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The Future of the Common Law

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THE FUTURE OF THE COMMON LAW. 1937. Harvard University Press, Cambridge.

This book consists of a reprint of the principal addresses and a few of the discussions of these addresses given at the "Conference on the Future of the Common Law" held at Harvard Law School on August 19-21, 1936. This conference was the principal Law School activity of the Tercentenary celebration of Harvard University, and was attended by a large number of invited guests, mostly of the legal profession.

The principal addresses, which are printed here, are (following the order in which they were given): "What is the Common Law?" by Dean Roscoe Pound; "The Common Law and the Civil Law in the British Commonwealth of Nations" by Sir Maurice Amos, Quain Professor of Comparative Law, University College, London; "The Common Law in Its Old Home" (England) by Lord Wright, Master of the Rolls; "The Common Law in the United States" by Mr. Justice Stone of the United States Supreme Court; "The Common Law in Canada" by Justice Henry H. Davis of the Supreme Court of Canada, and "The Common Law in Ireland" by Justice Henry Hanna of the High Court of Justice of the Irish Free State. It will be noted that all of these addresses, except the first, have a definite geographic context. It should also be noted that the address of Sir Maurice Amos omits any detailed consideration of those parts of the British Commonwealth of Nations dealt with specifically by other speakers—that is England itself, Canada, and Ireland.

The key-note of the entire conference was set in the address by Dean Pound. The question which forms the title of his address is obviously a most difficult one to answer; but it would be hard to find anyone more capable of doing this than Dean Pound. His answer is in substance that common law is a taught tradition—and a tradition of judging rather than administering. It follows that, unlike the situation in the Civil Law, the chief oracles of the common law are the decisions of judges; and statutes, administrative decisions, and theoretical writings, while all important, are still subordinate. Such a tradition naturally presupposes a doctrine of the supremacy of law—one of the very few settled doctrines in our polity. Dean Pound very definitely expressed the belief that despite the vigorous attack upon the common law now in progress, especially in this country, it will survive, just as it has survived several other equally vigorous attacks in past centuries. It may be noted that Dean Goodrich of the University of Pennsylvania Law School, whose informal remarks are reported later in the book, apparently agrees with Dean Pound on this point.

Next came the address of Sir Maurice Amos. As a student and teacher of comparative law, he is well fitted to compare and contrast the Common Law and the Civil Law as they appear in various parts of the British Commonwealth of Nations. It is noticeable that the Common Law technique has made important inroads even in countries basing their law on the Civil Law pattern. Thus, he pointed out that Scotland follows the "Roman" law system; yet in that country the decisions of the courts are based upon precedent nearly as much as in England itself. However, the speaker did point out one important advantage which the Civil Law seems to have; it is less formalistic and, therefore, more adaptable than the Common Law. As an instance of this, he cited the doctrine of "ultra vires," which, it is well known is at least theoretically more rigid

in England than in most jurisdictions in this country. Sir Maurice believes that this greater rigidity of the Common Law is due to the fact that it is younger than the Civil Law. Certain it is that legal history shows that undue formalism in law (as perhaps in other things) is a disease of youth.

Lord Wright, the next speaker, is a conservative in politics and apparently in temperament; but he is well known as a liberal, almost a radical, in legal theory. In this address he did not emphasize very much his well-known opposition to the whole doctrine of consideration in contracts; but he did attack vigorously what he regards as the unsatisfactory state of the English law with regard to quasi contracts. Here, too, the English situation, as evidenced especially in the cases growing out of the coronation of King Edward VII, is highly unsatisfactory. While the American law is probably somewhat better, it would hardly be claimed that it is beyond criticism, especially in its distinction between mistakes of law and fact. On the other hand, the assertion of Lord Wright that the concept of the "reasonable man" is an unadulterated fiction, and his advocacy of the complete repeal of the statute of frauds with respect to the sale of goods, are certainly far more questionable.

Certain comments of Lord Wright as to the state of English law are especially interesting. He expresses the opinion that although law and equity are still administered by separate branches of the High Court of Justice, yet the two now constitute a single set of principles. His assertion that statutes have hardly reduced the bulk of case law would perhaps be discouraging to those persons who believe that all legal difficulties can be solved by codification; but it seems clearly correct. An American lawyer would be especially impressed by the opinion of Lord Wright that the English courts generally adhere pretty rigidly to common law principles where the rights of the subject are concerned; in other words that our Bill of Rights is essentially a part of the law of England though there not expressed in a written constitution.

Finally, most people will agree with Lord Wright that the most important function of the legal system is to do justice. However, Lord Wright is too good a lawyer not to know, and too honest a man not to confess, that the problem of doing justice according to law is not only an ethical but an intellectual and practical problem of the utmost difficulty.

Next came the address of Mr. Justice Stone. Much of it was taken up with expressing his feeling that in this country individual rights are unduly protected, and that administrators should be trusted much more than they are by the courts. It may perhaps be said that this opinion will not be unanimously concurred in in the light of our experiences within the last few years. Probably more complete agreement will be reached with Mr. Justice Stone's lament as to the unsatisfactory handling of statutes by common law courts, especially in this country.

The address of Justice Davis was an interesting summary of the legal situation in Canada. That country largely adheres to the Common Law system. It is well known, of course, that the province of Quebec has always followed the Civil Law derived from France. But Justice Davis points out that even in Quebec the Civil Law is confined entirely to private law matters; there, as elsewhere in Canada, public law is based upon common law concepts. Even more interesting to the American lawyer is his showing that the lack

of a due process clause in the fundamental law of Canada is far from an unmixed blessing.

Next comes the address of Justice Hanna, who tells us of the legal situation in Ireland, and especially in the Free State. He pointed out that Ireland has always had its own common law derived rather directly from the Normans. This Irish species of common law, having considerable differences from the English type, survived rather vigorously "outside the Pale" until at least the time of Queen Elizabeth; and it has considerable survivals even yet. But on the whole, since Elizabethan times Ireland has been dominated largely by the principles of the English Common Law. This is still true, even in the Irish Free State. To be sure there is no appeal from the Free State courts to the English Privy Council; but Justice Davis had already pointed out that the same situation now exists in Canada.

This completed the main addresses except the one of Judge Crane, which will be later considered. Several, but not all, of the informal speeches, denominated "remarks," are also included in the book. Of these probably the most important is that by Dean Goodrich which has already been referred to. He also pointed out the very limited scope of laboratory methods in the study of law in action. This may be very unfortunate but it is indisputably true that society cannot be put into the laboratory and experimented with in test tubes.

The Indiana lawyer may, however, be most interested in the remarks of Hon. Walter E. Treanor, then a judge of our Supreme Court. Judge Treanor introduced his remarks with some rather amusing antiquities of Indiana law. But his particular emphasis was upon the idea that the doctrine of "stare decisis" is not a rule of law but merely one of practice. This seems entirely sound, and is no doubt a very helpful touchstone. However, his idea that the supremacy of law does not in any way require that the judges have the last word, is certainly more questionable. He asserted that the supremacy of the judiciary is an unknown idea in any country except the United States; but admitting this, it still seems true that it is pretty largely a fact in all common law countries. No doubt Parliament is supreme in England in a way that Congress is not in this country; but in England as in this country the courts really do have the last word.

Finally, in the conference and in the book, is a rather informal but important address by Hon. Frederick E. Crane, Chief Judge of the Court of Appeals of New York on "The Spirit of the Common Law." This excellent summary of the whole point of view and hopes of the conference is well worth reading in detail; but perhaps it and the whole conference may be adequately summarized in its last sentence:

"A patient hearing, a conscientious decision, a willingness to make new law for new conditions, is the life of the common law which in its advance and growth will sweep into its jurisdiction the conflicts of nations as well as the disputes of individuals."

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