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RECENT TENDENCIES IN ENGLISH JURISPRUDENCE.*

For the purpose of this lecture it is sufficient to define jurisprudence as the study of the general principles of law and their systematic arrangement. Perhaps at no time in English legal history has the emphasis on the study of law from the scientific standpoint as contrasted with the purely practical exposition of its various rules been as marked as it is at the present time. Signs of this interest are to be found not only in a rapidly growing literature on the subject itself,—such as the late Professor Vinogradoff's "Historical Jurisprudence," Mr. C. K. Allen's "Law in the Making," and Judge Dowdall's articles in the *Law Quarterly Review*—but also in the point of view of the writers who are dealing with the more technical subjects. No longer are they satisfied merely to state the law as it is. They are attempting to analyze the various principles involved, to test them logically by fitting them into the law as a whole, and to consider the extent to which they meet the needs of present-day society. The well-known distinction between analytical and historical jurisprudence and what Austin termed "the science of legislation" is becoming blurred. Scholars are realizing that law is not a static concept which can be described as at rest, but is a continually changing whole which is, both consciously and unconsciously, being adapted to novel conditions. Take, for example, two textbooks of major importance published during the past year. In the seventh edition of Salmond on Torts, edited by Mr. Stallybrass of Oxford, the emphasis is now placed on a discussion of the general principles on which this most difficult branch of

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the law is based, and a consideration of the modern tendencies in that subject. The student is no longer misled into believing that the law of torts has reached its maturity. In Salmond and Winfield's *Law of Contracts*, the learned authors introduce the student to the subject with a lengthy first chapter in which the nature of a contract is submitted to the most subtle analysis. Contrast with this the first chapter in Anson in which all the difficulties are light-heartedly avoided. If time permitted it would be possible to enumerate here a large number of recent books and articles in which this same interest in the jurisprudential aspect of legal questions has been shown. It is only necessary, however, to refer to the greatest legal work of the 20th century,—Holdsworth's *History of English Law*. Here we find no barren statement of historical facts but a keen analysis of the development of legal ideas which is historical jurisprudence at its best.

Why at the present time do we find this emphasis on the philosophy and science of the law? There are, I believe, two primary reasons. In his chapter on Ulpian in that interesting book, "*Great Jurists of the World*,"¹ Mr. Ledlie said:

The social and political conditions of the age in which Ulpian lived seem ill adapted to the growth and development of a great legal talent. A period of stability and tranquility, in which the supremacy of the law is secure and the search for truth undistracted by the play of violent, elemental passions, would appear indispensable for the fruitful pursuit of legal as of other kinds of knowledge.

But experience has shown that it is during periods of stability and tranquility that the study of jurisprudence is inclined to languish. It is during the stirring times when the supremacy of law is insecure and its various principles and doctrines are being questioned that we find legal philosophy of major importance. In the same book in which Mr. Ledlie's chapter appears, the lives of five English jurists are given. Each of them lived at a time of crisis in English history, and each of them was directly concerned in the events of the day. Bacon, whose star has recently been dimmed by the works of Professor Broad of Cambridge and of Mr. Lytton Strachey, living in the reigns of Elizabeth and James I, was not only a spectator but a participant in the most dramatic period of English legal history. Selden, the most profound student of the law until the time of Maitland and the champion of political freedom in both his literary and professional work, defended Hampden

¹ Continental Legal History Series.

and was imprisoned for the part he took in the Petition of Right. Hobbes, born in the year of the Spanish Armada, exiled from England for eleven years from 1640-51, had his books publicly burned and was apprehensive of a like fate. Bentham saw the American Revolution, the French Revolution, the Napoleonic Wars, and the beginnings of the Industrial Revolution. Lord Stowell, the creator of the modern international law of the sea, found his opportunity in the Napoleonic wars. None of these men lived during a period of stability and tranquility; it would be more in consonance with experience to say that the jurist, like the warrior, flourishes in a time of conflict.

Nor is this strange, for when conditions are static the main demand upon legal scholarship is to perfect the particular rules of law. In periods of great social upheaval, however, it is necessary to do more than this, for it becomes essential to understand the bases of the law and to test the principles on which they are founded. The law has to be modified to satisfy novel conditions, and to change a thing it is necessary to understand not only what we wish to change it to, but what we are changing it from. Perhaps this can be illustrated by an analogy. When a vessel is in the harbor its engines are overhauled, its decks are scrubbed, and the barnacles which cling to its hull are scraped away. But when the ship is at sea it is necessary to do more than this,—the bearings must be taken and the course must be mapped. At the present time the law is at sea. The social and economic conditions of the past have in great part been altered to adapt them to the life of today, and it follows that the legal conditions, which are an essential part of that life, must be altered too. As lawyers we must take our bearings, and it is therefore that we are turning to the sun of legal philosophy.

A second reason for the growing interest in jurisprudence is that English legal scholars have discovered that English law can be studied scientifically. During most of the nineteenth century the leading books on jurisprudence were written by scholars who were primarily civilians and whose concepts and illustrations were necessarily taken in large part from Roman law. This system, so conveniently arranged for the study of general principles, so rich in its literature, with a long and brilliant history, is peculiarly adapted for such a study. Austin was not alone in feeling that,² "Turning from the study of the English to the study of the Roman Law, you escape from the empire of chaos and darkness, to a world which

² Jurisprudence, p. 57.

seems by comparison the region of order and light." It was only natural that such great scholars as Maine, Markby, Holland and Clark should go to the Roman law for most of their material. Rights, duties, persons, possession,—all these were discussed from the standpoint of the Digest. But for the English reader these books were insufficient in one essential particular,—they did not deal primarily with his own law. However interesting a foreign system may be, it cannot be as interesting as one's own. Sir Frederick Pollock and Sir John Salmond did great service to English jurisprudence when they shifted the emphasis from Roman to English law. As Sir Frederick said in the preface to his *First Book of Jurisprudence*:

But I have written, in the first place, for our own learners of the Common Law on both sides of the ocean, and my work stands to be judged by their proof in using it. . . . The preference of English examples and illustrations in the first part, [is] intended as a protest against the habit of regarding "jurisprudence" as something associated with a little knowledge of the laws of every country but one's own.

That the reader's interest in a work on jurisprudence will depend to a great extent upon the ability of the writer to bring it into relation with present day problems, is illustrated by the importance of the subject in the United States. Dean Pound's preeminence as a law teacher is not due solely to his encyclopedic learning. He has shown, with a skill which no other scholar has equalled, that the development of the law is influenced by the dominant philosophy of the time, and that it is now possible for the scientific study of law to be an introduction to social engineering. It is because his theories are of practical use in solving the difficult problems of present day life that he is listened to with such respect not only by the law schools but also by the judges and the bar associations. Brilliant as Judge Cardozo's "*The Nature Of The Judicial Process*" is, it would not have run like wildfire through the law schools if it had not dealt with a matter which is of peculiar concern to the future of American law.

Perhaps the English jurist is faced with fewer problems than are his brothers in Canada and the United States, for in England, where the division between the present and the past is less marked than it is in the rapidly changing conditions of America, there is not the same need for legal adjustment. Nevertheless there are many branches of the law in which, the fundamental concepts being still vague and uncertain, juristic theories will prove to be of importance in guiding the course of the law. The following enum-

eration of some of the more difficult questions which have remained unanswered is necessarily imperfect, but will, it is hoped, be sufficiently complete to give an idea of the scope of the field.

1. INTERNATIONAL LAW.

In this subject we are faced at the outset with the question whether or not international law can correctly be termed law. It is less than a hundred years since Austin asserted that it was not law in the strict sense but merely positive morality. It would be possible to cite a considerable number of authorities who support the view that international law, as we know it, is no more than a collection of uncertain customs and particular treaty agreements. According to them the Great War has proved that it has no validity. There is no sovereign who can lay down the law and no court which has power to enforce it. We will not get international law in the true sense until we have a super-state. It is therefore necessary to turn the League of Nations, or some similar body, into such a state so as to enable nations to live under the rule of law. The majority of international jurists, on the other hand, claim that international law is law in the true sense. Certain rules are clearly established and are held to be binding on all countries. The war did not destroy international law any more than a thief by stealing can destroy the law of larceny. We do not need a super-state provided that there is a court which can declare what the rules of law are. Nor is this conflict as to terms a mere juggling of words, interesting perhaps to the pedantic scholar but unreal in practical content. Professor MacIver, writing from the University of Toronto, has said in his outstanding book "The Modern State":

If we understand the foundations of constitutional law, we have no difficulty in perceiving the genuine sanctions which in part already belong, and in full may yet be attached, to international law. The sanction of all law goes back to public opinion. If we consider political law, we shall see that there are certain agencies of definition and enforcement which are absent in the case of constitutional law. Hitherto international law has lacked not only these agencies but also the unity of opinion. Were the latter achieved, the former, in so far as they might be necessary, would follow.

This public opinion will be directly influenced by the ability of the jurists to explain the authority of international law and its binding character. Grotius, by means of the Law of Nature, succeeded in persuading the civilized world to take the first hesitant steps along this novel path; now that the Law of Nature has been

discredited we must find an adequate substitute by means of which the world can be convinced that it is as great a crime to prosecute a war in violation of international law as it is to commit a murder.

International law is also faced with the problem of defining a state. The comparatively simple categories of the nineteenth century have become useless in the complexities of the post-war world. What is the effect of Canada's separate representation in the League of Nations? Has she the power to declare war upon a foreign nation, and what would be the effect upon the rest of the British Empire if she did so? On the other hand, if Great Britain declares war, does this necessarily involve Canada or can she remain neutral? What is the legal position of the mandated territories, and of Egypt? It is obvious that the fundamental principles of international law will have to be readjusted to fit these novel situations.

2. CONSTITUTIONAL LAW.

The constitutional theory of the past has been based upon a simple conception of the state. Austin's idea of a sovereign and subjects was no more than a description of the British Empire at the time in which he wrote. But today we cannot find a sovereign in the Austinian sense in the Empire for it is obvious that the King in Parliament cannot in fact legislate for Canada or Australia without their consent. The constitution of the Irish Free State has emphasized this point. When theory and fact differ, it is a good rule to scrap your theory. As Professor Kennedy has said in "The Constitution of Canada"⁴:

Without doubt Canada is a nation, and beyond question Canada owns a sovereignty. The situation creates both new problems and new visions. It is part of the whole world situation which the War emphasized. Absolute sovereignty in the last resort proves to be an illusory but most perilous claim in face of the facts of interdependence. While the civilized world is groping for the solution of the problem thus created, the British Empire is at least adumbrating the form which that solution must take. Canada has a special significance in this development.

The Imperial Conference is faced with the necessity of working out a new principle or principles which will explain the relation of the various parts of the British Empire to each other.⁵

⁴ P. VIII.

⁵ Cf. Lord Balfour, cited in 5 Canadian Bar Review 206: "We, it appears, through the force of circumstances, without conscious premeditation, in no character of constitution-makers, find ourselves members of an Empire based upon principles hitherto wholly unrecognized in the past, without any example, and yet, I think, in a spirit which looks forward to the future in hope and belief."

The machinery of the state is becoming more complex and difficult of analysis. Although Montesquieu's famous "separation of powers" into legislative, executive, and judicial was based on a misconception, nevertheless it furnished a division which, during the nineteenth century, resembled the facts. But at the present time the sudden development of administrative legislation and of administrative justice has made these distinctions meaningless. Lord Hewart in England, like King Canute, is trying to stem the overwhelming flood but it will probably continue to rise. Mr. Robson in his "Justice and Administrative Law" has described its extent in England;—there are the Railway and Canal Commission, National Health Insurance Tribunals, a District Auditor with many judicial powers, Unemployment Insurance Tribunals, Pensions Tribunals, the London Building Tribunal, the various licensing authorities, etc. Mr. C. T. Carr in his "Delegated Legislation" has called attention to the fact that the legislation by the various ministers of state greatly exceeds in extent the statutes passed by Parliament. It is becoming more and more the practice for Parliament to state the principles while delegating the duty of filling in the details to administrative bodies. It is no longer possible for us to ignore this fundamental change in constitutional method; it is necessary for us to develop an adequate theory by means of which this new machinery can be controlled.

When we turn to what may be called private constitutional law, —the relation of the individual to the state,—we find equally striking changes. In the nineteenth century we had primarily the doctrine of *laissez faire*, the idea that any interference with the liberty of the individual was *prima facie* contrary to sound principles. The nineteenth century thought of the individual and his rights; the twentieth century is concerned with the community and its needs. It is significant that the idea of the community as a quasi-legal person is a new one, for it is first mentioned in the Emergency Powers Act, 1920. As we recognize and emphasize the community we will have to develop some theory to meet the present industrial situation. In discussing ancient methods of trial Professor Holdsworth says:⁶

Trial by battle is almost universally found among the barbarian tribes from whom the nations of modern Europe trace their descent. It was not merely an appeal to physical force because it was accompanied by a belief that Providence will give victory to the right. Christianity merely transferred this

⁶ History of English Law, Vol. 1, p. 308.

appeal from the heathen deities to the God of Battles . . . In early law to begin a law suit, or even to be a witness in a law suit when the other side was skilled in warlike weapons, was a perilous process.

In our advanced civilization of the twentieth century we are inclined to think that trial by battle was a clumsy method of attaining justice. We forget, however, that at the present time, we have trial by battle to a far greater extent than in any previous age in English history. Our battle is not even justified by a belief in the arbitrament of Divine Providence. Our great industrial strikes and lock-outs are trials by battle between the employers and the employed. The law provides the rules for this struggle. In the twelfth century the combatants were forbidden to use amulets and sorcery: in the twentieth century they may not use dynamite and revolvers. In the twelfth century if the appellee was vanquished he was hanged immediately: in the twentieth century if he is an employer he is ruined and if he is a workman he is reduced to starvation and beggary. The battles of the twelfth century had one great advantage over the modern ones,—those who watched the lists were safe, and they probably enjoyed the fight provided they were not directly concerned. To-day it is the innocent spectator who may suffer most, and in many cases it is the purpose of the trial or strike to make him suffer. The negative principle that "it is the duty of a Government to maintain law and order, not to interfere between employer and employed," will not satisfy the twentieth century. Society resents a theory which forces it to sit impotently by while the combatants are exercising their destructive liberty. The public is a third party in fact; it will soon be a third party in law. The law which has been thinking in terms of two dimensions must now think in terms of three. It does not take a courageous prophet to suggest that the twenty-first century will consider our trials by battle as unjust and unreasonable as we do those of the twelfth century.

3. LAW OF TORTS.

Perhaps no part of the law is developing so rapidly at the present time as the law of torts. The vast modern literature on the subject is evidence that here the law is certainly not static. The principles of tort were developed in large part during the end of the eighteenth and the beginning of the nineteenth century before the age of machinery had transformed the conditions of life. They were principles peculiarly adapted to a community which was pre-

dominantly rural and in which each man was more or less self-sufficient. From that period we get the doctrine that there shall be no liability without fault, and that a man cannot be held liable for his negligence unless he is under a duty of care. But in the twentieth century conditions have completely changed. In place of independence we have interdependence. At every moment our lives depend upon the actions of others. When we get into a train we are putting our trust in others; when we are passengers in a motor car we are depending—sometimes to our misfortune—not only on the care of the driver but also on that of the manufacturer; when we dine in a restaurant we may be trusting both the cook and a farmer in New Zealand or South Africa. Under these conditions a narrow construction of “duty or care,” based largely on a conception of personal relationship, is obviously unsuitable.

Nor is it in consonance with modern ideas of morality that a man may intentionally injure another without incurring any legal liability. Sir Frederick Pollock⁷ and Dr. Winfield⁸ have argued powerfully against such a doctrine, but the courts seem to remain unconvinced. A man may erect a spite fence on his land because he wishes to cut off his neighbor's view. He may drain percolating water for the sole purpose of injuring another's reservoir.⁹ His motive will not be considered by the Court however clear the evidence of malice may be. Provided he does not actually libel another he may publish the most intimate details of his life. A distinguished lady autobiographer recently published a list of the men who had proposed to her. An energetic advertiser may use the photographs of unsuspecting victims to popularize his wares.¹⁰ Professor Kenny cites the case of a dentist who was unable to obtain legal protection when a neighbouring family placed in their garden a large mirror which enabled them to observe all that passed in his operating room.¹¹ There is no law which prevents us from insulting our enemies. A landowner who had quarrelled with his estate agents placed a large sign board in his grounds adjoining the road which read, “Messrs. X are *not* agents for this house.” The agents appealed to the law in vain.¹² It is unnecessary to continue the list of intentional injuries which are not torts. An ingenious lawyer once worked out a list of over a hundred ways in which a

⁷ Law of Torts, 12 ed., p. 23.

⁸ 27 Columbia Law Review, 1.

⁹ *Bradford Corporation v. Pickles*, [1895] A.C. 587.

¹⁰ *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538.

¹¹ Cases on the Law of Tort, p. 367.

¹² See note in 43 L.Q.R. 12.

man might safely injure an enemy, but he refrained from publishing it in the interests of the general welfare. Sooner or later the English law will have to be changed so as to include the principle laid down in sec. 226 of the German Civil Code: "The exercise of a right which can have no purpose except the infliction of injury on another is unlawful."

4. CONTRACT.

When the average man speaks of a contract he thinks of a document carefully drawn by a lawyer in language which is unintelligible to the layman. He does not realize that making contracts is one of the ordinary acts of his everyday life. Like M. Jourdain he is surprised when he finds that he has always been talking prose. When he agrees to work for a certain wage that is a contract. When he buys his newspaper and his railway ticket in the morning he is entering into contracts which may lead to protracted litigation; when he eats a meal in a restaurant, goes to a theatre, or rides in a taxicab, the contractual relations created thereby are important and difficult. The idea of contract is therefore one of the fundamental conceptions of English law. It is obvious that here if anywhere the law must be certain; it must have a definite theory as to what a contract is. When we turn to the cases and the books we find to our surprise that there is a profound disagreement as to the nature of a contract. Each writer begins by demolishing the theories of his predecessors.¹³ The difficulty is that the law is not logical but depends to a great extent upon the vagaries of history. Every student upon entering upon this subject must spend the first few months studying the technicalities of consideration. Concerning this doctrine which "makes it possible for a person to snap his fingers at a bargain deliberately made" Professor Holdsworth has written:¹⁴

In fact, the doctrine of consideration in its present form is something of an anachronism. The substantive law has long ago broken away from the leading strings of the forms of action, and the law of actions has become merely adjective law. But our theory of contract is still governed by a doctrine which is historically developed, with great logical precision, from the procedural requirements of the form of action by which contracts were enforced.

The law is still in a large degree clinging to the strict interpretation method of the past which holds a man to the actual words of

¹³ Compare Anson "Law of Contract" 16th ed. p. 5 and Holland "Jurisprudence" 12th ed. p. 263.

¹⁴ History of English Law, Vol. 8, p. 47.

his bargain. As Mr. Justice Blackburn has said:¹⁵ "For whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake not induced by the act of the vendor." In other words, I am legally entitled to cheat passively but I must not do so actively. The law is deliberately encouraging sharp practices by insisting that the actual terms of the contract shall be the sole criterion of judgment. The German code has taken a more liberal view. It enacts that an error as to such characteristics of the other party, or of the subject-matter of a transaction, as are deemed essential in ordinary intercourse, is a ground for avoiding the contract. It requires good faith on the part of both the parties and discourages "snap" bargains.

In what is, perhaps, the most important part of the law relating to contract, the rules by which damages are assessed in case of breach, there is still hopeless confusion. Should damages be given because the defendant has promised, actually or impliedly, to pay them if he fails to carry out his agreement, or, ignoring any idea of promise, ought damages be based on the principle that the defendant has committed a wrong for which he must pay? There is ample authority for either view. As Lord Justice Atkin has said:^{15a}

This is one of those cases dealing with damages which in my experience I have found to be a branch of the law on which one is less guided by authority laying down definite principles than on almost any other matter that one can consider. I think the law as to damages still awaits a scientific statement which will probably be made when there is a completely satisfactory text-book on the subject.

5. COMPANY LAW.

Just as the business man has found the legal doctrine of contract inadequate, so is he now beginning to realize that the present conception of a corporation, when carried to its logical conclusion, may prove dangerous. The vast growth of statutory companies during the past century has enabled the fraudulent trader to flourish. By hiding behind the artificial personality of a company with a euphonious and attractive name, he is enabled to trade without any financial responsibility to himself. The company may become insolvent because the directors have paid themselves inordinate salaries. The creditor who has sold goods to the company is left with unpaid bills while, hidden behind the artificial person, the directors are enjoying the results of their cleverness. Recently, the "One Man" company has been found to be an ingenious means

¹⁵ *Smith v. Hughes*, L.R. 6 Q.B. 597.

^{15a} *The Susquehanna* [1925] P. 196, 210.

of evading the super-tax. The law will have to look behind the artificial personality of the company so as to protect the public.

It is not only the outside public which needs protection. To an even greater extent the artificial personality of the company has enabled the directors to defraud the shareholders. In law the shareholder is considered for most purposes to be merely a creditor of the company. His interests are distinct from the interests of the corporation. It is true that he elects the directors, but, once elected, the directors are the agents and the trustees for the company and not for the shareholder. The director is not legally representing the shareholder and may therefore take every advantage of him which his position renders possible. The director may,—and in many cases does,—use the advance information which he receives because of his office. If he knows that, owing to increased earnings, the value of the shares is bound to rise, he is able to purchase shares from the shareholders who have not got this information. In the same way if he has advance information that the company has had a disastrous year, he can unload his holdings upon the market. Sometimes the directors “manipulate” the dividends—they declare a high dividend which is not justified by the earnings for the sake of selling out on a rising market or else they withhold a dividend so as to enable themselves to purchase shares at an unreasonably low price.

It is easy to point out these defects of the company system. The fact that no solution has as yet been found for them shows how difficult the problem is. It is not exaggerated optimism, however, to believe that in the future some satisfactory answer will be discovered.

6. PROPERTY.

When we turn to the law which deals with private property we are faced with the initial difficulty of trying to define what the term means. The conception of property varies from period to period. By property is frequently meant only the rights in material things but this is too narrow a definition. A bond is only a claim to be paid a certain sum, still we would call a man who owned a £100,000 worth of consols a man of property. The goodwill of a business is an immaterial asset yet it is called property. Formerly a man was said to have a property in his wife and children and some of our law is still influenced by this conception. No definition of property is therefore ever satisfactory because as John Stuart Mill wrote: ¹⁶ “The idea of property is not some one thing iden-

¹⁶ Principles of Political Economy.

tical throughout history and incapable of alteration." Perhaps as practical a definition as we can find is that of Sir John Salmond's:¹⁷ "Property rights are *valuable* . . . those which are worth money." If this is an approximately correct definition then it is obvious that the suggestion that private property should be abolished is an impossible one unless all exchange of service is to be abolished and each man is to live as an independent unit. What the socialists mean is that certain forms of property are to be abolished. It is, therefore, essential to know what particular kinds of property are included in their theory.

But even if we limit the idea of property to the rights in material things we are faced with the difficulty of deciding what rights are essential to the conception. Austin has defined ownership as a right¹⁸ "over a determinate thing, indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration." To an ever growing extent these three elements are being limited by law. The owners of a public service utility such as a railroad or a gas company are restricted "in point of user." They cannot take up the rails so as to use them for scrap iron; the company is under a duty to maintain the public service. Nor is the owner necessarily unrestricted in point of disposition. The recent Rent Restrictions Acts have limited this right in the case of certain houses to such an extent that it is almost non-existent. The Death Duties have brought the "point of duration" within definite limits. As a result, the modern legal view is that the term "ownership" is too indefinite to be of juristic value. We are left with more limited but more definite rights—the right to user, the right to exclude others, the right to alienate, the right to leave by will or on intestacy, and the right to receive profits. The extremist is in favour of destroying all these rights at a blow. The more temperate reformer prefers to consider each of these rights from its own aspect so as to determine to what extent it can be brought into accord with the needs of society. By considering each of these rights separately we will be able to make more rational progress than by attempting to deal with such a misleading and vague term as "private property."

It is obviously impossible to discuss each of these rights in a limited space but two general considerations may be advanced. These rights, to a varying degree, are at present the basis of our economic civilization. To destroy them is therefore to destroy the

¹⁷ Jurisprudence, 7th ed., p. 264.

¹⁸ Jurisprudence, p. 371.

existing social order. On the other hand, by correcting any abuses we can reform our present society. As Judge Cardozo has said,¹⁹ "Legislation which destroys the institution is one thing. Legislation which holds it true to its function is quite another."

A more important consideration is that while law can destroy rights it cannot destroy the interests on which those rights are based. "Moreover, whatever we do," writes Dean Pound,²⁰ "we must take account of the instinct of acquisitiveness and of individual claims grounded thereon." An even stronger instinct is the desire to protect those who are dependent upon us. To destroy inheritance is to thwart this instinct. It has been glibly said that the dead have no rights and that therefore men have no concern with what happens to their property after death. But making a will is a right which is given to a living man even though it only operates in the future. To destroy this right is therefore to affect him while he is alive. How strong these various instincts are and how essential their satisfaction may be to human happiness it is not for the lawyer to say. Reform in the law will come primarily from the social psychologist. Perhaps he will be able to tell us whether society can be run on the principle of service rather than of gain. What is the relation between the right to make profits and the willingness to work? To what extent does the average man desire to have a share in management? These are not legal questions although their solution will affect the law. It is the part of the lawyer to see that the legal system does not become bound by fixed categories which will make adjustment to modern needs difficult.

7. DOMESTIC RELATIONS.

Probably no part of the law has altered so fundamentally in spirit within the past half century as has that which is compendiously called "domestic relations." The attitude of the Courts in these cases is of peculiar importance as the questions at issue are difficult ones of fact rather than of law. What rights has a father over his child? In the first half of the 19th century the Courts looked at the question largely from the parent's standpoint. "The natural rights of a father" was a popular phrase. It is strange that Nature, as interpreted by the Courts, did not have more to say about the natural rights of a mother. At the present time it is the welfare of the child which is the paramount consideration in

¹⁹ *Nature of The Judicial Process*, p. 87.

²⁰ *An Introduction to the Philosophy of Law*, p. 235.

these cases. Lord Cave has said: "Some of the earlier judgments contain sentences in which perhaps greater stress is laid upon the father's wishes than would be placed upon them now; but in the more recent decisions . . . the greater stress is laid upon the welfare and happiness of the children."

Turning to the second branch of domestic relations—the relations of husband and wife—we find that the law is in a more unsatisfactory state. The law of divorce is based on no discoverable principle. Is divorce a punishment for the guilty party? Is it a reward for the innocent party? The punishment theory is dangerous because as Professor Geldart has pointed out:²¹ "The fact that divorce, while it is in theory a punishment for the guilty party, is in many cases equally desired by both parties, makes it probable that there will often be collusion between them." Recently the Divorce Court judges have been protesting against this "hotel register" adultery. The self-sacrificing husband who agrees to go through the forms of adultery for the sake of his wife has become a stock figure of stage romance. The law at present says to a husband and wife desiring a divorce: "Divorce is a privilege not lightly to be granted. Unhappiness is not a sufficient ground, but if one of you will earn the privilege by committing adultery then you may have your decree." Every lawyer knows that this is what happens in a large number,—perhaps in the majority,—of the cases for divorce. The opponents of reform forget that in these cases it is usually both parties who are unhappy and are equally anxious to be separated. Probably the majority of people feel that when a couple are unbearably unhappy together they ought to be separated. Adultery is the only means by which this end can be attained and, therefore, the end justifies the means. The majority of Lord Gorrell's Committee on Divorce reported as follows:

If a reasonable law, based upon human needs, be adopted, we think that the standard of morality will be raised and regard for the sanctity of marriage increased. Public opinion will be far more severe upon those who refuse to conform to a reasonable law than it is, when that law is generally regarded (as we infer from the evidence) as too harsh, and as not meeting the necessities of life.

8. CRIMINAL LAW.

It is in the nature and purpose of punishment that the chief interest of criminologists has centered in recent years. But as Mr.

²¹ Elements of English Law, p. 92.

Justice McCardie has said:²² "The curious feature of our system and, indeed, of other systems is this: that, so far as I can see, nobody has ever yet set forth with clearness the principles of punishment which ought to prevail." Professor Vinogradoff has well summed up the conflicting principles:²³ "But even in the actual practice of the law, are people agreed about the aim and scope of punishment? Is it a measure of repression and amputation (Plato)? Is it a measure of educational discipline (Aristotle)? Is it principally a deterrent (Bentham)? Is it a necessary moral atonement (Kant)? Is it a measure of medical treatment (Lombroso)?" We cannot, however, accept any one of these doctrines and reject the others because as Liszt, the famous German criminologist, has pointed out, punishment is a means towards an end, that end being to counteract criminality. As that end can be achieved by a number of different methods the problem is to choose the particular method which will best fit each particular case.

Nor is the word "case" synonymous with the word "criminal." This is the error which the reformatory school, still so popular among the extreme humanitarians, makes when it says: "The ideal Court is not an instrument of punishment but a centre of moral regeneration. It is not punishment but treatment that the criminal wants." The criminal's reformation is one element, but not the only one, in fixing the punishment.

We must also consider the feelings of the victim of the crime. It has become the style to say that in a highly civilized modern state we must not consider the element of retribution. Unfortunately we are not all ideally civilized, and it is still human nature to demand that the wrongdoer shall suffer. As Sir James Stephen has said:²⁴ "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."

Nor must we forget the interests of the state itself. The state must protect itself against harmful acts, and it can do so most effectively by deterring others from following in the steps of the criminal. But, say the opponents of the deterrent theory, it is unjust to punish a criminal with added severity because someone else may be tempted to commit the crime if the wrongdoer is not so punished. In committing the crime, however, the prisoner ought to have realized that he was tempting others to do likewise because crime begets crime. A man is responsible for the example he sets.

²² "Some Aspects of Judicial Life"—2 *Cambridge Law Journal* 169.

²³ *Commonsense in Law*, p. 243.

²⁴ *History of the Criminal Law of England*.

It is, therefore, proper to take this into consideration in fixing the punishment. This does not mean, however, that the law should always apply the strongest deterrent. If this were so we should return to the promiscuous hangings of the 18th century. The deterrent should be one that is reasonable under the circumstances. It is here that psychology may prove to be of the greatest help in the future. There are an ever increasing number of books dealing with the effect of punishment upon the criminal but hardly any which discuss the influence of punishment upon the community at large. Is a sentence of ten years in prison so much greater a deterrent than a sentence of two years as to justify the additional years of suffering? Is flogging necessary in certain cases? The Court of Criminal Appeal has said that, in its view, it is the strongest deterrent to a certain class of persons. Others claim that it has a generally brutalising effect. Will the fact that over 12,000 cases a year in England are placed on probation increase crime or is the fact of probation a sufficient deterrent? What effect has capital punishment upon the community at large, for this, apart from morality, is the primary question? So, Sir William Harcourt, when Home Secretary, said in the House of Commons,²⁵ "The exercise of the prerogative of mercy does not depend on principles of strict law or justice. Still less does it depend on sentiment in any way. It is a question of policy and judgment in each case, and in my opinion a capital execution which in its circumstances creates horror and compassion for the culprit rather than a sense of indignation at his crime is a great evil." Is capital punishment a more efficacious deterrent than life imprisonment? "My own view is" writes Mr. Justice McCardie²⁶ "that as a deterrent to calculated crime the sentence of death is of supreme cogency. * * * I do not think that any deterrent will ever be wholly effective in preventing those crimes which spring from the sudden impulse of strong passion. * * * But in cases of calculated crime I believe that the power to inflict death by the scaffold is a powerful deterrent." These are questions which the jurist must consider, but which can only be answered by the trained psychologist.

In one other field of Criminal Law will psychiatry prove the dominant factor in the future. On the question of insanity the medical and the legal professions are at present in conflict. In considering it from the legal standpoint it is essential to realize that with insanity as such the law has no concern. It is concerned with in-

²⁵ Cited in Sir Edward Troup: *The Home Office*.

²⁶ *Op. cit.* supra note 22.

sanity only in so far as the disease has caused an act. In other words the doctor asks "Is the man insane?"; the lawyer's question is "Did the insanity cause the act?" If it did not, then it is immaterial whether or not the man is insane. The defence therefore must prove more than that the prisoner is insane; it must prove that the act was caused by his insanity. The essential question thus becomes, How can insanity affect an act? Dr. Prideaux, of the Ministry of Pensions, in discussing this point has written:²⁷

Our conduct is determined primarily, and always to some extent, by feeling, and never by the intellect alone. It is not the reason, it is the moral character of a man, which determines his responsibility. It is the moral character, using this term in a strictly psychological sense, which enables us to exert what is usually spoken of as 'self-control' and to act in accordance with the moral code. The mere knowing of the difference between right and wrong is of little value in itself—a child may acquire this knowledge quite early in life without necessarily having a sufficient strength of moral character to prompt him to right conduct. It is the feeling which prompts one to action, in accordance with the moral code, that is essential.

Insanity may cause an act, therefore, by destroying (a) a man's reason, (b) his moral character. The medical profession urges that the law should take into account both these results of insanity. This the law has refused to do. In *M'Naughten's case* (1843) the judges laid down the rule that an insane person is criminally liable unless he was so insane as either "not to know the nature and quality of the act he was doing," or "not to know that what he was doing was wrong." Legally, therefore, insane delusion is an excuse but insane impulse or absence of self-control is not. Why has the law refused to accept uncontrollable impulse as an excuse? The reason is an entirely practical one—difficulty of proof. In fact, it is impossible at present to distinguish between an uncontrollable impulse and an uncontrolled one. The conflicting testimony of expert alienists in murder trials, especially in the United States, has given weight to this criticism. Until the doctors can prove to each other's satisfaction when uncontrollable impulse does and, what is more important, when it does not exist, the stricter rule will probably still be followed. Changes in the law relating to insanity will depend primarily on the practical advance in medical science.

The strictness of the present rule has in practice been modified. "In the twenty-two years from 1901 to 1922, out of 1,445 persons committed for trial on charge of murder, 585 were convicted and

²⁷ *The Criminal Responsibility of the Alleged Insane*, 1 Cambridge Law Journal 302.

517 were found to be insane, either before trial or by special verdict of the jury, and of those convicted 13 were found insane on the Home Office inquiry. Thus almost half of the total number of persons judicially dealt with as murderers were found to be insane."²⁸ It is not surprising, in view of these figures, that in 1923 Lord Justice Atkin's Committee on Insanity and Crime reported "In our opinion to the insane person justice is done."

It would be possible to continue this list of doubtful or changing legal principles almost indefinitely but a lecturer must remember that to be everlasting is not to be immortal. Mention must be made, however, of those technical but important subjects,—procedure and evidence. Fortunately in England the law relating to procedure has been completely overhauled since 1873 and is now on a satisfactory basis; in the United States it is still in hopeless confusion because no scientific attempt at reform has been made. Quack legal remedies are as dangerous as quack medical ones. The law of evidence is of peculiar interest for it illustrates the profound difference between law in action and law in the books. The principles of evidence are substantially the same in England and in the United States, but nevertheless they function in an entirely different manner in the two countries. In England a trial, civil or criminal, is rapid, orderly, and fair; in the United States it is too frequently intolerably slow, punctuated by brawls between opposing counsel, and uncertain in its results. The law of evidence is in itself the most striking evidence that a legal system depends for its efficiency primarily upon the spirit and character of those who administer it. The best engine may be wrecked by an inefficient engineer.

I believe that I have said enough to suggest to you that at the present time the law is not in "a period of stability and tranquility," but is in a state which requires fundamental readjustment. The problems which I have so hastily outlined are problems which concern the Canadian as well as the English lawyer. If anything, they are more important here than in England, for the great system of the common law is being applied in Canada under novel conditions. Its principles are therefor undergoing a severe test, and it will be necessary to adjust them so that the law and public policy do not conflict. You are fortunate, gentlemen, in having a field almost as wide as your great prairies in which to dig. May your harvest prove a fruitful one.

Cambridge.

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²⁸ Troup: The Home Office, 72.