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To me it seems clear, beyond question, that neither in the Constitution, nor in the statutes enacted by Congress, nor in the judgments of the Supreme Court of the United States can there be found any substantial support for the proposition that, since the adoption of the Constitution, the principles of the Common Law have been wholly abrogated touching such matters as are by that instrument placed within the exclusive control of the National Goverment.

(Judge Shiras in Murray *v.* Chicago & N. W. Ry. Co., 62 Fed. 24.)

To whatever has required for its upbuilding the prolonged activity of countless men, in one generation after another, whether expressed in unconfined exertion of physical labor which produces for our astonishment a pyramid, a cathedral, or in endless mental effort which evolves for our wonder a science, an art, a system of law, men have always paid respect. As conferred upon a system of law, that respect has always, in English-speaking countries, been acorded to the Common Law. Law exists for justice, and Webster said: "The Common Law is a fountain of justice, perennial and perpetual."

Rightly did he as a representative American pay this tribute, for to the founders of this government there never had been another system of law. They were, in large measure, descendants of those Englishmen who, centuries back, had ceaselessly petitioned for

recognition of their rights of person and property; had finally obtained them, and from that foundation had ever thereafter through their courts received justice as their due. From an absolute monarchy, at times tyrannical, knowing no government but that of force, strengthened by feudalism which, by tithes and servitudes exacted, had stifled individual freedom of action,—they eventually through public acclaim, the resulting reaction of long-continued suffering,—aroused the government to consideration of its security and to the consequent realization that the nation's strength rested fundamentally in the spirit of the people. From that government they wrested recognition of personal rights which we have since cherished as inalienable.

A public spirit founded upon a resolve so unchangeable as to wrest from an unwilling sovereign a Magna Charta warranted a student of the time in saying that the rights appealed for rested universally in men's souls. And so we think to-day. Yet ours is the benediction of years of judicial construction, both by the Common Law courts of Great Britain and of this country. These courts have always applied the original rights broadening their interpretation and application and evolving a system of law whose just rules rests immemorable. We reason always in its terms when we apply the standard of social duty. Common Law is only another name for common justice.

No tribute can be other than meager to those judges who through eight centuries have labored almost unerringly to bequeath us our system of law. It was not easy for the earlier of them to oppose the will of monarchs. Nor was duty outlined clear without precedent. We little appreciate their efforts, for to us to-day those decisions lie plainly in the path of what we please ourselves readily to discern as their duty. Such precocity presents the fallacy *petitio principii,* for we base our determination of their duty on their determination of such duty as we find it in our present knowledge built up from the decisions they made. Suffice it to say, that to us, as lawyers, the Common Law has guarded with its extending arm rights in instances so varied as to pass our conception of the requirements for which passing time makes call upon a system of justice. As a product of both logic and experience, its rules offer justice to any situation now to be presented.

Imbued through inheritance with the principles of right and justice, gained by so much effort by their ancestors, our Fathers came to this land bringing with them the idea that "governments are instituted among men deriving their just powers from the con-

sent of the governed," and continuing their social relations under the Common Law as they found it applicable to their situation. Nor is this merely a historical deduction. To the colonists there was ever present, from their immigration to the founding of the Government, the great struggle for justice, and the justice they claimed was that of the Common Law. Edmund Burke, in his speech on "Conciliation with America," speaking of the interest in and devotion to the Common Law by the colonists, said: "I hear that they have sold nearly as many of Blackstone's 'Commentaries' in America as in England." The Colonial Congress on the 14th of October, 1774, declared: "That our ancestors who first settled these colonies were, at the time of their emigration from the mother country, entitled to all the rights, liberties and immunities of free and natural born subjects within the realm of England," and "that by such emigration they by no means forfeited, surrendered or lost any of those rights," and were, therefore, at that moment "entitled to the Common Law of England."

By the Ordinance of 1787 there were preserved to the people in the Northwest Territory the common law rights developed from the Magna Charta and their enforcement through "judicial proceedings according to the course of the Common Law." Into the Constitutions of the original thirteen States were incorporated specifically some of the more important of the great common law principles commonly designated as "Due Process of Law," "Trial by Jury," "Religious Liberty," the "Privilege of Habeas Corpus," "Freedom of Speech," and the "Right to Assemble and Petition." And in addition thereto the Constitution of New York, as well as those of some other States, provided that the common law and statutes then in force should continue to be the law of the State, subject to such alterations as the Legislature should make. The Declaration of Independence reveals, in its every line, a people thoroughly outraged and indignant because of denials of justice according to the standards their fathers had helped to make and that they knew so well.

All this proves that uppermost in the minds of the colonists were these common law principles. Upon these principles they asserted their right of independence, the right to establish a separate government, and the right to adopt a constitution. They knew of no powers to confer upon a Federal government except those which represented the relinquishment of rights of the States as understood at Common Law. They intended, therefore, to erect a government which expressed the ideals of their birthright.

When we take up for construction the Constitutions of the time,

whether Federal or State, we must have in mind that, then as now, there was a canon of construction requiring that written documents must be construed in the light of the facts and circumstances surrounding their making. That rule of construction forbids an interpretation in the light of the present day indifference to, if not ignorance of, the struggle of the Fathers to secure protection for life, liberty and the pursuit of happiness for themselves and their descendants, through the establishment of law and its enforcement by the courts.

Now, other ideas are, temporarily, I hope, in the forefront. We have so long enjoyed the blessings of a government of law rather than that of man that we fail to appreciate its value. Many know historically of the charter granted by William of Normandy in the fourth year after the conquest,—of the memorable event at Runnymede, when on the 15th of June, 1215, King John of England affixed his signature to the Great Charter there submitted to him by the militant nobles of his realm,—of the preliminary union among the American colonies in 1754 and in 1765,—of the protests of the Colonial Congress of 1774,—of the Declaration of Independence,—of the formation of the constitutions of the original thirteen States and that of the Federal Constitution,—and of the suffering and loss of life incident to the struggle to throw off a yoke of bondage that the ideal of government of law might come into being. But the underlying reason for it all is not fully appreciated by the great mass of people. It is not strange that this is so, for generations of people have come and gone since that period. None of them having suffered from the oppression of man, they know not of it. And the leaders of thought and political action who do know, have found other subjects more interesting, and so have discussed them to the exclusion of tht great truth often expressed: "Eternal vigilance is the price of liberty."

What the effect has been is well illustrated by a remark made to me the other day by a business man of more than average intelligence: "The Constitution did very well when it was made, but it is out of date now and must be ignored when it stands in the way of things we want." He neither knew nor cared that the Fathers had provided for its amendment to meet further necessities. He did not realize that this very Constitution is the charter of the people's liberties; that through it and through it alone, have the people the power to check encroachments by the Legislative, the Executive, and the Judicial departments of the Government, either upon each other or upon the reserved rights of the people, either as individuals or gathered into States; that any unrebuked and unchecked attempt

to exercise powers not granted to a department of the Federal Government is a serious menace to our scheme of government, in that it creates a precedent which may be taken advantage of later:

But a general discussion of this most important subject is foreign to my present purpose. That my business friend's echo of the now time-honored formula: "What is the Constitution between friends?" is more generally shared than thoughtful men can wish, is evidenced by the answer to, or rather the failure to answer suggestions openly and boldly made to practically destroy local State government by extending through Congressional enactment and judicial construction the Commerce and Post Road provisions of the Constitution. So to extend the powers actually granted by the Constitution as to take away power expressly reserved to the States or the people, seems to the unthinking not a deliberate violation of the Constitution. But they are mistaken. The phrase is a fraudulent one employed to deceive the people. Its purpose is to hide the real intent which is to modify the Constitution by other and different methods than that provided in the Constitution itself, namely, by the action of the people of the United States. Clearly, then, it is fortunate that the Common Law rule of construction which has ever been employed by the courts of this country, both Federal and State, required the Federal Court to take into consideration when construing the various provisions of the Constitution the circumstances surrounding and attending its making.

A government of law, not of men, was the aim of the Fathers. All history—confirmed by some that is very recent and very painful—had taught them that man cannot be trusted to govern his fellow man; that nearly all men in the possession of great power have favorites to reward and enemies to punish; that equality in enjoyment of life and property, as well as equality of opportunity, are best secured by sound legal principles administered by judges whose highest ambition is to work out justice under the law.

They knew what the judges had done in the centuries following Runnymede. They realized that as a class they had been faithful to their great trusts, fearing neither the Monarch on the one hand nor the mob on the other; and that to them the highest of all ideals had been justice. And, being determined that law and not man should govern, they made of the judiciary an independent department of government, and placed it upon a plane above the control or reach of either the Executive or the Congress. Never before had the judiciary in any country been accorded such a strong and independent position. And it should be noted that while the Constitution contains no general grant of legislative power, but instead the

grant is one of enumerated powers, it does grant to the Supreme Court and such inferior courts as Congress may create, the entire judicial power of the Federal Government. Section One of Article III declares that "The judicial power of the United States shall be vested in one Supreme Court, and in such other inferior courts as the Congress may from time to time ordain and establish." This is followed by Section Two, which provides in part that "the judicial power shall extend to all cases in law and equity arising under this Constitution."

No attempt was made in the Constitution, as first adopted, to cut down the grant of full judicial power conferred by the first section. The remaining clauses simply designated certain subjects which were included within the general grant of judicial power. The Eleventh Amendment did restrict the judicial power theretofore granted in one respect. It provides that the judicial power shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State. Moreover, the Seventh Amendment provides that "in suits at Common Law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the Common Law."

Who can read this grant of judicial power and the Seventh Amendment in the light of the aspirations and desires of the people as already noted, and doubt, for one moment, that it was their design that the National system of jurisprudence should be upbuilded according to such rules of the Common Law as should be found applicable? They knew of no other system. They loved the one they had inherited. They were seeking to retain its benefits. Socratically we ask again, how but by the rules of the Common Law, used here in its broadest sense, was justice to be dispensed in the United States Courts created by the Constitution? As Mr. Justice Story said: "What but the Common Law shall furnish the guide of decision, interpretation and restriction?" Upon the Constitution as a framework, was the Federal Judiciary with the aid of the Common Law to build such a system of jurisprudence as should satisfy the Nation's needs. And either consciously or unconsciously the Federal courts, under the leadership of that greatest of all courts, the Supreme Court of the United States, have consistently developed our National Jurisprudence along the lines which have led and will inevitably continue to lead toward that result for which the Fathers planned, prayed and fought.

Before taking up for consideration some of the expressions of the Supreme Court, both *obiter* and otherwise, bearing upon the question of the Comr. n Law jurisdiction of the Federal Courts, I shall allude briefly to the contribution of that Court toward the harmonious development of the Common Law throughout the country. The student of the Common Law as administered in this country cannot but be impressed with the remarkable uniformity which has attended the application of its principles in forty-six different States, necessarily representing as many different jurisdictions. For that happy result great credit is due to the willingness on the part of the State Courts to consider, respectfully and carefully, the decisions of the courts of sister States with a desire to produce uniformity of law. But it should not be overlooked that the Supreme Court of the United States has made substantial contribution thereto.

In suits at Common Law the decisions of the Supreme Court seem, at first, to assert their independence of State decisions in the case of *Swift v. Tyson*,[1] which was destined to create a following of authority now impregnable. The question there raised for determination was whether a pre-existing debt was a valuable consideration for the transfer of a draft. After a review of the cases in the New York Courts, where the controversy arose, tending to decide the question in the negative, Mr. Justice Story, referring to the 34th Section of the Judiciary Act, maintained that the word "laws," as therein used, included only the statute law, saying that "in all the various cases which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the 34th Section limited its application to State laws, strictly local, that is to say, to the positive statutes of the State and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent on local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of General Commercial Law, where the State tribunals are called upon to perform the like function as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of a contract or instrument, or what is

1. (1842) 16 Peters, 1.

the just rule furnished by the principles of Commercial Law to govern the case."

Consistently with such expression, the Court then refused to follow the New York decisions, and established the affirmative of the proposition.

During the same term in which the Court decided *Swift v. Tyson,* there was presented to them for construction a contract of insurance. This was the case of *Carpenter v. Providence Ins. Co.,*[2] Justice Story again writing the opinion. The Court would not follow New York or Massachusetts decisions, the position asserted being in harmony with and strengthening the attitude shown in *Swift v. Tyson.* Enforcing his former argument and extending the rule from negotiable paper to all contracts, Justice Story said:

"The questions under our consideration are questions of General Commercial Law, and depend upon the construction of a contract of insurance which is by no means local in its character, or regulated by any local policy or customs. Whatever respect therefore the decisions of State tribunals may have on such a subject—and they certainly are entitled to great respect—they cannot conclude the judgment of this Court."

The rule thus firmly established was uninterruptedly called into use. It was applied to a bill of lading in *Myrick v. Michigan Central R. R. Co.,*[3] the court overruling the Supreme Court of Illinois; to a stipulation exempting a common carrier from all liability, thus reversing the New York Courts;[4] to a question of negligence;[5] to the interpretation of the "fellow servant" rule contrary to the Supreme Court of Minnesota;[6] to a question of nuisance, disapproving the views of the Wisconsin courts, in which the court said:[7]

"This does not depend upon State statute or local State law. The law which governs the case is the Common Law, on which this court has never acknowledged the right of the State courts to control our decisions, except, perhaps, in a class of cases where the State courts have established, by repeated decisions, a rule of property in regard to land titles peculiar to the State."

Moreover, the exception in the sentence last above commands no special favor unless the courts under review have developed a rule firmly settled in the law. In *Foxcroft v. Mallett,*[8] Webster

2. 16 Peters, 495, 511.
3. 107 U. S. 102, 109.
4. Liverpool Steam Co. *v.* Phœnix Ins. Co., 129 U. S. 397.
5. Chicago City *v.* Robbins, 67 U. S., 418, 428.
6. Chicago and St. Paul R. R. Co. *v.* Ross, 112 U. S., 377.
7. Yates *v.* Milwaukee, 10 Wall., 497, 506.
8. 4 How., 352.

argued that the court should follow the courts of Maine, which had construed the language of a deed, for such decisions, he maintained, outlined a rule of property in that State. Allusion was made in the opinion to the argument, but the court closed with the view that such decisions "should not be regarded as conclusive on the mere construction of a deed as to matters and language belonging to the Common Law, and not to any local statute."

So, too, the court refused to follow a rule of evidence established by the court of last resort of Kentucky,[9] and in *Union Pacific Ry. Co. v. Yates,*[10] the court said: "The decisions of the courts of a State construing Common Law rules of evidence are not obligatory on the Federal Courts."

Whether punitive damages should be allowed was the question presented in *Lake Shore R. R. v. Prentice.*[11] The court disagreeing with the rule, announced by State authorities, said: "This is a question not of local law, but of general jurisprudence, upon which the court in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several States."

Did the limits of this paper permit, many similar decisions could be cited, but I shall add but one more, that of *Burgess v. Seligman.*[12] The action was commenced in the Federal court for the Eastern District of Missouri, the trial court holding that defendant, to whom a corporation had transferred a large amount of its stock as collateral, was not liable as a stockholder for the debts of the corporation. The fact that the court of last resort in Missouri had held otherwise in two cases was brought to its attention. It refused to follow the State court and presented its position in these words:

"The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient, but for the exercise of mutual respect and deference. . . . Acting on these principles founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of State

9. Russell *v.* Southard, 12 How., 139.
10. 79 Fed., 584.
11. 147 U. S. 106.
12. 107 U. S., 20.

courts. As, however, the very object of giving to the National courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

As we have seen the cases cited embrace commercial and mercantile papers, contracts, negligence, nuisance, evidence and damages. They have been selected because they show that the Supreme Court has recognized the right and the duty to announce what the true rule of the Common Law is whenever the question is presented, although their determination differs from that of the State courts where the controversy arose. Carefully considered as are the decisions of that court when it feels called upon to differ with the decisions of State courts, whether upon a direct review of such courts or of the Federal courts, it is readily apparent that its influence in the harmonious development of the law is immeasurable.

Further, these cases show, as do the great majority of the decisions of the Supreme Court, that the Federal courts have been both diligent and effective in applying and at the same time in broadening and developing the Common Law in accord with the intent of the framers.

How, then, has it happened that the impression has found lodgement in many minds that the United States courts have not employed Common Law principles and precedents in the development of National Law? The answer is simple, but it is at the same time conclusive, as authority will show. It is due to the unfortunate remark of Mr. Justice McLean in *Wheaton v. Peters,*[13] decided in 1834. The learned Justice said: "It is clear there can be no Common Law of the United States. . . . The Common Law could be made a part of our Federal system only by legislative adoption. When, therefore, a Common Law right is asserted, we must look to the State in which the controversy originated." This statement was clearly *obiter* for the case turns on the point that Congress by the Act of 1790, instead of sanctioning an existing right at Common Law as contended for (the literary property of an author in his works after publication), created that right, and the rights of the complainant must be sustained if at all under that act. This position was all that was needed for a decision. Whether there existed at one time such a Common Law right of authors in England or

13. 8 Peters, 591-658.

America was immaterial, and discussion of the inductive questions presented in the English cases of *Millar v. Taylor*[14] and *Donaldson v. Beckett*[15] was not germane, for the vital questions in those cases were similarly decided, *i. e.,* that since the Statute of 8 Anne that statute controlled the rights of authors in that country.

Wheaton v. Peters was decided early in 1834. At this time the question of State rights was a paramount subject. It was only in the year before, 1833, that Webster and Calhoun had engaged in vehement debate in the Senate on the Force Bill, and Webster made his famous speech in opposition to the position that the Union was a mere compact. It may well be that the discussion prevalent may have suggested the *dicta* in this case.

In saying that the statement of Mr. Justice McLean was unfortunate I do not mean that it thereby became the law, for it did not; or that it prevented the Federal courts from availing themselves of our great storehouse of Common Law principles, for it had no such effect. It was *obiter,* and was ever afterward so treated by the Supreme Court. Indeed, his remark was destined never to be quoted again by that court. Not even as a step in the upbuilding of an argument by the court has it ever been permitted a place. That fact has great significance to the lawyer who appreciates the wide familiarity of the Bench and the Bar with the first case to consider the effect of the copyright statute. In a few instances, it is true, the reasoning of Mr. Justice McLean upon this subject has been referred to by his successors, but never once in approval of his language.

What is treated as the substance and effect of his position—but which, indeed, is very far from it—is to be found in *Smith v. Alabama.*[16] It is interesting to note that this case had not to do with the Common Law even in the remotest degree. The question there presented was whether a statute of the State of Alabama providing for the examination and licensing of engineers engaged in operating locomotive engines in that State was void as applied to engineers running interstate trains, on the ground that it was an attempt to regulate interstate commerce. Hence, the question of the Common Law jurisdiction of Federal courts was not discussed by counsel, and probably not considered by the court as it did not present the point of decision. Therefore, it happened, as it quite often happens when the judge writes about matters not discussed

14. 4 Burr, 2303.
15. 4 Burr, 2408.
16. 124 U. S., 465, 478.

orally or in brief by counsel, and in turn followed by debate with associates around the consultation table—he wrote too broadly. He corrected as far as an *obiter* can ever correct one blunder in the *Wheaton v. Peters obiter*. He repudiated by indirection the suggestion that the United States courts have no Common Law and can have none except by legislative adoption. This was accomplished by citing *Wheaton v. Peters* as authority for a very different proposition, viz.: that "there is no Common Law of the United States in the sense of a national customary law distinct from the Common Law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own Statutes."

This admits necessarily what Chief Justice Marshall asserted in the beginning of the court's history, that the court applies and enforces the Common Law. But the learned justice seemed to deem it important to give the assurance that the Common Law thus utilized is not a new creation, but the Common Law of England as adopted in the States. In other words, that the Common Law, enforced by the Federal courts, is the Common Law of England so far as applicable, and not separate and distinct from that law which might be called a National Customary Law. A few sentences farther along, but on the same page, he proceeds to show the inaccuracy of the opening phrase of the sentence quoted and which I now repeat, "There is no Common Law of the United States, in the sense of a National Customary Law." The contradictory sentence is, "There is, however, one clear exception to the statement that there is no National Common Law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English Common Law, and are to be read in the light of its history. The code of constitutional and statutory construction, which, therefore, is gradually formed by the judgments of this Court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the Common Law as may be implied in the subject, and constitutes a Common Law resting on National authority."

Considered together these several propositions seem to mean that the Federal courts are constantly applying the Common Law rules and precedents of England and of this country to any appropriate situtation. When differing from a State court's conception of a Common Law rule, we (the court says) are correctly applying the same Common Law that the State court in our view

incorrectly attempted to apply. Our decisions construing the Constitution—framed in the language of the English Common Law—and the Statutes passed, in pursuance thereof, have gradually builded for National purposes solely what may be termed a Common Law existing on National authority. But it in no wise conflicts with the general Common Law of England and this country. It is rather an extension of the Common Law to meet the requirements of the Constitution and Congressional legislation in pursuance thereof. If I am correct in my conclusion as to the thought which the learned Justice intended to convey, then this *dictum* is in harmony, not only with the practice of the Federal courts, but also with their carefully expressed opinions, as I shall later show.

I have already called attention to a number of cases in which the Supreme Court has differed with State courts as to the true rule of the Common Law.

In *United States v. Wong Kim Ark*,[17] the court had to determine whether Wong Kim Ark was a citizen of the United States. The court said: "The Constitution nowhere defines the meaning of these words. . . . In this as in other respects, it must be interpreted in the light of the Common Law, the principles and history of which were familiarly known to the framers of the Constitution.[18] The language of the Constitution as has been well said could not be well understood without reference to the Common Law." The Constitution and the several amendments contain many provisions to which that opinion applies with equal force. Take the Fifth Amendment as an illustration. It provides in part that "no person shall be deprived of life, liberty or property without due process of law." This amendment applies to the Federal Government only as has been decided many times. It was intended to operate as a restraint upon its power. It forbade the Federal Government from doing what every State Constitution forbade its Government from doing—which in turn but adapted a restraint upon government that was secured by the Great Charter. But how were the Federal courts to determine what constituted due process of law? By the Common Law of course, which through many decisions covering a period of centuries had come to be thoroughly settled and well understood.

Kohl v. United States[19] presented the question whether the United States could exercise the right of eminent domain to acquire

17. 169 U. S.. 649.

18. Minor *v.* Happersett, 21 Wall, 162; *Ex. parte* Wilson, 114 U. S., 117; Boyd *v.* United States, 116 U. S., 616-624-5.

19. 91 U. S., 367.

a site for a post-office. The court said: "When the power to establish post-offices and to create courts within the States was conferred upon the Federal Government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means, well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. . . . The right of eminent domain always was a right at Common Law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute, but the right itself was superior to any statute. . . . It is difficult, then, to see why a proceeding to take land by virtue of the Government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at Common Law, when initiated in a court. It is an attempt to enforce a legal right."

One of the most forceful illustrations of the fact that the Government of the United States does recognize and enforce the principles of the Common Law with regard to matters within national control is to be found in the organization of the Court of Claims. It has jurisdiction to determine claims against the United States arising in any State or Territory. It is the one court in the Union, therefore, that deals at all times with matters of national concern arising under the Constitution and laws of the United States. The statute creating it contains no provision as to rules of evidence. On an appeal to the Supreme Court in *Moore v. United States,*[20] the question presented was whether the Court had erred in admitting evidence. The Court said, Mr. Justice Bradley writing:

"In my opinion, it must be governed by law; and we know of no system of law by which it should be governed other than the Common Law. That is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and many Acts of Congress could not be understood without reference to the Common Law. The great majority of the contracts and transactions which come before the Court of Claims for adjudication are permeated and are to be adjudged by the principles of the Common Law."

The question we are discussing came before the Court in *Murray v. Chicago & N. W. Ry. Co.*[21] in an action to recover damages for alleged unreasonable rates charged for transportation of

20. 91 U. S., 270.
21. 62 Fed., 24.

freight. In an able and exhaustive opinion Judge Shiras reviewed the history of the Common Law in England and in this country and many of the decisions of the Supreme Court, stating his deductions therefrom as follows:

"The conclusion I reach upon this subject is that at the time of the separation of the colonies from the mother country, and at the time of the adoption of the Constitution, there was in existence a common law, derived from the Common Law of England, and modified to suit the surroundings of the people; that the adoption of the Constitution and consequent creation of a National Government did not abrogate this Common Law; that the division of governmental powers and duties between the National and State governments provided for in the Constitution did not deprive the people who formed the Constitution of the benefits of the Common Law; that, as to such matters as were by the Constitution committed to the control of the National Government, there were applicable thereto the Law of Nations, the Maritime Law, the Principles of Equity, and the Common Law, according to the nature of the particular matter; that, to secure the enforcement of these several systems when applicable, the Constitution and Congress, acting in furtherance of its provisions, have created the Supreme Court of the United States and the other courts inferior thereto, and have conferred upon these courts the right and power to enforce the principles of the law of nations, of the law maritime, of the system of equity, and of the common law in all cases coming within the jurisdiction of the Federal courts, applying, in each instance, the system which the nature of the case demands; that, as to all matters of national importance over which paramount legislative control is conferred upon Congress, the courts of the United States (the Supreme Court being the final arbiter) have the right to declare what are the rules deducible from the principles of general jurisprudence which control the given case, and to define the duties and obligations of the parties thereto; that the Common Law now applicable to matters committed to the control of the National Government is based upon the Common Law of England, as modified by the surroundings of the colonists, and as developed by the growth of our institutions since the adoption of the Constitution, and the changes in the business habits and methods of our people."

His opinion is cited with approval in *Western Union Tel. Co. v. Call Publishing Co.*,[22] in which it was held that the principles of the Common Law operate upon all interstate commercial transactions except so far as they are modified by congressional enactment.

This important case set at rest the doubt and questioning which have been occasioned by the unfortunate *obiter* in *Wheaton v. Peters*. In order to show that the question was squarely presented and as squarely passed upon by a unanimous court, a brief statement

22. 181 U. S., 92.

of the case will be made. The plaintiff claiming to have been unjustly discriminated against, received in the State court of Nebraska a judgment for excessive telegraph charges. The contention of the telegraph company as stated by Mr. Justice Brewer, is that the service which it rendered to the publishing company was a matter of interstate commerce; that Congress has sole jurisdiction over such matters, but had not at the time the service was rendered prescribed any regulations concerning them; that there is no National Common Law, and the Statute or Common Law of Nebraska is immaterial, and hence there could be no recovery. In discussing the question, the Court conceded, of course, that Congress had jurisdiction to regulate, but had not done so. That left the question whether there could be a recovery at Common Law. The Court then considered the contention of counsel that there is no Federal Common Law and after quoting from *Smith v. Alabama,* hereinbefore discussed, said: "Properly understood, no exceptions can be taken to declarations of this kind. There is no body of Federal Common Law separate and distinct from the Common Law existing in the several States in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no Common Law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the Statutes of Congress." The Court then asked the question, "What is the Common Law?" and after answering it continued, "Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the Common Law, as so defined, and are subject to no rule except that to be found in the Statutes of Congress? We are clearly of opinion that this cannot be so, and that the principles of the Common Law are operative upon all interstate commercial transactions except so far as they are modified by congressional enactment." And the Court added: "But this question is not a new one in this Court," citing *Interstate Commerce Commission v. B. & O. R. R. Co.,*[23] and *Bank of Kentucky v. Adams Express Co.*[24] This case is of course decisive and controlling and sweeps away the last vestige of opportunity for further mis-education by the *obiter* in *Wheaton v. Peters.*

But there is another decision by the same court, handed down

23. 145 U. S., 263-275.
24. 93 U. S., 174.

May 13th last,[25] still more interesting in its facts; one that furnishes as striking an illustration as can be found in the books in justification of the proud boast of the devotees of the Common Law, that through the application of its principles either on the law side of the court or in equity, any controversy that can possibly arise can be solved. The suit was brought in the Federal courts by the State of Kansas against the State of Colorado. As it involves a controversy between two States, jurisdiction is expressly conferred by Section 2 of Article III of the Constitution. And the subject of dispute being justiciable in its nature, the Federal courts have full power to decide it, for Section 1 of Article III granted to the Federal courts all of the judicial power of the National Government. Kansas claims that Colorado, through corporations created by it and acting under its laws, is diverting the waters of the Arkansas River for the irrigation of lands in Colorado. The river not being navigable in Kansas, the claim is not that navigability is affected, but that Colorado has not the right to diminish the volume of water flowing into the State of Kansas.

By the Ordinance of 1787 the Common Law was extended over the territory covered by both States. When they became States each succeeded to the right to supersede the Common Law with statutes. Colorado did so, and Kansas did not. The local law, therefore, in each State is different, but neither could impose its law on the other.

But the controversy, being justiciable, was solvable, and has been solved in accordance with the dictates of good conscience, solved without precedent, as many other questions have been solved in the upbuilding of the Common Law. By it a precedent of great value has been created, one through which will be determined in the years to come other controversies between States. In its opinion, as one of the necessary steps leading inevitably to the conclusion reached by it, the Court referred to the argument, apparently again renewed in that case, that "it has been said that there is no Common Law of the United States, as distinguished from the Common Law of the several States."

But the Court replied in substance: That same contention was made in *Western Union Tel. Co. v. Call Publishing Co.*,[26] and we there answered it (in the language I have already quoted). And the error resulting from a little carelessness in writing was again, and for all time, stricken down. One quotation from this great decision

25. Kansas *v.* Colorado, 206 U. S., 46. (See Comment, p. 47—Ed.)
26. 181 U. S., 92.

let me add without comment. It has in a way been anticipated in this article and before reading the Kansas and Colorado case: "One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation or no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri v. Illinois,*[27] the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this Court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this Court is practically building up what may not improperly be called Interstate Common Law."

The student of our jurisprudence, when he first learns that here, as in England, the Common Law can solve and justly solve every problem in civil life, if permitted to do so, must compare with wonder and amazement the 25,000 pages of law annually placed upon our statute books, with the 46 general and the 246 special laws passed by England's Parliament in five years, although legislating for a home population of forty-two millions and for millions of dependents; and his wonder must deepen as he listens to the noisy acclaim of those who would destroy the local authority of the States and centralize all power in the Federal Government. The justification pleaded for overthrowing the governmental construction of the Fathers—that in that direction salvation lies from the wrongs the public have suffered—must seem so trivial as to be contemptible in the light of the fact that the Federal Government could have checked the abuses relating to interstate commerce before statutes were passed by Congress, had it undertaken to do so. The authorities I have cited demonstrate that proposition. The law therefore was adequate and the courts efficient—but the Federal Law officers were either inadequately equipped or unreasonably restrained.

There is activity now, it is true, but it is due to frequent applications of the whip and spur of the President. But there is also activity in the State governments—indeed, quite as much in some of them as in the Federal Government. All the difference then that there is between the two is that, after neglecting their duty for

27. 180 U. S., 208

many years, the Federal Government started first. But that fact was due to the man who was temporarily at the head of it, not because virtue inheres in the Federal rather than in the State governments.

Certainly no one will pretend that a scheme of government which has been found workable for more than a century should be overturned because of the manifestations of a special zeal for good works begotten after re-election by a single occupant of the office.

But the campaign against the governmental plan of the Fathers is on and has been for several years. It has for its leader the most accomplished politician of our history. Behind him and backing him stand these great corporations of the country which are engaged in interstate commerce and insurance. Their reason is that it is easier to deal with one government than with many. It is not their purpose to submit proposed amendments of the Constitution to the people as the Constitution provides—a procedure with which no one could find fault, as it offers an opportunity for discussion before the people prior to their action. Rather it is their scheme to accomplish the centralization of power by unconstitutional, and therefore dishonest, methods. These include: (1) Congressional legislation assuming powers not granted, but expressly retained either to the States or the people; (2) Executive exercise of powers not granted, and the seizure in one form or another of powers belonging to other departments of government; and (3) The substitution of statutes for Common Law.

Statutes are inflexible and cannot be expanded by judicial decisions. Legislators and executives, therefore, who are filled with the desire to control and regulate men and affairs, find in a statute the ideal method of accomplishing their wishes. The objection to an over-abundance of legislation by those who desire justice, rather than personal control, is that the men who draft the statutes cannot foresee the cases that will arise which do not come within the letter of the statute. It is for the opposite reason that the Common Law is so dear to the hearts of all students of it. It is flexible. It can be made applicable to every new condition which may arise and in every instance can be worked out according to the eternal principles of justice.

Herein we find a reason for the action on the part of those interested in the scheme to centralize power in the Federal Government. It was their theory that so long as Congress omitted to legislate with reference to interstate commerce, that there was no law to protect those who were wronged by those engaged in interstate com-

merce. But as we have seen, the Supreme Court decided that they were mistaken; that the Common Law did apply and would continue to apply until Congress should by legislation supersede some or any portion of it by its statutes.

Thus it happens that in both State and National governments, whenever there arise controversies which are not within the purview of statutes, they are still governed by law. And that law is the Common Law, as to which we may with all our hearts agree with John Adams, when in 1783, he said: "That the liberty, the unalienable, indefeasible rights of men, the honor and dignity of human nature, the grandeur and glory of the public, and the universal happiness of individuals, were never so fully and successfully consulted as in this most excellent monument of human art, the Common Law of England."

ALTON B. PARKER.