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CERTAINTY AND JUSTICE.

The lawyer in advising his clients is really in great measure bound to assume the *role* of a prophet. When he tells them what he thinks the law is, they cannot be certain that his prediction will come true until it has been upheld by the highest appellate court in the land. If he is not so fortunate as to obtain a favorable decision he must console himself with the thought that "*eventus arbiter stultorum*," and hope that his client is a philosopher. Unlike the prophet, however, he has no unfailing illumination from above, but must content himself with obtaining what light he can from the law reports and endeavoring from the past to judge the future. He is thus little more than an expert guesser.

That delightful writer and cogent thinker, Buckle, has said that a knowledge of history is valuable in that it furnishes us a measure by which we may predict the future from the past. This is all that the lawyer can do by examining past decisions. There is in all modern states to-day a general conflict between certainty in the law and concrete justice in its application to particular cases; in other words, between the effort to have a general rule everywhere equally applicable to all cases at all times and the effort to reach what may seem to be concrete right dealing between the parties at bar upon the particular facts in each case.

In actual practice the pendulum swings first one way and then the other. The social necessity for stability in the law is unquestioned. Law is necessarily a rule of action, and unless a court decides cases according to some cohesive plan or rule, the

justice administered is scarcely deserving of the name of *law*, however greatly it may fall in with the ethical notions of the community as regards any particular case. On the other hand, when rules become so fixed and rigid that they are difficult or impossible to change, the law is out of touch with prevailing moral ideas, which like all other ideas are constantly progressing; the law thus necessarily becomes a clog upon national development, an incentive to revolutionary reform.

Among semi-civilized people, absolute adhesion to the letter of the law is the prevailing system. In the ancient Roman law of the twelve tables, contracts in order to have any validity had to be made with specific formulae, or the repetition of certain particular words. It was not the substance of the contract relation—that is to say, the meeting of the minds and the consent of the parties as to the subject matter of the contract—that was looked to, but the formalities by which that meeting was evidenced. The sanctity attached to the use of a seal attests the mystic value of forms among primitive peoples.

In the ancient common law, before the growth of the equitable jurisdiction of the chancery, we see the same condition. It is illustrated by the story of the individual who, going into a silk merchant's, asked the merchant for how much he would sell him enough silk to go from ear to ear, and the merchant immediately named the price. Thereupon the purchaser, lifting his cap, showed him a place where the ear should be, and pointing to his remaining ear, said: "My other ear is at Newgate." As the ancient story goes, the merchant was forced to give him several hundred yards of silk for the price of a few inches. The same story is told in different forms and is apparently an Indo-European legal legend.

Again we find a literal adherence to the letter of the contract in the blacksmith case. An ignorant individual offered to give a blacksmith two pence for the first nail, four pence for the second and eight pence for the third, and so forth. When the four feet were shod he found that it had cost him a number of pounds, owing to his absolute ignorance of the laws of geometrical progression. Nevertheless, he was held to the letter of his bargain.

Again, in the medieval world, trial by ordeal supplanted to a great degree the rational methods of determining facts. There was no doubt felt of the guilt of the man whose feet were burned by walking on red hot iron, and this method had the

advantage of leaving open no questions for dispute. But with the growth of modern civilization, came the necessity of applying to cases a general ethical standard to some degree at least in accordance with that of the age.

Nevertheless a fair degree of certainty is a necessity in every system of law; as a consequence, the common law doctrine of *Stare Decisis* was gradually evolved by the common law courts as one mode of bringing about some sort of coherence in the justice administered and in formulating that justice into rules of law. That the doctrine is an old one does not admit of doubt and modern research seems to indicate that it was first vaguely adumbrated as far back as the fourteenth century. The truth is that the doctrine is founded upon one of the peculiarities of human nature which in its ultimate analysis is based upon the imitative faculty in man. The mass of men will naturally follow in a beaten track, rather than branch out into new and untrodden ways, and the courts naturally fell into the habit of following precedent, just as merchants fall into the habit of following certain usages of trade which after a time harden into customs. In this way the judges by making a line of uniform decisions on any question create a judicial custom which in its turn acquires, almost unconsciously, the force of law.

That the English courts have gone much farther than our own in upholding the dignity of the doctrine of *Stare Decisis*, may be easily illustrated by one or two prominent instances. In 1843 the famous case of *Queen v. Millis* (10 C. and F. 534) came before the House of Lords. The case was a prosecution for bigamy. The question there involved was as to whether a marriage contract in Ireland, without the presence of an ordained clergyman or priest of the Church of England, was valid. The Marriage Act not applying there, the common law alone governed. It was contended that in England the presence of a priest had been absolutely necessary to such marriage by the rule of the canon law prevailing throughout western Christendom, up to the time of the decree of the Council of Trent, which, owing to the separation of the Church of England from the Roman Catholic Church, had not gone into force there. The House of Lords, however, decided from one or two precedents, which historic research has now discovered were erroneously interpreted, that the law of England in this particular was different from that of the rest of Western Europe and that a marriage without the presence of such priest was invalid. The decision

was reached by a divided court, the members of that tribunal standing three to three, the form of the question, however, being such that the decision was necessarily in favor of the validity of the marriage.

In 1861 this historically erroneous decision, reached by an equally divided court, was brought in question before the same tribunal in the case of *Beemish v. Beemish* (IX H. L. 275). The very same question being again presented, a majority, at least, of the judges were of the opinion that the decision of *Queen v. Millis* was reached upon a false historical basis and that the precedents adduced from the early English law to support that decision, were misunderstood by the court. Lord Campbell himself took that view. The court nevertheless felt bound to follow that case and decided, contrary to the historic fact, that a marriage without the presence of a clergyman of the Church of England was and always had been invalid at the common law.

In rendering this decision, Lord Campbell said that he felt himself bound by the doctrine of *Stare Decisis* and that to depart therefrom would be a usurpation upon the part of the House of Lords. His theory was that the law once laid down by that tribunal became the law of the land, was binding upon the tribunal itself, as well as upon every other subject, and was changeable only by the supreme authority of Parliament. This case contains the strongest utterances that I have been able to find upholding the absolute obligation of the rule of *Stare Decisis*. "Had the present case been brought here by writ of error previously to the decision of this House in the year 1844 in the case of *Queen v. Millis*, I should not have hesitated in advising your Lordships to affirm the judgment in favor of the validity of the marriage and the legitimacy of the respondent."

After giving his reasons for believing that a marriage without the presence of a priest was valid at the common law, he continues: "However it must now be considered as having been determined by this House that there could never have been a valid marriage in England before the Reformation, without the presence of a priest episcopally ordained, or afterward without the presence of a priest or of a deacon. . . . My Lords, the decision in the case of the *Queen v. Millis* that unless a priest especially ordained was present at the marriage ceremony the marriage was null and void and the children of the marriage were illegitimate, seemed to me so unsatisfactory, that I deemed it my duty to resort to the extraordinary proceeding of entering a protest against it on your Lordships' journal."

And yet he continues: "But it is my duty to say that your Lordships are bound by this decision as much as if it had been pronounced *nemine dissentiente* and that the rule of law which your Lordships lay down as the ground of your judgment, sitting judicially, as the last and Supreme Court of Appeal for this Empire, must be taken for law till altered by an act of Parliament agreed to by the Commons and the Crown as well as by your Lordships. The law laid down as your *ratio decidendi* being clearly binding on all inferior tribunals and on all the rest of the Queen's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law and legislating by its own separate authority." The fiery law reformer, Bentham, in his dread of judicial encroachment could hardly have gone farther in limiting the power of appellate courts.

It must be remembered, however, that even in England that useful and somewhat modern instrument—the distinction—is not unknown and the results of strict adherence to *Stare Decisis* may in many cases be escaped or mitigated by the use of that now highly-developed weapon, even where to the ordinary mind the distinction would not seem to involve even an appreciable difference.

It is a rather curious thing that Lord Campbell's views, which, at the time of their utterance, seemed to be in every respect most conservative, were enunciated in almost the same language by Mr. William J. Bryan in his campaign as nominee of the Democratic Party for the Presidency in 1896. At that time he was generally looked upon as a radical, if nothing worse, and his views as to the Supreme Court were the subject of most severe strictures. I do not intend to comment upon their wisdom or unwisdom, but his underlying view, as I understand it, was that the Supreme Court once having passed upon a question, that decision became the law of the land and was binding upon that august tribunal as well as upon all other American citizens. That view, which to many seemed so startling as to savor of revolution, in any event had in it nothing of novelty, and if Mr. Bryan did not cite the authority of Lord Campbell, it was probably because he had overlooked it. Whether the doctrine as enunciated by him would have sounded less harsh had it been backed by the authority of that great name, it is impossible to say. In the heat of political conflict it might have mattered little.

It is a significant fact, however, that the same doctrine

should be considered as over-conservative or as over-radical, dependent upon the position of the person announcing it and the circumstances of its announcement.

Mr. Justice Holmes, one of the greatest students of the development of English law, adopts what would seem to be a very different standpoint. He believes the judge-made law to be a slow and steady growth which must adapt itself to present needs and present necessities, and that the formal rules of the syllogism do not and should not be allowed to fetter the judges in reaching a result compatible with present ethical notions and sound public policy.

"On the other hand, in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the ground to which they have been transplanted."

This latter view would seem to be the one more generally prevalent in the United States. The highest courts, although expressing great regard for the doctrine of *Stare Decisis*, do not hesitate to overrule prior decisions upon the ground that they were erroneously rendered, as the Supreme Court itself has done upon several occasions and notably in the legal tender and income tax cases and the passenger cases. The soundness of this latter view depends upon how far conformity to present standards of justice is more important than certainty as to what the law actually is. It would surely be better if more cases were overruled directly than by the indirect method of the distinction.

By the indirect method a case once deemed to be law is

gradually so honeycombed with exceptions and distinctions that after a certain number of years it finally collapses—in the meanwhile, however, like a dangerous derelict, spreading confusion among litigants, and consternation, real or feigned, among awyers.

It is to be deprecated that in many cases respect for "*la chose jugée*" should not allow the case to be directly overruled. In the long run it may well be questioned whether the maintenance or the dignity of the doctrine of *Stare Decisis* profits by the respect apparently paid to it through a resort to distinctions that do not distinguish.

On the other hand a strict adherence to the adjudged cases would prevent all progress in the law, as has been pointed out by Mr. Justice Matthews in the famous case of *Hurtado v. California*, 110 U. S. 516, and would result in a rigidity incompatible with social progress:

"To hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."

That delightful and most erudite old writer, Montaigne, gives an instance of how far false respect for a judicial decision may be carried. He says that he heard of a case occurring in his time in which a thief, having been convicted by the court of a certain province, was condemed to death. While awaiting execution the judges of a neighboring province sent word to the judges of the tribunal that had condemned the supposed culprit, that the real culprit had been found, had confessed his guilt and was about to be punished. The judges of the first province held solemn deliberation on the question as to whether justice required that the innocent man, adjudged guilty, should be freed or whether respect for "*la chose jugée*" did not require that the court should proceed with the execution of the sentence. The latter view prevailed. The dignity of the tribunal was thus sustained by the prompt and solemn execution of the legally adjudged guilty but in fact innocent victim.

The truth is, that the pendulum is constantly oscillating between a desire for certainty on the one hand and a desire for flexibility and conformity to present social standards upon the other. It is impossible that in a progressive society the law should be absolutely certain; it is equally impossible that the

courts should render decisions conforming to the prevailing notions of equity without thereby causing a considerable degree of uncertainty, owing to the constant fluctuations in moral standards and their application to new and unforeseen questions.

New ideas are often if not always due to economic changes and many views regarding natural rights or individual liberty which were held fundamental in the eighteenth century, sometimes find little support in the public opinion of the twentieth, by reason of changed social and economic conditions.

The rights of the individual were once opposed to those of the state alone. He is now opposed to the state and to those great aggregates of wealth in corporate form and possessing to a great degree public powers. The rules evolved before the rise of corporations as the main factors in the business world are not always applicable to present conditions.

When a series of questions has finally become settled, such as the law relating to partnership or negotiable instruments, it is because that particular branch of business has reached for the time being, at least, an ultimate form and we have certainty in law because we have fixity in business custom and opinion.

It has been happily said that the sense of equity of one generation is generally the law of the next, but this very fact involves a slow process of change and adaptation resulting in consequent uncertainty.

There is much criticism at the bar at the present time, of the growing uncertainty of law, as enunciated in judicial decisions; panaceas of all kinds are suggested by zealous and sometimes intelligent men, but the law reformer is a dangerous animal and one calculated often to do infinite mischief. He necessarily believes himself to contain more concentrated wisdom than all the generations of lawyers and judges who have gone before, and actual experience has proved that his self-valuation is not infrequently an over-appraisal.

It is perhaps not unprofitable to inquire whether the people of the Continent of Europe are so much better off than ourselves in regard to certainty in their law. An extended attempt at comparison on this point would involve work far beyond the scope of this article. A few reflections, however, upon the continental method may not be without interest.

The fear of the uncertainty of judge-made law and the usurpation of courts has been even more prevalent in Europe than in America. This fear is well illustrated by what took place at the time of the promulgation of the Prussian Code of

1794. It was understood and the judges were instructed that if a case of first impression or a case not absolutely covered by the letter of the code should arise, they were to refer to the Prussian Legislative Council for decision, which decision would, of course, have taken legislative form. Some cases arose in this way and were referred to the council, which was an active body and whose time was taken up with other matters. The cases thus sent to them from the courts were quietly dropped and the judges were informed they would have to proceed as best they could without legislation for each particular case, and thus that attempt to curtail possible judicial encroachment failed utterly.

The French law was supposed not to recognize the authority of adjudged cases, but in fact the result reached is very similar to that in England and America. The Court of Cassation was established for the purpose of unifying judge-made law, which had been made uniform as far as legislation could effect it by the Code Napoleon. The Court of Cassation has jurisdiction over all cases coming up from the various courts of appeal, of which there are some twenty-six, in France, and, by the Statute of 1837, the decisions of the Court of Cassation were made authoritative, so that they had to be followed by all courts of appeal. This statute was made necessary by the hopeless conflicts which had arisen between the various courts of appeal, and the uncertainty thus engendered was so great as to call for radical remedy. But in addition to the decisions of the Court of Cassation, the French judges in the courts of appeal naturally desire to have a certain amount of uniformity in their decisions and therefore where one or two similar decisions are rendered they are almost invariably followed and a judicial usage on the subject is thus established much as in England or America. The only practical difference would seem to be that the French courts will not hesitate to overrule a case which they believe has become antiquated or was erroneously decided originally, and thus they do not resort to the method of the distinction which with us not infrequently accomplishes the same result through fiction. As a consequence the French lawyer is confronted with a great number of reports, the number of reported opinions in France being perhaps greater than that of any one state of the Union.

The Code Napoleon left certain great gaps which could only be filled in by legislation or by judge-made law. As corporations had scarcely begun to develop at the time of the adoption

of the Code, there was almost nothing in that body of legislation to cope with the modern conditions which grew up thereafter, and hence under the Second Empire the void had to be filled and a detailed law of corporations enacted.

In many instances provisions of the Code have been in effect wholly repealed by judicial decisions, so that a directly opposite result from that desired by the codifiers has been in fact reached. Trusts were abolished by the Code and yet have been to a great extent revived by the courts. State annuities were not attachable under the French law, but by a long line of decisions a result has been reached which in fact makes them attachable for debt, and other instances to the same effect might be cited.

It must also be remembered that the Code, admirable as it is by reason of its lucidity, due largely, if not wholly, to the French intellect and language so wonderfully adapted to the expression of clear thought, is now becoming in many respects antiquated. A movement is on foot in France to change the Code in essential particulars. The nation feels that its system of law has been more or less outgrown and finds itself in the condition of a boy who has outgrown his youthful clothes. The system of French law is criticised as one incompatible with the notions of to-day and as belonging in many respects to a social system which has in great measure passed away. The French Minister of Justice at the recent celebration of the centenary of the "Code Civil," used the following significant language:

"The Code Civil did not and could not foresee everything. It would be puerile to deny that it needs revision, for in fact Parliament does revise it daily. Already many drafts of laws on corporations and insurance are presented for enactment into legislation which really present the appearance of special codes and in addition the work of making a Code of Labor is progressing.

"Thus the great voids in the Civil Code are being filled in. *Moreover judicial decisions reveal from day to day the new needs of society and apply the will of the nation to particular cases, disclose new formulae and reveal new sources of law by providing new sources of light.*

"I would ask to have a great commission appointed to compare our Civil Code with those of other peoples, to note the differences, to analyze the solutions of the new problems adopted by foreign legislations, and to study the solutions reached by our neighbors, in order that we may profit from the work of all, as all have profited from the work of the French jurists.

"The more the intellectual domain of humanity is enlarged, the more the development of industry and of science diversify

forms of production and forms of property, the greater the political ascendency of the proletariat tends to cause a recognition by society of new rights and of contracts heretofore unknown, the less can it be pretended that a code can contain and hem in the powerful movements of a nation's life.

"What then is the use of our re-making our Code from the beginning? It never prevented changes in the law, nor did it ever paralyze the law. It can be adapted to every change and seems like a well-conceived plan where every degree of progress may naturally be placed under its proper classification."

It is thus very doubtful whether the French law is any more certain than our own. If ours be more uncertain we are inclined to believe that it is because economic changes here have come faster than in other countries, and greater pressure has been put upon the courts to decide cases arising out of novel business situations.

The fact is that the two systems, while founded upon different theoretical bases are tending in fact to reach very much the same results in very much the same way. Law reformers have been for a long time suggesting the codification of our law. As far as greater certainty is concerned, I do not see any advantage to be derived from codification. The objections to codification are, first, the difficulties of obtaining from our legislatures a good code and one that is not in constant danger of amendment for the purpose of meeting specific cases. That *monstrum horrendum*, the Code of Civil Procedure of New York, is so recent and lamentable a monument of the failure of legislative attempts at codification that it is not necessary to refer to it in detail.

The foreign codes have the advantage of a fixed and settled terminology derived from the Roman law. They were made by experts and are little subject to legislative change. In addition it must be remembered that the making of the Code Napoleon, as well as that of the recent German Code, was due to a desire for uniformity in law rather than for certainty. As Voltaire remarked: "One changed systems of jurisprudence each time one changed his omnibus in pre-revolutionary France." Therefore, the Code was for the purpose of giving the nation a national law rather than the obtaining of certainty in any one or more branches of the law in a particular jurisdiction. Some of the continental codes are very defective and have hindered legal development.

The French Code of Commerce is inferior to the Code Civil in every respect. It shows one of the most marked defects of

code law in that it codified commercial usages of the seventeenth century and thus retarded the development of French law in those important particulars.

Another objection, and perhaps the main one, to a code, is that even a well-constructed code would help us little in making the law more certain. The general principles or rules on many subjects are pretty well settled and easily stated. The common law of tort or partnership and negotiable instruments is admirably summed up in various text-books and could without great difficulty be codified, but that would do little to help us out of our difficulties for the question arising in these branches of the law is not generally what is the rule of law, but which of several rules apply to the facts of the case. The divisions that have taken place in our Supreme Court have not been due to common law questions, but to questions arising under various statutes and under the Constitution of the United States, one of the clearest and most admirable of written instruments. As the most familiar instance of this, it is only necessary to cite the insular cases, the legal tender cases, the income tax cases and the anti-trust law cases. In each one of these, the difficulty has been to ascertain whether the law applied to a particular state of facts and if it did apply, which portion of it was applicable. Did the Sherman Act intend to codify the common law? Was it merely declaratory or was it revolutionary? The answer must be sought in many opinions extending over a period of some ten years. Such cases cannot be avoided and constantly arise under statutes.

And again, should we codify our law, the old decisions would be cited as an attempt to show what the law was intended to do and we would not get rid of the masses of case law which now so sorely burden and perplex the practitioner.

The civil law of Rome grew largely out of commentaries on the Twelve Tables, and it was really the commentators who expressed the law, long after the Twelve Tables had ceased to represent the legal views of the time. Justinian endeavored by law to prevent the writing of commentaries on his Code and Napoleon is reported to have exclaimed, when it was announced to him that a commentary on the code had already appeared: "My code is lost!" There is thus no patent remedy for the situation of legal uncertainty that confronts us. It is due to changed social conditions and the conflict of new ideas with old ones, which is now at an acute stage.

Mr. Lea, the distinguished American historian, has said

that if you want to know the ideas that dominate a particular age, you must examine its jurisprudence. Perhaps the complex and confused condition of our jurisprudence is a more faithful reflex of the public mind than we realize. Certain great branches of the law have been pretty thoroughly worked out and the ideas of the community thereon crystallized into positive law. Whether this has been codified or is found in the decisions, is of little importance. On other great questions such as the relation of capital and labor and of corporations to the state and the individual, the public mind is in a flux. It will be impossible to get uniformity in this regard until we have some uniformity in opinion, which will then reflect itself through legislation and through judge-made law. The one will be confused and incoherent and the other vacillating and uncertain until such a time arrives.

For the present, reforms in the administration of the law, the selection of able men as judges, the leaving of procedural questions, as has been done in Massachusetts, largely to the regulation of the courts themselves by rules, are all desirable and immediate objects of attainment, but to make the law certain on subjects as to which the community itself is most uncertain, is a task that never has yet and never will be accomplished. If the Hindoo laws are unchanged and unchangeable, it is because the Hindoo himself has not changed and does not wish to change his opinions and ideas nor the actions which flow from them. When we reach that stage of development the question may become academic.

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