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TITLE II

LAW OF THE UNITED STATES OF AMERICA

361. Expansion of English law

The law of England, originally and principally the work of the royal courts of justice, has undergone a considerable geographical expansion. The Common law has become one of the world's great legal systems along with the Romanist and, more recently, the socialist laws.

But this expansion of the Common law has necessarily meant that it has undergone certain changes in the course of its adaptation to the special conditions of the countries where it has been received. These alterations vary in their importance and nature according to the strength of the ties which such countries have maintained with England, the mother country, the variations in geographical conditions, the possible influence of an indigenous civilization and many other factors.

Unfortunately, the scope of this work only allows a study to be made of the law of the United States of America and not the laws of the other Common law countries.⁸¹

CHAPTER I

HISTORY OF LAW IN THE UNITED STATES OF AMERICA

362. Historical factors: the rule in Calvin's case

The first English settlements in what is now American territory only date from the seventeenth century. Independent colonies were created in Virginia in 1607, at Plymouth in 1620, in Massachusetts in 1630 and in Maryland in 1632; the colony of New York, founded by the Dutch, became English in 1664 and the colony of

⁸¹ See the summaries published as "The Migration of the Common Law" (1960) 76 L.Q.R., pp. 39-77; the law of India is however examined *infra* §§450-479.

Pennsylvania, originally Swedish, became English in 1681. There were thirteen separate colonies by 1722.

What was the law of these English colonies?⁸² If this question were asked in London the answer, in conformity with the holding in *Calvin's Case*,⁸³ decided in 1608, would have been that in principle the Common law of England was applicable. In effect English subjects carried it with them when they settled new lands which were not under the control of a civilized nation. The American colonies fell within the scope of this rule with the result that in principle the Common law was applicable along with those statutes which, up to the time of the colonization of America, had completed or modified it. According to the American author James Kent (1763-1847), the date in this respect for all the colonies was 1607, the moment of the founding of the first settlement.⁸⁴ This opinion, although certainly debatable in that there was never any link between these colonies before 1776, seems nevertheless to have been generally accepted.

The rule in *Calvin's Case* suffers a restriction, however: the Common law of England was only applicable in the colonies "so far as it was adapted to [local] institutions and circumstances."

363. American law in the seventeenth century

In seventeenth century America this restriction counted for much more than the holding in *Calvin's Case*. The English Common law rules were wholly inappropriate to the conditions of colonial life.

The Common law was bound to an archaic procedure requiring experienced legal technicians and was therefore largely unsuitable as the law of territories where, for all practical purposes, there were no lawyers and no attempts made to encourage them to settle or to train new ones. Moreover, the substantive Common law rules, to the extent that they did exist, had been made by and for a feudal society as remote as possible from the kind of community found in American settlements. The problems facing the colonists were new, and ones for which the Common law offered no very satisfactory answers. Moreover the Common law itself was distasteful to the

⁸² Poud (R.), *The Formative Era of American Law* (1938); Wengler (W.), "Die Anpassung des englischen Rechts durch die Judikatur in den Vereinigten Staaten," *Festschrift für Ernst Rabel* (1954), t.I., pp. 39-65.

⁸³ (1608) 7 Co. 1, 17b, 77 E.R. 397.

⁸⁴ *Commentaries*, vol. I, Lecture XXI.

colonists because in many cases they had been forced to emigrate to escape persecution in England and they were not at all ready to share the English view that the Common law was the bastion of personal liberties. And finally the Common law was not really known in America; according to Dean Roscoe Pound (1870–1964) “a prime factor in shaping the law . . . was ignorance.”⁸⁵

What then was the law applied in America in fact? Apart from certain special regulations issued by local authorities, the law applied in practice must have been fairly primitive—in some colonies it was founded on the Bible and more or less everywhere amounted to little more than the exercise of judicial discretion. As a reaction against such arbitrariness, several colonies undertook a “codification” of the law and primitive codes were thus drafted from 1634 (Massachusetts) to 1682 (Pennsylvania). These of course had no connection whatsoever with the Romanist or modern techniques of codification. Their main interest lies more in the idea that inspired them than in their actual contents. Unlike the English, who at the same period saw the statute as a dangerous weapon and even a threat to their liberties, the American colonists of the seventeenth century looked favourably upon written law. From this original difference the divergence between American and English points of view and the American orientation towards methods out of favour with English jurists can be traced.

364. The eighteenth century

During the eighteenth century, with improvements in colonial living conditions and changes in the economy and political ideas, the need was felt for a more developed law. Gradually the Common law was seen in a different light; it was realized that it could be used as a bulwark to protect civil liberties against royal absolutism on the one hand and, on another, that it was a link between all that was English in America in the face of the menace constituted by Louisiana and French Canada (*Nouvelle France*). The extent to which the Common law was applicable as a matter of principle and that to which it was in fact applied is still the subject of some discussion and doubt; there was at this period a continued lack of persons trained in law and it was rare even for judges to have had any professional training. Nevertheless there was a movement in favour of a more general application of the Common law—

⁸⁵ Pound (R.). *The Formative Era of American Law* (1938), p. 11.

American courts showed their intention in this regard by applying certain English statutes, such as the *Statute of Frauds* of 1677.⁸⁶ Later the *Commentaries* of Blackstone were published in Philadelphia (1771).⁸⁷

365. American Independence

American independence proclaimed in 1776 and finally established in 1783 created completely new conditions for these English ex-colonies, then constituted as the United States of America. The French threat, first reduced by the English annexation of Canada in 1763, was later altogether removed with the American acquisition of Louisiana in 1803. France had in fact become the friend and ally of America and hostile feelings were reserved for England. The growing popular idea of an autonomous American law was in complete agreement with the new American political independence. Republican ideals and the desire for a national law also naturally encouraged the idea of codification. It seemed normal therefore that the Constitution of the United States (approved by the Federal Convention on September 17, 1787) and the Bill of Rights⁸⁸ be completed by codes. The territory of New Orleans, detached from Louisiana, seemed to provide the necessary example because shortly after its incorporation in the Union, it adopted codes of the French type and in particular a Civil Code (1808). Bentham offered his services in 1811 to President Madison for the purpose of providing the United States with a code.⁸⁹

There was some hesitation until the middle of the nineteenth century about the outcome of the struggle taking place in America between the supporters of the Common law and those who championed codification. In Massachusetts in 1836, a law commission requested the drafting of a code; the constitution of the State of New York of 1846 provided for the drafting of a "written and systematic code" which was to include the whole of the law of that state; and in 1856 the English legal historian Sir Henry Maine (1822-1888) predicted the success in America of the Romano-Germanic system. Indeed various events seemed to presage or at

⁸⁶ 29 Charles II, c. 3.

⁸⁷ James (E. R.), "A list of Legal Treatises printed in the British Colonies and the American States before 1801," *Harvard Legal Essays* (1934).

⁸⁸ 7 U.S. Statutes at Large 10.

⁸⁹ Bentham (J.), *Works*, vol. IV (1843), pp. 459-460; Vol. I of *Theory of Legislation*, entitled *Principles of Legislation; Principles of the Civil Code*, was first published in French by E. Dumont (Paris, 1802).

least encourage this development. Soon after independence, several states prohibited the citation of English judicial decisions rendered after 1776; a number of territories in which French or Spanish laws applied (at least in theory), and where no tradition of Common law existed, were annexed to the Union; America was also populated by a host of new settlers from countries where the Common law was unknown or where, if one thinks of the Irish for example, anything English was disliked. Pothier and Domat were translated into English in the United States⁹⁰ and a powerful movement best symbolized in New York by David Dudley Field (1805-1894)⁹¹ advocated the codification of American Law. A number of states did in fact enact codes of criminal law and civil and criminal procedure.

366. Triumph of the Common law

Ultimately however the United States remained within the Common law family with the exception of the Territory of New Orleans or, as a portion of it became in 1812, the State of Louisiana. While other territories annexed to the Union might in theory have been subject to French, Spanish or Mexican law as well, such laws were really unknown for all practical purposes; and so in Texas in 1840 and in 1850 in California, the English Common law was adopted in principle. Their earlier traditions were only retained for certain institutions (matrimonial property law, land law). The legal concepts of the former English colonies were thus preponderant and these colonies themselves remained fundamentally attached to the Common law, at least such as it was at the time of independence.

There is hardly any need to ask why the Common law did triumph in the end. It was, very simply, a victory of tradition. A new regime can easily change or alter the solutions and legal rules of an abolished regime; it is much more difficult to break away from familiar concepts, techniques and intellectual or sentimental

⁹⁰ Domat had been translated into English as *The Civil Law in its Natural Order* by W. Strahan in 1722 and re-published in 1737, but the first American edition by L. S. Cushing appeared only in 1850; Pothier's work on *Obligations* was translated by F. X. Martin in 1802 and edited as *On the Law of Obligations or Contracts* by W. D. Evans in Philadelphia in 1826, 1839 and 1853; L. S. Cushing edited *On the Contract of Sale* in 1839; C. Cushing edited *On Maritime Contracts of Letting to Hire* in 1821, and *On Partnership* was edited in London in 1854 by O. D. Tudor followed by an American edition the same year.

⁹¹ Fiero (J. N.), "David Dudley Field and His Work," 18 Rep. N.Y. State Bar Assoc., p. 177, 51 Alb. L.J., p. 39 (1895).

reactions instinctively employed or experienced. And the use of the English language was necessarily the vehicle for the Common law throughout the country. The outstanding works of certain authors, above all Kent's *Commentaries* (1826–1830) and those of Justice Joseph Story (1779–1845)⁹² were also largely responsible for its adhesion to the Common law family. The law schools, although only fully developed after the Civil War (1861–1865), also helped to shape legal structures by their teaching of the Common law from the time of independence.

The Common law did then triumph in America. In many states legislation specified that the Common law as of a particular date was to be the basis of the law in force, whereas in others it was not considered necessary to do so specifically. But the "conflict" in the United States during the half century following independence between the Common law tradition and the advocates of the Romano-Germanic system was not unproductive. It influenced American Common law in important respects and explains certain of its peculiarities as compared to English Common law. The United States has remained a Common law country in the sense that it retained the concepts, the means of legal reasoning and the theory of sources such as these are generally understood in England. American law nonetheless has a special place in the world-wide Common law system because, much more than any other law within the family, it has a number of rather original characteristics; and these same characteristics are those which very often link it to the Romano-Germanic family to which, at one moment in its history, it experienced a certain attraction.

367. Reasons for differences

But the triumph of Common law in America was not won without difficulty, nor was it complete. Many English Common law rules were never introduced because of prevailing American conditions. Other rules were never introduced because of their non-judicial origin; it has in fact always been considered that statutes enacted by the English parliament do not apply outside England unless parliament itself has specially so provided.

The most important point to note however is that the English law received in America was the law in force in England at a time

⁹² His *Commentaries on Bailments* (1832), *The Constitution of the United States* (1833), *The Conflict of Laws* (1834), on *Equity Jurisprudence* (1836), *Agency* (1839), *Bills of Exchange* (1843).

when this country controlled America. There was never of course any question that statutes enacted after 1776 were to apply in the United States; nor were the English Common law developments after that date ever considered as inevitably forming part of American law. In principle the development of the two laws, American and English, has been independent ever since the declaration of American sovereignty.

This principle cannot be doubted. It suffices to consider first of all the evolution of English law since 1776 and, on the other hand, the transformation of American society since the same date to realize that there is, because of these two factors, a serious threat to, or at least serious restrictions upon, the unity of the system as a whole. England and English law are obviously profoundly different from countless points of view from the England and English law of the 18th century; and, by the same token, America is no longer the same country. Even in geographical terms there is no real similarity between the thirteen colonies of 1776 and the America of today. It is now a country of 210 million inhabitants, highly industrialized and the world's first and richest power, and has nothing in common with the small string of Atlantic settlements inhabited by less than four million who proclaimed their independence 200 years ago. The ways of living and thinking and new economic conditions pose quite different kinds of problems to those of the colonial period, or again to those of the European environment to which England belongs. American law cannot be the same as English law because it is separated by the same distance that now separates American and English life and civilization.

368. English influence

For a long time however the Americans continued to use English law as a model. English progress, both economically and culturally, and the slow development of the American universities and legal writing, prompted American judges and lawyers to look to the English and to adapt the developing American law along English lines, even when they were no longer obliged to do so. From this general point of view it can be said that there was a certain parallel development in the two laws, and that as American social conditions developed to an approximation of European conditions, American law in certain respects was closer to English law after independence than it was in the colonial period.

The English legal reforms of the nineteenth century had, generally, their equivalent in the United States. In the individual states, the ancient forms of action were abolished in favour of much less formalistic procedures in such a way that lawyers' attention was directed much more than in the past to matters of substantive law rather than to questions of judicial administration. In the same way the relation between Common law and Equity was revised in most states to bring about the abolition of the old court duality. In a number of states there was a movement to rationalize the law; as in England, an effort was made to purge the system of its archaisms by repealing out-of-date legislation and, through statutory consolidation, the rules in many areas were systematically organized so as to facilitate their study.

This evolution begun in the nineteenth century continued in the twentieth. And in America, just as in England, the twentieth century has seen a new effort to organize and reform society through law. Law is no longer thought of as simply a means of resolving disputes but more and more, by lawyers and citizens alike, as the proper instrument for creating a new kind of society. An "administrative power," unknown during the earlier period, has developed on both the federal and the state levels alongside the three classical powers, legislative, executive and judicial.

The *general* characteristics therefore of English and American legal development since the time of independence are substantially very similar.

369. Originality of American law

The two laws have never nonetheless become re-united.⁹³ The original and essential difference between them from the earliest times has been the impossibility of applying English law in America. Today the difference, amounting sometimes to an opposition, may be explained (apart from the fact of national sovereignties) by a whole series of complex factors which make the United States a very different nation from England.⁹⁴ The latter is a European island; the United States is a continental mass less dependent upon its immediate neighbours; the English have ancient traditions and respect them whereas Americans, proud of those who

⁹³ Pound (R.), "The Deviation of American Law from English Law," 67 *L.Q.R.*, pp. 49-66 (1951).

⁹⁴ Kahn-Freund (A.), "English Law and American Law. Some Comparative Reflections" in *Essays in Jurisprudence in honour of Roscoe Pound* (1962), pp. 362-409.

threw off the colonial bonds and largely made up of immigrants who found a new home in America, place much less reliance on older ways. England has a constitutional monarchy, its political system is parliamentary; the United States is a republic with a presidential system. England, formerly the ruler of an empire and now associated with the Commonwealth nations, has always been a unitary nation with a highly centralized judicial administration; the United States, having no traditional links to the outside world, is a federal state in which national and individual state interests must be reconciled. Their economic structures are also very different; and their populations differ in numbers, ethnic origin, religious affiliations, life styles, feelings and ambitions. "The American way of life" is neither the reality nor the ideal of the English; their educational systems differ; and even their languages are increasingly distinctive.

It therefore follows that countries so different will have different problems and their own means of solving them. American law has evolved in the light of its own circumstances. That there be differences in the rules and solutions of the two laws is not at all surprising; the opposition, however, is greater than that and has a deeper significance. Nor are the two laws identical in their structure or their concepts. American lawyers are trained, and professionally organized, quite differently from the English; the theory of the sources of law, as well as its practice, are not the same. The American attitude towards the law is not that of the English.

It may very well be that these differences should not be overstated and it remains true that there is certainly a very important common basis to the two laws. These similarities are sufficient for the Americans themselves to admit unhesitatingly that they form part of the Common law family. It is best to realize however that apart from this community of feeling there are nonetheless very real differences between the two laws. Even though an American may have no very great difficulty in dealing with English law, the opposite is not true. The English jurist is not at ease in American law, and to become familiar with it he requires some kind of initiation.

CHAPTER II

STRUCTURE OF AMERICAN LAW

370. American and English law

Because of its structure, American law is a member of the Common law family. The English and Americans have the same general concept of law and its role; the principal legal divisions, concepts and conception of the legal rule are the same in each country. Categories such as Common law, Equity, torts, bailment and trusts belong naturally in each system. For both law is thought of as essentially judge-made; legislative rules, no matter how numerous, are viewed with some discomfort because they are not the *normal* expression of the legal rule. They are only truly assimilated into the American legal system when they have been judicially interpreted and applied and when it is possible to refer to the court decisions applying them rather than the legislative texts themselves. When there are no precedents, the American lawyer will say: "There is no law on the point," even though there may be some legislative provision covering the matter.

The structure of American law is therefore generally analogous to that of English Common law. This, of course, is a very general observation and upon examining any particular problem it is soon seen that between the two laws, as already mentioned, a number of structural differences of true importance do exist and cannot be ignored.

One such particular and fundamental difference must be examined—the distinction made in the United States, but not of course in England, between federal law and the law of the different states. These two related notions will be examined first, and then certain other differences respecting the classification, concepts and terminology of English and American law will be studied.

SECTION I—FEDERAL LAW AND STATE LAW

371. Two-fold problem

In England any idea of a federal law is completely unknown because it has a unitary political structure. In the United States, a