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Law and Precedent

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Tradition is the lifeblood of the law. A thorough familiarity with the history of the law must precede a scholarly understanding of its machinery. Those who decry "A Government of the Living by the Dead" forget that ideas are immortal. Social and economic necessity continue to mold and to modify the legal substance, but the actual materiality of that substance is rooted in historical precedent and is, strictly speaking, for all time unchangeable. A conscious law-making people will do everything within their power to apply the law according to an interpretation which will best suit the needs of their immediate code of civilization. Yet the law remains like the ball of mercury, pressed into a thousand shapes, but still retaining the essential marks of its original identity.¹

Or, perhaps, using a chemical analogy we might say that the law is a catalytic agent whose function it is to accelerate or to retard social change without ever undergoing any permanent material change in itself. An excellent example of this is the traditional significance of the seal as a presumption of consideration. The original importance of the seal resulted from the fact that the placing of the seal upon a document was accompanied by certain ceremonial conduct. The hot wax was applied with dignity and consumed enough time to raise the presumption that the contracting parties carefully considered their contractual conduct. Parallel with historical progress appeared advanced commercial methods so that the ceremonial affixing of the seal became a lost practice devoid of present practical application. The importance of the seal

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¹There is no better example of this than the gradual legal emancipation of women. At common law the husband and wife were considered as a single person. Such a theory created many inconveniences. Neither could make a contract with the other. Neither could commit a tort upon the other. Reform legislation began to modify the common law disabilities of married women. A married woman can today sue her husband or any other person for a property tort. A married woman today may freely contract with any person, including her husband. However, the enabling statutes today fail to abolish the common law theory entirely. Under the New York statutes, a woman cannot sue her husband in tort for assault and battery; nor for malicious prosecution; nor can they steal from one another; nor can they be guilty of conspiracy.

has thus been gradually diminished, so that in many jurisdictions the essential differences between sealed and unsealed instruments have been abolished. In the State of New York today a seal upon an instrument is neither conclusive nor presumptive evidence of consideration. We see, then, that an intelligently advanced people completely modified a strongly entrenched traditional principle in the law of contracts to meet the requirements of a modern commercial society.

However, it is also worthy of our notice that certain importance still clings to the sealed instrument. A sealed instrument is of a higher nature than an informal written contract or one not under seal.² In New York a right of action on informal contracts is barred if it is not brought within six years after such action accrues. A longer period, twenty years, prevails with sealed instruments.³ To render a sealed instrument operative, it must be delivered and accepted.⁴

Here we have viewed the gradual sequence of traditional law to the degree of modification but not obliteration. It is true that the substantial importance of the seal in the law of contracts has been abolished, but the *materiality* of the traditional significance of the seal is still zealously guarded. This has been the fate of almost all the law.

The dead past continues to govern, but each generation gives new youth to the law either by its own interpretation or by statutory change. Our own nation inherited the firmly entrenched principles of the English common law, and yet, within the lifetime of our judiciary, the courts on more than one occasion have found opportunity to point out that social and cultural transition amongst our people demanded doctrinal digression. Typically, without hesitation, the courts have so commented.

“It cannot be necessary to cite cases to prove that those portions of the common law of England which are hostile to the spirit of our institutions, or which are not adapted to the existing state of things in this country, form no part of our law.”⁵

Justice Cardozo, with magnificent subtlety, manipulated the legal putty to fill the mold. He rendered the opinions of the court in two tort cases that were thoroughly antagonistic upon the surface, so that the essence of the two decisions became har-

²Schoonmaker v. Hoyt (1896) 148 N. Y. 425, 42 N. E. 1059.

³CIVIL PRACTICE ACT, §§47 and 48.

⁴King v. Fragley (1912) 19 Cal. App. 735, 127 P. 813.

⁵Parker & Edgerton v. Foote (1838) 19 Wend. (N. Y.) 309.

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moniously reconcilable by virtue of their individual adaptation to the peculiar circumstances of each case. In *MacPherson v. Buick Motor Company*⁶ he said bluntly:

“Precedents drawn from the days of travel by stage coach do not fit the conditions of today.”

But with more pliable conditions the distinguished Justice was unwilling to discard traditional precedent. In *Matter of Babington v. Yellow Taxi Corporation*⁷ he was the scholarly jurist speaking. This was an appeal from an order of the Appellate Division which affirmed an award of the State Industrial Board made under the Workmen's Compensation Law. Babington, employed as a chauffeur by the Yellow Taxi Corporation, was ordered by a police officer to pursue another car and thereby met his death through accident. Under such state of facts the question arose as to whether Babington was killed in the course of his employment. Discussing the obligation of a citizen to aid an officer in arresting a suspect, Justice Cardozo commented:

“The duty goes back to the days of the hue and cry.”

He then cites as a typical illustration the Statute of Winchester, 13 Edw. I, enacted in 1258, wherein it was stated that every man shall have “in his house Harness for to keep the Peace after the antient Assise.” Developing his argument, he continues:

“The horse has yielded to the motor car as an instrument of pursuit and flight. The ancient ordinance abides as an interpreter of present duty. Still as in the days of Edward I, the Citizenry may be called upon to enforce the justice of the State . . . with whatever implements and facilities are convenient and at hand.”

Is not this enough to make it appear that the law is a vast fabric of relevancy in which the synchronization of legal principles creates a composite functioning mechanism whose source of energy is traditional?

During the time intervening between the two foregoing decisions, the scholarly Justice delivered a series of lectures at the Yale Law School in which he emphatically stated to the students:

⁶(1916) 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C 440, L. R. A. 1916F 696.

⁷(1928) 250 N. Y. 14, 164 N. E. 726.

“Nothing can take the place of rigorous and accurate and profound study of the law as already developed by the wisdom of the past. This is the raw material which we are to mould.”⁸

The beauty of the law is apparent only to those who have the vision which enables them to view its substance in its entire composition.⁹ Isolate a single judicial principle from the legal machinery and thus, standing alone and indifferent to the traditional pattern, the principle becomes inorganic. The law of itself is a huge structure; justice becomes its function. The important fact in this connection is that this legal structure is thoroughly a traditional structure, erected by time through the experience of men, and to this extent the law is an inheritance.¹⁰ However, all of that inheritance has not been beneficial and so each generation takes from the past what it can mold to its own pattern and rejects that which it cannot use. Our American system of law has so handled the common law of England. Said Justice Story:

“The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birth-right; but they brought with them and adopted only that portion which was applicable to their situation.”¹¹

⁸Cardozo, *THE GROWTH OF THE LAW*, p. 60 (Yale U. Press, New Haven, 1927.) These lectures were given in December, 1923, supplementing those given in 1921.

⁹“ . . . it is one of the chief beauties of our system of jurisprudence that it is flexible, and opens to take in all meritorious cases and give a remedy.” *Wade v. Malloy* (1878) 16 Hun. (N. Y.) 226.

¹⁰This is known as the doctrine of *stare decisis*: “To abide by, or adhere to, decided cases. It is a general maxim that when a point has been settled by decision it forms a precedent which is not afterwards to be departed from.”

The following opinion is a concrete defense of *stare decisis*: “The question is again presented whether we shall adhere to the former decisions of this court, or overrule them. The propriety and justice of the doctrine of *stare decisis* is stated with great force and marked ability by this court in the case of *Harrow v. Myers*, 29 Ind. 469, where it is said: ‘The question at the threshold is, whether a rule of property thus repeatedly declared by the court of last resort after earnest contest, and, it must be supposed, upon the most careful deliberation, should be deemed open to further controversy. The repose of titles is important to the public. Upon the faith of these decisions our people have, for a considerable period of years, invested their money in real estate, the titles to which they were thus again and again assured were not liable to be disturbed. There must be a just basis of confidence in the stability of judicial decision, somewhere in the history of a controverted legal question, when it may be confidently relied on that the question is settled . . .’” *Carver v. Louthain* (1872) 38 Ind. 530, 538.

¹¹*Van Ness v. Pacard* (1829) 2 Peters (U. S.) 137, 7 L. Ed. 374.

In spite of such select inheritance, the layman persists in asking: Why should I be governed by an inheritance that was applied hundreds of years ago to conditions that were so different from those which exist today?

The reason is substantial. The primary concern of the law is with the behavior of individuals so as to insure an orderly social organization. In the light of this concern, the layman must never forget that since the first formation of men into a society, over all those hundreds of years until the present moment, *the requirements for individual behavior so as to insure social order have never changed*. It is true that civilization has left a trail of complications, but as pointed out previously, that is why certain traditional legal concepts are constantly being modified but seldom being obliterated. In the words of Justice Cardozo we might say at least that "decisions are helpful" to mark a "direction and a tendency."¹³ This is what he meant by the "wisdom of the past."

But before we leave the contemplation of legal tradition there is one more step necessary to insure the impregnability of our proposition. The lawyer must constantly guard against the insinuation that his method of reasoning is *sui generis*. There are those who would baptize the legal brain-child with a name unknown to any other academic family. With due recognition of such skepticism I must resort to the realm of impartial and abstract thought known by classification as *Philosophy*, for which system of thought the scientific student has an undue reverence.

"There is a special service which the study of philosophy may render. Empirically pursued it will not be a study of philosophy but a study, by means of philosophy, of life-experience. But this experience is already overlaid and saturated with the products of the reflection of past generations and bygone ages. It is filled with interpretations, classifications, due to sophisticated thought, which have become incorporated into what seems to be fresh, naive empirical material. It would take more wisdom than is possessed by the wisest historic scholar to track all of these absorbed borrowings to their sources. If we may for the moment call these materials prejudices (even if they are true, as long as their source and authority is unknown),

¹³Varriale v. Brooklyn Edison Co. (1929) 252 N. Y. 222, 169 N. E. 284.

Or as was said by Justice Martin in Peck v. Schenectady Ry. Co. (1902) 170 N. Y. 298, 63 N. E. 357, ". . . notwithstanding the fact that many jurisdictions have held a contrary doctrine, still a principle which has been so thoroughly ingrafted upon the law of our own jurisprudence should not be lightly disregarded."

then philosophy is a critique of prejudices. *These incorporated results of past reflection, welded into the genuine materials of first-hand experience, may become organs of enrichment if they are detected and reflected upon.* If they are not detected, they often obfuscate and distort. Clarification and emancipation follow when they are detected and cast out; and one great object of philosophy is to accomplish this task."¹³

Thus John Dewey, in his profound volume on *Experience and Nature*,¹⁴ commits himself upon the value of tradition to the law as described in the decisions of Mr. Justice Cardozo.

There is a value to experience which has a superiority over every other form of knowledge. For experience is proof. The procedure and substance of the law are a residue, not the corpus. Therefore the emphasis on history. It is a liberal viewpoint, although many have taken the opposite and mistaken viewpoint. One cannot trace the lost river by analyzing a specimen of its water, but only by examining the direction of its bed. In the same manner one will never determine the development of the law by examining legal specimens but only by searching for its historical bed through which it flows and by which its course is determined. When an insistent voice says: "Let us analyze the problem *my way*," the judiciary may answer with the voice of authority: "History forbids this construction."¹⁵ In some cases, "the historical prop failing, the prop or fancied prop of principle remains."¹⁶

The layman fails to perceive the picture as a whole. The court answers his general attack in *Bergman v. Scottish Union & Nat. Ins. Co.*:¹⁷

"Popular notions of the administration of justice may approve any judgment which is considered right, irrespective of the methods by which it was obtained. Experience has taught us, however, that without forms and regulated procedure chaos and confusion soon develop and evils arise which make summary and hasty dispositions more unfair and unjust than the slow but sure methods of the law."

¹³Italics are mine.

¹⁴(1929) p. 37.

¹⁵*Lord v. Equitable Life Assur. Society* (1909) 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420.

¹⁶*Steward Machine Co. v. Davis* (1937) 301 U. S. 548, 580, 81 L. Ed. 1278, 57 S. C. 883, 109 A. L. R. 1293.

¹⁷(1934) 264 N. Y. 205, 190 N. E. 409.

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Mr. Justice Brandeis stated,¹⁸

“*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right . . . The Court bows to the lessons of experience . . . recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function . . .”

To which one might add that,

“The importance of observing the spirit of this rule cannot be overestimated, for, while justice in a given case may be worked out by a decision of the court according to the notions of right which govern the individual judge or body of judges comprising the court, the mischief which will finally result may be almost incalculable under our system, which makes a decision in one case a precedent for decisions in all future cases which are akin to it in the essential facts.”¹⁹

A close study of the philosophy of precedent will lead to three attitudes on the part of the judiciary. The first is that,

“It is better to adhere to established general rules than to attempt to work out equity in exceptional cases.”²⁰

The second is that

“No inflexible rule can be laid down. Each case must in a measure be a law unto itself.”²¹

The third takes the middle road, that

“While that fact (precedent) may not be conclusive upon the question, it is entitled to weight . . .”²²

The latter attitude represents the utmost in liberality in regard to the doctrine of *stare decisis*, and is an attitude that is often followed. Usually the court will be blunt and say, for instance, very tersely that

“Whatever line of attack on legislative power is taken, the assault is turned back by numerous decisions on the subject.”²³

¹⁸*Burnet v. Coronado Oil & Gas Co.* (1932) 285 U. S. 393, 52 S. C. 443, 76 L. Ed. 815.

¹⁹*Roberson v. Rochester Folding Box Co.* (1902) 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828.

²⁰*Clark v. Sickler* (1876) 64 N. Y. 231, 21 Am. Rep. 606.

²¹*Fischer v. Blank* (1893) 138 N. Y. 244, 33 N. E. 1040.

²²*Conrad v. Conrad* (1908) 124 App. Div. 780, 109 N. Y. S. 387.

²³*In re Morse* (1928) 247 N. Y. 290, 160 N. E. 374.

The situations of life do not change. Man does not change. It is neither life nor man that changes, but man's discovery of life that changes, and this leads to the inadequacy of former law. Even when changes appear, the court has been reluctant to say:

“However, without attempting to justify this distinction as logical or reasonable in most cases, we nevertheless are forced to realize that as the result of inheritance and frequent repetition the rule has become too firmly established to be disregarded.”⁸⁴

The judiciary has never claimed to seek thoroughly abstract decisions but constantly admits that a certain opinion is not even a matter of pure logic “but rests more upon authority and precedent than reason.”⁸⁵ Let not the layman abhor this condition. Behind the vulnerability of a human judge's mind, but before the defendant, invisibly stands the wisdom of the ages.

⁸⁴Wright v. Wright (1919) 225 N. Y. 329, 122 N. E. 213.

⁸⁵Vanderzee v. Slingerland (1886) 103 N. Y. 47, 8 N. E. 247, 57 Am. Rep. 701.