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THE OLD FIELDS AND THE NEW CORN—
Some Observations on the Common Law and Its Continued Vitality†

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You will recall Maine's aphorism—"The most celebrated system of jurisprudence known to the world begins, as it ends, with a code."[1]

In contrast, the common law had its origins in the decisions of judges, and its growth through the cases. The legal system thus built is one of the imposing products of the human mind; and all who serve it are justly proud of it. Not a little of the literature of our system, indeed, is concerned to assert the superiority of the case method. "Law grows, and though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times. Some persons may call this retrogression; I call it progression of human opinion,"[2] said a nineteenth century English judge. His sentiments are echoed time and again from the Bench and from the rostrum.

It is my purpose to raise for your consideration whether this description remains accurate and this appraisal valid. Are we not in a new situation from our predecessors; and if we are, how suited are our techniques—of instruction, of advocacy, of decision—to the new conditions? In all the long and uninterrupted history of the common law to the end of the nineteenth century and well into the twentieth century (a span of some 800 years), the fashioning of the law was almost wholly in the hands of the legal profession. Only fitfully had resort been made to the legislature in building the system. So much is this so that the historians single out the reigns of the first Edward and the Tudors as exceptional by reason of the legislative activity of those times, an

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[1] MAINE, ANCIENT LAW 1 (3rd Amer. Ed. from 5th London Ed. 1911).
[2] Reg. v. Ramsey and Foote, 48 L.T.R. 733, 735 (n.s.) (1883) (Coleridge, C. J.).

activity which, while it left its mark on the law, was short lived. Indeed, the writers can scarcely conceal their relish as they recite how the ingenuity of the old conveyancers, with the co-operation of the Court of Chancery, managed to circumvent the Statute of Uses and put aside the fiscal purposes of that piece of Tudor legislation—as neat a bit of tax avoidance as a modern tax expert could wish for.

But the even and leisurely flow of the law through the cases is nowadays being more and more interrupted by the impact of legislation. Every year sees the statute books bulk larger; and every week regulations, orders, and rulings from government departments and agencies accumulate. This material is the expression of the popular will; it is not, in large part, as is the case law, the product of our professional expertise—traditional, professionally familiar, easily comprehensible. On the contrary, much of this new material does not sit well with the inherited case law. It hangs loosely on the body of the common law; much of it is a different texture, a different and sometimes clashing color.

I do not stop now to seek the reason why this change has come upon us. To some, our experience will be seen to bear out the generalization of Maine that the natural evolution of a society is successively through ages of custom and equity to an age of legislation. Others will be more critical. The fecundity of the common law was one of the boasts of our profession. The system could grow and expand to keep pace with new needs. It could find its way into new lands, serving them well and carrying with it the freight of human freedom and orderly development. The stirring words of Sir Frederick Pollock come to mind

> For if there is any virtue in the Common Law whereby she stands for more than intellectual excellence in a special kind of learning, it is that Freedom is her sister and in the spirit of freedom her greatest work has ever been done. By that spirit our lady has emboldened her servants to speak the truth before kings, to restrain the tyranny of usurping license, and to carry her ideal of equal public justice and ordered right into every quarter of the world.[3]

Has the creative power of the common law diminished? Has the common law entered upon a period of limited outlook, of cautious impulse? Has the pace of social, economic, and technological change of our day been so rapid that the law has been unable to keep abreast of the times? Is this an explanation of the role that legislation now plays in our lives?

These perhaps are not comfortable questions to be asking, but it

[3] POLLOCK, THE GENIUS OF THE COMMON LAW 124 (1912).

does seem to me that it is well that we should lay the process of self-inquiry on ourselves. The very core of our methodology, the case system, is to draw on past experience as a guide to present conduct. This carries with it the danger of an excessive attention to the past and neglect of the present and future. 'Out of the old fields cometh the new corn"[4] is a favorite quotation of ours. But we should not forget that the author of that metaphor, unexcelled as was his learning of the past, was himself the chief architect of that alliance between the common-law lawyers and the legislative branch which has been so pregnant of consequence to both the law and the legislature ever since his day. "[I]t is to the partnership" wrote Holdsworth,

> between the Legislature and the lawyers that our common law owes the great position which it holds in the world today. Without the efforts of the lawyers the statute book would be a lifeless body of regulations, uninspired by the quickening breath of principle. Without the efforts of the Legislature, the lawyers' rules would be in danger of becoming so fixed and technical that they would lose touch with the concrete facts and needs of daily life.[5]

If this partnership between the lawyers and the legislature was important to the life of the law in the past, how much more important it is today when the feet of the years run so quickly. The immense growth of scientific knowledge and the pace of technological change have yielded complexities of social adjustment which are putting strains on the legal system. The protest of a Scots judge underline the difficulties in the field of inherited doctrine: "On many subjects we are far further from certainty than we were in the middle of the nineteenth century, and far too many cases are presented daily in our courts the result of which in the light of conflicting authority is wholly unpredictable."[6] More stringent still are the words of Judge David W. Peck of New York concerning our procedural arrangements:

> As for the processes or mechanics of court operations, we find nothing corresponding to the improvements made in every other sphere. In medicine, all the sciences, engineering, business and the practice of law outside the courts, we have witnessed amazing advances. But in the courts, methods and techniques are practically the same in the automobile age as in the age of the ox-cart.[7]

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[4] 5 HOLDSWORTH, A HISTORY OF ENGLISH LAW 478-79 (1924), quoting Sir Edward Coke.

[5] HOLDSWORTH, SOME LESSONS FROM OUR LEGAL HISTORY 51-52 (1928).

[6] Cooper, *Defects in the British Judicial Machine*, 2 J. SOC'Y PUB. TEACHERS L. 96 (1953)

[7] HARV. L.S. BULL. Oct. 1955, p. 15.

And in the field of revision and reform of the private law we have plainly fallen short of the early enthusiasms held when the age of legislation began in the nineteenth century. Though we may consider the fierce faith in the efficacy of legislation as a cure for social ills, which many held in those days to have been excessive and naive, we cannot escape the charge that, as a profession, we have left the revision and reform of the private law largely to chance and sporadic interest. The revision of private law is not a matter which can be expected to attract political interest and legislative time; and if the profession does not bestir itself to see to it that the weaknesses and defects which daily come to the notice of its members are repaired, it can ill blame others for lack of action.

The fruitfulness of research in the natural sciences marks and distinguishes our times. Man's burdens and risks grow visibly less as his command over his environment increases. The law is served by no comparable activity and no comparable result. The state of our research activities can give us little comfort. It is not that law, as a discipline, lacks the intellectual potential. The many fine judgments to be found in the reports, the exacting research which goes into many briefs and into many treatises, and our wealth of periodical literature are good furnishings of a House of Intellect. But, measured against the pace of today's world, they are insufficient to keep the doctrines and procedures of the law fully up-to-date and legislative change informed by the background of ordered fact and tested hypotheses which systematic research alone can supply. It is this comparative lack of research in law, it seems to me, which accounts for so much that is unsatisfactory about legal doctrine, procedure, and statutory amendment. We have yet to pass through the kind of crisis of which a physicist recently spoke:

> It is common knowledge that since the turn of the century the physicist has passed through what amounts to an intellectual crisis forced by the discovery of experimental facts of a sort which he had not previously envisaged, and which he would not even have thought possible.

If we are to move in the direction of increasing research activities in law we shall have to have a more widespread conviction than presently exists of the need for research and to provide facilities to meet that need.

In the matter of facilities, there is much that has to be done. Take our libraries, for instance, the heart and core of our intellectual life, at once our laboratories and our treasure-houses. They are usually well stocked with reports—the working tools of our craft, but how often

does one not come upon limited holdings of treatises and of critical monographs or how usual it is to find, even, I am afraid, in law schools, really adequate holdings of periodical literature. To many members of the profession, drawing on periodical literature for a solution of legal problems is still an unfamiliar technique. Their attention tends to rivet on the reports, a practice less common perhaps in your country than in many jurisdictions where the writ of the common law runs. We still have nothing like the strong literary tradition of the civilians. They developed it, significantly, from the need of ordering the mass of legislation with which they had to work. It may well be that, with the increasing volume of legislation which confronts the modern lawyer, reliance on materials for decision of a wider range than is to be found in the law reports will become more common. This will call for the stocking of our libraries with more than the basic reports, the standard treatises, and federal and local statutes. A frequent practice of our times is the borrowing of legislation between jurisdictions. This practice, in turn, throws the burden of inquiry into the field of comparative law. To serve such inquiry holdings have to be extended much beyond what used to be considered the provision of a "working library"; and appropriations and library staff enlarged to a point not needed in a simpler age.

We shall have no less to look attentively to a more effective deployment of our human resources. The expansion of graduate work has been one of the significant contributions which the universities are making to national development in this century. It has gone farthest in the natural sciences and has progressed a good distance in most of the other disciplines. It is still not common in law. The proportion of law students continuing their studies beyond their first law degree remains fractional. Partly the reason is economic. By the time he has received his law degree the student has used up his financial resources. If he is to go on, he must have support. But until recently graduate legal studies have not attracted much foundation or other outside support and few but the largest schools have been able to offer assistance from their own funds. I would like most emphatically at this point to acknowledge the generosity of your schools and foundations to Canadian law students. Many thousands of dollars have been made available by your schools and foundations enabling Canadian law graduates to continue their studies. This has immeasurably assisted Canadian legal education. It has come at a time when legal education in Canada is taken much more seriously than ever in the past and the law schools have in-

creased their staffs from the three or four full-time faculty members which was normal before the war to a size more in keeping with their responsibilities. Your help has turned the tide for us. Above all it has made clear the value which comes, not only to the schools but to the profession generally, from the encouragement of graduate work. What has been particularly interesting is the eagerness with which firms now seek out men who have had graduate experience. It is a complete change from the attitude which regarded first degree studies in law almost wholly as terminal. What is now being clearly perceived is that legal materials because of their mass and complexity, require study in depth and that graduate work is the surest path to the mastery of a specialty.

We are late in coming to this view. In other disciplines it is the normal thing for gifted students to go on to graduate work. Assistance has been forthcoming to support them and most universities nowadays would consider themselves ill provided if they did not have facilities for graduate studies. The work of the students has become an essential part of the programmes of investigation and research carried out in graduate schools. The students become contributors to the process by which the learning of a discipline advances. They frequently are collaborators with their seniors in the ordering of experimental facts and the dissemination of the results of inquiry. This amounts to a considerable feedback of data and ideas into the educational process.

I would like to carry this point about the deployment of our human resources a step farther and to do so by asking if we have not clung too long to the notion within our schools that instruction can be managed effectively in the mass—that is, in large classes—and if we would not be doing a better job if more instruction were carried out in seminars and other forms of group work. I have a suspicion that we have carried over into our day a form of instructional organization which came into existence when students entered upon legal studies directly from school or at most one or two years thereafter. Nowadays a degree in law is almost universally the second degree for which a student sits. Before law school he must have reached a level of undergraduate performance equal to that for entry into graduate work. If he had continued in Arts or Science it would be unthinkable that he would continue to receive most of his instruction in large classes. On the contrary, he is considered by this time to have reached a level of intellectual development where more individual attention should be given to him and he in turn encouraged to pursue inquiry on his own. It is not easy to

see why the techniques of instruction found appropriate and fruitful for graduate work in other disciplines should not, with advantage, be followed more closely by us.

The complexity of the materials which must be drawn on for an understanding and solution of many of today's legal problems is forcing change in this direction upon us, however much we may find ourselves tied to old practices and habits of thought. The dust of "black-letter" learning has long since gone, blown away by the vigorous breezes of the case method. The case method with its intellectual toughness and vivacity remains the most effective teaching method for the main job. But it carries a danger to be warded against, the danger of walling oneself up with the law reports and expecting to find within the case law the answer to all legal problems. It takes little time in practice to discover how, time after time, case law, no matter how diligently researched or deeply reflected upon, will supply no answer to the problem before one, or an apparent answer which it requires little wit to see is so far out of keeping with the times that no court could be persuaded to accept it. If the problem is one of the application of modern legislation the difficulty may be that the legislation is a conscious departure from all that has gone before and has no case parentage to point to a solution. The old landmarks are missing; the safe anchorages of judicial precedent are not to be found in this terra nova where Leviathan sits soverign.

The key to the meaning and application of such legislation can only be found in a knowledge and understanding of the social and economic forces which have fashioned the legislation.

It is for such practical reasons that so much is being heard today about inter-disciplinary studies and about the need to inform the work of the lawyer with the findings of the natural and social scientists. How we can bring together the "two worlds" of C. P. Snow is very much the problem for all of us. But the effort must be made. It must especially be made by lawyers. The law comprehends the total range of human conduct and behaviour. It is concerned with the whole of man's life in society; in the old phrase, "it comes home in its effects to every man's fireside."

One of the encouraging developments making for an improved state of the law is the vigor being shown by many of our bar associations in bringing areas of the law under scrutiny, exposing weaknesses and proposing legislative action to correct them. Yearly the appreciation grows that the challenge of the times is upon us. The American Law Institute

and the American Bar Foundation for Legal Research show what can be done within the ranks of the profession under enlightened leadership. Your great foundations are doing a good deal to redress the balance in higher education by directing substantial grants towards research in the humanities, the social sciences and law. The avid pursuit of continuing legal education, in one form or another, which is very much a post-war innovation, indicates a growing awareness of how quickly, under modern conditions, knowledge and skills can become redundant. But there is still a good distance to travel if we are to overcome the inherent inertia of our profession and draw abreast the advances in knowledge being made in other areas. It is right that we continue to till the old fields; for one of the purposes of the law is to maintain the stability essential to the good ordering of society. But as prudent husbandmen we must seasonably seed to the new corn; for the fresh harvest of change is equally a condition of social well-being.

I hope I will not be thought impertinent if I urge on the young initiates of tonight who are at the thresholds of their careers to be active in supporting their bar associations and give all the leadership they can to steps looking to the improvement of the law and its procedures. It is through the association that a great deal which urgently needs doing can be done.

There is an area of somewhat wider responsibility than the matters about which I have been inviting your attention to which I would like to speak before I close. I do so the more readily because of the fine work of the University of Washington in inducing the Ford Foundation to support the programme of international and Asian studies just instituted at the Law School.

Traditionally, international law has not been an area of general common-law interest. The common law had insular beginnings, with the result that international law has been regarded largely as a specialty. It has had difficulty establishing itself in the schools as part of the curriculum, and when offered, has not usually been heavily patronized.

The case for international law as an ordinary subject either of study or of professional interest is not, in these circumstances, easy to make. It has not been a bread and butter subject except to the few students who expected to take up a diplomatic career. Lately there has been some change in this regard. As the world grows closer together economically, more people find themselves involved in international dealings: the volume of foreign investment has increased greatly since the war and direct participation in foreign business ventures is becoming

more frequent. The legal problems which this involvment in foreign business gives rise to require a competence in international and foreign law and the schools should be organized to produce lawyers with these qualifications.

But the case for international legal studies can, and I think should, find footing on a wider ground. Events have thrust our two countries onto the international stage, your country into the burden of the leading role, ours in a lesser dimension.

International law no less than domestic law is under the strain and stress of rapidly changing conditions. In the absence either of an international legislature or of a large body of case law, it depends for its authority and development on international practice and the mechanics of its application lie largely in diplomatic action.

If we are to have the influence in creating a viable international legal order, which our interests require, is it not plain that there should be knowledge of international law diffused among us. Is it not part of the public responsibility of the profession to give a lead to public opinion when policies are being formed involving questions of international law? We count with satisfaction the many members of our profession in public life. At a time when much of their attention has to be given to foreign affairs a competence in international law increases their opportunities for service. The codification and progressive development of international law is being actively pursued under United Nations auspices through the International Law Commission and other agencies and decisions about their recommendations have to be made by our governments and their officials. Quite apart from official action, a good deal of discussion about international law goes on in international professional associations, and ideas emerge from them which help to shape legal doctrine; it is scarcely to our interest that we should not be able to take full part in such deliberations.

Nor does the need end in the provision of trained personnel. The first line of diplomatic action has to have behind it supply depots of well thought-out and researched doctrine. The influence which the Harvard research into international law of 1930 has had, for instance, is a clear warrant for giving international legal studies an enlarged place in our instructional and research programmes. But they only find such place if they have the support of those who are alive to the larger responsibilities of their profession.