THE STUDY OF JURISPRUDENCE.

Those members of the legal profession who have not studied Jurisprudence, or who have studied it but casually, consider that it is the cream puff of the legal diet. Perhaps many instances in the past have justified this attitude but of recent years practical common lawyers have been working in Jurisprudence and the results have been such that much useful material is now available for the assistance of busy practitioners.

Properly defined Jurisprudence is called the science of law in its widest possible aspect. It is therefore chiefly concerned with problems of justice and with formulae which lead to the right solution of difficult and obscure causes. Modern writers do not attempt to supersede the old common law methods so much as to develop these methods to their fullest and to adapt them to our present developing civilization. In seeking for a criterion of justice the Common Law judge has in his time followed various gods. Almost invariably hitherto he has used as criteria statutes and decided cases dealing with the points involved in the case before him for consideration. In doubtful cases he has proceeded by what he considers to be a close analogy to the case before him. The system thereby tended to some degree to perpetuate the past with its justice and its injustice. It was probably the ideal of the followers of this method that eventually a complete system would be created so that a case could be found to cover every possible point. The personal element entered into a decision if at all to no practical extent. This ideal is fittingly called the Fiction of Legal Adequacy. The problem of the significance of statutes is considered below.

An apparatus such as that just described has in the past worked with greater success than one might expect. The reason is that the theory of legal method outlined above, fortunately, is not an accurate theory. A realistic study of the same process is very different. In cases of injustice caused when some inferior court follows this theory too blindly there is usually an appeal to a higher and better informed tribunal, which does not hesitate to make the law its servant rather than its mistress in the search for justice. (Following therein the practice of the great jurist Jurgen, who is so well known to students of the Middle Ages). The final decision will usually bear the imprint

of humanity and justice. In other instances chances of future harm will be done away with by means of a statute repealing or amending the offending law. Thus by means of a new law, courts are periodically set free to start new and valuable lines of judicial decision. The power of judicial law making is in fact so great and has been so widely used throughout the whole history of the Common Law that we need never have grave fears of a mere perpetuation of the past with all its blunders. The highly trained sense of justice, or what is called judicial intuition, enables the superior court to find its way through the confusing mass of conflicting precedents to the exit marked "Justice." Even so less talented judges and even the great ones when pressed for time in this relentless modern life will find on occasion some need of a formulation of the principles behind this judicial intuition, and such a formulation is provided by Jurisprudence and its philosophy of law. Not only is such a philosophy needful for the judge; for the untrained lawyers or statesmen who sit on executive committees and tribunals it is becoming almost indispensable. Particularly in Canada this problem affects lawyers, statesmen and the entire commercial world because of certain provisions in the British North America Act of 1867.

Under the British North America Act two types of problems bound to affect the entire community some day are to be found. The first one has to do with the declaration of certain statutes of the Dominion or the Provinces as *ultra vires*. This declaration will be made by our Courts. The second problem has to do with the disallowance of Provincial or Dominion Acts by the Dominion or Imperial Executive authority, which in practice is the Cabinet of the Dominion or of Great Britain.

What is meant and what is the effect when an Act is declared to be *ultra vires?* First let us assume that the declarant is the superior court with jurisdiction over this dispute. The decision in the particular case is therefore final. Since the act is beyond the power (*ultra vires*) of the legislature to pass, it was never of binding authority upon any person who was affected by its provisions. Such conclusion, however, assumes that we have a definite test and agreement of what constitutes a law. Except for Jurisprudence it would be difficult to find a definition acceptable to many people of what is a law. The significance of this difficulty appears in the next problem to be suggested. If the declarant is instead a court subject to a review by a higher court we cannot be sure that for us the act is law until the appeal to the higher court has been heard or the time

for such appeal has finally expired. For others who are not parties to the dispute, no matter whether the declarant is a superior or an inferior court the point must always remain with an element of uncertainty in it, varying of course with the particular circumstances of each particular case. No two cases are exactly alike. In another cause the appeal may be taken to the superior court from our inferior court and the inferior court reversed. We who under the first decision paid over our money feel a sense of injustice. The Act was never binding upon us. Or perhaps we who paid over the money by order of a superior court may be chagrined to find that superior court in effect reverse its own decision in a year or two. The Act was never binding on us it now seems although last year the superior courts said that under the division of legislative powers provided for by sections 91 and 92 of the British North America Act it was. Unless we have some clear formula of what constitutes law how can we say there is any justice or an absence of justice in these conflicting decisions.

Some recent jurists have achieved a definition of law which if still a little vague, may prove a guide in these difficult deliberations. "Law is the body of rules, principles and standards recognised and administered by permanent tribunals in the administration of justice." One should also bear in mind the ancient legal maxim that "Matters adjudged are taken for the truth." This maxim is qualified by the rule that questions of fact may be reopened on the ground of mistake but that except in a very few instances mistakes in law will not be recognised as a ground for re-opening a decision once made by a superior court. Two persons who had acted in the belief that such and such a thing was the law and found that it was not law (because *ultra vires*), have done a thing acting on a mistake in law and are in the same position as if they had been given bad legal advice by counsel whom they retained. This case is made harder of course when the advice is given by the inferior court or in exceptional cases by a superior court. Taking the definition given above however one finds that at the time it was given the advice was a correct statement of the law. It was the law applicable because enunciated by the court. Since then the law has been changed because the court has given a different rule although it purports to do so under the theory that the first interpretation was really a mistake. If at any time one becomes suspicious of the validity of a decision he should by a written contract provide for a return of his money or his property if there should subsequently be a declaration that the law is *ultra vires* the legislature which passed it.

A more difficult case arises where one of the parties is the Crown and the statute declared to be *ultra vires* is a taxing statute under which large sums of money have been collected as taxes. Here we have two new factors which should be considered. The first is a considerable prejudice shared by most people against paying illegal taxes. The second is the scandalous Common Law rule still practically in force, although there are exceptions, that a subject cannot sue the Crown for the return of his property as a matter of right. There is of course the remedy of Petition of Right but one does not see an Attorney-General gladly granting the right to petitions to many thousands of tax payers. The rule barring the right of suit is, we are promised, soon to be abolished and a regular machinery provided. Indeed the illegality of direct and indirect taxation under sections 91 and 92 is largely a technical one which a clever draftsman can cure in many cases under the existing decisions. Even with the bar to suing removed, the result should be about the same as in like suits between private parties which are centred round some question of *ultra vires* and *intra vires*. Recovery of money unconstitutionally paid over should be impossible on mistake of law. A condition or contract providing for return in case a statute is declared *ultra vires* should be necessary for the recovery of the moneys. At present in all cases the wealthy and determined litigant who can dare and can afford to remain in default and fight a long legal battle is the one whom fate rewards. These conclusions can only be offered as hypotheses because no cases sustaining them are available.

The *disallowance* of Acts is done by an executive authority, the Governor-General-in-Council for Acts passed by the provinces, and His Majesty-in-Council for Acts passed by the Dominion. The power has been exercised frequently by Governors-General-in-Council, but His Majesty-in-Council has refrained from its exercise for many years past. Two theories have governed Canadian Ministers of Justice who are the persons responsible for the opinion and action of the Governor-in-Council in cases of disallowance. The first Acts to be disallowed were held to be contrary to natural right and justice and so not to be allowed to exist. One also finds traces of the second theory at this time namely *ultra vires*. Then one finds the period when the theories of the supremacy of Parliament so dear to the English Analytical School of jurists prevailed. Finally these theories after a long period of dominance practically gave way to the original theory that Acts contrary to natural right and justice should be disallowed. In the second period Acts only were disallowed when they

appeared clearly to be *ultra vires*. Disallowance under these circumstances appears redundant. It was said that any real injustice could be remedied by an appeal to the electorate at the polls. This last argument implies that the injustice will reach the importance of a national issue capable of being used as an argument in the campaign by His Majesty's Loyal Opposition. One can only say that the number of instances of this kind is infinitely small.

Although the preamble to the British North America Act of 1867 sets forth the laudable ambition to establish governments in Canada modelled closely after the government of the old country, the Parliament of Great Britain and Ireland, in fact the organisation of the Dominion and its provinces more closely resembles the organisation of the United States of America in that each is a federal state and therefore is faced with more complex problems of government than is the comparatively simple unitary state which is formed by the four nations in the British Isles.

Moreover the commercial contacts between industrialists and public men of the North American continent are inevitable, and will be the cause of the development of distinctive principles of business usage which national boundaries will not be able to prevent or eliminate. At the time of Canadian Confederation it was to be expected that the political theories behind the various American constitutions should have some influence in the formulation of a Canadian constitution. One might argue that the provisions of the British North America Act providing for the disallowance of Acts could be explained as a continuation of the Colonial Office practice of disallowing Colonial statutes which were considered repugnant to the fundamental ideas of the Common Law (a sop to Coke's theory) or otherwise offensive to the notions of the Colonial Office. The new procedure provides for disallowance of Provincial Acts by the Dominion, and of Dominion Acts by the Imperial Executive. But one can detect something like the American judicial control in the early decisions of Ministers of Justice who disallowed Acts which they considered as contrary to natural right and justice.

Many historians have pretended to find authority for the proposition that in the 17th century there was an established principle of the Common Law that Acts of Parliament which were repugnant to the fundamental principles of the Common Law (itself natural reason and justice) were void. Contemporary scholarship has shewn conclusively that this theory was never substantiated by Common Law cases, but was in fact a political weapon forged by

the great Coke for his fight against the Chancellor and the King. Coke's writings were so long accepted as authoritative by common lawyers that the forgery threatened almost to become a rule of the Common Law, but failed to do so eventually. It did become the backbone of the theory of the American Constitution. In England it has descended to the status of a rule for interpreting difficult and obscure statutes. Statutes in derogation of the Common Law must be very strictly construed, and an interpretation leading to an absurd and unjust result (i.e., contrary to natural reason and justice) is not to be made unless the words of the statute are perfectly clear on that point. It is not a surprise therefore that judicial pronouncements by English judges on the subject of natural right and justice are very rare. A significant one is to be found in the opinion of Lord Shaw in the important case of *Local Government Board* v. *Arlidge*.[1] The rather summary practice of the Local Government Board was attacked as contrary to natural right and justice because it did not follow legal procedure in allowing one party to appear in person to present his appeal, although giving an opportunity to present his case on appeal by means of a written memorandum. There was also a question of refusing to give the defendant the details of the report under which he was being prosecuted. His Lordship remarked that legal or judicial practice was not the only possible means to attain justice, and that a deviation from its details could not be considered in defiance of natural right and justice. The headnote succinctly states, "the term *natural justice* considered."

Despite the elaborate collection of judicial opinion in the United States and the many rules making up the Constitutions, the precise content of natural right and justice is very difficult to ascertain. At least one may say that it is partially enunciated in the Constitutions and that their interpretation is carefully scrutinized by an eager; and, in many instances, highly educated, Bar sure to detect any flaws. In Canada we have no such enunciation and no such scrutiny. In the end a Minister of Justice is only controlled in giving his advice by considerations of obvious and open injustice or political expediency. Take for example the controversy over the St. Lawrence waterways. Quebec has passed an Act authorising a certain company to develop large hydro power on one of the key sections of the St. Lawrence. The Act prohibits the exportation of any of the power so developed. Suppose that the Dominion Government, at present, it seems, committed to the St. Lawrence

[1] [1915] A.C. 120.

Development, finds that the export of power is necessary to obtain the American financial support or, indeed, is the only way in which the tremendous supply of power made available by this development can be consumed. The Governor-General-in-Council proceeds to disallow the Act as contrary to natural right and justice. Or the reverse situation might occur. The Dominion Government might be opposed to the scheme and the Quebec Government in favour or it. The latter now secures an Act repealing the earlier bar against export, and the Dominion disallows the Act as contrary to natural right and justice. What have we by which we may clearly state that this Act is or is not contrary to natural right and justice? It is obvious that political expediency will determine the decision and we are at the mercy of the political machine behind each government, whether it be the growing wealth and political consciousness of our Western Provinces or the control of St. James Street, what a weapon is in the hands of any financial group able to dictate to a government? Are not its financial rivals, to say nothing of the small or medium sized investor, entirely at the mercy of such power?

After years of realism and academic doubt, sociologists, political theorists, philosophers and jurists are eagerly seeking some formulæ which shall contain fundamental rules for the guidance of contemporary civilisation. They do not seek the absolutes which the nineteenth century writers sought, but rather something to ensure that permanence and security which the consolidation of wealth created by the industrial and scientific development of the last two centuries so urgently demands.

Jurists with any realism in their make-up will say that a complete and final formula of natural right and justice cannot be produced. But they will now admit that there are many things on which the experts are generally agreed, which are illustrations of some of the aspects of natural right and justice. One is the inviolability of private property which is only used by its owner to bring in a fair return on his original investment. Another is the security of domestic relations and particularly family life. Another is the freedom of the person and the safety of our physical and mental organisms. War time hysteria which appeared during the last war alike in England and in the Dominions, produced regulations and accusations which are inconceivable to the rising generation. The injustice caused by D.O.R.A. and similar acts, since legalized by Parliament under the theory of war time emer-

gencies, would have been greatly lessened had we possessed something more than our Habeas Corpus rights (suspended of course by D.O.R.A. *et al.*) and those vague principles of mediaeval right to be found in that antiquated land grant called Magna Charta. The English judges laboured heroically in an attempt to find in the ancient common law precedents defences and principles to protect unfortunate citizens who were pursued by the iniquitous D.O.R.A. and her minions. The adequate tools were not available. Lord Hewart of Bury, Lord Chief Justice of England, complains that since the war the situation is becoming worse in England, and that the autocracy of Governmental Boards is almost unbearable. Clearly we need some formulation of fundamental rules of right and justice that legislatures may be controlled effectively as and when they exhibit tendencies to create oligarchic organisations. Where can we find such a formulation?

The American constitutional practice is too closely identified with a unique political organisation and structure for other nations to attempt to use it as more than illustrative, perhaps in some phases an object lesson. There are in the American system many pitfalls to be avoided and a mass of antiquated social theories to be discarded as soon as possible. There are also many excellent features which the contemporary practice tends to make difficult of realisation. It is not for contemporaries to pass final judgments on each other, but they can benefit by close observation of similarities and dissimilarities. That observation is surely the proper activity for Canadian statesmen.

First of all following recent jurisprudential principles, we should see what judicial pronouncements are made on the disallowance of Acts passed in Canada. We shall find as anticipated that the question of natural right is not considered; merely the technical side is dealt with. When an Act has been disallowed can one say that it ever was the law? We found that when an Act is declared *ultra vires* it appears even so to have had a certain validity before that declaration was made. When an Act is disallowed as contrary to natural right and justice, we should suppose that it never could be treated as a binding law, but again we shall find some instances where the act was considered to produce binding legal results.

One reported case from the Privy Council is available on this point, *Wilson* v. *Esquimalt and Nanaimo Railway*.[2] The time limit for applying for the renewal of leases of certain Crown lands

[2] [1922] 1 A.C. 202.

in British Columbia was expiring and an Act was passed extending this time limit. Under the time extension the plaintiff applied for a renewal of his lease which was accepted, then the Act extending the time limit was itself disallowed by the Governor-General-in-Council. The Privy Council gave an interpretation of section 56 of the B.N.A. Act, taking as the text the words "shall disallow," which declared that the effect of the disallowance was only to be from the time when the declaration was made disallowing it. Accordingly the application for the renewal of the licence was made within the legal time limit, although the renewal was denied in the end on other grounds.

One wonders what theory should govern such a case as the *MacNeil* case, which had to do with a Nova Scotia Act[3] vesting title to property and subsequently disallowed by the Governor-General-in-Council as contrary to natural justice. The principles of the *Nanaimo* case appear to be unique rather than general ones. For example, a statute vesting title is disallowed as contrary to natural right and justice. The person favoured by the disallowed statute had gone into possession of the property, and since it was a mine had been able to remove great quantities of coal or other minerals and sold them at a profit of a million dollars. Shall the rightful owner have no right of redress against the legislative usurper, or shall the statute merely justify the usurper in any defence of good faith (e.g., rules as to the rights of trespassers in good faith) to which he might by law be entitled? Suppose that the property in question is a large building or a block of houses, to whom shall the year's rentals belong?

Another example is a taxing statute which is disallowed as contrary to natural right and justice (millionaires pay 80 per cent. income taxes) because it amounts to a practical confiscation of property. Taxes had already been paid over to the Crown and since the disallowance only takes place from the time of the announcement the taxes already paid belong to the Crown. Rather perhaps in practice the Crown would be declared to be a debtor to the subject and interest allowed. But the question of interest is difficult, for it may only be given from the time of disallowance or, instead, it may be for the entire period. One omits here the problem of bringing suit against the Crown, as a matter too detailed in

[3]Statutes of Nova Scotia, 1921, 11 & 12 Geo. V. c. 177. An Act to vest certain lands in Victoria County in Jane E. MacNeil.

Kennedy. *Disallowance of Provincial Acts in the Dominion of Canada* Journal of the Society of Comparative Legislation, 3rd series. Volume 6, p. 81.

scope for this article. It is enough to say that this great scandal is being cleared up slowly by legislation in England and in the Dominions.

Why does one say that the principles enunciated by the Privy Council appear to be inadequate. A sense of justice, powerful but undefined, and unformulated is the only answer. To follow Professor Hocking, there is a great need for a philosophy of law, if we can find one capable of use. There are many people who think that they have provided such a philosophy. It is for the students of Jurisprudence to decide which one has really accomplished this task or to synthesise those which are offered, as well as they may. For that purpose Pound, Stammler, Kohler, Hocking, Lunstedt, DeMogue and Geny are writers worthy of careful consideration.

It is impossible as yet to offer any one formula to fill the needs outlined above. The writers named at the end of the last paragraph offer stimulating attempts at formulation and definition of guiding principles, but for some time to come each person must use a synthesis of the writers he finds most helpful. That no formula will ever satisfy all demands one can be certain, but that is no good reason for not using the valuable part of each man's writings. The present uninformed situation will only be productive of more injustice and contempt for the law.

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