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## AMERICAN PROGRESS IN JURISPRUDENCE.\*

The history of a nation's movements, material or moral, in a given period, would be incomplete without some account of the development of its laws. The legislation of a people, made with deliberation and duly enforced, is after all the best index of its advancement or retrogression.

Having been requested to prepare for the Columbian Exposition, some account of the progress in jurisprudence made by the United States, I had undertaken to do so, when the admirable address of Professor Baldwin, of Yale, delivered in July last before the Bar Association of Ohio, fell into my hands, and I found there the work already in great part done. Little remains for me but to group together the principal facts which Professor Baldwin has given in greater detail, and to add some observations on what I must consider certain steps of retrogression.

All the world knows that for more than a century that part of the newly-discovered hemisphere, which is now occupied by

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\* This paper, prepared by the late David Dudley Field for the World's Congress of Jurisprudence and Law Reform, held at Chicago, in August, 1893, is one of the series which THE AMERICAN LAW REGISTER AND REVIEW has been given the right to publish.—ED.

the United States, remained a wilderness over which roamed only savage tribes. That there had been prehistoric races, the mounds of the west and other vestiges bear witness, but the early part of the seventeenth century saw the beginning of settlements by Europeans. The first comers were English, French and Spaniards. They brought with them, of course, the laws of their respective countries. The predominant element in population and in law was English, and so continued up to the last half of the eighteenth century. From that time an American element began to develop itself. Of what preceded that development it is unnecessary to speak here.

We began with asserting the sovereignty of the people. This was done by the Declaration of Independence in 1776. What is meant by sovereignty? The right to make and unmake forms of government. Not the power to enact statutes, for that is usually delegated to legislative assemblies. The formula for enactments in New York expresses the general principle: "The People of the State of New York represented in Senate and Assembly do enact as follows." Sovereignty in a political society is the supreme power, a power from which there is no appeal. In our country this supreme power is divided between the Union and the States, but so much of it as has been given to the former was given by the latter. The result is, that Congress is not sovereign, nor is the President sovereign, nor is the Judiciary sovereign; nor, indeed, are all three combined sovereign. They may exercise their part of the sovereign power, but it is only by delegation that they exercise it at all. On the other hand, the reserved powers are all with the separate States, so that we have, in fact, a divided sovereignty, but none the less is it true, that sovereignty in this country resides with the people, partly in all the states united, and partly in the several states—"*E pluribus unum.*"

What is meant by the people? At the time of the great Declaration, the people meant adult white men. After the civil war and for some years, the people meant adult men, white or black. What is meant now? In the State of Wyo-

ming, by the people is meant adult men and women, white or black. In that most advanced of all the states in this respect, a woman as well as a man votes for the representatives of the people. Why should she not? She counts in every enumeration of the census; her name is on every tax-roll; she is the nurser and instructor of youth; she forms more than man the habits, tastes and manners of all the living; she is as deeply interested as man in good laws well administered; she suffers as much from bad administration and profits as much by a good one. I repeat, why should she not vote as well as men? Certainly, it is not because she is not as capable to rule. In modern times, three of the greatest rulers of the world have been women: Maria Theresa of Austria, Catherine of Russia, and Victoria of England. It does not become a man to say that any one of these great personages was not, at least, his equal in the capacity and art of governing. And in these states, who will pretend that it is just and decorous to give the right of voting to ignorant blacks, when it is refused to intelligent women? Political and social movements are sometimes slow in their coming; but come they will, and it is the logical sequence of our frequent saying, that this is a government of the people, by the people and for the people, that every true man should allow to the wife of his bosom and the daughter of his house the same voice in the government of their country that is allowed to his brother and his son. For use, it is enough to say, that, though in many states and nations the right of voting for holders of the less important offices has been conceded to women, yet it has been reserved to an American state to be first in the long procession of ages to place upon the head of woman as of man the crown of a free and equal suffrage.

Following this primal and fundamental principle of sovereignty in the people, and consecrated by it, are certain rights pronounced inherent in every human being, to be lost only for crime: the right to life; the right to liberty; the right to worship God as conscience dictates; the right to choose one's home wherever he can find it; the right to speak and write freely; and the right to labor when, where, and for such

reward as the laborer and his employer may agree to between themselves.

Under the influence of these great principles, our political system, state and national, has been built; a fabric purely American, without precedent in the past and ready for further development in the future.

Dividing the law into two great branches, international and national, the United States may boast of having been the first to establish expatriation as the right of every human being, whatever may have been the bonds of birth or inheritance which bound him to the soil. Next to the vassalage which condemned the man to serve on the estate upon which he was born, was the vassalage which bound him to the country which gave him birth. This was one of the fetters from which, according to the international law prevailing for many ages, no man could free himself. Upon this monstrous theory, seamen of foreign birth were impressed from the decks of our merchantmen, until we became strong enough to break the fetters; and the doctrine of perpetual allegiance so long upheld in the old world is now hardly remembered in the new.

The United States have also done more than any other nation toward making international arbitration a maxim of public policy and an article of public law. Within the present century there have been at least fifty-eight instances of arbitration between nations, in thirty-five of which the United States were parties. They have endeavored, also, though with no great result as yet, to bring about an agreement between the independent states of North and South America to submit all their differences to that manner of settlement. Good has already come from the peaceful adjustments in which we have participated, and greater we devoutly hope will follow. The two strongest nations of the world are now contending at Paris, before seven gentlemen selected for the purpose, to settle by peaceful discussion and judgment a dispute which a century or perhaps half a century ago would have reddened the North Pacific with the blood of kindred nations, and threatened with fire and rapine cities and villages along the coasts of half the world.

Passing on to national law, in its five great departments of organic law, the law of persons, the law of property, the law of obligations, and the law of procedure, we are to observe, first of all, that the United States placed their Constitution beyond the reach of executive or legislative power. The President may act, and the Congress may act, but the judiciary may decide after all, whether the act is authorized by the Constitution. Never before in any constitutional government was the organic law put under the guardianship of the judiciary. This is a feature purely American, and of value incalculable for the protection of individual rights.

In the category of these individual rights I conceive that the greatest achievement ever made in the cause of human progress is the total and final separation of the state from the church. If we had nothing else to boast of, we could claim with justice that first among the nations we of this country made it an article of organic law that the relations between man and his maker were a private concern into which other men had no right to intrude. To measure the stride thus made for the emancipation of the race, we have only to look back over the centuries that have gone before us, and recall the dreadful persecutions in the name of religion which have filled the world with horror. Think of Torquemada in Spain; the martyrs suffering at the stake or in prison in many another land; the exiles driven from France by the revocation of the edict of Nantes; the "slaughtered saints, whose bones lay scattered on the Alpine mountains cold." Amid all our shortcomings, it will remain forever to the glory of these states that they allow no man to step between his fellow-man and his maker. Clouds and darkness do indeed often seem to cover the land; but there is one rift in the clouds through which, to the mind's eye at least, the daylight will shine as long as the world lasts. This nation may be torn into fragments, or other races may occupy the land in some era far away, but the fact will still remain that there was a nation of free men on this continent which first rent the shackles that priestly domination had been forging for centuries, and solemnly decreed that no man should

dare intercept the radiance of the Almighty upon the human soul.

Besides this great act of deliverance, we have emancipated woman from the domination of her husband; we have freed the honest debtor from the possibility of passing his life in prison; we have rendered it impossible for legislation to make that act a crime which was not a crime when it was committed; we have forbidden the states to impair the obligation of a contract between man and man; we have proclaimed from sea to sea that all men are created equal in rights, and that among those rights are the rights to life, liberty and the pursuit of happiness; we have imbedded in the fundamental law of the land as principles inviolable and eternal, that no man can be deprived of these rights without due process of law, and that all are entitled to the equal protection of the laws.

After personal rights come the rights to property; and in respect of real property we find that the feudal system, with all its incidents, has nearly passed away. The Colonists, indeed, brought with them, in theory at least, that intricate and burdensome system, as it existed in England at the time of the emigration. But so early as 1829, a writer in the "American Jurist" was able to publish the following, in respect of the changes made up to that time in one or more of the states:

"(1) Abolition of feudal tenure, including copyhold; (2) Abolition of tithes; (3) Making both the real and personal property of intestates descend to the same persons; (4) Enabling parents to become heirs to their children; (5) Abolition of primogeniture and preference of males in descent; (6) Making all estates descend in the same course, whether acquired by purchase or by descent from paternal or maternal relations; (7) Abolishing the preference of male stock in descent; (8) Enabling half-blood relations to inherit; (9) Making husband and wife heirs to each other in case of failure of blood relations; (10) Making seizin of land pass by the mere delivery of the deed; (11) The general registration of deeds; (12) Making a fee simple pass without the word 'heirs' or any equivalent, where a less estate is not expressed;

(13) Enabling tenants in tail to convey estates in fee simple without a fine or recovery; (14) Enabling married women to convey their estates and bar their dower without a fine; (15) Change of joint tenancies into tenancies in common; (16) Removing the disabilities of alienage with regard to real property; (17) Abolition of the doctrine of tacking in mortgages; (18) Placing land mortgages, as well as the debt for which it is security, at the disposal of the mortgagee's executor; (19) Making all real estate liable to execution for debt, and having it sold on execution, like personal property; (20) Rendering real estate assets for payment of all debt without any preference; (21) Shortening the time of limitation.

"The object and effect of the changes that we have enumerated are to render the principles of law applicable to real property more simple and equitable; the rules of construction more conformable to common sense; the modes of transferring it more cheap, direct and expeditious; the title to it more clear and easily investigated, and in consequence its purchasers more secure."

Before this time, indeed, and in 1827, the revisers of the New York statutes had elaborated a code of real property which lacked but a few additions to make a complete code on that subject. And since then many of the states have adopted a Homestead Exemption law, the object of which is to make every homestead a citadel against the claims of creditors. There is in this no injustice, so long as creditors deal upon this condition.

In the two vast domains of personal property and of personal contracts, the laws of America and England have moved very much abreast of each other. It could hardly be otherwise, considering the ties of trade and the frequency of intercourse between the two kindred nations. The reports of decisions in the courts of the two countries are interchanged year by year and almost day by day. Our contingent, according to the latest computation, amounts to 118 volumes a year. How many volumes come over the sea, I do not know. I can only guess at the accumulations from a publication now passing through the press, entitled "The American

and English Encyclopedia of Law," which has already issued twenty volumes and promises five more, boasting (what a boast!) of having collected 700,000 decisions.

Approaching now the great department of procedure, the key of jurisprudence, or I should rather say the key of its temple, we find the United States first of all English-speaking nations rejecting the cumbersome and contradictory methods of the common law of England, which that country had been gathering together through immemorial ages. Time-worn and worm-eaten were those cracked, dusty parchments, on which was written the worst contrived plan of entering the courts and getting out of them that the wit of man could devise. In place of the old labyrinthine ways we have laid out a plain and easy road for all litigants with their burdens, and their witnesses. No suitor is turned away for defect of form, and no witness is rejected who has sense enough to think and voice enough to speak.

We all know, or rather, I should say, all lawyers know, that by the English common law, made by the judges, a suitor was obliged to choose between two great divisions of the courts, one called legal and the other equitable. If he entered one when he should have entered the other, he lost his suit. This was not all: the legal division was subdivided according to what were called forms of action, and he was required at his peril to choose one of these as his particular form for the occasion. A royal commission in England had reported that there was no authentic enumeration of these forms. This grotesque machinery has been swept away, wholly or in great part, in twenty-eight American states and territories, New York, Missouri, Wisconsin, California, Kentucky, Ohio, Iowa, Kansas, Nevada, North Dakota, South Dakota, Oregon, Idaho, Montana, Minnesota, Nebraska, Arizona, Arkansas, North Carolina, South Carolina, Wyoming, Washington, Connecticut, Indiana, Colorado, Georgia, Utah and Maine.

The example was contagious, even so far as across the sea, and in 1873 the Parliament of England took up the subject, and following American example adopted the Judicature Act,



by which the forms of action were abolished and law and equity fused together. This act extended to Ireland, and has been followed in the English colonies of Victoria, Queensland, South Australia, Western Australia, Tasmania, New Zealand, Jamaica, St. Vincent, the Leeward Islands, British Honduras, Cambria, Grenada, Nova Scotia, Newfoundland, Ontario and British Columbia.

It was not civil procedure alone that was taken up in America; criminal procedure, that is, procedure in the criminal courts, was meliorated and codified. Long before this, however, and from the very beginning of American courts, the denial of counsel to persons accused of crime had been repudiated as a gross inhumanity.

I must not pass from this subject of advancing jurisprudence without a few words upon the form of expression which it seems tending to assume, and that is codification. This tendency is remarkable, and, in that respect, we have also outstripped all other English-speaking communities.

Besides the acts of civil procedure that I have mentioned, and which I count as codes—though a few of them, like the practice act of Maine, are couched in not more than a dozen comprehensive and fundamental sections, to be engrafted upon the general practice of the state—besides these acts, I repeat, there are already to be found in American jurisprudence 18 codes of criminal procedure, 5 penal codes and 5 general civil codes. Taken altogether, here is an array of 56 codes which the United States are able to present to the world as the fruit of the first century of independence, or rather of the present half of it.

It is not my purpose here to enter upon an argument in favor of codification. I will not debate the question whether judges should be makers as well as interpreters of the laws. The controversy has been carried on with much warmth in New York and some other states. It lies now, as it has ever lain, between the written and unwritten law—between the statute book and the chaos of myriad precedents. Upon the whole subject I content myself with copying two passages from Professor Baldwin's address, two resolutions, one of the

American Bar Association, and the other of the New York State Bar Association, and then giving a tradition of the old New York Bar :

“ We have given, I cannot but think, an undue prominence to judicial precedents as a natural source or annunciation of the law. The multiplication of distinct sovereignties in the same land, each fully officered, and each publishing in official form the opinions of its courts of last resort, bewilders the American lawyer in his search for authority. The guiding principles of our law are few and plain. Their application to the matter we may have in hand it is the business of our profession to make, and if we spent more time in doing it ourselves, and less in endeavoring to find how other men had done it in other cases, we should, I believe, be better prepared to inform the court and serve our client.”

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“ The drift of American jurisprudence is towards the expression of the law in an orderly and official form ; in other words, towards codification. It has approached the question from the practical side, and in a practical way. The early colonies soon put their scanty statutes into print, arranged in some convenient way for ready reference, the various heads often following each other in alphabetical order, as in our digests of reports. New York led the way towards a more systematic and comprehensive treatment of the subject, by her Revised Statutes of 1827, a revision which, though in many points revolutionary, was so well considered and well done that it has held the ground for over half a century, while in most of our states revision succeeds revision every ten or fifteen years. But there is nothing distinctively American in codification. It is simply un-English. It is the natural aim and end of every system of jurisprudence—of jurisprudence itself, apart from any particular system of it. Jurisprudence is the science of law, and the orderly statement of its rules can be called by no better name than Code.”

At its annual meeting in 1886, the American Bar Association, after full discussion, adopted a resolution that “ the law itself should be reduced, so far as its substantial principles

are settled, to the form of a statute ;” and in 1892 the New York State Bar Association by resolution expressed its regret that no action had been taken in the last preceding Legislature toward the enactment of the civil code and code of evidence so long pending. A great lawyer, but subsequently discredited statesman, in the beginning of our century, when asked for a definition of the law, was wont to reply, according to the tradition, “That which is speciously proposed and plausibly maintained, that is the law.” Was he not right ?

The foregoing is a sketch, and but a sketch, of what I call our advancement in jurisprudence. I have avoided questions of morals, or tastes, or manners, and have refrained from enquiring how far, if at all, our acts have strayed from our professions. I am discussing only the laws of the land as they appear in our books. I have shown the bright figures of the shield. We are all proud of them, and, as I think, justly proud. I wish there were no shadows there. But shadows there are, nevertheless, from which we ought not to turn our eyes aside, since they may prove to be the cloudy precursors of storms. I refer to the popular election of judges ; allowing them short terms of office, and the increasing habit of spasmodic and excessive legislation.

The Federal judges are all appointed by the President, with the consent of the Senate, and hold their offices during good behavior. The judges of the several states are appointed or elected, and hold office as the constitutions of the states severally provide. These constitutions have been so often changed, that I am not sure that I can write them all down correctly ; but so far as I have the means at present of knowing, their arrangements are as follows : In 8 of the 42 states the judges of the highest courts are appointed by the governors, with the consent of the Senate or a Legislature or a Council ; in 7 they are elected by the Legislature ; in 27 they are elected by the people. In 8 of the states, New Hampshire, Massachusetts, Connecticut, Delaware, North Carolina, South Carolina, Florida and Alabama, the judges of the highest courts hold their offices during good behavior ; in 6, New York, Pennsylvania, Maryland, Louisiana, Tennessee

and West Virginia, they hold for terms between 10 and 15 years; in 2, Illinois and Colorado, for 9 years; in 5, Virginia, Kentucky, Michigan, Arkansas and Wyoming, for 8 years; in Minnesota for 7 years; in Ohio for 5 years; in Georgia for 3 years; in all the rest for 6 years, except that Vermont elects her judges annually by the Legislature, and Rhode Island elects hers by the Legislature to hold during its pleasure. Now, after reading this catalogue, let us call to mind, that according to the dogma of the common law, and the rule of *stare decisis*, every one of these judges, so appointed or so elected, for terms long or short, makes law in some degree, great or small, for the whole English race, which lives upon reports, near or afar, excepting those autonomous states which have had the courage and the wisdom to condense their laws into codes.

In framing the judicial department of some of our states, and particularly the new ones, we have forgotten the lessons and departed from the practice of the statesmen who contrived our system of Federal government. This system was but the evolution of movements that had been struggling and swelling for ages in the mother country between the sovereign and the people. Our fathers of the revolutionary period considered profoundly the formation of a judiciary and the best means of securing fit occupants, and of placing them above the reach of temptation. They understood well that the functions of the judicial department were different from those of the legislative or the executive. These two represent the people, and are chosen to execute their will; the judges are but interpreters of the law. They have nothing to do with the will of the people, except as that will is expressed in the laws of the land.

The problem is simply this, how to get the best judges, and make them safe against temptation. We have but three means of selection—a convention of the people, the Legislature, or the chief executive. A popular convention has rarely the knowledge and frequently not the disposition to choose the fittest lawyer for their judge. Generally the members of these conventions do not know and cannot know who that fittest person

is, or if they know they are apt to be swayed by personal or party motives. If an architect or an astronomer were to be made a public officer, who but a lunatic would think of making him elective by popular vote? We, in New York, have had some experience of a mistake in that respect. By the Constitution of 1846, the canals and prisons of the state were put into the charge of two sets of officers elected by the people. This was an object lesson easy to understand, and the power of appointment was taken from the general body of the people and devolved upon the governor.

A choice by the Legislature is subject to many of the objections which can be offered to a selection by popular convention, and it is subject to the further objection that it devolves upon the Legislature functions which do not properly belong to it. The closer a legislative body is confined to the making of laws, and the less scope is allowed to other measures, the better for the laws themselves.

On the other hand, a president or a governor is usually a person of some distinction who has already shown ability and discernment. He may, indeed, abuse his trust, and choose the unworthy or unqualified to office, but the chances are greater that he will make a wise choice than that such a choice will be made by a casual assembly of the wise and the unwise, brought together for a day, and animated more by considerations of party than of country. We have seen in our late President the choice of the highest judges made with wise discernment.

It is by no means true that popular election is regarded with such favor as to be resorted to whenever an opportunity occurs for filling the various agencies most important in the conduct of life. The abstentions from the polls, so frequent and so increasing of late, are proofs that the people do not, except on occasions of great excitement, take to voting as if moved by instinct. In 1884, one city of Massachusetts, out of 8699 voters found only 6108 at the polls. On subjects not political nobody thinks of calling for a popular vote; the subject of religion, for instance. While the citizen is, as we have seen, left free as possible in his beliefs and religious services, the

offices are filled by churchmen. In the Romish Church the hierarchy is self-elective, from pontiff to priest; all receive their calling from above, and the laity has as little to do with the dignities, the emoluments and the services, as if there were no such things. To a greater or less degree the other communions replenish the priesthood in a similar way; some allowing all communicants to participate, and some the pew-holders, and some the believers. Then turn to the secular employments of life; run the eye over the banks, the railways, the steamers, the manufacturing corporations, and other associations, great and small, by the work of which we build our houses, furnish them to our several tastes, and satisfy our wants, night and day. I do not here speak of those private individuals who supply most of our wants, but of the enterprises, half public and half private, which are expressly authorized and controlled by the state, but not manned by it. I mention these instances to show that popular election is not the general rule in human society. Citizens do not necessarily hunger and thirst for the privilege of voting. What they want is the ultimate sovereignty and a ready means of exercising it in case of need. This ultimate sovereign power in this republic rests, we know, in the body of the people. That does not signify that individuality should be crushed out, or that all offices, or even the most of them, should be filled by popular election. And so the only true question in respect of filling the judicial department is whether a popular assembly is the best device to ensure the choice of the best judges; and I insist that it is not. They who have read aright the history of subservient English judges before they were made independent—they who remember the chancellor of Mississippi, who lost his office because he decided against repudiation, and the Supreme Court judge of Michigan, who was voted down because he did his duty—they who thus read and remember, can best appreciate the value of a judiciary which has nothing to hope or fear but from the conscience of its own members.

Whilst I was writing these last words of my paper, the Chief Justice of the United States, with two other judges, was delivering a masterly judgment in a case involving the ques-

tion of opening the Exposition at Chicago on Sunday. This judgment is certain to wound the susceptibilities of a large number of religious teachers and their disciples. If the Chief Justice were to be a candidate for renomination by a popular convention, is it likely that he would receive it? And yet his judgment rests upon the foundation stones of this nation.

In respect of the terms of office, what can be said in favor of short ones? None that I can discern, except that office-seekers may have a better chance of coming in for a seat upon the bench, however transitory, and a salary, however small. How can a judge feel that independence which is his right and the right as well as of all within his jurisdiction, unless he can say, if need be, to a disappointed suitor or a displeased and surging crowd, "I judge according to my conscience; do your worst?" It is sometimes suggested that the people like to see a judge serve a sort of probation before entrusting him with enduring office. But a judge on probation would be a queer spectacle. We know, indeed, that the wisest are sometimes disappointed in their estimate of men when placed in untried positions. Even an Emperor was pronounced "*Capax imperii, nisi imperasset;*" but such instances are exceptional. Men do not change their character by putting on the ermine.

It is my conviction, and I wish that every other citizen had the same conviction, that a learned, efficient and independent judiciary cannot be obtained through popular suffrage and short terms of office. Experience is our great teacher. We have two systems side by side, the Federal and the State; the former placing on the bench judges appointed by the executive, endowed with office during good behavior, and with salaries that cannot be lessened; the latter lifting to the seats of justice, judges nominated and chosen for the most part by popular vote, holding for short terms and too often provided with salaries meager at best and changeable at the will of the Legislature. Which of the two systems do those who are forced into the courts most prefer? Into which do suitors most seek entrance, and how often do those who are sued desire to have their cases transferred thereto?

As to excess in legislation : we all know it, we all feel it, and look upon it with dismay. One supposed remedy has been adopted in many of the states, requiring its Legislature to meet once in two years. That, I fear, will prove a broken reed. There is no true remedy but in restraining the scope of legislative power, supplemented by self-restraining legislators. Look at the piles of statutes which issue yearly from the halls of our assemblies ; often dozens or more on the same general subject. In a manual or red-book, printed last year in New York, a short biography was given of many of the members, and it was frequently mentioned as matter of commendation that the member had introduced such and such a bill. Greater would have been the reason for commendation if it had been recorded in his favor that he had prevented the enactment of such and such a bill.

A Federal Congress and forty-two State Assemblies, filled with members mostly new to legislation, but all seeking to distinguish themselves by some change in the laws, present a spectacle appalling to the citizen. Whoever shall devise and bring to pass an adequate measure of relief will be a benefactor of his country.

*David Dudley Field.*

June 21, 1893.