Editorials

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EDITORIAL NOTES

THE EARLY ENGLISH LAW COURTS.

The fact that we inherited our law from England makes the English common law courts of interest to us. Furthermore, we are constantly dealing with English cases that formulated our present law and are landmarks of so great importance that no case book of the present time would be considered complete without them, so that it is quite fitting that we should have some knowledge of the system of courts in which they arose.

From the time of Queen Anne to near the close of the reign of Queen Victoria there were three superior common law courts in England in which civil cases were tried; the Court of Common Pleas, the King's or Queen's Bench, and the Court of Exchequer. The Court of Common Pleas had general original civil jurisdiction between subject and subject. It sat at Westminster. The number of judges varied from time to time; the largest number at any one time was eleven. The King's Bench, which was called the Queen's Bench whenever a woman wore the crown of England, was originally a criminal court. It gradually usurped civil jurisdiction except in matters pertaining to land, real actions. This court in theory could
sit anywhere in England but as a matter of fact it always or nearly always sat at Westminster. The number of judges that composed this court was four. The Court of the Exchequer originally dealt with questions pertaining to revenue, things that concerned the exchequer. However, it easily acquired other jurisdiction, as all a person had to do to give the court power to deal with a case, was to allege that he could not pay his debts as his means had been taken for taxes. Any subject consequently had a choice of these three courts when he wished to bring a suit.

Although these three courts had jurisdiction throughout England and had power to deal with the same subject matter, there was no conflict as the whole system was centered in the king. The Normans brought to England with them the idea that the king administered justice. He did this by delegating his power he delegated it in each case through his chancellor. Whenever a subject wished to bring a suit, he applied to the lord chancellor's office for a writ. In this way the chancellor had an opportunity to turn the case over to any one of the three courts.

Before the court could proceed in the matter it must get jurisdiction over the person of the defendant, as the primitive idea was that the court could do nothing binding on a subject unless it had him in the court room. Two schemes to get him there were practiced; one was to have the sheriff, under the authority of the writ issued by the chancellor, summons him to appear at the appointed time and place; the second was to have the sheriff destrain on the defendant's goods and in that way cause him to appear before the court. In the first way the sheriff was authorized to seize the person of the defendant and bring him into the court room.

When the defendant was in one of these ways brought within the jurisdiction of the court, it was the plaintiff's duty to supply the defendant with a copy of the declaration, which contained a statement of the cause of action; and the defendant was called upon to plead. If he said nothing, a default by *nil dicit* was entered and judgment given the plaintiff. If he pleaded and a question of fact were put in issue, a jury trial might be had. The party asking for a trial by jury applied for a jury summons. The sheriff was thereby directed to have a jury ready when the judge should come into the county. The time of the judge's coming was known to the sheriff
and he would have the jury waiting when the judge appeared on his circuit for the trial of cases. The judge would have with him copies of the summons and he would direct the jury what verdict to return as they found the facts so and so. The verdict would be entered on the pleadings and the judge, when he had finished up in his circuit from county to county, would report the case to the full bench. The grieved party might then move for a new trial, apply for a motion to arrest judgment because of irregularities, move to enter judgment notwithstanding the verdict, or move for a repleader. The court would then direct the clerk to enter judgment according to their finding. In this way most of the questions of pleadings were disposed of before the case was carried to the appellate court.

Cases could be tried before the full bench and very important cases were so tried. A judge might purposely fail to appear in a county at the appointed time. In that event the sheriff would take the jury to London and the case would be tried by the full bench.

The trial court’s jurisdiction over a case was confined to the particular term in which it arose. There were four terms each year for each of the three superior courts. Hilary term was held in January; Easter term began at Easter time; Trinity term was held during the early part of summer; and Michaelmas term came just before Christmas time. A court could do nothing as a court except during term time. So long as it was term time, the court could review; set aside; in fact, do anything with what it had done that term. As soon as it had adjourned for vacation, however, it lost this power. Only the appellate court had power to deal with the matter thereafter. We have adopted this idea of the English court term in this country wherever we have a single judge presiding over a court. He has full power over what he has done until he adjourns at the end of the term. When he has once adjourned he is out of business until the next term. He may, however, make an order of continuance carrying the question over to the next term.

It is in this idea of term time and, in fact, in this system of court organization, which so long prevailed in England, that we often find the key to the explanation of many of the cases we are called upon to analyze at the present day.
OLIVER WENDALL HOLMES.

Associate Justice Oliver Wendall Holmes passed his eightieth milestone this March. A long and distinguished judicial career his has been. Born in March, 1841, a soldier of the Civil War, several times severely wounded, appointed to the Supreme Court of Massachusetts in 1882, made Chief Justice in 1899, and finally appointed by President Roosevelt to the Supreme Court of the United States in 1902. Thirty-nine years upon the bench, nineteen of which was upon the Supreme Bench of the United States, surely constitutes an enviable career.

Justice Holmes is the oldest member on the Supreme Bench, but several others are not far behind him. Joseph McKenna is seventy-eight, Chief Justice White is seventy-six, and William R. Day is seventy-two. These four old and distinguished justices are likely to be replaced by others within a few years. May their successors be as capable and as honorable.

The other five may be called the younger set. Brandeis is sixty-five years of age, Clarke is sixty-four, Pitney is sixty-three, Van Devanter is sixty-two, and McReynolds, the youngest on the bench, is fifty-nine.

In point of service, Chief Justice White is the senior, he having served as Associate and Chief Justice twenty-seven years. The terms of service for the others are: McKenna twenty-three years, Holmes nineteen years, Day eighteen years, Van Devanter eleven years, Pitney nine years, Brandeis five years and Clarke five years.

WHAT IS LAW?

It has been said that law is not primarily a system of justice, but a system of order. Courts are not established to do justice but to terminate controversy. It is better that a dispute be settled wrongly than not to be settled at all. Otherwise there would be constant controversy and friction of which anarchy would be the consequence. If law were to have justice as its end a great body of rules would be useless for each dispute would have to be decided upon its own merits, according to its own peculiar circumstances without regard to the application of set and immutable rules. But a body of rules is necessary if we are to have order in society. It is necessary that an
individual member of society be able to ascertain in advance the re-
sults which the law will attach to his acts or his omissions. But it
would be beyond human possibility to devise rules in advance for
every possible situation that might arise, for the number is indefinite.
Consequently, it is necessary for the law to classify persons, acts and
relations, and to shape its rules to suit the average person, the ordi-
nary act or the normal relation. Justice does not demand such a
classification, but order does. In truth such a classification defeats
justice, but it promotes order. The principal end is thereby at-
tained.

But it is also the function of law, if it is only a secondary
function, to promote justice so far as the primary object of order
permits. But the proper administration of justice is limited by the
necessity of the application of rules of order. And the result of it
all is that law is only an imperfect instrument of justice.

It is true that many rules of law promote justice as well as
order, because in many cases it is possible for the same rules to per-
form both functions, and certainly when just rules will bring about
order equally as well or better than unjust rules, the just rules ought
to be the law. But it is equally true that when there is a clash be-
tween justice and order, the law upholds order and sacrifices justice.
For instance is there any reason in justice why an intelligent and
capable young man twenty years and eleven months of age should
not be permitted by the law to execute a will or act as an executor or
trustee when a young man unintelligent and incapable but one month
older is permitted by the law to do so? Or is there any reason in
justice why a young man twenty years and eleven months old, hav-
ing all the appearance of a man, should not be held bound by his con-
tract? But this is the law and it is altogether a satisfactory one.

True it may be said that by the application of such rules justice
is more often promoted than defeated. But this is not because of the
justice in the rules but because of the order and certainty produced
by the rules. It is generally admitted that the application of these
principles sometimes, at least, works an injustice. Then if justice is
law’s aim, why have the rules? The answer is, order requires it. Cer-
tainty demands it. The desirability of predicting the consequences of
certain conduct makes it necessary. Experience teaches that it is
better for the whole of society, that there be uniform and well es-
established rules governing men's conduct, even though the application of them frequently results in injustices, than it is that justice be worked out in every case, according to its merits, to the sacrifice of order and certainty.

The justification, therefore, for this function of law is, that no justice at all would be possible without order.

**RECENT CASES.**

**Alienation of Affections—Action for Does Not Survive the Death of the Party Injured or Injuring.**

This is an action for the alienation of the affections of the wife of Charles Gross, against James Ledford. The action was brought by Gross, who died intestate before a trial or judgment, and the only question presented is whether the action survives to his administrator.

Section 10, Ky. Stats., is as follows: "No right for action for personal injury or injury to real or personal estate shall cease or die with the person injuring or injured, except actions for assault, slander, criminal conversation and so much of the action for malicious prosecution as is intended to recover for the personal injury; but for any injury other than those excepted, an action may be brought or revived by the personal representative, heir or devisee, in the same manner as causes of action founded upon contract."

It was held that since at common law the action did not survive, it being an action for an injury to the person, the only question was whether such an action comes under one of the exceptions in sec. 10, Ky. Stats.

As to the construction of this section, the court held that since the action for the alienation of affections and for criminal conversation were of the same genus and the measure of damages to be recovered the same (the remedy and the facts upon which the action is founded are not necessarily the same), hence the legislature must have intended that neither of the actions should survive the death of one of the parties.

It was pointed out by the court that any different construction would allow the adultery of the spouse to be introduced and aggra-