MACCABAEAN LECTURE IN JURISPRUDENCE

# TWO BRANCHES OF THE SAME STREAM

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IN 1936, in connexion with the Tercentenary of Harvard University, there was held at the Harvard Law School a Conference on the Future of the Common Law. Lord Wright, then Master of the Rolls, delivered an address on 'The Common Law in Its Old Home', in which he referred to the 'duality of English law, the streams of law and equity'. In this lecture, I propose to deal with some aspects of another duality, the two versions of the common law which have developed on each side of the Atlantic, and to consider some of the differences which have arisen in these two branches of what I like to think of as essentially the same stream. Whether these branches will ever fuse as has been the case with law and equity, I do not know. But, diverse as they may be, they retain identity not only of source but of spirit. The differences which have developed are to a large extent, I think, the reflection of the application of common law principles to different facts and circumstances. This has always been the essence of the common law. Perhaps this is an instance within the scope of Alexander Pope's phrase—'Though all things differ, all agree.'

There are some differences between us that are hard to explain. Why, for example, do we pass on the right on the road, while you pass on the left? Why is our gallon about four-fifths of yours? Why does 'billion' mean a thousand million with us, and, generally, a million million with you, except in the *Economist*, which has adopted the American usage. Why do you say 'zed' for the last letter of the alphabet, while we call it 'zee'? Why do you say 'inverted commas' when we say 'quotation marks'? Why do you often put a decimal point in the middle of the line when we always place it at the bottom? Why do we put assets on the left side of a balance sheet, and liabilities on the right, while you reverse this, putting liabilities first, or at the left, and assets on the right? Why is stock with you used for what we call bonds or debentures, while what we call stock you call shares?

None of these things is of very great importance; but they, and others like them, cause differences in terminology which sometimes bring about confusion and misunderstanding. Some differences seem largely matters of habit, and are very persistent. With us shares are generally 'without par value', or 'no par', or, at least, as readily 'no par' as they are with par value. Yet, with you, there is a magic to par value which you have hardly been able to break away from. You may yet find that this is a delusive magic, and the time may come when you are as happily accustomed to 'no par' shares as we are.

## I

But such things are matters of detail. The basic differences between English and American law have developed, of course, out of differences in history and geography, including differences in our governmental systems. You, or rather your predecessors here, had much to do with the origins of some of these differences.

Our experiences in the eighteenth century led our statesmen to do a great deal of thinking about governmental structure. They were much influenced, on the one hand, by French writings about the separation of governmental powers, which they felt could be sharply categorized, and assigned to legislative, executive, and judicial branches of government. They were also much concerned, for understandable reasons, with the necessity for restraints on governmental power, which led them to set up a system of 'checks and balances'. At that time, your executive authority was based largely in the House of Lords, which did not provide an acceptable pattern for our founding fathers to follow. So we ended up with a separately chosen executive, quite independent of the legislative authority, and with the three branches of the government set up separately and largely independent of each other, under a written constitution, adopted, directly or indirectly, by the people.

Our Federal system arose naturally, indeed, inevitably, out of history and geography. There were thirteen separate colonies in our part of North America, and the incredibly difficult political task was to put them together. The only way that this could conceivably have been done was through a Federal system. No doubt, if we were starting now, we would not choose to have as many as fifty states in our somewhat over 3 million square miles. But each of our states has its distinctive characteristics, its separate history, and political traditions. The Federal system makes our government far more complicated than yours; but it is,

almost certainly, the only system that could have made our country possible. Our Supreme Court has recognized that 'Our dual form of government has its perplexities . . .'.[1] Perhaps it was better put by Walt Whitman in his 'By Blue Ontario's Shore', where he wrote: 'Here is not merely a nation but a teeming Nation of nations.'

Out of our Federal system arises a dual complexity. There is, first, the division between Federal and state governments. This requires the allocation of power and duty and function between the Federal government, with its headquarters in Washington, on the one hand, and the fifty separate states, on the other. But there is, too, the complete independence and separateness of the fifty states, one from the other, as far as matters allocated to state power are concerned. The consequence is that on most subjects of common interest and concern between your country and ours, there is no 'law of the United States', in any meaningful sense. Indeed, to ask: 'What is the American law on this subject?' is often not a very useful question. On most points of contracts, torts, partnerships, trusts, property, procedure, and other matters of everyday concern, the law, both statute and decisional, can and does differ considerably from state to state. There is usually a common approach, and considerable similarity in general outline. Yet the details may differ greatly; and a person well versed in the law of New York would not ordinarily undertake to give an opinion on the law in Illinois, or any other state.

One consequence of this is that Conflict of Laws becomes a subject of considerable importance in our domestic law. And the rules of conflict of laws, too, vary considerably from state to state. This gives rise to frequent conflicts of conflict of laws, which delight the professors, but so far have not received much explicit recognition from the courts. Results in the conflict of laws field are highly inconsistent, so much so that one of our authors actively writing in this field urges that each court should generally apply its own law to all aspects of every transaction that comes before it.[2] This may be a way out of difficulty, but it seems to me to be a rather complete negation of the whole purpose of the conflict of laws, the function of which, I would suppose, is to try to make the result in any controversy as independent as possible of the rules of the particular forum in which the case is brought.

[1] *Hoke* v. *United States*, 227 U.S. 308, 322 (1912).

[2] See Currie, 'On the Displacement of the Law of the Forum', 58 *Col. L. Rev.* 964 (1958); Currie, 'The Verdict of Quiescent Years', 28 *U. of Chi. L. Rev.* 258 (1961).

All that I have said is, I know, elementary, and well known. But it is, I think, too often forgotten, on both sides of the Atlantic. You, and your lawyers, think of us, naturally enough, as one nation, and you find it very hard to visualize or to conceptualize the chequer-board nature of our law. And we, for our part, having grown up in the system, have little awareness of how complicated it is. We regard division of powers between Federal and state governments, and diversity among the states as natural and indeed inevitable. We have to live with it, and, indeed, we do, quite comfortably. But the diversity and the sheer volume of 'law' that an American lawyer has to know, and that an American law student has to learn, is so much greater than is the case in the United Kingdom that it can fairly be said that the two systems differ in kind, though having many elements in common.

With this background, I am going to try, in this lecture, to deal with some of the differences which have grown up in the law of our two countries. My purpose is to try to explain these, so that you will be more understanding of them, and perhaps more tolerant when you regard them as aberrations. I have no thought that these differences represent improvements which we have made in our stream of the common law. On the other hand, they have not, for the most part developed accidentally; and even when they are unfortunate, there may be some reason behind them.[1]

We are proud of our heritage of the common law. We like to think that we have kept the true faith. We may be schismatics, but we are not heretics. We derive strength from our common tradition with you, and trust that our development, though separate, is at least parallel with yours. If there is better understanding, on both sides of the water, of what we have each done we may be able to keep closer together in the future. It is clear enough that the English-speaking peoples of the world must stand together. Our common, though diverse, legal heritage may be an important factor in this task.

## II

One difference between us which may be quickly noted is that we are a much more litigious people than you are. This arises,

[1] Because American law is complex, we are accustomed to legal writing with many footnotes. For anyone who cares to follow up some of the matters with which I will deal, I am including a number of footnotes giving a selection of materials on the topics discussed.

in part, out of the complexity of our legal and governmental system, to which I have already referred. It is also due in some measure to a sincere belief on our part, deep-seated and long-held, that every wrong should have an effective legal remedy.

In more practical terms, this increase in litigation with us is surely, to a large extent, a consequence of our fee system, and the lack of any system of costs. I suppose that the greatest barrier to legal work in the United Kingdom is your practice of assessing costs, including legal fees, against the losing party to a litigation. True, this sounds only fair and right to you; and there is clearly much to be said for it. But it is equally clear, I should think, that it operates to prevent, as a practical matter, the bringing of many just claims. Whether it leads to the most effective means of recompense for actual losses, and the best plan of loss distribution, may not be clear. I have heard a friend in England, who learned that an aunt had been injured in an automobile accident, tell me that he must at once go to London to make sure that the aunt would not start any litigation. 'That would be ruinous', he told me. Multiplied many thousands of times, this must mean a large amount of unrequited wrong, unless, as may well be the case, your system and practices for settling such matters without litigation, and without even the threat of litigation, are far superior to ours.

This leads of course to the delicate question of the contingent fee. I know that that is anathema to you, and there are many reasons for thinking that you are right. Yet the fact remains that the contingent fee is common in the United States, though its exact legal status may not be wholly clear in all states.[1] And beyond that, what might be called the *quantum meruit* fee is perhaps standard practice in a very large amount of legal work, with or without litigation. American lawyers can hardly understand the system of fixed daily fees which are customarily received by English barristers, or the elaborate scale of fees that is prescribed for each item of work done by a solicitor. Much legal work is, of course, done in the United States on regular annual retainers; and other work is done for a fixed fee, agreed upon in advance, or simply billed by the lawyers when the work is done. But in many other cases, even though the fee is not strictly contingent, it is understood that the fee will be more if a successful result is produced, and less if the effort is fruitless.

In the field of personal injury litigation—what you would call 'running down' cases—the strictly contingent fee is more or less

[1] Cf. *Sullivan* v. *Goulette*, 182 N.E. 2d 519 (Mass. 1962).

standard practice in most sections of the United States as far as lawyers for plaintiffs are concerned. The lawyer gets an agreed percentage of what is recovered; and if nothing is recovered, he gets nothing, no matter how much skill, time, and effort is devoted to the case. This, I know, is scandalous to you. And I am sure that it presents problems which we have by no means fully solved.[1] But it is, too, a matter which should be examined with an open mind, without too many preconceptions, at least as far as other people doing it is concerned.

What the contingent fee means (coupled with the absence of any system of costs) is that an injured person in the United States can always get a lawyer—and often a very competent lawyer—to press his claim. The plaintiff risks nothing himself. If his claim cannot be established, he owes his lawyer nothing; and he incurs no risk of having to pay the other side's legal costs. The most he may have to pay is relatively small amounts for filing fees, and a few other usually small items, which are all that are covered with us in the way of court costs. If the plaintiff is successful, he pays a relatively large portion of his recovery to his lawyer, often a third, and sometimes as much as one-half.

Are there not risks in this that people will advance improper or exaggerated claims? There surely are. Are there not risks that the plaintiff's lawyer, being directly interested in the outcome of the case, will be tempted to use improper methods to help to bring about a recovery, or a larger recovery? This risk may be present, but it is easy, I think, to exaggerate it. Most lawyers have high standards; and if they do not have character enough themselves to keep their advocacy honest, they may well have fear of the consequences—suspension or disbarment—if improper practices are exposed. What the system does mean is that every claimant can find a lawyer to handle his case. It means, too, that the lawyer who takes the case will work very hard on it, developing the facts thoroughly and carefully, examining the applicable law exhaustively, and presenting all of this to the court and jury as effectively as he can. Except for the nuisance value of baseless suits, I doubt if much is recovered that should not be; and the system does provide a considerable amount of protection to many plaintiffs who would not be able to proceed at all otherwise.

[1] See 'Lawyer's Tightrope—Use and Abuse of Fees', 41 *Cornell L. Q.* 683 (1956); 'Contingency Fees! Bane or Boon?' 25 *Insurance Counsel J.* 453 (1958); Institute of Judicial Administration, Contingent Fees in Personal Injury and Wrongful Death Actions (1957).

Of course this greatly increases the amount of litigation, and one result is congestion and delay in many of our courts. The former is something about which lawyers generally do not complain. The matter of congestion is one to which a great deal of thought and energy are devoted, and is generally resolved by us by increasing the number of judges—so that we must have at least ten times as many judges *per capita* as you have. Whether that is good or not, I do not know. I do feel confident, though, that it cannot be said that all matters in this area are either black or white. There are many competing considerations, and no way of resolving the problems fully satisfies all the needs.

But is not this system very expensive to the plaintiff, since he has to give up such a large portion of his recovery to his lawyer? At first blush, this would appear to be the case. However, a study has recently been made in New York by researchers at Columbia and the Association of the Bar of the City of New York.[1] This was confined to relatively small claims for personal injury or property damage, arising out of automobile operations—claims of $1,000, roughly £350, or under. It was found that a high proportion of the claimants used lawyers, and that they recovered enough to make themselves whole, and a little more, even after the legal fees had been deducted. In many of these cases suits were filed, but very few were actually brought to trial. Thus it would appear that the defendants, or their insurance companies, do actually pay the plaintiff's lawyers, but this is done roughly and indirectly, through adjustment of the amount of recovery.

Our greatest problem here, I think, is to get the great mass of personal injury litigation out of the courts. Perhaps there should be a simple system of insurance, with every injured person entitled to recover ordinary losses—up to, say $3,000 or even $5,000—without any proof of negligence or fault. The awards would be made by an administrative agency, much as in the case of workmen's compensation. Only the larger cases—in excess of $3,000 or $5,000—would involve issues of negligence or fault, and these would go to the regular courts. But there would be relatively few of these, and they would be proper occasions for the application of court-room advocacy. Developments along these lines are long overdue with us. But there are many obstacles and inertias, including the opposition of the lawyers who specialize in injury cases, who, generally speaking, are content with the present system of large volume of cases on contingent fees.

[1] Hunting and Neuwirth, *Who Sues in New York City?* (1962).

## III

I have referred to the number of our judges, and this makes it relevant to mention next the method of choosing judges. This is another area where our practice is often different from yours.

Many of our judges are elected by the suffrage of the people. This is not a system that I would favour. I do not think that it works as well as having judges appointed by a responsible executive officer. It can, of course, be observed that appointing judges does not always work out perfectly either. I have only recently received a letter—from another country, I hasten to say—in which the writer said: 'I am afraid that that judge should never have been appointed to the Bench.'

Before going further, let me observe that not all of our judges are elected. Our Federal judges, several hundred in number, are appointed by the President, after confirmation by the Senate. They hold their offices for life, or during good behaviour. In addition, in the New England states (Maine, New Hampshire, Vermont, Massachusetts, and Connecticut), and in New Jersey, the judges of the state courts are appointed by the Governor of the state. In the other forty-four states, though, these judges are generally elected. Sometimes their terms are fairly long—twelve or fourteen years. In other cases, they have rather short terms, even as short as three or four years.

Although a state has a system of electing judges, it may work out that nearly all judges are first put on the bench by appointment. Because a sitting judge is usually re-elected, vacancies generally occur because of death or resignation: and the Governor usually has power to fill a vacancy until the next election. Thus, an appointment is made when a sitting judge dies or retires, and the incumbent then runs as a sitting judge in the next election. The chances that he will be elected are fairly good.

In other cases, as sometimes happens in New York, the leaders of the two political parties agree on the same candidate so that the person, although elected, runs without opposition. This may put the judgeship in politics, but perhaps no more so than when the judge is originally named by the Governor, who, of course, is in active political life. Once, when I referred to this matter in Australia (in New South Wales), the response that came to me was that their system was really not much different, since selection there really depended on the vote of the caucus of the Labour Party.

Finally, in a few states, we have what is known as the Missouri plan, since it was first adopted in Missouri some twenty years ago. Under this plan, a person is appointed by the Governor. Then, two or three years later, his name appears on the ballot with the question whether he shall be retained in office. The people have power to reject him. However, he does not run against anyone. He runs, as it is said, on his own record.

At its worst, the elective system can be very bad, with candidates running on party tickets, with active campaigning, through speeches, posters, radio, and television. In some states a considerable effort is made to have the load carried by the local bar association. The lawyers are polled, and then the bar association conducts an active campaign for the persons who are endorsed by the vote of the lawyers. Even at its best, this process is surely full of difficulties.

Finally, it should be pointed out that the elective system sometimes works very well indeed. Many outstanding American judges have been elected to their offices. I need only mention Justice Cardozo, who was several times elected to the bench of the Court of Appeals of New York, the highest court of that state. I have no doubt that the elective system pulls down the average quality of our state judges. There are many fine men who would be well qualified to be judges who simply will not go through the strain and possible indignity of an active election campaign. As far as I am concerned, I can readily understand that reaction. I think it would be much better if all our judges were appointed, even though, as I have said appointment does not always produce perfect results.

Curiously enough, election of judges was a rather late development with us. It arose out of our period of Jacksonian democracy which came to the country in the 1830's and thereafter. By that time our people had shown that they could function without a king, and without a strong ruling class. They had shown that the people could truly govern themselves, and that the results were, on the whole, rather good. It is not surprising, then, that in such a democratic community there should be pressure for more and more democracy. The notion grew and developed that no one should exercise governmental power over another man unless that power was granted to him by the franchise of the people.

The great impetus came in 1846, when the key state of New York, after extended debate, adopted a new constitutional provision for the popular election of all judges for relatively short

terms. Since that time this has become the standard pattern, followed in most states.[1] As a matter of practical politics, it is now quite impossible to eliminate election of judges entirely. The results are not all bad, but there are some areas of the law, and of the country, where justice may be distorted because of the election of judges. For example, the appointed judges of the Federal courts have, I think it can be fairly said, had to exercise an undue proportion of the task of upholding civil liberties in the country. State court judges, facing an election in the not too distant future, sometimes find it hard to make decisions which will be unpopular where questions involving great emotions are involved. We have, perhaps, rather more of such questions in our country than in some others. There are times when one can be very proud of the strength and courage shown by our judges, including elected judges. There are other times when the courage is less apparent, even, be it said, on the part of appointed judges.

## IV

Now let me turn from practice and governmental structure to some questions of substantive law. One of the most striking differences in the rules of law of our two countries is in the use of what we call 'legislative history' in the construction of statutes. Although there is danger of over-simplification, this is, I believe, largely a result of the fact that you have a Parliamentary system, and can readily obtain legislation if the controlling figures in Parliament want it, while we have a legislature and an executive which are wholly independent, and no individual or small groups of individuals has any very effective control of the legislature.

I need not recount your rule, which, in form, at least, directs that the court must look only to the words of the statute as written, and cannot consult any extraneous materials when it is confronted with the task of construing the statute. Moreover, the statute is construed in terms of what is regarded as the 'literal' meaning of its words. The fact that language, even statutory language, can have many latent ambiguities, even when superficially it has a so-called 'plain meaning', is not given much recognition. This subject was in part the one with which Lord Evershed dealt in the first of the Maccabaean Lectures in 1956.[2]

[1] See Haynes, *The Selection and Tenure of Judges*, 100 (1944).

[2] 'The Impact of Statute on the Law of England', 42 *Proceedings of the British Academy*, 247 (1956).

Generally speaking, your rule is that a statute should be narrowly and literally construed by the courts, lest they engage in legislative activity, and that if Parliament is not satisfied with the result, being an all-powerful legislative body, it should then pass an amendatory law, stating, in literal terms, just what it does want. This is a plausible rule, and in many areas it has worked well enough, even though some bizarre results are sometimes produced.[1]

But with us, the whole legislative process is entirely different. The President, as such, has no very great control over legislation, aside from his veto power. We have two houses of Congress, both of which are effective, vital, repositories of power, apart from the executive. In neither House is there strong party control, and the two Houses may be, and occasionally are, made up with majorities of different parties than the President. The result is that there is far less Party control over legislation with us than there is with you; and the ultimate legislative product with us may be more the product of the concensus of many minds than it is the executive's decision, ratified by the executive's necessary majority in Parliament.

In a sense, our system is more 'democratic' than yours, since many persons have an effective voice in shaping the policy and the details of our legislation, and even members of the minority party may play a considerable part in the process. I have heard the Prime Minister of a Commonwealth country talk in a way that would never be heard in the United States. He said, for example: 'Yes, I have decided' to do so-and-so. 'No, that is not my policy.' 'I am going to introduce legislation' to this effect—and so on. Under the Parliamentary system the Prime Minister can convert his decisions into law, taking the advice of his Cabinet to the extent that he deems proper. When he ceases to be able to convert his decisions into law, he ceases to be Prime Minister. But while he is Prime Minister he has far greater personal power than the President of the United States, or any other figure in our political structure. With us legislation must be achieved by request, suggestion, persuasion, by threats based on political patronage, but always by the concensus of many

[1] See Landis, 'Statutes and the Sources of Law', in *Harvard Legal Essays* 213 (1934). Cf. *Inland Revenue Commissioners* v. *Hinchy*, [1960] A.C. 748, where the meaning which was plain to the House of Lords was not plain to the Master of the Rolls and his two colleagues in the Court of Appeal. [1959] 2 Q.B. 357. See 'The Hinchy Case', 23 *Modern L. Rev.* 425 (1960); A.L.G., 'Treble Penalties in Income Tax Law', 76 *L.Q. Rev.* 215 (1960).

men having different points of view and wielding varying amounts of political power.

This difference in political structure has its effect in the legislative process. Among other things, it greatly increases the power and importance of committees in the American Congress. Congressmen as a whole cannot participate very effectively on every bill that comes along, so they in effect delegate much of their power to Committees which give special attention to the legislative proposals falling within their jurisdiction. And the Chairman of the Committee has with us a considerable extra power, sometimes a position approaching dominance in his House.

We have found that various things happening in the course of the legislative process—particularly the reports of the Committees, and statements made on the floor of Congress by the Chairmen of the Committees, in explanation of the Bill, or in answer to questions—can be illuminating when a question of the construction of the Bill later arises in court or in administrative proceedings. Such material—legislative history, we call it—must be used thoughtfully and cautiously; it is by no means conclusive; and it can never override the 'plain language' of the statute, when that language really is plain. But we find that statutory language is not as often 'plain' or 'clear' as one might think,[1] and that the legislative history often gives an excellent guide for properly resolving the ambiguities which develop. When these ambiguities arise, we find it hard to see why we should blind ourselves to the help that can be obtained by examining the details of the legislative process. True enough, this must be done with skill and circumspection; but that is what judges are for.

Let me observe that our rule does not mean that anything that anyone says in the course of a speech in a legislative body will be given weight in the construction of the statute. Such speeches might be made by members who are opposed to the Bill, or by other members who were speaking for themselves alone. The important legislative materials for this purpose are the reports of Committees, and also occasionally, statements made by the Chairman of the Committee, or other member in charge of the Bill, when he is speaking as part of the process of steering the Bill through Congress.

[1] See Frankfurter, 'Some Reflections on the Reading of Statutes', 47 *Col. L. Rev.* 527 (1947); Chafee, 'The Disorderly Conduct of Words', 41 *Col. L. Rev.* 381 (1941).

## V

There is also a special problem, leading to a difference between us, arising out of the plain meaning rule in the construction of statutes. This is an important matter, and has to do with the construction of a Constitution. It is true that the United Kingdom has no written constitution. But it is likewise true that the United Kingdom has spawned constitutions all over the world. You were in a very real sense responsible for our Federal Constitution, and for our fifty state constitutions. But above and beyond that you have actually enacted the British North America Act, which is the Constitution of Canada, the Commonwealth of Australia Constitution Act, the Constitution of New Zealand, the South Africa Act, which was the Constitution of the Union of South Africa, and the Constitutions of India, Nigeria, and of many other present and former members of the Commonwealth. This has been a great and constructive governmental task and any informed observer must admire the way that this redistribution of power has been carried out.

But you have sometimes been misled, I think, by the form in which these Constitutions have appeared. Many of them, especially the early ones, were Acts of Parliament. More recent ones have appeared as Orders in Council, but they do not present a materially different situation. Since these were in form statutes, and since you have a 'plain meaning' rule for the construction of statutes, your courts—usually the Privy Council—have often said that these constitutional provisions must be construed literally, and in accordance with their supposed 'plain meaning'. This has, I venture to say, been unfortunate, and has led to many difficulties, especially in Australia and in Canada. The vicissitudes of Section 92 of the Australian Constitution may be mentioned as an illustration;[1] and plain meanings have been found which were not very plain to anyone except the court making the decision, either before or after the decision was made. Our experience seems to show that if a Constitutional provision is treated as a statute, unsound results are almost inevitable. If, however, it is recognized that 'it is a *constitution* we are expounding',[2] the situation can be considerably clarified. And if the question is one involving a question of Federalism, as, for instance, with respect to Canada or Australia, it is hard for an

[1] Cf. Stone, 'Government of Laws and Yet of Men', 25 *N.Y.U.L. Rev.* 451 (1950), 1 *West Aust. Ann. L. Rev.* 461 (1950).

[2] Marshall, C. J., in *McCulloch* v. *Maryland*, 4 Wheat. 316, 407 (U.S. 1819).

English judge, brought up in a unitary system, to develop the appropriate 'feel' for Federalism, and the approach which will make the system work.[1]

Your reliance on the 'plain meaning' rule has had its effect on the way in which you have recently been drafting Constitutional provisions. Let me refer first to the Constitution of the United States. The First Article of our Bill of Rights—the First Amendment to our Constitution—reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Now this is framed in sweeping terms. It is indeed majestic language. It is clear that it cannot be taken literally in every respect. In providing for freedom of speech it says nothing about the man who cries 'Fire' in a crowded theatre; nor in providing for freedom of the press does it allow for the law of libel. Nevertheless it is a fine and effective Constitutional provision. Its basic meaning—its essential drive—is crystal clear. There may be questions as to its exact scope and extent. But that is what courts are for, provided they are always aware that it is a Constitution that they are expounding.

But if one follows the approach that a Constitution is just another statute, and that a statute is to be construed literally, let us see what happens. In the Constitution of Nigeria,[2] which was largely drafted in London, and put into effect as an Order in Council, the corresponding provisions are found in sections 23 and 24. Section 24, relating to freedom of speech, reads as follows:

[1] This point has been well made by an eminent judge, Sir Owen Dixon, in his judgment in the case of *O'Sullivan* v. *Noarlunga Meat Ltd.*, 94 *C.L.R.* 367, 375 (1956):

> '[F]ederalism is a form of government the nature of which is seldom adequately understood in all its bearings by those whose fortune it is to live under a unitary system. The problems of federalism and the considerations governing their solution assume a different aspect to those whose lives are spent under the operation of a federal Constitution, particularly if by education, practice and study they have been brought to think about the constitutional conceptions and modes of reasoning which belong to federalism as commonplace and familiar ideas. A unitary system presents no analogies and indeed, on the contrary, it forms a background against which many of the conceptions and distinctions inherent in federalism must strike the mind as strange and exotic refinements.'

[2] Nigeria (Constitution) Order in Council, No. 1652 of 1960, [1960] 2 *Statutory Instruments*, 2381.

24.—(1) Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

(2) Nothing in this paragraph shall invalidate any law that is reasonably justifiable in a democratic society—

(*a*) in the interest of defence, public safety, public order, public morality or public health;

(*b*) for the purpose of protecting the rights, reputations and freedom of other persons, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating telephony, wireless broadcasting, television, or the exhibition of cinematograph films; or

(*c*) imposing restrictions upon persons holding office under the Crown, members of the armed forces of the Crown or members of a police force.

Well, there it is. The 'i's' are dotted, and the 't's' are crossed. It is given an atmosphere of precision and certainty, which may or may not be found to be there when the actual questions arise. But in the process it has lost its majesty. It may, indeed, have so far become just another statute that it will cease to be effective just at the time when a provision for freedom of speech and the press must be effective if it is worth having such a provision at all. This section of the Nigerian Constitution may help in the application of the 'plain meaning' rule, but to an outsider it would seem to be a case where the result would have been better if it could have been recognized that the task in hand was the supremely important one of drafting a Constitution for the ages, rather than a statutory provision subject to the detailed supervision of the 'plain meaning' rule.

## VI

Now let me turn to another area of difference between us, which is often in the public eye. One of the immediate consequences of our Federal system is our confused law of divorce. To an outsider it must appear that Americans do not take marriage very seriously. This is an area, though, like most fields of American law, where it is hardly safe to generalize. About all that can be said is that the situation is full of complexity. With us divorce, not being referred to in the Constitution, is a matter for the states; and that means that each state can have its own rule on the subject—and each state does. There are fifty-one laws of divorce in the United States—the fifty states and the District of Columbia—and they are all different.

It might have been wise if Congress had been given power over divorce in the United States. The Federal Government has power over divorce in Australia—perhaps as a result of our experience—and has recently exercised that power.[1] But Congress has no such power, and there is no prospect that a Constitutional Amendment could be adopted now transferring such power to Congress so that our law in this area could be made uniform. Indeed, this may well be one of the many areas in which our country has been made possible by having a Federal system, allowing for great local variation in accordance with the wishes of the people in the various sections of the country. Divorce is a subject on which opinions differ, and on which emotions may run high. So each state has its own law of divorce; and for practical purposes these laws are effectively binding on a large proportion of the people in the several states.

But we are a Federal nation, and people do move about a good deal. In the old days they moved about as the country was expanding; and in more recent times they have moved about as travel became easier and quicker. They are always free to move from state to state, as they may wish, and can afford it. This leads to a kind of Gresham's law in the field of divorce.[2] A person wanting a divorce can easily move to another state. He claims that this is now his home, and he starts proceedings for a divorce there, in accordance with the law of the state to which he has moved. If he appears in the court alone, without participation by his spouse, and his presence in the state is really illusory, his divorce will be invalid in other states.[3]

But suppose both spouses want the divorce. One of them goes to a state with 'easy' grounds for divorce, and starts a divorce proceeding, alleging domicile in that state. The other spouse appears in the proceedings, either in person or through counsel. The defendant admits the domicile, or, denying it, presents no proof on that subject. The court then finds, on the plaintiff's evidence, that he is domiciled there, and grants the plaintiff a divorce. Our Constitution provides, in Article IV, Section 1, that 'Each State shall give Full Faith and Credit to the Court Proceedings, Records and Public Acts of every Other State.' On this basis our Supreme Court has held that, in the instance

[1] Matrimonial Causes Act, 1959, Commonwealth Acts, 1959, No. 104.

[2] See Ross and Crawford, 'Gresham's Law of Domestic Relations: The Alabama Quickie', 27 *Brooklyn L. Rev.* 224 (1961).

[3] *Williams* v. *North Carolina*, 317 U.S. 287 (1942). See Powell, 'And Repent at Leisure', 58 *Harv. L. Rev.* 930 (1945).

I have put, the issue of domicile is *res judicata*, and that all other states must give Full Faith and Credit to the decision of the court on this question, since the court had jurisdiction over both parties.[1] Thus, if both spouses appear, a synthetic validity can be given to a divorce, enough to make it valid throughout the United States.[2] The amount of perjury that is involved in this process is surely shocking,[3] unless and until one can bring himself to regard it as a mere formality, like the allegation of a lease in ejectment, which everyone knew was not true, but no one was allowed to deny, or the allegation of loss and a casual finding in trover, or the allegation of venue in trespass, or many other fictional allegations in the history of what I hope you will allow me to call our law.[4]

## VII

Closely related to the matter which I have just discussed is the difference between us in the matter of the law relating to domicile. You have been a compact country, with a single law for England and Wales. You have been a country from which people went, to India or the colonies, but nearly always with the expectation of returning. No matter where these people were, 'home' was always on your fair and verdant isle. Thus, you developed the doctrine of domicile of origin. And you have clung tenaciously to the rule that the domicile of a married woman is always the same as her husband, no matter what the circumstances may be, and even if he has outrageously deserted her.

Our country, on the other hand, has been a country to which people came from other parts of the world, generally with the intention of remaining with us. And we are also a Federal nation, with fifty states, and with great ease of travel from state to state. As a consequence we have never accepted the concept of domicile of origin. In determining domicile with us, we simply look to the facts as to where the man's home is now, with little or no regard to his origin, or where he has been in the meantime, which seem to us to be largely irrelevant. And having reached the conclusion that domicile depends simply on the facts, we

[1] *Sherrer* v. *Sherrer*, 334 U.S. 343 (1948); *Coe* v. *Coe*, 334 U.S. 378 (1948).

[2] See Clark, 'Estoppel against Jurisdictional Attack on Decrees of Divorce', 70 *Yale L.J.* 45 (1960); von Mehren, 'The Validity of Foreign Divorces', 45 *Mass. L.Q.* 23 (1960).

[3] See Bradway, 'Collusion and the Public Interest in the Law of Divorce', 47 *Corn. L.Q.* 374 (1962).

[4] See Fuller, 'Legal Fictions', 25 *Ill. L. Rev.* 363, 513, 877 (1930–1).

apply that view to the married woman, too. If she is happily married to her husband, we are likely to say that her domicile is the same as his, even though, for one reason or another, she is not presently living with him. However, if she is separated from her husband, or if he has abandoned her, or disappeared, we determine her domicile by the facts which are applicable to her, and we regard the facts as to his domicile, even if they are known, as irrelevant. Thus, almost from the beginning of our separate legal history, we have been accustomed to the separate domicile of a married woman, and we would not have it otherwise.[1] Of course this leads to some complications, but these are not too difficult to deal with. And it leads to advantages, too. For example, we have always been able to take care of the deserted wife, through divorce proceedings at her domicile, without having to say that she can get a divorce at her residence, even though she is not domiciled there, with the resulting complications as to the effectiveness in other jurisdictions of a divorce granted on the basis of residence only.[2]

## VIII

Turning now to another field, I will refer to the matter of newspaper coverage of court proceedings, and cases pending in court, particularly in criminal cases. This question is with us materially affected by our Constitutional provisions. As things have worked out, I think, you have a definite advantage on us in this area. Your newspapers are sharply restricted, and are subject to severe sanctions through proceedings for contempt of court. As a result, your newspapers can only report matters which actually happen in court, and then only in a restrained and factual way. Things like news accounts of the arrest of the accused, statements by the police that he has confessed, a summary of the expected evidence against him, and photographs of the accused before trial, are regarded as unfairly prejudicing his right to a

[1] See *Williamson* v. *Osenton*, 232 U.S. 619 (1913), per Holmes, J. See also Beale, 'The Domicile of a Married Woman', 8 *Minn. L. Rev.* 28 (1923). Cf. Graveson, '*Boardman* v. *Boardman* through English Eyes', 23 *Conn. B.J.* 173 (1949), commenting on *Boardman* v. *Boardman*, 135 *Conn.* 124, 62 A. 2d 521 (1948), where it was held that a wife can have a separate domicile even though she was unjustified in leaving her husband.

[2] Cf. *Travers* v. *Holly*, [1953] P. 246. See also *Fenton* v. *Fenton*, [1957] *Vict. L.R.* 17, and the statute changing that decision, Vict. Act. No. 6186, of 1957, commented on in 72 *Harv. L. Rev.* 786 (1959). See also Matrimonial Causes Act, 1959, Commonwealth Acts, 1959, No. 104, sec. 95.

fair trial, and are effectively forbidden by action of the courts through their contempt power.

It is my own view that this is a wise and salutary rule. But our law in the United States has developed differently. In all of our state constitutions, and in the Federal Constitution, there are explicit provisions guaranteeing the freedom of the press. You have some responsibility for this, for events in England and in the colonies in the seventeenth and eighteenth centuries had much to do with making free speech and free press a constitutional matter with us. At any rate, our courts, in considering this problem, have not felt themselves free to hold the papers within the limits which the courts themselves might feel proper in the interests of justice. For the papers quickly and vigorously, through their counsel, point to the Constitutional guarantees of the freedom of the press. This is a value which stands high on our scales, as it does in yours. But, with us, it is more than that. It is Constitutionally protected. And our Constitutions are our highest law.

In this area, the views of the Supreme Court of the United States are controlling on the state courts as well as on the Federal courts, since the provisions of the Federal Bill of Rights, though in terms applicable only to the Federal Government, are held to be binding on the states because of the provisions of the Fourteenth Amendment to the Federal Constitution which forbids any State from depriving any person of life, liberty, or property without due process of law. It is a long story, but it was finally held some years ago that, generally, action by a state contrary to the provisions of the Federal Bill of Rights would likewise be so contrary to basic standards that they would violate the 'due process' clause, which is applicable to the States.[1]

On this basis, the Supreme Court has held that no court has power to punish summarily for contempt of court, except for matters which happen within the courtroom itself, and directly obstruct the actual conduct of the Court.[2] My own view is that this is too narrow a decision, and that it was not required by our constitutional provisions. But my own view is of no importance on this matter after the Supreme Court has spoken. The

[1] *Palko* v. *Connecticut*, 302 U.S. 319 (1937); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939).

[2] *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 367 (1947). See Donnelly and Goldfarb, 'Contempt by Publication in the United States', 24 *Modern L. Rev.* 239 (1961); 'Contempt by Publication: The Limitations on Indirect Contempt of Court', 48 *Va. L. Rev.* 556 (1962).

consequence of the Supreme Court's decision is that our papers are subject to virtually no legal restraint with respect to what they print about pending criminal cases. Some of our papers exercise excellent self-restraint, and are very careful to see that what they print is fair, accurate, and non-prejudicial. But there is always an element in the press, and with us a sizable element, which will do almost anything to build circulation. In this area they have the self-justification that they are exercising the constitutional right of the freedom of the press, and that they are carrying out their responsibility to meet the 'public's right to know'. Some of the things that have been done by the press, and sometimes by the radio and television, are shocking beyond belief, and make me embarassed for my country. Many of the courts, however, because of the constitutional restraints imposed on them by the Supreme Court, have felt themselves helpless to do anything about it.[1]

## IX

Closely related is another matter, which will surely be shocking to you, as it is to me. There is in the United States great pressure from 'the media', that is, the newspapers, radio, and television, that they be admitted into the courtroom itself. The press wants the right to take pictures during the course of the trial; the radio wants the right to broadcast the court proceedings; and the television people want to send both sight and sound out to the general public. This claim is based on the same constitutional provisions, and on another provision generally found with us, and having its roots in English history—namely the provision guaranteeing to the accused the right to a 'public' trial. The 'media' contend that modern methods of reporting should be recognized, and argue that the courts are standing in the way of progress. As usual, the more vociferous elements among the 'media' are not concerned about the circumstances which will provide a fair trial. They see a chance for a good show, which will attract a wide audience.

A few states have yielded to this pressure. In Colorado, for example, the state Supreme Court has provided that the admission of television cameras is a matter to be decided by the

[1] For discussions of this problem, see Sullivan, *Trial by Newspaper* (1961); Goldfarb, 'Public Information, Criminal Trials, and the Cause Célèbre', 36 *N.Y.U.L. Rev.* 810 (1961); Mueller, 'Problems Posed by Publicity to Crime and Criminal Proceedings', 110 *U. of Pa. L. Rev.* 1 (1961).

trial judge.[1] The trial of a man accused of placing a bomb in an airplane, causing some forty deaths, was televised in that state several years ago.[2] This has also been allowed in Texas and a few other states. Newspaper cameramen and the radio have also been admitted. Generally speaking, we have held the line fairly well. Canon 35 of the Canons of Judicial Ethics of the American Bar Association, adopted in 1936, after the Hauptmann trial,[3] provides:

> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

This Canon, however, is not binding on any court, except as it is adopted as a rule of court, or is made generally applicable throughout the state by the state Supreme Court. This has been done in a number of states. And the rule is fully applicable in all of the Federal Courts. Only last spring, the (Federal) Judicial Council of the United States:

> Resolved, that the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceeding, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court.

The 'media' are now carrying on an extensive campaign to get Canon 35 modified, and it is distressing to see the kinds of support they can get. The American Bar Association has a Committee considering the matter now. It is my earnest hope that, after a full hearing and consideration, they will not yield a particle from the present rule of Canon 35. I do not see how we can take any other position and be true to our responsibilities as officers of the courts and members of the legal profession.[4] Your are fortunate, indeed, that your system and traditions are such that you do not have to face such pressures.

[1] In re Hearings Concerning Canon 35, 296 P. 2d 465 (Colo. 1956).

[2] *Graham* v. *People*, 134 Colo. 290, 302 P. 2d 737 (1956).

[3] *State* v. *Hauptmann*, 115 N.J. Law 412, 180 Atl. 809 (1935).

[4] I have tried to state my views on this in Griswold, 'The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered', 48 *A.B.A.J.* 615 (1962).

## X

I will conclude with reference to another question in the area of the criminal law where our constitutional provisions have led to differences in our law. This is with respect to proceedings after conviction of a criminal offence. Here, two factors in the constitutional situation come into operation: first, the Federal system, which gives us two sets of courts, one the state courts, which have primary jurisdiction in most criminal matters, and, second, the federal courts, which have a peculiar responsibility to see that the provisions of the Federal Constitution are complied with. The other difference relates to constitutional provisions applicable in criminal cases, particularly the 'due process' and the 'equal protection' clauses of the Fourteenth Amendment.

This means that a person may be convicted of a crime in a state trial court, and may then take his case on appeal to the state supreme court. Sometimes there is an intermediate court of appeal in the state, so that the defendant may have two appeals in the state court system. He may even have to seek review from the United States Supreme Court, but this can be withheld by that Court in its discretion, without any decision on the merits. At this point the defendant can start a new line of proceedings. He can apply for a writ of habeas corpus from the Federal district court, alleging that the state court decision deprives him of his constitutional rights. He may contend, for example, that, he being a coloured man, Negroes were excluded from the grand jury, or from the petty jury that tried him. Or he may contend that the trial was improper because he was not provided with counsel. The rule as to the duty of the states to provide counsel in non-capital cases is not yet clear,[1] and many of the states, including my own state of Massachusetts, have inadequate provision for counsel for indigent defendants in criminal cases.[2] Or the defendant may contend that there were unfair circumstances at his trial, even that it was dominated by mob violence, and that, alas, has actually happened.[3]

[1] In *Betts* v. *Brady*, 316 U.S. 455 (1942), the Supreme Court held that the states need not provide counsel even where a serious felony was charged, if a death sentence was not involved. This question is now being re-examined. See *Gideon* v. *Cochran*, 370 U.S. 908 (1962), where the Court requested counsel to discuss the question whether *Betts* v. *Brady* should be reconsidered.

[2] See *Equal Justice for the Accused* (Ass'n of the Bar of the City of New York, 1959).

[3] *Moore* v. *Dempsey*, 261 U.S. 86 (1923).

In a great many cases, the Federal court will find that there is not probable cause for habeas corpus. But even then there can be an appeal to the United States Court of Appeals, and an application for review in the Supreme Court of the United States. Not many of these efforts to seek Federal review are successful. But occasionally they are, and some of the things which turn up in these cases are shocking. Some of our states, even some states which surely ought to do better, have not always maintained the highest standards in the administration of criminal justice. There is complaint from some of the state authorities about interference from the Federal courts;[1] but the best answer to that is surely for the states to see to it that the highest standards are maintained so that there will be no basis for any intervention by a Federal tribunal.

Occasionally, the delays in these cases are spectacular, as in the *Chessman* case, which arose in California.[2] This was an unfortunate case all around. There were difficulties about the trial, and especially difficulties about the appeal in the state courts. The stenographer who took the record of the trial died before he had transcribed his notes and there was doubt whether a subsequent stenographer had transcribed the notes accurately or completely. Moreover, Chessman was sentenced to death for kidnapping. His crime was a heinous one, but no one was killed; it was not murder. And it was only literally kidnapping, because the victim was forcibly removed against her will a distance of about fourteen feet.

In this circumstance, all of the forces which make for delay in our criminal procedures were fully brought into play. Despite our failures in many ways, we have a great belief in not subjecting a person to a severe penalty until he has been given every opportunity to show that he does not deserve it. We are not as convinced as you are that justice is always served by a system in which the trap is sprung three or four or five weeks after the crime is committed. That may be a good thing if you are sure that the crime was committed, and that this is the man who committed it. But are you always sure? The history of our

[1] For discussions of this problem, see Brennan, 'Federal Habeas Corpus and State Prisoners', 7 *Utah L. Rev.* 423 (1961); Reitz, 'Federal Habeas Corpus: Post Conviction Remedy for State Prisoners', 108 *U. of Pa. L. Rev.* 461 (1960). See also the proposed Uniform Post Conviction Procedure Act, 9B *Uniform Laws Annotated* 344 (1957).

[2] See *Chessman* v. *Teets*, 354 U.S. 156 (1957). The whole chronology is summarized in Kunstler, *Beyond a Reasonable Doubt?* 291–8 (1961).

criminal law shows a good many known mistakes,[1] and there may be some, known and unknown, in yours, too. At any rate, our courts generally take the position that it is better to be as sure as possible in capital cases than to be fast. We are sometimes less careful in other than capital cases.

There is with us, as there is with you, a great debate about capital punishment. I would say that, generally speaking, we are about equally divided as to whether we should have capital punishment at all. As a result, we temporize about this in many ways. For example, in my Commonwealth of Massachusetts we have capital punishment, but there has not been an execution for fourteen years. In California, where the *Chessman* case occurred, there are executions, though not many for kidnapping. But there is also extensive and vocal opposition in that state to capital punishment in any case. This probably does not reach a majority of the people, certainly not a majority of the legislature, but it is a large and influential segment of the public. In this situation, and in the special circumstances of this case, I can understand how any judge would want to be sure that every legally available avenue of approach was exhausted before a final conclusion was reached.

Add to the delays in the state courts, the subsequent delays through proceedings in the Federal courts, and you have a long-drawn-out proceeding, which is surely no credit to our administration of criminal justice. But, though it cannot be excused, it can, I think, be at least in part understood as a part of our concern for the maintenance of proper standards in criminal proceedings, and our recognition of the possibility of error even in a well-conducted criminal trial.

## Conclusion

In a paper which undertakes to set forth, and perhaps to explain a bit, some areas of difference, there has not been time to stress the areas of similarity. I cannot close, though, without emphasizing that, for all our independent individuality, the similarities are far more numerous and more important than the differences. We talk the same legal language. We use much the same terminology. We can understand each other, if we do not get off into some of the finer points of federalism and constitutional law, on the one hand, or the Law of Property Act, on the other. We have the same approach, the same method. Despite

[1] See Borchard, *Convicting the Innocent* (1932); Frank and Frank, *Not Guilty* (1957).

problems in my country which you, happily, have escaped, we have the same respect for courts; and we deal with cases in much the same way you do. Bracton, Glanville, Littleton, and Coke are ours as much as they are yours, and Blackstone had perhaps more influence on the development of our law than he did in England. For the past 175 years our legal contacts have not been direct. But they are real. We are travelling, I like to think, down two branches of the same stream.