"Of The Civil Law And The Common Law".

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"**There have grown up in the history of nations only two great systems of law, the civil law of ancient Rome, and the common law of England. All the most civilized nations in the world are governed by either of these two great schemes of justice. Though the civil law and the common law have much in common, yet in many important particulars they are the opposites of each other. In the course of his studies, the student of law finds so much said, in an incidental way, about the civil law, that is calculated to mislead his judgment in regard to the true character of that scheme of justice, that it is important, at the outset of his walks over the fields of the common law, to give him some account of the civil law, and point out in what it differs essentially from the common law. This is a matter of much importance to every student who aspires to a comprehensive and enlightened knowledge of jurisprudence. ...**

... it was under the empire, when the glory of the republic was gone, that the jurists attained their eminence, and in fact became the architects of the great system of Roman law. ...

As the military power, which during the republic was kept in the strictest subordination to the civil, could, under the empire, at any time be put above the civil authority by the emperor, his very title being military, Septimus Severus appointed Papinian, the greatest of all the Roman jurists, pretorian prefect, which placed him at the head of the army and of the law. ...

The jurists wrote innumerable treatises on the law, which came to be of as much authority as their privileged opinions. ... Oratory was no longer, as it had been during the glorious period of the republic, the great art by which men rose to eminence in the state. Its voice was now silent; when to speak of the rights of Roman citizens was treason. ...

The administration of the law, too, was subordinate to the imperial authority, not only in theory but in practice, the courts being organized accordingly. Under the republic, the courts were open to the public in both civil and criminal trials. Under the empire, open courts disappeared, and an appeal lay in all cases to the emperor in his imperial court. Thus a perfect system of despotism, disguised under forms of law, was built up on the ruins of the republic. ...

If we now turn to the common law of England, we will find that, as far as administrative principles and forms of procedure are concerned, it is the opposite of the Roman civil law as it was molded under the empire. The principle which, in the practical administration of the two systems, marks the primary essential distinction between them, is the relative obligatory force under them of precedent or former decisions. Under the common law, former decisions control the court unconditionally. It is deemed by the common law indispensable that there should be a fixed rule of decision, in order that rights and property may be stable and certain, and not involved in perpetual doubts and controversies.

Under the civil law the principles is different. Former decisions have not so fixed and certain an operation, but are considered as only governing the particular case, without establishing as a settled rule the principle involved in it. When a similar case occurs, the judge may decide it according to his personal views of the law, or according to the opinion of some eminent jurist. The civil law, as administered at the present time on the continent of Europe,

possesses all the uncertainty and fluctuations of doctrine that results from the little respect paid by it to precedent. The commentaries of the doctors, who have succeeded to the jurists, are as various as the diversity of human judgment can make them. ...

The diversity of doctrine in the schools signalized by Mr. Legare descends into the courts to perplex and bewilder the administration of justice. Let anyone, who wishes to examine a specimen of this perplexity in regard to a fundamental classification which the civilians make of laws into personal statutes and real statutes, refer to the opinion of the supreme court of Louisiana, by Mr. Justice Porter, in Saul v. His Creditors, in 17 Martins' Reports. After referring to the jurists of the different European countries who have treated of this distinction, Justice Porter says:

"The moment we attempt to discover from these writers what statutes are real and what personal, the most extraordinary confusion is presented. Their definitions often differ; and, when they agree in their definitions, they dispute as to their application."

And Mr. Justice Story, in his "Conflict of Laws," when speaking of the civilians who have treated of the subject of his book, says:

"The civilians of continental Europe have examined the subject in many of its bearings with a more comprehensive philosophy, if not with a more enlightened spirit. Their works, however, abound with theoretical distinctions, which serve little purpose than to provoke idle discussions and metaphysical subtleties, which perplex, if they do not confound the inquirer.
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Precedents, too, have not, either in the courts of continental Europe or in the judicial discussions of eminent jurists, the same force and authority which we, who live under the influence of the common law, are accustomed to attribute to them; and it is unavoidable that many differences of opinion will exist amongst them, even in relation to leading principles." Such is the fluctuating wind of doctrine with which the judicial mind is liable to veer under the civil-law institutions where precedents have but little force. ...

The common law, in broad contrast to the civil law, has always wholly repudiated anything as authority but the judgments of courts deliberately given in causes argued and decided. "For (says Lord Coke, in the preface to his 9th Report) it is one amongst others of the great honors of the common law that cases of great difficulty are never adjudged or resolved in tenebris or sub silentio suppressis reationibus, but in open court: and there upon solemn and elaborate arguments, first at the bar by the counsel learned of either party, (and if the case depend in the court of common pleas, then by the sergeants at law only;) and after at the bench by the judges, where they argue (the presiding judge beginning first) seriatim, upon certain days openly and purposely prefixed, delivering at large the authorities, reasons, and causes of their judgments and resolutions in every such particular case, (habet enim nesio quid energia viva vox:) a reverend and honorable proceeding in law, a grateful satisfaction to the parties, and a great instruction and direction to the attentive and studious hearers."

Nothing less elaborately learned and cautiously considered than such a judgment of a court has a legitimate place in the common law. By such adjudication has that great system of jurisprudence been built up. The opinion of no lawyer has a place in the system of common law. And this wise principle of the common law is never lost sight of by those bred in its spirit. When Lord Coke wrote his commentaries upon certain statutes of England, from Magna Charta to Henry VIII, which are called his II Institutes, he did not give his personal opinions of their meaning, but gave the judicial interpretations of them, which had been made. In the conclusion of the preface to the II Institutes he says:

"Upon the text of the civil law there be so many glosses and interpretations, and again upon those so many commentaries, and all written by doctors of equal degree and authority, and therein so many diversities of opinions, as they rather increase than resolve doubts and uncertainties, and the professors of that noble science say that it is like see full of waves."

"The difference, then, between those glosses and commentaries are written by doctors, and which be advocates, and so in a great manner private interpretations; and our expositions or commentaries upon Magna Charta and other statutes are resolutions of judges in courts of justice in judicial courses of proceeding, either related and reported in our books or extant in judicial records, or in both, and therefore, being collected together, shall (as we conceive) produce certainty, the mother and nurse of repose and quietness."

Such is the doctrine of the common law! Nothing but the solemn voice of the law itself, speaking through its constituted tribunals, is of any judicial authority. And how august is that authority, reposing as it does upon the solemn decisions of courts which have administered justice in the very same halls for nearly eight hundred years!

In vain shall we search the history of nations for a parallel to this stability of law amidst the fluctuating vicissitudes of empire. It is this stability of law, ruling over the prerogative of the crown and administering equal justice to the high and the low through so many centuries, that vindicates the "frame and ordinary course of the common law" to the consideration of the present times.

It is this primary difference in the principles of practice, under the two systems of law, which gives to the common law its great superiority over the civil law, as a practical jurisprudence regulating the affairs of society. It has the great advantage of producing certainty in regard to all rights and obligations which are regulated by law. But, above all, it excludes private interpretations and controls the arbitrary discretion of judges. In the common law the principles of interpretation are fixed and certain. Rules of interpretation were early adopted, and have never been departed from. Other rules from time to time have been adopted, but when once introduced into practice they become precedents."

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The above text is from the "Introduction" of the book entitled; "A Treatise on the Principles of Pleading in Civil Actions: Comprising a summary view of the whole proceedings in a suit at law"; by Henry John Stephen, Sergeant at Law; as published by a law-book publisher & seller named "Walter C. Morrison", in 1871.

That book's "Introduction" was entitled: "Of The Civil Law And The Common Law", & was written by Samuel Tyler, ll. D., Professor in the Law Department of Columbian College, in Washington, D. C. .

A precise copy from the original & fuller text of that "Introduction", is available, here:
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