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Reactions to Current Legal Literature

edited by
ARTHUR JOHN KEEFFE

ROGER J. TRAYNOR: The Pope John lecturer at the Catholic University of America this year was none other than Chief Justice Roger J. Traynor of the Supreme Court of California. Admiral F. Trowbridge vom Baur (who was promoted from commodore to admiral by his friends when he became General Counsel of the Navy during the Eisenhower Administration, even though his only ship is a sailboat at Kennebunk Port) convened a special luncheon of the Milkweed Marching and Chowder Society in Roger's honor at the National Lawyers' Club. Some forty Washington lawyers, Chief Justice Warren and Judges Burger, Leventhal and Robinson of the Court of Appeals for the District of Columbia Circuit attended.

In the evening Chief Justice Traynor gave his address on the university campus, choosing as his topic "Statutes Revolving in Common-Law Orbits".

You obtain a copy by writing the Catholic University of America, Washington, D. C. 20017, and asking for the Summer, 1963, issue (17 Catholic University Law Review 401, $2.00).

To Traynor, Pope John is "one of the great men of our time". His "noble example" renews "faith everywhere in the world that human beings can resolve their problems with reasoning humanity" and, therefore, his "vision" encompasses "a context of lege et gerege, of rules in relation to people".

Statutes "are of infinite variety in purpose", and "legislators innovate with a freedom unknown to judges, who must ordinarily stay within the confines of precedent and articulate the reasons for their rules".

The "hydrated problem" for the poor judge who makes use of statutes "is how to synchronize" these "un-guided missiles launched by legislatures with a going system of common law".

Because the volume of lawmaking is now so great, we "no longer can afford to have judges retreat into formulism, as they have recurrently done in the past to shield wooden precedents from any radiations of forward-looking statutes", while they ignore the "dry rot in the precedents themselves".

Recognizing that "such spells of formulism in the law come and go, induced by shifts in politics and philosophy", Chief Justice Traynor contends, as did Roscoe Pound, James Landis and William Page before him, that "for many centuries judges have been accommodating statutes to the common law openly or indirectly, expansively or warily". These and other scholars have been "piecing together fragments of old records to yield a chronicle of what might today he called the conglomerate mergers of judicial rules and statutes".

Long before the discovery of America the English courts made use of statutes to develop the common law by a "sweetly named" and "imaginatively conceived" doctrine called "the equity of the statute".

The resistance of the law to change being what it is, the chief justice assures us the "it was not the average ancestor-judge who took the initiative in the search for the edelweiss, the rare decision whose center reasoning emerges to dominate its wooly context". The judge who thus used a statute to decide a point not covered by it needed to invoke "such magic words as equity of the statute".

The doctrine of the equity of the statute became "a double-edged device" that enabled common law judges to write exceptions into loose statutory generalizations and bring within the reach of the statute situations that admittedly lay without its express terms.

A judge who feared Blackstone and did not wish to be caught "engaged in lawmaking", not deeming himself "a piece of the action", would "spring to life when a statute bearing on the case before him came into view". Then, you see, he "would not be stepping beyond the bounds of his own domain".

Suppose, for example, a statute bearing a phrase like X number of years, specifying that it shall apply to A and B and clearly unconsidered with anyone else. Why not an equivalent rule for C? The Judge might ask himself, when there is a perplexing C before the court who appears to be a little cousin, if not the sibling of A and B. Whatever this courageous judge "chose to call his method, he would be creating law with a capital C". Though ostensibly "acting under the influence of a statute", the "rule he created was his own".

Chief Justice Traynor finds that "far back in time, when libraries were not yet creaking under the weight of law tomes, the chatty Year Books were replete with creative lawmaking in the courts on the basis of statutes". In truth, he concludes that "Judges used the eyes at the back of their heads to note statutory rules as a source for analogical decisions".

For instance, in 1305 a Year Book (Y.B. 32 Edw. 1 519, 520, cited in 3
Holdsworth.-History of English Law
169, 3d ed. 1923) tells us that

Hugo and others, with the whole county and the King's tenants of the
vill and land of Montgomery sued E. de Mortuomari for that he had de-
forced them of their common of past
ure in L., their free chase and fishery
throughout the whole of Sabrina, and
of all their streams in the land of K.

Traynor comments on this pleading
that neither the "most indifferent" nor
"the dullest Judge" could turn "a deaf
ear to such a hue and cry" and remain
"unmoved by the visions of Hugo and
others turned back in a pasture they
regularly traversed", hailed "on their
customary free chase through Sabrina,
commanded to lay down their fishing
rods" and "abruptly barred from the
use of their familiar streams".

How to give relief?

The judges did so by noting that in
the pleading Hugo and his friends al-
leged that they had enjoyed the uses in
question "from before the time of
memory". This they readily equated
"with the year 1189, when Richard the
Lionhearted acceded to the throne and
held that a continuous use since that
year would be conclusively presumed
to be of lawful origin".

The judges "fastened upon the year
1189 by analogy to the Statute of
Westminster I (1295) which specified
that year as marking the limit of time
in which a plaintiff in a Writ of Right
could trace his title". But as the chief
justice says, "it took judicial imagina-
tion" to see a statute marking title to
property as likewise appropriate to
mark a right to an easement; more es-
pecially when 106 years stretched be-
tween the marking year 1189 and the
date of the statute, 1295.

When it became impractical to prove
continuous use back to 1189, our courts
in "the late eighteenth century" began
to "accept proof of twenty years of
continuous use to buttress a plea of
a fictional lost grant". The twenty-year
period came from a statute of James I
that the courts had previously held to
be "applicable to actions of eject-
ment".

In 1623 there was a statute of limita-
tion covering "a range of common law
writs". In 1767, 144 years later, "Lord
Camden heard a plea to set aside a
clearly erroneous thirty-year old de-
cree". His Lordship evaded decision by
recourse to "the statute that barred any
action on a Bill of Error at common
law after twenty years".

Similarly, in missing person cases,
by analogy to early statutes, our courts
have gradually fixed on "an unex-
plained absence of more than seven
years" as creating a presumption of
death.

Likewise, "the origins of the off-
ense of conspiracy" are in the "Third
Ordinance of Conspirators enacted in
1304 in the reign of Edward I, Long-
shanks", which prohibited "conferen-
cies for the false and malicious procu-
rement of indictments". Ultimately, by
expansive interpretation of this statute,
the judges wrote into the common law
the generalization that an agreement to
commit any crime was a criminal con-
spiracy.

Roger Traynor believes it to be "one
of the gentle ironies that the mother
country's most unruly children, the
American colonists, founded a govern-
ment whose courts would rely at first
primarily on the parental rules in its
legal matters". But "when the colonies
became the United States, parental
rules were increasingly subject to in-
spection at the border to determine
their adaptability to the native soil".

States differed as to their willingness
to receive either British common law
or statutes. "Some courts recognized
only statutes that had either codified
the common law or had been assimil-
ated into it." For instance, in 1843
Ohio did this in a real estate case
(Crawford v. Chapman, 17 Ohio
449, 453) because the English statute
in question there had some three cen-
turies earlier abolished "the common
law rule that choses in action were not
assignable". By so doing, the statute
"remained forever a stranger to the
common law" and was not "part and
parcel of it".

Apparently, Chief Justice Traynor
has visited Ohio because he remarks
that "In Ohio one did not take chances
with such innovation, even though its
respectable place in English law for
more than three hundred years sug-
gested that it had long since been
assimilated into the common law."

But most courts, Roger assures us,
"received English statutes, including
this one, more hospitably".

For instance, "there was a disposi-
tion to receive English statutes enacted
before 1776 as part of the common
law, subject to such tests of relevance
and propriety as were applicable to
judge-made rules". "The preponderant
view was that indigenous law could not
assimilate any English rule inconsist-
ent with its own rules or repugnant to
its tenor."

But judges in California and else-
where "saw no reason why they should
limit reception to 'the ancient and fre-
cently most barbarous rules and cus-
toms of the common law', and in so
doing refused to take into account the
mitigation of their harshness and the
broadening of the rules themselves
which followed the successive enact-
ments of the English statutes".

Accordingly, California courts "rej-
ected early the Statutes of Enroll-
ments”, rejected also the Statute of Uses “insofar as it purported to vest legal title in the cestui que trust”, and when dealing, with the Statute of Elizabeth, “permitting enforcement of charitable trusts, they took care to note that it was not ‘technically adopted’, since its procedures were ‘totally inapplicable to our social or political condition’.”

“American judges were compelled to play a far more creative role in the law than their English contemporaries and as time went on there would be no end to the creativity required to meet the novel problems of a rapidly growing economy.” Compare Blackstone, who had among other things “made it plain that ‘the husband and wife [became] one person in law’, and then made it plain that the wife was not the one”. But “who today would condemn his mother or sister, let alone his wife or daughter, to banishment in the world of Blackstone?”

As we all know, it took the married women’s statutes for women to be “recognized as people” and a constitutional amendment to permit them to vote. As Roger Traynor says, “there were abundant legal rules to keep her in order as the zero in oneness” and the new statutes were needed “to give impetus to new judge-made rules” to free her.

To give some idea how long it takes for courts to rid our law of formulistic rules, the chief justice tells us that it was not until 1961 that California was able to overrule an 1839 decision “that there could be no conspiracy between husband and wife”. He rejoices in telling us that in California today, “The fictional unity of husband and wife has been substantially vitiated by overwhelming evidence that one plus one adds up to two, even in twogtherness.” (California v. Pierce, 61 Cal. 2d 879, 880, 395 P. 2d 393, 394 (1964). . . . “Two years earlier, in the appropriately-named case of Self v. Self, [58 Cal. 2d 683, 376 P. 2d 65 (1962)] the court ruled that one spouse may recover against another in tort.”

Of course, in the conspiracy case the court had “to reckon with the argument that it should leave any new rule to the legislature since its old rule had endured so long”. This is an argument which “dies hard because old age tends to command respect and we are likely to ignore that many an old rule has survived in a comatose state, sometimes from the outset, because its vitality has not been tested by the rigors of new litigation”. “A various circle ensues, for the longer a rule exists, the more likely it is to discourage such testing.”

In California v. Pierce, Traynor tells us, his court was “confronted with a moribund rule that was patently awaiting a coup de grâce”. His court obliged, noting that “the rule had been judicially created in the first place and hence it would be inappropriate to await its undoing by the legislature”. The chief justice acknowledges that while “it has taken doing and redoing”, nevertheless down through the years judges “have thus amplified the range and steadied the course of such legislative missiles as Married Women’s Statutes”.

Turning then to “the penal or regulatory statutes constructed to specific standards of conduct”, Roger Traynor finds that courts have no difficulty in cases involving direct violations; the “judicial guideline” problem is not with the statutes themselves but rather “with all the unidentified flying objects that do not come strictly within their orbit”. Particularly in civil cases on negligence, judges “have still to make optimum use of penal or regulatory statutes”.

In Sutterlee v. Orange Glen School District, 29 Cal. 2d 581, 177 P. 2d 279 (1947), there were “large differences of judicial opinion”. One was that the violation of a penal statute was merely evidence of negligence, another, that it was a rebuttable presumption of negligence. Traynor’s own view was “and still is, that the statutory standard for penal liability was the appropriate one for civil liability and hence that a violation of the statute was negligence per se”.

By instructing a jury under the standard of the penal statute, the trial judge “guides the flying objects of civil litigation on a course that can be rationally synchronized with that of the pilot penal statute”.

In the chief’s view, “It would be wasteful for courts not to utilize such statutory materials when they are so readily available for analogy as well as for adoption.” Particularly, “statutes that protect specified classes of people from specified risks” are “rich sources of analogy”. “It is logic run riot” to argue “that a statute requiring the barrerading of an open well or elevator shaft for the protection of employees cannot, by virtue of its particularity, be invoked for the protection of any others.”

And Roger Traynor then remarks with that beautiful liquid prose of his, so reminiscent of the gentle, loving Benjamin Cardozo: “The well and the elevator shaft and the busy intersection aptly illustrate a first-grade reader on the mounting interactions of human enterprise, the mounting statutes that govern such enterprise, and the mounting use that judges make of statutes that spin in long-travelled orbits of common law.”

Though some may still believe there
is a "great distance between seemingly immovable precedents and seemingly irresistible statutes", Justice Traynor says "the twain are always meeting in the courtroom", especially in California which "abounds with judicial precedents, sometimes as old as the gold from its hills but sometimes dated in their experience".

He puts this case:

The deceased Mary had executed a will leaving her home and most of its contents to the mother of Robert if she were living to receive the bequest; if not, it would go to Robert. Robert's mother predeceased the testatrix. Several years after Mary executed her will she became mentally incompetent and a bank was appointed guardian of her estate. With court approval, the guardian sold Mary's home for $21,000 and kept the proceeds in a separate account. It spent nearly all the proceeds to support Mary, who remained incompetent to her dying day. It left intact nearly seven thousand dollars in the estate that were not part of these proceeds.

The question was whether Robert could get that residue in partial restoration of his own nearly extinguished specific gift. A "doctrine of ademption mollified with a smidgen of Latin was not equal to a guardianship case. Whatever its deceptively reasonable sound, pro tanto ademption, like plain ademption was bound to operate erratically as well as harshly." Of the $21,000 the bank received from the sale of Robert's house, but $555.66 remained. "Over twelve times that sum remained intact to be claimed as a residue. Pro tanto was hardly pro bono Roberto."

Though silent on the point before the court, Chief Justice Traynor in the decision of this case found California's Probate Code of great value. Its rules as to the abatement of testamentary gifts mitigate "the adverse consequences to a specific devisee or legatee when a gift intended for him and never revoked by the donor" is used "to meet charges against the estate". Why not a comparable rule in a like situation except that management of the estate was entrusted to a guardian rather than to an executor? "Sweet are the uses of adversity, but sweeter still when shared."

The moral:

When a judicial rule is thus modelled after a statutory rule, the very fact of copying signifies that it is not to be confused with interpretation that clarifies an obscure statute or amplifies a skeletal one. Such a judicial rule takes on a life of its own in the common law. It can prove endlessly useful within its own orbit and may even serve as a model itself for successive judge-made rules.

Even judges "who resist reading up on any law outside that inscribed on their own caves", consult the uniform acts of the National Conference Commissioners on Uniform State Laws. When the "formidable" Uniform Commercial Code "begins to revolve in common-law orbits, it dramatically compels even those who may hitherto have been unheedingly to note that in the vanguard as well as in the wake of such a skymark there are many less spectacular planets". Courts have followed U.C.C. provisions even though the code has not yet been enacted in their jurisdictions. Like the Restatement, the code has "the stamp of approval of a large body of American scholarship."

Thanks to Henry Friendly's decision in United States v. Wegematic Corporation, 360 F. 2d 674, 676 (2d Cir.
1966), "the Uniform Commercial Code has become a major influence in the development of common law in the federal courts to govern cases involving government contracts and other commercial transactions". It has become "a source of federal law", and Judge Friendly has noted that it is "well on its way to becoming a truly national law of commerce".

Even the "diehard judge", resistant to the use of statutes in the formulation of common law rules, can hardly ignore the rich source of law in the Uniform Commercial Code so that by analogy in case after case in both state and federal courts we have seen the U.C.C. revolving in orbit to create new law in areas where it has no direct or official application.

Of course, it is "only when a case is not governed by a statute" that a court is "free to work out its own solution". But once it formulates "a rule by analogy from a statutory rule, it creates a precedent of the same force as any other", which "may endure for generations or succumb to rapid obsolescence".

As Roger Traynor says, "The real problem is not whether Judges should make use of statutes, but how they can make optimum use of them."

In answering this, he calls attention to the need for a national "Ministry of Justice" that would collect and study statutes and assist the Congress in national law reform. "Until there are signs of a much closer watch on the legislative process than we now have," Chief Justice Traynor asks, as do I, "What are we to think of the enigmatic aphorism that ours is a government of laws and not of men?"

His answer is that,

If the librarians and researchers will systematize the study of statutes, if the watchbirds will sharpen their watch on legislatures in action, if commentators will set forth salient qualities or defects of legislative products, the judges will surely make better use than they have of the statutes revolving in common-law orbits. Then benefits will flow in every direction, pro bono Hugo, pro bono Roberto, but above all to Pope John's) pro lege et gregge.

Thus, I hope I have given you a small sample of Roger J. Traynor's magnificent prose. It flows so beautifully and with biblical quality.

Roger Traynor, who once taught law, is still a scholar at heart. He has put his learning to such good use that today we must rate him as our master legal phrase-maker, even as we did Cardozo yesterday. What a beautiful writer!

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