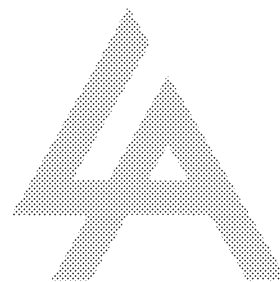


IN PRAISE OF COMMON LAW AND EQUITY AND AGAINST STATUTE LAW

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“The Common Law possesses a great deal of historical and contemporary colour: it is lively, realistic and, incidentally, eminently teachable. The student of common law rubs shoulders with Indian princes, fishwives, conjurers, shopkeepers and sea-captains of the East India Company. Translated into statutory language, only the pale shadows of this colourful assembly would remain, they would become plaintiffs, traffic accident witnesses, promisors of rewards, hire-purchasers and applicants for public office. The common law is a storehouse for worm tubs, ornamental broughams, snails in ginger beer bottles and fancy waistcoats, all of which would long since have turned to rust and rubbish had the cases which brought them into prominence been governed by some statute.”

Thus H. K. Luke in *The Common Law: Judicial Impartiality and Judge-Made Law*, illustrating the difference between the development of the common law and statutory interference in its development. Although of course the common law is made by state appointed Judges, and is not therefore a reflection of pure libertarianism, it approximates most closely to the law which would have been made in a society in which different tribunals could compete to offer justice. Statute on the other hand is purely state produced law.

INHERITANCE

The difference between statute and the common law can be illustrated by the law of wills.

The present law of wills is based upon the three notions of freedom, efficiency and fairness. The efficiency argument states that no matter what the wishes of the testator, the property should devolve on those who can use it in the most efficient way possible. But how do you define efficiency? And even if such a definition were possible who is to determine who is the most efficient user of capital? Not even the most sophisticated batch of computers could determine who is the most economical in the use of capital.

The fairness argument is fallacious as well; it implies that men are unable to make provision for their nearest and dear-

est and must be forced to do so after their death by adjustments to the terms of their wills. Often, men make lifetime provisions (sensible under the current Inheritance Tax and Potentially Exempt Transfer regime) before giving all their money to Battersea Dogs Home. The common law's principle is the sanctity of wills, except where other principles are stronger. Where a beneficiary murders the testator he may not inherit under the principle of 'no man shall profit from his own wrong' (see *Re Crippen*). But statute has decreed that men must incorporate fairness into their wills or the provisions will be altered after their death at the suit of certain categories of people. That policy is laid down in the Inheritance (Provision for Family and Dependents) Act 1975. After defining the possible categories who may benefit from the Statute, the Act goes on to state what the Judge must take account of in the exercise of his discretion.

In fact the cases concerned with the Act are all too often used merely as a way of hitting back at other members of the family or to blacken the name of the deceased. The level of bitterness is extraordinary and the cases rarely settle. Sometimes incidents from the 1930s are dredged up to prove how deserving an ex-wife or mistress actually is. Sometimes the testator actually says why a person is not named in a will. Yet even that is not enough to prevent the mounting of a claim; it may only be taken into account.

For wives the provisions are particularly generous and the violence done to the will is tremendous. It is true that a Barrister has a duty to 'promote and protect fearlessly and by all proper and lawful means his lay clients' best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including his professional client or fellow member of the legal profession)' (Code of Conduct para 207(a)). That principle was established by Thomas Erskine at the trial of Thomas Paine in 1792, during Pitt's attempt to establish dicatorship by the use of treason trials. It has served the cause of liberty well. However, this principle does not mean that a Barrister such as I cannot support the repeal of particular statutes.

CONTRACT

Another example of statutory interference in the development of the common law is the Unfair Contract Terms Act 1977. The usual principle of the common law is freedom of contract and the sanctity of contracts. The Sale of Goods Act 1893 did indeed codify the common law, enacting that certain terms were to be implied into contracts. However, the implied terms could always be excluded by the contracting parties. With the Unfair Contract Terms Act the principle of freedom of contract was partially reversed, especially in relationships between manufacturers and individuals (such terms receive tortuous definition in the Act). No longer can the effect of the Act be excluded. So, for instance, football clubs can no longer exclude liability for

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death and serious injury to spectators. This ignores the fact that people decide to go to such places freely and information is available about the relative safety of the various stadia. In any free market one has a right to try to obtain the best possible deal, and the Act violates that principle as well. It deprives people of the freedom to run particular risks and agree with others what compensation will or will not be payable. To argue that people have no choice is nonsense. If enough people do not go to the stadia the terms of business will soon be changed.

EQUITY

However, it might be objected that left to its own devices the common law might become excessively rigid. That is certainly a possibility. In the Middle Ages the common law refused to look further than the legal title to determine rights and obligations over land. Hence when knights leaving for the crusades put the legal estate of their castles in the hands of their stewards, the common law recognised no obligations on the stewards towards the wife and children of the knight. That is where an even more beautiful creature steps forward to save the day: the marvel of equity. Donning its shining armour it imposed a trust upon a steward and forced him to act in an equitable way towards the *cestui que* trust. It could not award damages but proceeded by way of injunction, restitution and specific performance. (Ignore the propaganda in Dickens' *Bleak House!*)

The area of equity I found most attractive in its concepts is the tracing remedy. That usually follows a successful judgement for breach of trust. During a lecture on the subject I found myself able to anticipate what the next point would be, such is the harmony of principle in equity.

In *Re Diplock* 1948 Ch. 465 the Court of Appeal said that beneficiaries under a will could trace assets into the hands of a third party depending on the nature of the third party. There are three possibilities. First, where the transferee was a *bona fide* purchaser for value of a legal estate without notice, then in that case no tracing would be possible. Secondly, where the transferee took property with notice, but where it was trust property transferred in breach of trust, that would be subject to the rights of the beneficiaries irrespective of whether the purchaser gave value or not. The transferee would be a constructive trustee. Thirdly, where the transferee is an innocent volunteer - in other words he took the trust property without knowing of the breach and having given no consideration - he would take the property subject to the trust. The beneficiaries have a right *in rem* and a right *in personam* for the balance. It is certain (see *Minister of Health v Simpson* 1950 2 AER 1137) that such an action is available in the case of the administration of a deceased person's estate. But one cannot assume that the same action is available in the execution of a trust.

REALITY VERSUS ABSTRACTION

Why should there be such a great difference in style between statute, the common law and equity? First, the common law is made out of the dust of conflict - the Judges will have their feelings powerfully evoked on behalf of the various *dramatis personae*. They will experience emotions from appreciation to indignation and from approval to disapproval. It is only against that vivid background that the *rationes decidendi* of cases are created. Common Law Judges do not often sail into the oceans of abstraction - at least never without losing sight of the land. The land represents the facts of the case and it is in those that the ratio of a

judgement is grounded. The truth of that statement is borne out by the immense problems of defining the borderline between law and fact (crucial for many appeals to higher courts).

Compare that to the task of draftsmen and parliamentarians in creating a new statute. Here conceptions are kings. In statutes such as the Inheritance Tax Act 1984 and the Consumer Credit Act 1974 there are hierarchies of concepts. No human feelings from Plaintiffs and Defendants can possibly influence the drafting of a statute. It is written in a cold prose style. Hence it tends not to enhance the natural development of principle. Indeed it is often up to the common law to restore some faithfulness to principle in its interpretation of statutes. Take for instance s53(1)(b) of the Law of Property Act 1925 (previously in the Statute of Frauds 1677). That section says that the creation of equitable interests must be evidenced in writing. That looks like a cast iron rule. But equitable principles (he who comes to equity comes with clean hands and equity will not allow a statute to be used as an instrument of fraud) gave rise to the doctrine of part performance. When the statute is pleaded it is now mostly overridden by the equitable maxim.

Secondly the Counsel who argue the cases and the Judges who decide them are trained to think by analogy. That in itself will produce a harmonious development. Analogy establishes classifications of what is the case. Given an experience of event A - we now have experience of different event B. A we assume is an established or core member of the class X. Can B be classified and is it also a member of class X? How is such a problem solved? Observations must be made: (1) B is like A in respect of feature 1; (2) B is like A in respect of feature 2; (3) B is not like A in respect of feature 3. The question is then how important are features 1 and 2 as opposed to feature 3 in establishing A's membership of class X? The questions should then be repeated in relation to membership of class not-X. Then take a decision to assign B to class X or not-X. That type of reasoning is not used in the drafting of any statute - it is too subtle and inappropriate. It is also the reason why computers are not (yet) able to replace Judges.

Finally, legislative language gives no thought to euphony or literary elegance - it must if possible be self evident in its meaning and able to survive scrutiny by the best minds that the law can provide. That often makes the operation of statute awkward and its effects arbitrary.

MANY STATUTES SHOULD BE REPEALED

In conclusion I would plead for less statutory intervention. Very often the common law will provide new remedies for novel situations, and if all else fails equity may provide new solutions. Legislators should not try to anticipate in advance situations which may occur (they are usually wrong in any case). Secondly, many statutes could be repealed. One example is the Rent Acts, which are a major contribution to the homelessness problem. They represent an interference in the operation of the free market. The Inheritance Tax Act could be repealed with virtually no loss to the Treasury - and a considerable administrative saving - as well as encouraging the passing on of family businesses (which, incidentally, is the basic reason for the success of the German economy). The Inheritance (Provisions for Family and Dependents) Act 1975 could be removed from the statute book and many bitter conflicts within families (the core method of imposing socialism and totalitarianism) prevented. Then the colour of the common law could reign supreme.