THE ENGLISH COMMON LAW IN THE UNITED STATES.

THERE has been some debate recently regarding the law that is taught in our American law schools,[1] and the suggestion has been made that the time has now arrived when the emphasis should be placed upon the local law — the law of a particular jurisdiction, like Illinois — rather than upon a so-called general law, which, it has been assumed, is or ought to be the same in all the states where the common law is supposed to prevail. Without contributing directly to this discussion, it has seemed to the writer that a better understanding of the problem of the law in this country, and of the meaning of the terms "local" and "general" law, would be obtained if some attempt were first made to ascertain what is meant by the common law which has been adopted in some form by most of the states in this country. Did the adoption of the common law of England mean the adoption of a complete system or general body of law, which should have the effect, if properly administered, of making the decisions of the courts of the different states uniform; or did its adoption mean primarily that, by reason of the force and effect given by the common law of England to decided cases, there should develop in each separate state, as in England, a more or less scientific system of law which, of necessity, must, in each state, become in time a separate and distinct body of law? Which of these views, as to the effect of the adoption of the common law, is the accepted one, or is it true that, disregarding the fact that the two views necessarily involve more or less inconsistent ideas of what is meant by the law, the courts in this country have been, and still are, attempting to make both views prevail and work in harmony? These questions are worth consideration in any attempt to determine the meaning and nature of the common law in this country.

For some reason the writings of Bentham and Austin upon the nature of the common law have never had any great influence in

[1] Vol. xxxi, Reports of American Bar Association, 1012–1027, 1091–1119, and vol. xxxiii, 780 and 919.

this country, certainly not with the courts. And yet no better opportunity, perhaps, could have been offered for testing conflicting theories of the nature of the common law of England than the adoption of that law as a rule for the government of courts in jurisdictions different from that of England. The earlier generations of lawyers in the United States were taught law by Blackstone, and his view that the courts only discover or declare a preëxisting law was generally accepted in this country, not only by writers on the law, such as Kent, but by the courts and the lawyers. It was, perhaps, of no great practical consequence, so far as English law was concerned, if Blackstone and the English judges preferred to say that the courts did not make the law, but only declared it, so long as it was always understood that the common law of England on any subject was never different from the law as settled by decided cases. But when the question concerned the effect of the adoption of the common law of England as a controlling source of law *in another jurisdiction*, it obviously made some difference whether English decisions were thereby made as controlling and binding upon the courts of that other jurisdiction as the decisions of its own courts, or whether English decisions were only made some evidence of the common law, and the courts of the other jurisdiction were in fact given perfect freedom to determine for themselves what the English common law was or ought to be, at the same time that their own decisions, according to the rule of the English common law, became binding upon them in the decision of subsequent cases. In the one case the common law of England is identified with the decisions of the English courts; in the other it is treated as something existing apart from the decisions of the English courts, which all courts subject to the rule of the common law are engaged independently in discovering and declaring, though in regard to which their discoveries and declarations should be the same. Which of these views is the prevailing one in this country?

I.

It is generally assumed, even outside of our law schools, that in those states in which the English common law has been adopted, the decisions of the courts should, upon most questions, in the

absence of modifying statutes, be the same. This general assumption is illustrated by the presumption which is indulged in by the courts of one common-law state in regard to the law of another such state.[2] If, for instance, in a case pending in a court in Illinois, it becomes material to know the law of New York, the Illinois court, in the absence of direct evidence, will presume that the common law as found and declared by the courts of Illinois is the law of New York also, on the theory that, as both courts declare or interpret the same common law, they should arrive at the same result. This means, of course, that the decisions of the courts of Illinois are regarded not only as determining the law of Illinois, but as correctly declaring the common law adopted in the different states. The law of Illinois and the common law are regarded by the courts of Illinois as identical, and the courts of all the other states which derive their law from the common law of England regard their own decisions in the same light. But, while each state regards its own decisions as correct declarations of the common law, which ought to be followed in all common-law states unless modified by statute, it admits that the decisions of other state courts, even when different from its own, do in fact determine the law of those states, whether such law be the true common law or not. The settled decisions of the highest courts in each of the states are accepted in other state courts as conclusive evidence of the law in each of those states.

Similarly, the United States courts, upon certain questions of so-called general law, not yet completely defined, assume the existence of a uniform law which should be declared in the same way by the courts of all of the states. But even this general law, which is regarded as so obviously the same everywhere, is not in fact always discovered and declared in the same way by all the courts. This is recognized by the federal courts, but instead, on that account, of following the different decisions of the state courts in which they sit, the federal courts assume the right to exercise an independent judgment in declaring this general law, so that there may be uniformity of decision on such questions in all the federal courts at least.[3] The federal courts sometimes speak of

[2] See "Presumption of the Foreign Law," by Albert Martin Kales, 19 HARV. L. REV. 401.

[3] Myrick *v.* Michigan Central R. R., 107 U. S. 102, 109–110.

this law which they declare independently as a general law, and sometimes as the common law, or as based upon common-law principles, but if there is a general law which is still more general than the common law, at any rate it is not regarded by the federal courts as different in its principles from the common law.[4] It is a law which is assumed to prevail at least in all of the states which have adopted the common law of England.

The federal courts, in cases in which they have jurisdiction, like the different state courts, exercise this power of declaring the common law for the purpose of determining the law of the states. The federal courts, like the state courts, assume that the general law and the law of the states is identical, and they assume also that their decisions not only correctly declare the common law, but the law of all the states as well. Unlike the attitude of the different state courts toward one another, however, the federal courts do not always accept the decisions of the state courts on these questions of general law, when different from their own decisions, as conclusive determinations of the law of the states. And as each court, federal and state, applies the common-law doctrine of *stare decisis* to its own decisions, the result is that contracts and other acts subject to the "general" law may be in fact governed at one and the same time by two conflicting laws, — the law as declared by the state court and a different law declared by the federal court.[5]

[4] In the famous Baugh case, 149 U. S. 368, the court refused to follow the decisions of the court of Ohio on the fellow-servant question, — a question of "general law," — but decided it for itself as a question which "rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.'"

[5] It has not yet been determined, so far as the writer knows, whether parties may provide that their contract shall be governed by the law of the federal courts, but the law of the place of a contract is usually regarded as determined by the decisions of the state courts.

Suppose a "general-law" contract is made after a decision of the state court, on common-law principles, declaring the rights and obligations of parties to such contracts. Suppose the federal court, exercising an independent judgment in a similar case, disagrees with the state court, and then suppose the contract in question comes before the state court and that court overrules its former decision and follows the decision of the federal court. Would such a change of decision by the state court be held to deprive the parties of their constitutional rights under the doctrine laid down in Muhlker *v.* N. Y. & H. R. R. Co., 197 U. S. 544? Or is the rule of that case inapplicable to cases which fall within the "general" law, and have parties no right to rely upon the principle of *stare decisis* in such cases?

The result of this doctrine of the federal courts is a striking illustration of the difficulties which follow from an attempt to apply at one and the same time, in the same territory, the common-law doctrine of the authority of precedent — the identification of the law of a particular jurisdiction with the decisions of its courts — and the view that the decisions of the courts are only evidence of the law, which other courts, if given the opportunity, may declare differently. In cases of "general" law, the federal courts consider it of more importance that the true general or common law should be declared as the law of the states by the federal courts at least, even at the sacrifice of the common-law principle of singleness of the law within a given territory; while in those cases where the decisions of the state courts have settled a rule of property, the federal courts deem it better to forego their assumed constitutional duty to declare independently the true common law, for the sake of preserving within each state the common-law principle of the authority of precedent and singleness in the law.[6]

The question which it is now necessary to consider is whether this common or general law, which is assumed to be the same in all states, is identical with the common law of England adopted

[6] See the latest case in the Supreme Court of the United States on this subject, Kuhn *v.* Fairmont Coal Co., 215 U. S. 349, where the right of the federal court to decide for itself a question relating to real property was sustained, the cause of action having accrued prior to any decision by the state court on the subject, though such a decision was rendered by the state court before the federal case was decided.

Suppose that after the decision of the case by the West Virginia court, but before the case was decided differently by the federal court, parties in West Virginia had entered into a contract similar to that passed upon. If that contract later came before the West Virginia court and that court changed its mind, and, instead of following its prior decision, followed the decision of the federal court, would the doctrine of the Muhlker case, 197 U. S. 544, be applied on writ of error from the United States Supreme Court to the state court? Probably it would. But this only shows that the federal court does not declare the law of the state in the common-law sense; its power in such respects is not in fact coördinate with the jurisdiction of the state court. Even on questions of general law it is the decisions of the state courts which in fact determine the law of the state; the federal courts, while purporting to declare the law of the state, are in fact making the law of the federal courts.

Take another example. Suppose a case similar to Gelpcke *v.* Dubuque had come up in the federal court before any decision on the question in the state court. Suppose, after the decision by the federal court, a similar case came up in the state court on a contract made after the decision by the federal court, and the state court disagreed with the federal court. Would the Supreme Court of the United States, on writ of error to the state court, hold that the decision of the state court deprived the parties of their constitutional rights?

by the different states, in many cases by statute, or whether the adopted common law of England is something different from this general common law.

The Supreme Court of the United States has in several instances [7] put the precise question, "What is the common law?" and has uniformly answered it in these words quoted from Kent's Commentaries: [8]

> "The common law includes those principles, usages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature."

Such a definition [9] does not materially advance our present inquiry, and merely suggests in another form the question: Did the adoption of the common law of England have the effect merely to confer upon the courts of each state the power to decide for themselves, in the absence of statute, what are the "principles, usages, and rules of action applicable to the government and security of persons and property," regardless of previous decisions by the courts of England or of any other jurisdiction? If so, and if the statement and application of these principles by the courts of each state become binding as authorities only upon the courts of that state, then obviously the result in time can only be a different body of law in each state. If, on the other hand, it is assumed that there is only one consistent and true set of "principles, usages, and rules of action applicable to the government and security of persons and property," that this one set of principles constitutes the common law as it really is, and the decisions of all the courts are only evidence of what this real common law is, then obviously the search for this true common law ought always to be maintained by the courts of every common-law jurisdiction. No principle of *stare decisis* should be applied by state or federal

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[7] Western Union Tel. Co. *v.* Call Publishing Co., 181 U. S. 92, 101; Kansas *v.* Colorado, 206 U. S. 46.

[8] Vol. i, page 471.

[9] It may be doubted if this definition is any more helpful than the statement of the chancellor in the case of Marks *v.* Morris, 4 Henning & Munford 463: "It was the *common law* we adopted, and not English decisions; and we should take the standard of that law, namely, that we should live honestly, should hurt nobody, and should render to every one his due, for our judicial guide."

courts until the true common law is discovered and everywhere accepted.

We shall find many state courts repeating the statement that it was the English common law that was adopted and not the decisions of English courts, but, as already pointed out, no court in fact treats its *own* decisions as merely evidence of what the common law is. Each court proceeds upon the assumption that it has discovered the real common law, and regards its own decisions as determining the law for that jurisdiction at least, and as controlling in subsequent cases, regardless of any suggestions as to what the common law really is or ought to be. Even if we assume, therefore, that the adoption of the common law of England means the adoption of a single system — one uniform and consistent set of "principles, usages, and rules of action applicable to the government and security of persons and property" — we are yet forced to recognize that each one of the separate states has adopted the common-law principle of the authority of precedent, and acts on the theory that what its courts decide is the real common law governing each question passed upon. No court treats its own decisions as subject to be disregarded as readily as the decisions of the courts of another jurisdiction, on the ground that they do not represent the true adopted common law. If it did, it would not be following the practice of the English courts, and the method of developing and defining the law would be essentially different from that recognized by the English common law. Such an adopted common law would be the English common law with its most distinctive feature left out, — the feature which identifies the law with the rules enforced by the courts.

In short, the acceptance and application of the common-law principle of the authority of precedent in a given jurisdiction eats up and destroys the theory that the decisions of the court are only evidence of the law. The two principles are entirely inconsistent; if you accept one you cannot have the other. Bentham and Blackstone will not work together. But what becomes, then, of the adopted common law of England in this country? What is *that* common law?

In the recent case of Kansas *v.* Colorado,[10] the United States

[10] 206 U. S. 46.

Supreme Court, after quoting the passage from Kent already referred to, goes on:

"As it [the common law] does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of the courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. *For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes.*"

This is a sufficient identification of the common law with the decisions of the courts, and if the first declaration of a principle by any common-law court were followed by all other common-law courts everywhere, or if there were a final court of appeal for all jurisdictions in which the common law is the rule of decision, no further difficulty, perhaps, would be experienced in determining what the common law is. But state courts in declaring the common law do not always follow a prior decision in England or in another state, and the federal courts do not always follow the prior decisions of the state courts whose common law they purport to declare. The result is that there are a great many independent jurisdictions in this country alone, in which the courts are all supposedly engaged in declaring the common law, and there is no final court of appeal to determine what this common law really is. Most of these jurisdictions have expressly adopted the common law of England, but there is great uncertainty as to what this English common law thus adopted is.

If we adopt the language of the United States Supreme Court last quoted, which identifies the common law with the decisions of the courts, it should follow, if the authority of precedent within a single jurisdiction is recognized, that the *English* common law is "but the accumulated expressions" of the *English* courts "in their efforts to ascertain what is right and just between individuals in respect to private disputes." No courts other than English courts can determine definitely and finally what the law of England is, and the common law of England on any subject cannot possibly be something different from the final and settled determinations of the highest court in England. The common law of England is what the English courts make it. The courts

of New York and Illinois may express an opinion as to the common law of England, but they cannot by any possibility *make* the law of England as the English courts in fact make it, any more than the courts of New York can settle the law of Illinois, or the federal courts, which are in fact courts of another jurisdiction, can make the law of the states in which they sit.

Any other jurisdiction, therefore, which should now adopt the English common law as it is to-day must at least adopt those principles which are now established as the law of England by the decisions of the English courts. There is no English common law which is different from the final decisions of the English courts. To talk, therefore, about adopting the English common law without adopting the decisions of the English courts is to talk about adopting something which does not exist; it is an attempt to adopt the common law, as already stated, with the essential and significant feature of the English common law left out, — the feature which identifies the English common law with the decisions of the English courts. Yet that is what many of our states have attempted to do, and what the federal courts regard all of them alike as having in fact done. The theory is, as it is often expressed, that the "whole body" of the English common law was adopted, without thereby making any English decisions at any period of time controlling authorities in the states. On the other hand, in other states, while it is admitted that English decisions of some period of time are binding upon the state courts, it is not agreed what the period is in which the decisions rendered by English courts should be regarded as controlling, and, as a matter of fact, in most instances the courts in this country treat all English decisions of all periods as of the same consequence, to be followed or not as may be seen fit in each particular case.

Whether we speak of previous decisions in a given jurisdiction, which, under the rule of *stare decisis*, are absolutely binding in subsequent cases, as constituting the law itself, or only as authoritative sources of the law, is of no great consequence. The two statements, properly understood, mean the same thing. But it is important to distinguish such binding decisions from the decisions of the courts of other jurisdictions, which, though they may be sources of law in the sense of furnishing assistance in the matter of reasoning upon the principles involved in a case, are not binding

or controlling sources of law in the decision of subsequent cases in other jurisdictions. In all serious litigation, where the questions involved are never absolutely settled, it is necessary to draw upon all the sources of legitimate legal argument. Opinions rendered in decided cases bearing upon the matter in hand are better sources of law, usually, than expressions of opinion in any other form. Opinions in such decided cases from other jurisdictions, when based on general principles, or on general sources of law common to all courts, will always be persuasive and especially valuable for purposes of argument;[11] *but not because they constitute any part of the adopted common law of England.* That is the point to remember. Decisions of New York courts, for instance, do not represent, in Illinois, any part of the common law of England adopted by the Illinois statute, which provides that the common law of England, so far as applicable, shall be the rule of decision until changed by statute. The English common law thus adopted by statute in Illinois is not necessarily the law of all the states, or a general law which all the states of the Union are constantly pursuing and discovering, much less developing. No doubt the law grows, but not the adopted common law of England which is to remain unaltered until changed by statute. The failure to distinguish between the adopted and binding common law of England, and those general sources of law and right methods of reasoning which may properly be regarded as of the same force and validity in all the states, has been the cause of much of the confusion regarding the meaning of the common law.

From the historical point of view, also, difficulties have existed. No doubt the common law brought to this country by our English ancestors who settled the first colonies in America did not, as a matter of historical fact, consist of all the decisions of English courts rendered prior to such settlements. Our ancestors knew

[11] No one, therefore, who is to engage actively in the practice of the law anywhere in this country can safely confine his knowledge of the law to the cases of a particular jurisdiction, and it may well be argued that the law schools should aim to fit the lawyer, not to know merely the settled law of any one jurisdiction, but to know the general sources of law and methods of reasoning which will enable him to deal with the unsettled problems. At the same time, if he is to be properly trained in common-law methods of making law, he must know in particular the force and effect to be given in each jurisdiction to the decisions of the courts of that jurisdiction. As a practicing lawyer it will always be with what the courts of some particular jurisdiction will decide that he will be concerned.

little enough about such decisions, and, as a matter of fact, in some of the colonies the law of God was preferred to the common law. The appeal to the protection of the common law by the colonists was not, for the most part, an appeal to the decisions of English courts in matters of private rights, but in matters affecting the personal liberty and political privileges of the citizens.[12] It was a long time before English decisions were known and referred to by the courts in this country in the decision of litigated matters between private parties. After the Revolution and the creation of the states, when settled courts conducted and presided over by lawyers became established, English decisions were generally accepted as authoritative. Whether the adoption by the states of the common law of England meant that English decisions prior to the first colonial settlements were binding upon the state courts, and those after that time were not, was a matter little discussed. As Mr. Gray has said,[13] the decisions of English courts after the settlement of the colonies and before the Revolution had as great and direct an influence, as a matter of fact, upon the decisions of the courts of this country as if they had been considered binding authorities. For a long time the English cases were the only cases to which any reference could be made. It was the practice of the courts then, as it is still, to declare that such and such a rule was the rule of the common law, and refer as authority to English cases, without reference to the date of the decisions relied on. The prejudice which existed for a time in this country against English decisions rendered after the Revolution was not, in particular, a prejudice on the part of the courts. But when, for any reason, the courts did not wish to accept the rules laid down in such decisions of the English courts, the usual method of avoiding their conclusions was by saying that the English decisions were not the law, but only evidence of the law. This, in fact, became the common method of treating all English cases not found acceptable; it was easier than showing in each one of such cases that the principle involved was not applicable to conditions in this country.

Then there was the further practical difficulty, if all English

[12] See the article by Reinsch, "The English Common Law in the American Colonies," vol. ii, Bulletin of the University of Wisconsin, 23.

[13] "The Nature and Sources of the Law," § 525.

decisions prior to a particular period were to be regarded as binding, in the fact that not all of such decisions were accessible to the courts. In such a situation it was easier to adopt the general principles of the common law than its particular applications by the English courts. This practical difficulty is illustrated by two comparatively recent decisions of the Illinois and Kentucky courts.[14] Both courts agree that the question of criminal liability at common law in the case of agreements between competitors to maintain prices is to be determined by the law of conspiracy as settled in England prior to 1606, but they disagree entirely as to what that settled law was, and neither court bases its conclusions entirely upon actual decisions of English courts rendered before 1606. It would be a difficult matter, in the case of many subjects, to state the common law of England as it was prior to 1606 without taking cases since that date into account. Where the common-law method of developing the law by means of the decisions of courts prevails, it is possible to speak of decisions prior to a certain date, but it is very difficult to state the law in general prior to that date without regard to later decisions which have in fact settled the law as, theoretically, it always was in the particular jurisdiction.

It was not until there existed in the different states in this country courts regularly established, prepared to decide cases, write opinions, and apply the common-law principle of the authority of precedent, that it could be said that there was any law administered in this country which was substantially like the common law of England. But when that time arrived, when the highest courts in each state were regularly engaged in deciding cases and applying the rule of *stare decisis* to their own decisions, then there began to develop in each state a law of that state in precisely the same sense that there existed a common law in England developed by the English courts. If English decisions at first, no matter of what period, had as great influence with the state courts as if they were decisions of their own courts, this influence could not continue with the growth of the decisions of the separate state courts. The true state of the case has been concealed by the universal assumption that, at the same time that we adopted or created

[14] Chicago, W. & V. Coal Co. *v.* People, 114 Ill. App. 75, 104; 214 Ill. 421; and Ætna Insurance Co. *v.* Commonwealth, 106 Ky. 864, 880.

common-law courts to determine the common law in each state, we adopted also a whole body of law or system of principles known as the English common law, which, if properly understood and applied, would be a sufficient guide to the courts of each state in the determination of all questions that might come before them.[15] But, as already shown, if the adoption of the common law meant no more than the adoption of this so-called general law, then the application in each state of the common-law principle of the authority of precedent meant, not only the destruction of this general law, but the development in each state of a law different from the common law of England. Only if all English decisions were accepted by the courts in this country, not merely as *evidence* of the English common law, but as identical with it, could it be said that the whole common law of England had been adopted. The refusal to follow English decisions means necessarily the development in each state of a law different from the English law, just as the refusal of the federal courts to follow the decisions of the state courts on certain subjects means the development in the federal courts of a common law different from the law of the states.

The truth of the matter is, therefore, that the greater part of the law of the states which is in fact identical with the common law of England does not consist of the common law of England which was adopted and made binding upon our courts, but it consists of rules established by the English Courts which have in fact been accepted and followed by the courts in this country, without regard to the dates of the English decisions establishing such rules, and without consideration of the question whether such decisions are a part of the adopted common law and binding upon our courts or not. The distinction between English cases which are controlling because part of the adopted common law, and English cases which are not controlling because not a part of the adopted common law, is seldom noticed. The confusion and inconsistency which have resulted from the failure to keep the distinction in mind can be fully appreciated only after a careful examination of the cases in each state. That this confusion has contributed greatly to the uncertainty of the decisions of our

[15] The statutes which, in many states, expressly adopt the common law of England assume, apparently, that that law will enable the courts to decide all questions that may come before them.

courts there can be no doubt. At one time the decisions of English courts are accepted as conclusive of a question; at another time, or in another jurisdiction where the common law is equally controlling, English decisions are disregarded and a new common law, a law founded upon a supposedly better reason, is established in its place. If we had not adopted the common-law principle of the authority of precedent, the law of the better reason might be accepted as the law which all of our courts, as well as our law schools, should unceasingly strive to discover; but as this principle of the common law has now become established more or less securely in every jurisdiction, we can only hope that in time our courts will be at least as successful as the courts of England in establishing a reasonably definite and certain body of law in each separate state.

II.

The consideration of a few of the decisions of the courts in this country, if not sufficient to disclose all the uncertainty which has resulted from the failure to determine definitely what is meant by the common law of England, will at least show something of the variety of views entertained by the courts in regard to the adopted common law. Let us examine, in the first place, some of the cases in which the view is expressed that it was the whole of the common law of England that was adopted in this country, and not a portion of it merely, or only certain decisions of the English courts.

In Williams *v.* Miles [16] we have an excellent statement of this theory. In that case the question presented was whether a former will was revived by the destructio of a subsequent will which in terms revoked the former one. Lord Mansfield had held that, in such a case, the former will was revived, while the rule of the English ecclesiastical courts was the other way and was generally followed in this country. It was contended by counsel that the Nebraska statute adopting the common law of England required the court to follow the rule laid down by Lord Mansfield and applied in the English common-law courts, since English decisions prior to the Revolution were made controlling. As to this contention the court says:

[16] 68 Neb. 463.

"What is the meaning of the term 'common law of England,' as used in chapter 15 a, Compiled Statutes ?[17] Does it mean the common law as it stood at the time of the Declaration of Independence, or as it stood when our statute was enacted, or are we to understand the common-law system, in its entirety, including all judicial improvements and modifications in this country and in England, to the present time, so far as applicable to our conditions ? We can not think, and we do not believe this court has ever understood, that the legislature intended to petrify the common law, as embodied in judicial decisions at any one time, and set it up in such inflexible form as a rule of decision. The theory of our system is that the law consists, *not in the actual rules enforced by decisions of the courts at any one time*, but the principles from which those rules flow ; that old principles are applied to new cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of fact require. . . . The term 'common law of England,' as used in the statute, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or Civil Law system, which was in force in this territory prior to the Louisiana purchase. Hence the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution, in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system."

In this view, the adoption of the common law gives to the court of Nebraska the fullest power to determine for itself what it regards as the soundest or preferable common-law doctrine upon any subject.

In Chilcott *v.* Hart[18] it was contended by counsel that the Colorado statute,[19] adopting the common law, made English decisions prior to 1607 controlling where not changed by statute, while

[17] The statute reads : "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States . . . is adopted and declared to be law within said territory."

[18] 23 Col. 40.

[19] The Colorado statute is similar to that of Illinois and several other states, all of which follow the Virginia act of 1776, and provide that "the common law of England, so far as applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority."

English decisions since that time were not; that prior to 1607 the English rule was that executory devises which did not vest within lives in being were void, and that the period of twenty-one years and a fraction was not added until later, and therefore was not in force in Colorado. The contention as to what the law of England was prior to 1607 was probably unsound, but the court deals with the question of the common law of England that was adopted by the Colorado statute, and says:

"The rule against perpetuities was of slow growth, and in its development it was for no considerable period, if at all, that the time was thus limited to one life only. The common law thus being a constant growth, gradually expanding and adapting itself to the changing conditions of life and business from time to time, what the law is at any particular time must be determined from the latest decisions of the courts; and the recognized theory is that, aside from the influence of statutory enactments, the latest judicial announcement of the courts is *merely declaratory of what the law is and always has been.* We are at liberty, therefore, if not absolutely bound thereby, to avail ourselves of the latest expression of the English courts upon any particular branch of the law, in so far as the same is applicable to our institutions, of a general nature, and suitable to the genius of our people, *as well as to consult the English decisions made prior to 1607.*"

The Colorado court evidently agrees with the Nebraska court in regard to the adopted common law, although the statutes of the two states are not the same. In fact, statutes similar to that of Colorado have been construed in Illinois and Kentucky at least as adopting the English common law as it existed prior to the fourth year of James the First. The Nebraska statute, which contains no reference to the fourth year of James the First or any other period, is construed merely as excluding the civil law (which might otherwise be claimed to be in force in a state originally a part of Louisiana territory) or any other law which might be considered as different from the common law. What the adopted common law is, is left to the determination of the Nebraska court, and, as the Nebraska case above referred to shows, the court considers itself at liberty to prefer the rule of the English ecclesiastical courts to that of the English common-law courts, or even to adopt as preferable a rule different from that of the English courts.

It might be difficult, perhaps, to suggest any different interpre-

tation which could be given to such a statute as that of Nebraska, and the courts of other states which have adopted a similar statute seem to regard the adopted common law in the same light. For instance, in Lux *v.* Haggin [20] the question was as to the rule to be applied in California regarding the right of a riparian owner to appropriate the waters of a stream. The common law of England, by a statute passed in 1850, had been made "the rule of decision in all the courts of this state," and the court says that "the expression 'common law of England' designates the English common law as interpreted *as well in the English courts* as in the courts of such of the states of the Union as have adopted the English common law." The court then goes on:

"And it was not the common law 'as the same was administered' at a certain date that was adopted, *but the common law.* . . . The statute adopts the common law of England, except where inconsistent with the constitution and statutes, and there can be no good reason why, to ascertain the common law of England, we should not refer to the decisions of English and American courts (in states where the common law prevails) rendered before and subsequent to the date of the statute.

Looking at the whole array of adjudications, if we find a question has often been decided in one way . . . the rule of the common law involved or presented in the question ought to be considered as settled. . . . Where the rule has become settled, it is not, as opposed to any former decision, a new rule, but must be held to have been the law from the beginning, because 'right reason' has always been the prime element of the law. . . . Courts do not repeal former decisions: when they reverse them they hold they were never law."

The statute of the state of Washington is substantially like that of California. The case of Sayward *v.* Carlson [21] presented the fellow-servant question, and the court held it was not obliged, by the statute adopting the common law, to follow English decisions, that American courts as well as English courts decide what the common law is. "Therefore," the court says, "we have the common law as declared by the highest courts of this, that, and the other state, and by the courts of the United States, sometimes varying in each."

Many more expressions similar to those above quoted might

[20] 69 Cal. 255. [21] 1 Wash. 29.

be given from the decisions of other state courts. It is not too much to say that they express the generally accepted view in most of the western states where the common law has been adopted by statute. Where the common law of England has not been adopted by express statute, some cases, as in Ohio, apparently hold that there is a common law of the state of which the law of England forms a part.[22] No English cases evidently are made controlling. In Pennsylvania, in the case of Lyle *v.* Richards,[23] we find the statement that our ancestors "brought with them the common law *in general*, although many of its principles lay dormant, until awakened by occasion."

The law which is followed or declared by the United States courts in connection with the decision of questions of so-called general law, where the rule of Swift *v.* Tyson applies,[24] and in cases where the federal courts have a special or exclusive jurisdiction, is a general common law substantially like that adopted in the states to whose decisions reference has already been made. Whether there is a common law of the United States — a much-discussed question — depends obviously upon what is meant by the common law. In connection with the classes of cases above referred to, the federal courts are developing a separate law in the same sense and by the same methods that the state courts are developing what is called the common law in the states.

This is clearly stated by the Court of Appeals for the Eighth Circuit in the case of Murray *v.* C. & N. W. Ry. Co.,[25] where the court says:

"It has always been assumed that the federal courts were endowed with a power and jurisdiction adequate to the decision of every cause, and every question in a cause, presented for their consideration, and

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[22] Railroad Co. *v.* Keary, 3 Oh. St. 201, 205; Bloom *v.* Richards, 2 Oh. St. 387, 390. See also State *v.* Cawood, 2 Stew. (Ala.) 360, 362.

[23] 9 Serg. & Rawle 330.

[24] An inconsistency in the application of the doctrine of Swift *v.* Tyson should be noticed. When a state adopts a statute governing matters of so-called general law, the federal court follows the statute and the decisions of the state courts interpreting it. Yet state statutes adopting the common law, and the decisions of the state courts determining the meaning of the statute, are disregarded by the federal courts, even though the common law of England, as adopted by statute, does not mean the same thing in every state.

[25] 92 Fed. 868.

of applying to their solution and decision any rule of the common law, admiralty law, equity law, or civil law applicable to the case, and that would aid them in reaching a just result, which is the end for which courts were created. If a case is presented not covered by any law, written or unwritten, their powers are adequate, and it is their duty to adopt such rule of decision as right and justice in the particular case seem to demand. It is true that in such a case the decision makes the law, and not the law the decision, but this is the way the common law itself was made and the process is still going on. A case of first impression, rightly [26] decided to-day, centuries hence will be common law, though not a part of that body of law now called by that name." [27]

And in the recent case of Kansas *v.* Colorado [28] the United States Supreme Court speaks of its decision of cases connected with boundary disputes between the several states as being in effect the creation of an "interstate common law." It is difficult to see, therefore, any real difference between the general or common law which the federal courts rely on in the decision of such matters, and the common law which states like Nebraska, Colorado, and California have adopted as the rule of decision for their courts in such cases as come before them. The only controlling body of law in any case is the law which the courts, state and federal alike, make, unless it can be said that the state courts are excluded from preferring a rule of the civil law as preferable to a settled rule of the common-law courts of England, while the federal courts are not. And, as a matter of fact, there are many principles established as law in the various states which have been introduced at different periods from the civil law, and which are not a part of the original common law of England.[29] The body of common law which is said to exist in the states is in no essential respect a different source of law from that which the federal courts rely upon.

Let us consider now some of the decisions in which the view is expressed that the adoption of the common law of England meant,

[26] Is the use of this word intended to suggest that the common law consists of all cases rightly decided in all jurisdictions?

[27] See also Western Union Telegraph Co. *v.* Call Publishing Co., 181 U. S. 92.

[28] 206 U. S. 46.

[29] See Professor Beale's article in 23 HARV. L. REV. as to the adoption of the civil-law rule with respect to the law which governs a contract, an especially important question in this country.

not the adoption of the whole common law, but the adoption of the common law as it existed in England prior to some particular period, so that English cases prior to that time became binding upon the courts in this country.

The most interesting, and perhaps the most logical, view in this connection is that expressed by Chief Justice Marshall to the effect "that as the common law of England was and is the common law of this country, and as an appeal from the courts of Virginia lay to a tribunal in England, which would be governed by the decisions of the courts, the decisions of those courts, made before the Revolution, have all that claim to authority which is allowed to appellate courts." [30] Marshall states this theory again in two other cases,[31] but, in spite of the weight which is usually attached to an opinion of Marshall's, the view never gained general acceptance, although it is referred to with apparent agreement in some other cases,[32] and was accepted by Cooley as the correct exposition of the matter.[33] It is much easier, however, to find cases which state that English cases after the Revolution are not binding than it is to find cases where an English decision prior to that time, but after the settlement of the colonies, is followed for the reason merely that it is a binding authority.[34]

In some states the common law as it existed down to the time of the Revolution [35] is declared, either by a constitutional or statutory provision, to be in force. For instance, the Florida statute provides that "the common law and statute laws of England which are of a general and not of a local nature . . . down to the fourth day of July, 1776," shall be in force in that state. Without making a more careful search of the authorities in these states than the writer has found time for, it is impossible to say, however, that English decisions after the settlement of the colonies and before the Revolution are held in any of these states to be absolutely binding.

The prevailing view in the eastern states of the country seems

[30] Murdock & Co. *v.* Hunter's Rep., 1 Brock. 135, 140-141.

[31] Cathcart *v.* Robinson, 5 Pet. (U. S.) 264, 280, and Livingston *v.* Jefferson, 1 Brock. 203, 210.

[32] Johnson *v.* U. P. Coal Co., 28 Utah 46; Mayor *v.* Williams, 6 Md. 235, 265.

[33] Cooley, Constitutional Limitations, chapters iii and iv.

[34] Gray, Nature and Sources of the Law, p. 232.

[35] For example, New York, Georgia, and Florida.

to be that decisions of English courts prior to the settlement of the colonies, particularly if regarded in England as establishing or settling the law of England, are to be regarded by the state courts as binding upon them. This, apparently, is the view which is taken also in those states which follow the Virginia statute of 1776, for instance Kentucky and Illinois. In Ray *v.* Sweeney [36] the Kentucky court holds that it is the common law as it existed prior to March 24, 1606, that is adopted, and says:

"To declare that the common law and statutes enacted prior to that time should be in force, was equivalent to declaring that no rule of the common law not then recognized and in force in England should be recognized and in force here, . . . and when it is sought to enforce in this state any rule of English common law as such, *independently of its soundness in principle*, it ought to appear that it was established and recognized as the law of England prior to . . . [March 24, 1606]."

In Illinois the statute seems to be given the same construction, although there has been considerable uncertainty in the decisions from the beginning. For instance, in Penney *v.* Little,[37] one of the earliest cases, the court said it did not consider itself restricted to the limits of the common law of England as it was prior to 1606, without subsequent improvements and modifications, "for the simple reason that it is more than two hundred years behind the age." Then, in a case a little later, Gerber *v.* Grabel,[38] the court accepted the English doctrine in regard to ancient lights on the ground that the English common law as it existed prior to the fourth year of James the First was adopted by the statute, while Judge Caton, in a separate opinion, expressed the view that it was the common law as administered in England at the time the Illinois statute was enacted that was adopted, although only English statutes prior to 1606 were included. In Guest *v.* Reynolds [39] the doctrine of ancient lights was repudiated on the ground that it was inapplicable to conditions existing in Illinois, and the court stated that it was not authoritatively settled prior to what period of time the common law was regarded as adopted. In People *v.* Williams [40] the court refers to the statute and says, "Thereby the great body of the English common law became, so far as appli-

[36] 14 Bush (Ky.) 1. [37] 3 Scam. (Ill.) 301. [38] 16 Ill. 217.
[39] 68 Ill. 478. [40] 145 Ill. 573.

cable, in force in this state." Finally, in the Revell case,[41] which involved the right of shore owners to build structures out into the lake, the court says that the statute adopts "the common law as it existed prior to March 24, 1606," and that, "in the absence of any statute of the state changing the common law in regard to rights of riparian or littoral owners, the common law *as it then existed* must control."

The interesting point to notice in connection with this last Illinois case referred to is, that the particular rule accepted and applied, because a part of the common law of England as it existed prior to 1606, was in fact settled by a decision of the House of Lords[42] in 1876, as the Supreme Court of the United States says,[43] "after conflicting decisions in the courts below." Apparently, therefore, the Illinois court considers the recent decision of the House of Lords a conclusive determination of the common law as it in fact existed prior to the fourth year of James the First. It should be noticed also that, in a recent New York case,[44] the question decided in the Revell case is decided differently, although the New York court admits that the constitution of New York adopted the common law of England as it existed prior to the Revolution. The New York court, however, does not base its decision upon the ground that recent English decisions are no part of the common law, but on the ground that the principle of the English cases is inapplicable to conditions existing in New York. Yet in a recent English case[45] the House of Lords, referring to the case decided by it in 1876, says that "that decision was arrived at not upon English authorities only, but on grounds of reason and principle, which must be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the *lex loci*," and therefore applies the rule to Canada. These cases sufficiently illustrate the difficulties of determining what the adopted common law is and how it is discovered, as well as what principles of the common law the courts may consider applicable to conditions existing in this

[41] 177 Ill. 468.
[42] Lyon *v.* Fishmongers' Co., 1 App. Cas. 662.
[43] Shively *v.* Bowlby, 152 U. S. 14.
[44] Town of Brookhaven *v.* Smith, 188 N. Y. 74.
[45] North Shore Ry. Co. *v.* Pion, 14 App. Cas. 620.

country. A common law which is to be the rule of decision until altered by the legislature ought not readily to be held inapplicable by the courts.

It is worth noticing also that the law merchant, which did not become a part of the common law of England, so that it need not be proved as a foreign law, until the eighteenth century, is nevertheless considered a part of the adopted common law in this country.[46]

It has already been noticed that the Kentucky and Illinois courts, although they apparently agree as to the construction of the statutes adopting the common law, disagree as to what the common law of conspiracy was prior to 1606. In the Kentucky case[47] the court says:

"In the volumes of Wright and Stephen all the English cases cited on behalf of the Commonwealth are considered and discussed, and it is very conclusively shown that prior to 1607 there was no such thing at the common law as criminal conspiracy, except the confederacy for the false and malicious promotion of indictments and pleas, or for embracery or maintenance of various kinds, and that whatever may have been the *dicta* of the judges who decided subsequent cases, or the deductions drawn therefrom by some of the text-writers, the cases themselves, for more than two hundred years thereafter, do not support the contention made on behalf of the Commonwealth."

On the other hand, the Illinois court holds[48] that by the adopted common law every conspiracy which has a tendency to prejudice the public in general is a crime. The court says:

"We must look to the acts of Parliament enacted and to the judicial decisions handed down prior to the fourth year of James I for evidence of what the common law is. An examination of them shows that the points made and the conclusion reached by the learned judge in State *v.* Buchanan[49] are clear and correct statements of the common law concerning conspiracy as it existed at the time from which we adopted the same."

In concluding our examination of the cases it will be well to notice the Maryland case which is referred to by the Illinois court

[46] Cook *v.* Renick, 19 Ill. 598; Piatt *v.* Eads, 1 Blackf. (Ind.) 81.
[47] Ætna Insurance Co. *v.* Com., 106 Ky. 864, 880.
[48] Chicago, W. & V. Coal Co., 114 Ill. App. 75, 104.
[49] 5 H. & J. (Md.) 317.

in the case last referred to, because it states the theory of the adoption of the whole common law in a form which we might have expected to come across more frequently, — a theory, however, which the Illinois court was hardly justified in relying on for ascertaining the common law prior to 1606. The court in that case first says that "it is to judicial decisions that we are to look, not for the common law itself, *which is nowhere to be found*, but for the evidences of it," and then, after referring to English cases decided prior to the settlement of Maryland, goes on to say that it is a mistake to suppose that later English cases

"are expansions of the common law, *which is a system of principles not capable of expansion, but always existing*, and attaching to whatever particular matter or circumstances may arise and come within the one or the other of them. . . . *Precedents therefore do not constitute the common law, but serve only to illustrate principles.* And if there were no other adjudications on the subject to be found, the judicial decisions since the colonization furnish *conclusive evidence*, not only of *what is now understood to be the law of conspiracy* in England, so far as these decisions go, *but of what were always the principles on which that law rests.*"

The court then says that the section of the Maryland Bill of Rights adopting the common law of England "has no reference to adjudications in England anterior to the colonization, or to judicial adoptions here of any part of the common law during the continuance of the colonial government, but to the common law *in mass*, as it existed here, *either potentially or practically*, and as it prevailed in England at the time."

If what we have adopted is indeed the whole common law, or the common law "in mass," then it may well be that, rather than to speak of a developing common law, which is in constant process of improvement by means of the decisions of the courts in all common-law jurisdictions, as is maintained by the courts of some of the states, it is better and more logical to adopt, with the Maryland court, the timeless, unchangeable, complete, and perfect common law which exists nowhere. Then, in truth, only those cases, "rightly decided," as stated in the opinion of the federal court before referred to, would constitute conclusive evidence of the true common law; and no court could content itself, in the decision of any case, with the application of the easy rule of *stare decisis*, but

must determine each time that the decision to be followed is indeed rightly decided and in harmony with the true common law.

As has been previously explained, however, the constant search by the courts for the true common law (particularly if it is nowhere to be found) means the elimination of the principle of the authority of precedent, the distinguishing characteristic of the English common law. That principle of the common law of England at least has been accepted and applied to such an extent by our courts that, in most states to-day, any supposed duty on the part of the courts continually to review and modify their decisions to keep them in harmony with a true common law is lost sight of in the ever-present problem of the systematic and consistent development of the law in each state in accordance with common-law methods, and the principle of *stare decisis* in particular. The adoption of the common law of England has resulted in the creation in each state of courts possessed of the power of making and developing the law in each state as the English courts make it in England, and not with the power only of the courts of the countries where the civil law or some other system of law prevails. The exclusion of the civil law by the adoption of the common law has meant that at least. The first question always in every common-law jurisdiction is the determination, with respect to any question, of the already settled law of that jurisdiction. If English cases of some period, as well as cases already decided by the courts of each state, are to be regarded as controlling authorities, it is important that it should be known what those cases are. The previously settled law being ascertained, then, if the case in hand is not concluded thereby, other sources of law may be resorted to. But the fundamental problem in each jurisdiction is the systematic, consistent, and, so far as possible, certain development of the law by means of the cases decided by the courts which make the law for that jurisdiction. So only will the law in each state develop in accordance with the essential principles of the English common law.

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