be specifically enforced and this led to a resistance of the demand for specific performance in numerous option cases,[10] although concededly upon the exercise of the option the vendor was subject to a legally binding contract.[11]

Obviously a doctrine so out of harmony with modern business practice could not maintain itself in its unrestricted form and finally in *Epstein* v. *Gluckin*[12] the court held that the assignee of the vendee could secure specific performance merely by bringing suit and alleging willingness and readiness to perform, so that by subjecting himself to the jurisdiction of the court, the court could direct the assignee to pay the purchase money in order to secure specific performance by the vendor. The court intimated that the earlier cases to which reference has been made must be limited to their precise facts. Thus justice was done for the particular case and the court did the best it could to turn the current of the law back into its proper channel. But has it done so? Or will it take some generations or even centuries of precedent making before we can reduce the simple doctrine of mutuality in the specific performance of contracts to orderly and systematic form? Meanwhile the cases which have been limited by the decision in *Epstein* v. *Gluckin* to their precise facts in New York are being cited in other jurisdictions and their influence is extending into the law of other states, and under the doctrine of *stare decisis* will conceivably and indeed probably affect the law long after we have all passed from the scene of action. My estimate, based on an examination of the authorities, is that the doctrine originally laid down in *Stokes* v. *Stokes* has within the brief period of twenty-six years been directly responsible for not less than fifty litigations, about one-half of which have been carried to appellate courts and none of which would ever have arisen had the court laid down the doctrine in force in many jurisdictions—that the only requirement of mutuality in specific performance is that the court should have jurisdiction and power to compel complete performance of the contract on both sides at

[8] (1909) 194 N. Y. 376, 87 N. E. 454.

[9] (1917) 177 App. Div. 143, 163 N. Y. Supp. 626, *aff'd* (1918) 224 N. Y. 560, 120 N.E. 861.

[10] See for example, *Bullick* v. *Cutting* (1913) 155 App. Div. 825, 140 N. Y. Supp. 686 and *Dittenfass* v. *Horsley*, *supra*, footnote 9.

[11] *Carney* v. *Pendleton* (1910) 139 App. Div. 152, 123 N. Y. Supp. 738.

[12] (1922) 223 N. Y. 490, *esp.* p. 493, 135 N. E. 861.

the time of rendering its decree. I have referred thus at length to this segment of legal history not so much because it is unusual but because it is typical of the processes by which anachronisms find their way into the law and of the practical impossibility, once they become a part of the law, of stemming the current of their influence. Indeed, the unusual aspect of the matter is that our Court of Appeals found a way to turn the current of the law back into its proper channel in the short period of twenty-six years. I could spend this and many other evenings in giving you other and similar examples where the outcome has not been so fortunate.

Can we explain, for example, except upon the basis of a too-blind reverence for history, or the perpetuation by the doctrine of *stare decisis* of anachronisms in the law, the survivals of such rules as that the right of entry upon real estate for condition broken cannot be disposed of by will; [13] that the extension of the obligation of the principal debtor for a single day discharges the surety; [14] or the rule that a contract under seal may not be modified or discharged by another and later agreement either oral or in writing not under seal; [15] or that the maturity date of a mortgage cannot be extended by mere written agreement by the mortgagor and mortgagee to extend it; [16] or that the release of one joint tortfeasor discharges another? [17] How else can we explain, to select only one of many rules of evidence, the present status of the rules relating to the proof of the contents of books of account, especially where the books are kept by one not a party to the litigation; or such inconsistencies as that the purchaser in good faith of a bond and mortgage takes subject to the equities of both the mortgagor and third persons against the mortgagee,[18] whereas the *bona fide* pledgee of a savings bank-book by a fraudulent trustee takes free of the claims of the defrauded *cestui que trust;* [19] or that a recorded mortgage on chattels to be acquired by the mortgagor in the future is valid against purchasers of the after-acquired goods in good faith [20] but invalid against attaching creditors.[21] Attempts at eliminating such anomalous rules by piece-meal legislation have often had the effect only of adding to the confusion.

As is well known, the doctrine of purchase for value presents many curious variations under the common law and equity decisions of our courts. When, however, we came to regulate the matter by statute the variations were multiplied. Our Factors Act expressly provides that a past indebtedness is not value [22] sufficient to cut off equities with respect to property taken to secure it. Our Negotiable Instruments Law, on the other hand, seemed to provide that a transfer of a negotiable instrument to a *bona fide* taker on account of a

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[13] *Uppington* v. *Corrigan* (1896) 151 N. Y. 143, 45 N. E. 359.
[14] *New York Life Ins. Co.* v. *Casey* (1904) 178 N. Y. 381, 70 N. E. 916.
[15] *McCreery* v. *Day* (1890) 119 N. Y. 1, 23 N. E. 198.
[16] *Olmstead* v. *Lattimer* (1899) 158 N. Y. 313, 53 N. E. 5.
[17] *McNamara* v. *Eastman Kodak Co.* (1921) 232 N. Y. 18, 133 N. E. 113.
[18] *Owen* v. *Evans* (1892) 134 N. Y. 514, 31 N. E. 999.
[19] *Wickenheiser* v. *Colonial Bk.* (1915) 168 App. Div. 329, 153 N. Y. Supp. 1035.
[20] *Kribbs* v. *Alford* (1890) 120 N. Y. 519, 24 N. E. 811.
[21] *Rochester Distilling Co.* v. *Rasey* (1894) 142 N. Y. 570, 37 N. E. 632.
[22] N. Y. Pers. Prop. Law, § 43.

pre-existing debt entitled him to the benefits of the defense of purchase for value.[23] After some years of litigation the courts reached that result.[24] The Warehouse Receipt Law [25] provides that an antecedent debt "is value when a warehouse receipt is taken as security therefor." This language was repeated in substance in the Stock Certificate Law,[26] but it is omitted from the Sales Law,[27] and from the Bills of Lading Act,[28] so that the banker who today takes security on account of an antecedent debt may find his rights with respect to parties asserting prior equities depending upon whether he deals with the physical property or acquires a warehouse receipt or a bill of lading. And, if it happens that he is dealing with a customer who acquired his merchandise as a factor, he cannot be certain of what his rights are until he has been advised whether the rule of value laid down in the Factors Act has been amended or repealed by the new definition of value in the Warehouse Receipt Act. In short, there is still a common law rule as to value in New York, applicable in the case of lands and ordinary goods and chattels and bills of lading, and there are four distinct statutory definitions of value applying to special subject matters. Three of these change the common law rule but conflict with the definition contained in the Factors Act. And in our Real Property Recording Act the phrase is used without definition, but it has been interpreted as though the language of the Warehouse Receipt Law had been incorporated into the Recording Act.[29]

One would find it difficult to assign any logical or practical reason for these variations of a concept so fundamental in business transactions, and they are quite obviously due to the fact that we have legislated very much as we have declared law by judicial decision—to fit a particular case or particular types of cases with only incidental reference to the general symmetry of the law or the orderly and convenient progress of business operations, whether they chance to be conducted through the medium of the transfer of a warehouse receipt or the transfer of a bill of lading.

Oftentimes particular concepts developed in diverse and remote fields of the law, carried to their logical conclusions, produce results which sharply conflict when judged in the light of social policy or practical utility. If, for example, we apply the doctrine of the law of executory contracts of sale, the seller of a horse of ordinary quality must bear the loss if the animal is destroyed before the title passes, and there is no legal device whereby, in this situation, the burden of loss may be cast on a buyer.[30] If, however, the subject of sale should chance to be a house and lot which the buyer desires to use as a dwelling and the house should be destroyed by fire under like circumstances the

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[23] N. Y. Neg. Inst. Law, §§ 2, 51, 53.
[24] *Kelso & Co.* v. *Ellis* (1918) 224 N. Y. 528, 121 N. E. 364.
[25] N. Y. Gen. Bus. Law, § 142.
[26] N. Y. Pers. Prop. Law, § 183.
[27] N. Y. Pers. Prop. Law, §§ 40, 156.
[28] N. Y. Pers. Prop. Law, §§ 224, 225, 239.
[29] *O'Brien* v. *Fleckenstein* (1905) 180 N. Y. 350, 73 N. E. 30.
[30] *Higgins* v. *Murray* (1878) 73 N. Y. 252; N. Y. Pers. Prop. Law, § 103 (a).

loss falls on the buyer[31] through the application of the equity doctrine of specific performance. But again, if after the contract for the sale of real estate is entered into and before the date for conveyance, a zoning ordinance is passed, making the land of little value for the purpose of the buyer, he cannot be compelled to take title and the loss falls on the seller.[32] Just what would be the result in the case of an executory contract for the sale of a race horse of unique quality is still the subject of speculation. If we apply logically the legal rule generally applicable to the sale of chattels, the loss would fall on the seller. But if we apply logically the equity doctrine applied in real estate cases because of the unique subject matter, the loss would fall on the buyer. The only interpretation which one not familiar with the genesis of these doctrines could place on such a result is that equity does not look with friendly eye on the purchaser of race horses.

In giving these examples of inharmonious development in our system of case law I am not unmindful that I am dealing with the exceptional. The great body of the common law remains as it has been through the centuries, the greatest exposition of the principles of justice and right that the brain of man has devised. But can it continue to be such if we go on with this process of accumulating and retaining in the body of our law the exceptional and anachronistic? The strain to which the law is subjected by it is progressive and cumulative and ultimately the breaking point must be reached. I do not ask you to accept my own opinion on this point but appeal to the high authority of Judge Cardozo of our own Court of Appeals. In his address to this Association last year he said:

"Thus, again and again, the processes of judge-made law bring judges to a stand that they would be glad to abandon if an outlet could be gained. It is too late to retrace their steps. At all events, whether really too late or not, so many judges think it is that the result is the same as if it were. Distinctions may, indeed, supply for a brief distance an avenue of escape. The point is at length reached when their power is exhausted. All the usual devices of competitive analogies have finally been employed without avail. The ugly or antiquated or unjust rule is there. . . . But the evil of injustice and anachronism is not limited to cases where the judicial process, unaided, is incompetent to gain the mastery. Mastery, even when attained, is the outcome of a constant struggle in which logic and symmetry are sacrificed at times to equity and justice. The gain may justify the sacrifice; yet it is not gain without deduction. There is an attendant loss of that certainty which is itself a social asset. There is a loss too of simplicity and directness, an increasing aspect of unreality, of something artificial and fictitious, when judges mask a change of substance, or gloss over its importance, by the suggestion of a consistency that is merely verbal and scholastic. Even when these evils are surmounted, a struggle, of which the outcome is long doubtful, is still the price of triumph. The result is to subject the courts and the judicial process to a strain as needless as it is wearing. The machinery is driven to the breaking point; yet we permit ourselves to be surprised that at times there is a break."

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[31] *Anderson* v. *Steinway & Sons* (1917) 221 N. Y. 639, 117 N. E. 575; *Paine* v. *Meller* (1801) 6 Ves. Jr. 349.

[32] *Sewell* v. *Underhill* (1910) 197 N. Y. 168, 90 N. E. 430.

It is precisely because the process which Judge Cardozo here describes has been going on progressively for some eight centuries in our legal development that the problem of finding some practicable scheme of relief is today pressing on us for solution.

Second only in importance to the intrusion and the retention of anachronisms in our legal system in their influence on the form and practical availability of our law, is the lack of a realistic understanding and of an accurate definition of many of its most fundamental concepts. The terms right, power, duty, privilege, title, possession, ownership, constantly fall from our lips, but always with varying and elusive significance and application.

The difficulty is not alone one of the vague use of language, but we have endeavored to deal with many of these legal concepts as though they were changeless phenomena of nature, concealing from ourselves the fact that they are mere generalizations of certain relationships of persons to each other and to things under cover of which we have expanded and elaborated our system of rights. Possession, for example, is in English law always that relation of the individual to a physical thing which relationship is the foundation of rights. He who is possessed may bring an action for interference with the thing possessed. By enlarging our concept of that relationship through the fictions of constructive possession to include relationships not previously expressed by the term, we have gradually enlarged the category of rights of action and of those who are entitled to exercise them. Title in turn is the generalization by which we have sought to denote those rights *in rem* which may be acquired or enforced or transferred independently of possession, a concept which we have gradually built up through some centuries of legal experience. It would seem that the time had now arrived when such concepts might be restated not only with greater clarity and precision than heretofore, but with a more frank recognition of their real nature and purpose.

One might refer to many other situations in our law where the vagueness and uncertainty of its terminology or lack of a clearly defined concept lying back of its terminology, renders its substance difficult of apprehension and uncertain in application.

The point, however, to which our attention should be immediately directed is that this age-long process of the accumulation of anachronisms, of rules which have been created only to be judicially repealed or limited by more or less arbitrary distinctions, of the sometimes haphazard development of the use of a terminology which lacks a scientific connotation, is the inevitable accompaniment of the development of law which is always created with reference to particular cases.

Growing recognition of this truth has led legal thinkers in recent years to subject the judicial process to critical examination, and to direct their energies toward the discovery of some principle, some "methodology" whereby case law might be guided to a development more systematic, more consistent with principle and more harmonious with social needs. The result of these investigations has been to place great emphasis on the "method of sociology"

or "sociological jurisprudence" and to establish in our legal thinking that trinity of juridical theory—logic, history and the "method of sociology"—as the source of all true legal doctrine. We are told that the application of logic and history must be tempered by the "method of sociology," and that we must enlarge our scheme of jurisprudence so as to embrace within it the operations of a program of "social engineering."

It is not a novel idea, that in declaring law the judge must envisage the social utility of the rule which he creates. In short, he must know his facts out of which the legal rule is to be extracted and in a large sense they embrace the social and economic data of his time. Many years ago, Mr. Justice Holmes in classic phrase reminded us that "the life of the law is not logic but experience." If this is what is meant by the sociological method and by sociological jurisprudence, it is the method which the wise and competent judge has used from time immemorial in rendering the dynamic decision which makes the law a living force. Holt, Hardwick, Mansfield, Marshall and Shaw employed it long before the phrase sociological jurisprudence was thought of. But can we in any proper sense speak of the application of this principle as a "method?" Has sociological jurisprudence any methodology, any formulae, or any principles which can be taught or expounded so as to make it a guide either to the student of law or to the judge? History and logic are guides but has sociological engineering been reduced to a science and does it embody such formulae or principles as will enable the judge to render a just decision except by the application of that practical wisdom which characterizes the decision of the great judge and distinguishes him from those who are not so great? If not, then sociological jurisprudence will not tend to reduce the accumulation of anomalous doctrines; it may even add to it. At most it warns the judge and the student of law that logic and history cannot, and ought not, to have full sway when the dynamic judgment is to be rendered. It points out that in the choice of the particular legal device determining the result, social utility, the *mores* of the times, objectively determined, may properly turn the scale in favor of one and against the other; and it should lead us as lawyers and students of law to place an appropriate emphasis on the study of social data and on the effort to understand the relation of law to them, because by that process we may lay the foundation for a better understanding of what social utility is and where in a given case the path of social utility lies. Sociological jurisprudence, rightly understood, ought to give a new inspiration and a new trend to legal development, but we must have other resources if we are to make of the common law the great and abiding system which it may become.

The real problem, therefore, of the future development of the common law is the adoption of some device whereby that development may be more systematic and more scientific and whereby the law may free itself of its centuries of accumulations of anomaly and of rules and technique, the reason for which has disappeared or been forgotten, without loss of its vitality and its adaptability to each particular case as it arises. The Roman law system created such a device through the writings of the jurists who subjected its doc-

crimes to critical examination and whose influence was in the direction of systematic organization and development. Through imperial decree the writings of Papinian, of Paulus, of Gaius, of Ulpian, and Modestinus and their collaborators, already possessed of the authority of their merit, were given the authority of law, of greater weight in fact than the pronouncements of courts. The result was the excellence in form and systematic development of the Roman law which, surviving the dark ages, ultimately found expression in the European codes which, however, were without the elaboration and frequently without the technical excellence in point of substance or the adaptability of the common law.

When one approaches the problem of giving to our law a more symmetrical form and development he turns very naturally to the European codes as an exemplification of the ideal method of accomplishing that result. Sir John Salmond, in the address already referred to, evidently regarded some form of codification as the only available method of effecting the formal improvement of our law.

Codification, however, has always been anathema to those trained in the methods and habits of thought of the English common law, and the limited codification of commercial law subjects in this country has not proved so successful a method of law simplification as to encourage the hope that the other and more complex branches of our law may generally be simplified by that method. It is possible that there are parts of our law, where certainty and rigidity are more important than flexibility and adaptability, in which codification may properly be resorted to. The adoption of a simplified statutory system of the law of future interests, such as that recently adopted in England, and a statutory enactment of the rules of evidence abolishing many of the existing rules altogether are proposals worthy of serious consideration.

But in general when we come to deal with the larger fields of law, by the very process of codification we would destroy those elements in the common law system which have given it its vitality and its great practical utility; *viz.*, the power of the judge to create law as it arises and the consequent capacity of the law itself to adapt itself to actual situations by the elaboration of minute and precise rules of action.

Codification must either be based on the principle of the loose general statement of legal doctrines adopted in the framing of the European codes, or the more exact and precise method of statement of legal rules employed in the American codification of commercial law. Either procedure involves an incalculable sacrifice. If the European type of codification be imitated, it is not to be supposed that we will likewise imitate its judicial system by abandoning our system of precedent. If not, then we will begin over again the elaboration of legal doctrines by judicial decisions if, indeed, whenever the code failed to give us a precise rule of action, we did not forthwith revive our existing system with all its legal anomalies and age-long accumulation of legal debris. Such a procedure would give little immediate relief and ultimately would merely add to the burdens of uncertainty and confusion in our law and

leave our last state worse than our first. There is little to tempt us to enter upon a road so little known or leading to such an ultimate destination. If we attempt to codify by the exact and precise statement of legal rules, we fetter our judges and rob our law of its really great contribution to legal science—its elasticity and adaptability to new situations. However skillfully performed and whatever learning and experience may be lavished upon it, the human mind cannot envisage every situation which may arise even in a well-known and well-understood social order or foresee the variations which will take place in a changing and increasingly complex civilization. To place our law after centuries of free development on a Procrustean bed of unyielding statutory law would not make for progress. It would only be the precursor either of stagnation or, what is more probable, of the utter confusion and disorganization which would result from the struggle of the spirit of the common law to free itself from its statutory bondage.

What is required to accomplish the great task of law simplification in England and the United States is not the enactment of a code, or the adoption of fragmentary statutory enactments, which make little progress toward the end sought if they do not measurably defeat it. We must look rather to the creation of some agency which can be made a part of the common law system to perform the function of examining and stating our legal doctrines in systematic fashion and in the light of those social and economic functions for the guidance and control of which law itself exists; and at the same time we must retain our own system of creating and developing law by judicial precedent. As has been already pointed out, such an agency is lacking in the common law system and while the Roman law had something approaching it in the work of the jurists whose pronouncements were made authoritative by sovereign command, that system made no provision for the creation of law by judicial precedent. Is it possible for us, profiting from the experience of the two systems, to bring to the aid of our courts clothed with the full power to create law applicable to each situation as it arises, the aid of a scientific analysis and systematic survey and restatement of our law in such form and with such authority that courts may avail of it to correct its defects and to free it of its accumulations of false or useless doctrine?

It is only in the last generation that we have developed the habit of critical and scholarly examination of legal doctrine. The great commentators of the common law, Bracton, Coke, Littleton and Blackstone were for the most part gatherers and cataloguers of legal data. To this Blackstone and Kent added the embellishment of an illuminating style, and a more orderly and systematic presentation of elementary legal principles. Kent took the first steps in the direction of legal analysis and criticism which, it is interesting to note, were the fruits, as was also the work of Blackstone, of studies carried on in a university. Roman law has been the subject of university study in England and on the Continent since the Middle Ages, a fact to which may be attributed in part at least its system and excellence of form, especially when it is remembered that in that system the commentary is of greater weight

than the precedent. But it is only in the last generation that the common law has become in any real sense the subject of university study. The emphasis placed on judicial precedent gave rise to the apprenticeship tradition of acquiring the art of our profession. In its early history, the student attended court and acquired knowledge of practice and of precedent as an observer of proceedings there. Later the apprentice system was transferred from the court room to the lawyer's office. But in the last thirty or forty years there has come the realization that the common law, quite as much as Roman law, or philosophy, or science, or any subject of human interest and experience, would richly repay scholarly investigation and that its study in systematic fashion, might make possible a better organization and systematization of our legal knowledge and enable us to penetrate the dogma and fiction and illusions which obscure its realities to the essential principles which underlie formal legal rules. This is the advance to be gained in method and result by a systematic study of legal doctrine as a science over the trade guild tradition of legal study of the past. It has remained therefore for modern law schools and those engaged in teaching in them to carry on the historical investigation of many of its more important doctrines, to subject the law to a searching critical analysis and on the basis of that analysis to make the beginnings of a reconstruction of its parts in the light of the whole and with reference to those social functions which it is the business of law to facilitate and control. The results of these investigations are beginning to find expression in monographs on various phases of juristic science appearing for the most part in the law journals published in connection with our university law schools. Two treatises of the modern critical type embodying the results of the researches of law teachers have been published. I refer to the monumental work on Evidence by Professor Wigmore and to that on Contracts by Professor Williston, both of which are exercising a powerful influence in shaping and reconstructing the law of those subjects.

If concrete evidence were required to demonstrate the extent to which our law has developed anomalies, uncertainties, refinements and conflicts of authority in the fields of contracts and evidence, these two treatises would supply it. And as one turns their pages and realizes that it has required five ponderous volumes to present an adequate picture of the law of evidence and five volumes more to portray the problems of the law of contracts, he can but wonder how many volumes will be required to accomplish this task a generation hence unless some way is found to reduce the law to more orderly and systematic form.

When courts are called upon to render the dynamic judgment or when, conscious that the current of the law has been diverted from its proper channel by a faulty precedent, they overrule it or, more euphemistically, limit it to its facts, they do not disdain to support their opinion by references to criticisms of the legal doctrine concerned, occurring in current legal publications. Indeed, the profession at large is not yet fully aware of the great extent to which the law is being reshaped and reframed by judicial decisions aided and

inspired by the scientific investigations of law carried on in connection with university law schools. The judges of many courts now freely acknowledge this, both on and off the bench.

Some indication of the confusion into which the law is falling viewed as a law of precedent, as well as the great need of some scientific and authoritative statement of legal doctrine as an aid to the judicial declaration of law is found in the growing tendency of courts especially in the southern and western states to cite the various legal encyclopedias in their opinions as the basis of judicial decision. It is not unusual to find such a citation given as the sole authority for the legal precept which is seized upon to determine the rights of litigants, obviously because the search of the authorities would be either too laborious or too uncertain in its results to justify the expenditure of judicial labor upon it. Unfortunately this use of mere compilations not only demonstrates but tends to create our need, for the so-called legal encyclopedias in their substance and arrangement are too often not scientific and the tendency of courts to accept and cite them as authority is one of the contributing causes making a more systematic development of our law a necessity. But all these aids to law improvement in the form of special studies, treatises and encyclopedias, even at their best, are more or less sporadic and unsystematic because they are the result of private enterprise and of individual effort, with each individual conducting his researches independently of other like efforts and too often without the benefit of the criticisms of others conducting like investigations or especially qualified to criticise. One field may be intensively tilled while another, equally important, may be neglected or only studied partially or superficially.

There is undoubtedly sufficient legal talent and expert knowledge in the United States and England to restate the whole body of the common law and equity scientifically within a reasonable time, having in mind the character and magnitude of the task to be performed, and to produce a result which would simplify our law in its form and content by freeing it from anachronisms, by systematizing its doctrines and adapting it more closely to social needs. But it is a task requiring the active coöperation of that talent and expert knowledge, under a common leadership, and it requires the active support and coöperation of the American bar as a whole in order to make its labors effective.

The inherent merits of a work so prepared would inspire confidence, and confidence in it by the bar at large would insure its use in such a manner as to improve and strengthen our legal system.

Next in importance to this support and coöperation is the requisite time to carry out so great an undertaking. Tribonian and his associates completed the work of compiling the Pandects in the short period of three years, but a great part of it had been done by the jurists in the earlier stages of development of the Roman law. Yet Gibbon remarked that ten years would not have been too long a period for so great an accomplishment.

The Code Napoleon—the most important undertaking of legal restatement of modern times, since its great objective was the removal of the diver-

gences created by the operation of the Roman law, local codes, customary law, the feudal law, the canon law, and the royal ordinances, all within the limits of a single territory—was completed in about thirteen years of more or less intermittent labor, but it was the product of the intensive coöperative effort of the legal talent and scholarship of Western Europe under the leadership of genius and it had a background of a vast judicial literature. The task of restating the common law is even greater, for the subject matter is more difficult to analyse and classify than was the French law and much less preliminary work has been done than had been done before the organization of the Code Napoleon. Its money cost, too, will be an item of magnitude. But the cost of a single battleship, as Sir John Salmond aptly remarked,—indeed, half of that amount,—would suffice to accomplish this great and beneficent work. No price is too large for the preservation and perpetuation of a great system of law which history teaches us outlives every other type of human institution unless it be the university. A nation that spends annually hundreds of millions of dollars for cosmetics, tobacco and chewing gum, and which proposes in the near future to send to the scrap heap battleships costing many millions, will find a way to finance so worthy an enterprise provided only that it is organized in a manner which commends itself to the American Bar.

And how shall that organization be effected? It is, I think, generally known that a movement has already been launched under the leadership of Mr. Elihu Root and others whose names carry weight at the bar to bring together into a single organization those elements in the legal life of the nation best adapted to furthering the project and bringing to it the support of bench and bar, of the law schools and the learned societies interested in the problems of law and its administration.

It is not an extravagant prediction which I venture to make that the first steps toward the restatement of the common law or important parts of it by a body of experts representing the legal scholarship of the country, working in close coöperation under the direction of a common leadership and with the support of the bar, will be well under way by a year from this date. He would be rash who would predict the date of the completion of such a task or who would hope that the date would be an early one. Great edifices are built by placing one brick upon another and so this work must be carried forward not with the thought of bringing forth a finished product at a single stroke as Minerva sprang full armed from the head of Jove, but step by step taking first those fields of the law which are ready for restatement and carrying forward the restatement in that field, and then proceeding to other fields as experience is gained and as organization is strengthened and technique developed. Indeed our knowledge of the nature of the common law should not encourage us to predict that a restatement would ever be completed in final form, for conditions which make it necessary now will continue in some measure to operate and will continue to require the services of some competent body in applying the systematizing process to our developing law. To suppose that law will never require further simplification or restatement is to suppose that

law will become static, which can only occur when society itself becomes static.

What form shall the statement take and how shall it be used, are important questions, the final answer to which cannot be given with certainty until the problems involved have been scrutinized and proposed solutions tested by the collective judgment of those having expert knowledge. This paper will have failed of its purpose, however, if it has not indicated the lines along which both the form and use of the restatement must proceed if those elements of the common law which have given to it its great merit are to be preserved. The loose generalizations of the European codes could not carry on and perpetuate the traditions of the common law or satisfy the needs of those accustomed to its use. To accomplish that, it must state in detail and with precision accepted rules and doctrines, eliminating or modifying the rule or doctrine not supported by reason or adapted to present day social institutions and needs. But it must avoid the formal statement of the law as a closed system, clearly leaving open for future statements on the basis of judicial decisions as they are rendered the rules governing the new and unforseen situations with which the law must hereafter deal as they arise. And finally there should accompany such a restatement, preferably in a separate document, a comprehensive annotation showing the origin and history of each rule and doctrine dealt with in the primary restatement, indicating conflicts of authority and, in the case of conflict or in the case of precepts modified or eliminated, the reason for the adoption of the rule actually incorporated into the restatement.

Now let us suppose that such a restatement of a definite part of the law with the accompanying annotations were completed, that it was subjected to the examination and criticisms of the most competent critics of the United States and England in the particular field to which it relates and after appropriate study and revision it were printed and published as the final work of the body preparing it. What use could be made of it? I suppose no one would deny that a statement of law thus prepared would be the most important and useful law book published since the compilation of the Digest, and that if nothing more were attempted or accomplished, a work of the first importance to the future development of our law would be brought to fruition, that it would save infinite labor to generations yet to come in the process of finding the law and presenting it for the consideration of courts, and that it would strengthen and stimulate all those forces which tend to unify and simplify law. If no more ambitious goal were set before us than that, the attempt would richly reward the time, the effort and the cost devoted to so worthy an enterprise.

But need this, or should this be our ultimate aim? To make effective the real reform contemplated by such a restatement of the law we must reconcile it with the principle of *stare decisis*. And how can that reconciliation be effected? Either courts, regarding themselves as bound by a precedent in conflict with the restatement which they frankly admit to be unfortunate, will bow to the precedent and disregard the restatement; or they will adopt and

follow the restatement by the familiar and more or less transparent device of limiting the precedent to its precise facts or by making arbitrary distinctions of fact in cases as they arise—a reconciliation which at best is partial and which only adds to the confusion and uncertainty which it is the very purpose of the restatement to eliminate.

Nevertheless a reconciliation of the restatement with our system of judge-made law is not impossible if we take into account the precise nature of the difficulties which are to be overcome. The solution which I make bold to suggest is open to the objection that it is novel in the history of methods of law simplification. The presumption against novelty, however, may well be outweighed by the fact that the problem to be solved is itself a novel one in the development of the common law, being no less than an attempt to preserve the principle of the creation of law by judicial decision under a system of precedent and at the same time bring to its aid the coördinating and systematizing and reforming influence of a juristic agency which, in formulating legal doctrine, looks beyond the particular case to be immediately decided to the law as a whole and with the resources of coöperative scholarship which can rarely be drawn upon by courts in the usual litigation.

Having made the suggestion to the committee of the organization headed by Mr. Root already referred to and they having found it not inadmissible, I venture to present it here. If we may assume that a restatement of the law or a portion of it may be prepared by the coöperative effort of a body of experts in such form and with such content as to commend itself to the profession at large, then it may be asked that it receive legislative recognition and sanction, not as a body of legal rules and doctrine imposed on the courts and litigants as a formal statute or code, but as "an aid and guide" to the courts in formulating legal rules, with full liberty reserved to them to accept and follow any of the precepts of the restatement when they conflict with precedent but without making such action mandatory.

In any given case, the court would have before it the rule or precept of the restatement, with the accompanying annotation indicating its history and the state of the authorities with respect to it. If the court deemed it applicable to the case in hand and consistent with the law previously declared in precedent, it could follow the restatement, citing it as the basis of its decision. If it deemed it inconsistent with existing precedent, it would still be left free to accept and apply the restatement, thus overruling or limiting the anomalous precedent. It has been pointed out that it is comparatively rare that the retroactive effect of judge-made law actually involves hardship. In those instances where precedent is overruled or limited, it is seldom that the conduct of litigants has actually been influenced by the rule previously laid down or that overruling it has operated more harshly than would the creation of a new precedent where no rules had been previously declared.[33] Even when precedent is overruled, the common law has, in cases of extreme hardship, found a way to limit the retrospective operation of judge-made law. When courts have

[33] See Cardozo, *The Nature of the Judicial Process* (1921) 146.

held statutes void and later reversed their earlier ruling, they have not hesitated to declare the statutes suspended and inoperative in the meantime.[34]

By providing that where the precepts of the restatement conflict with an existing precedent, the former could be followed only in those cases arising subsequent to the publication of the restatement or by giving the court of last resort power to declare that the precept of the restatement, when conflicting with precedent, should control only in future cases, this beneficial principle would be given a wider and more systematic application and facilitate the adoption of the restatement without affecting adversely rights acquired before its adoption. What is here suggested is only that a way be found whereby the undoubted power of courts to overrule or limit precedent may be more frankly and honestly exercised in those cases where the collective scholarship and expert knowledge of our profession agree that such action is desirable and where there are proper safeguards to prevent the harsh operation of the newly declared rule upon cases which have previously arisen.

By such a procedure, we would bring to the aid of the common law system an agency lacking to it during its entire history, and to the absence of which may be attributed those defects of form and arrangement and the retention of those anomalies and uncertainties which make the problem of law simplification increasingly urgent. It would enable us to preserve to the courts their traditional function of creating law, to govern cases as they arise without imposing on them the unyielding and inflexible limitations of a statutory enactment. At the same time, it would free the courts from the dead hand of the outworn or mistaken precedent, leaving them free to accept and follow instead so much of the restatement as might commend itself to their judgment.

It will be observed, too, that the proposal for accompanying the restatement with a comprehensive and systematic annotation affords most of the advantages to be gained by the establishment of a ministry of justice which has received the commendation of high authority, both in this country and in England.[35] In many respects more is to be hoped for from such a restatement of the law than from a ministry of justice, for it enlists at once resources of scholarship and experience and the support of the Bar, which no ministry of justice could draw upon except under most exceptional conditions. It would be free from those exigencies which in America seem inevitably attached to efforts at reform carried on under the direction of public officials and which are inimical to scientific investigation and collaboration.

It would create a comprehensive and flexible scheme whereby our law might move at once in the direction of enlightened and considered reform with

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[34] Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision* (1918) 18 Columbia Law Rev. 230; Carpenter, *Court Decisions and Common Law* (1917) 17 Columbia Law Rev. 593.

[35] Pound, *Juristic Problems of National Progress* (1917) 22 Amer. Journ. of Sociology 721; Pound, *Anachronisms in Law* (1917) 3 Journ. Amer. Jud. Soc. 142; Lord Haldane, *Report of Committee on Machinery of Government* (1918) 12 Great Britain Sess. Papers 1; Cardozo, *A Ministry of Justice* (1921) 35 Harvard Law Rev. 113.

the best expert assistance without waiting for the sporadic and unrelated enactments of legislatures or the creation of the official machinery of a ministry of justice.

An incidental but nevertheless important benefit to be derived from the adoption of such a plan for the restatement of the law would be the lessening of the necessity or even the excuse in many cases for the writing of elaborate judicial opinions. For what need or excuse could there be in the great majority of cases, requiring only the application of settled legal rules, for courts to write elaborate opinions to support the application of legal rules or doctrines which had already been precisely stated and comprehensively annotated in a restatement of the law to which reference could be succinctly made.

I shall accomplish the purpose of these remarks if I succeed in emphasizing in your minds certain essential facts: First, that the common law system carries within itself elements which sooner or later will compel its reconstruction in important particulars and its restatement with reference to considerations which cannot be sufficiently examined and correlated in the course of litigations which result in the judicial declaration of law governing particular cases. These elements are: the multiplication of its authoritative literature; the vague and shifting content of its terminology; the uncertainty and confusion and lack of symmetry which is gradually permeating our law through the accumulation of precedents which are out of harmony with its system and its social objective. Second, that the time has now come, after centuries of legal experience and the development of an unprecedented legal material, when we are in a position, by employing the skill and expert knowledge of our profession, to begin the great task of bringing to our law that simplicity and symmetry of form which will enable it to endure, the source and guaranty of justice and right for uncounted generations yet to come.

The precise form which such a reconstruction and restatement should take; whether it shall receive legislative sanction enabling courts to accept and adopt it without necessity of avoiding precedent by resort to the devious method of fine-spun distinctions of fact; or whether we are to rely upon the sanction of its inherent merit, in the expectation that as law becomes more complex and uncertain Bench and Bar will turn to it as the only relief from an intolerable situation, are incidental questions which need not yet be answered, but they must receive our serious and thoughtful consideration and we must take on ourselves, as the members of a profession, the burden of finding wise answers to them if the common law is to live on and do its appointed work as a vital and energizing force in western civilization.

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