THE COMMON LAW
AND
OUR FEDERAL JURISPRUDENCE

I

While the law is classified in different ways, for various purposes, for our present purpose it will be dealt with simply as *lex scripta*, or statutory law (including, of course, written constitutions), and *lex non scripta*, or common law; and wherever the term "common law" is employed, it will be used in the sense of non-statutory law, as shown by the decisions of courts acting within their general or prescribed legal jurisdiction, as distinguished from their equitable or other special jurisdictions. To amplify this meaning, a further classification will be adopted, namely, "the spirit of the common law," and "the body of the common law"; we shall also speak of "the common-law system," and of "independent systems of common law."

By the "spirit of the common law," when that term is employed, will be meant those fundamental conceptions of right and wrong, of justice and injustice, of proper and improper conduct, which are so manifest as to be generally accepted and credited—even though not always acted upon, and subject on occasion to judicial variations and differentiations according to the conditions under which they are applied in given cases. Many
of these conceptions involve the customs of the people, and some of them are expressed in ancient and approved maxims. After a custom has been recognized as of controlling force, in the decision of a court exercising purely legal jurisdiction, it becomes part of "the body of the common law," to the extent of its judicial recognition.

According to our view, the "body of the common law," in any territorial jurisdiction, comprises all the decisions of its courts, acting as purely legal tribunals, that apply the general principles and customs of which the spirit of the common law consists.

As judicial decisions of the kind just mentioned multiply in number, the later of them following those previously rendered, they, in course of time, come to constitute a legal system; and the rules and principles thus enunciated and acknowledged by common-law courts, as distinguished from equity and other special tribunals, constitute a "system of common law," in the sense in which that term is here employed.

Those fixed with the duty of formulating judicial decisions consult the published works of judges and other authoritative writers on legal subjects, and, when making new pronouncements or revising rules previously laid down, they are always influenced by the general policy of sustaining existing law and advancing it, if need be, along established lines; ¹ also, on all occasions, they are largely guided by their innate sense of justice, as well as by what they conceive to be the established customs, moral convictions, consensus of opinion, ripened judgment, general understanding, matured feeling, enlightened thought ² and, to a certain extent, the general convenience, ³ of the mass of people concerned. But, while all these elements and sources of knowledge are constantly taken into account by the judiciary, the fact remains that the body of unwritten, or non-statutory, law in any jurisdiction consists of the decisions recorded by its courts;

¹ Harlan F. Stone, Law and Its Administration, 32.
³ Stone, supra, 30, 31a.
which, for the ultimate benefit of all, and to maintain the stabili-
ty of jurisprudence, are kept as consistent with previous deter-
minations as humanly possible. In course of time, the accumu-
lation of these decisions forms a “common-law system”; and
when the courts of a particular jurisdiction exercise their uncon-
trolled judgment as to the authorities which they will follow,
or refuse to follow, and the principles by which they shall be
guided, the system thus established is “an independent system
of the common law.”

From what has just been said, we see that, if the United
States courts have developed, to any degree, an independent
system of common law, as distinguished from the common law
of the several states, it should be acknowledged as such, and
ought to be so termed; for confusion in terminology leads to
confusion of thought, and, almost inevitably, to misconceptions,
if not errors in the administration of the law; and where a ques-
tion of the existence of a legal system is concerned, such con-
fusion may become responsible for not only a lack of generality
but also actual inequality in the application of the law. All of
which will be pointed out more fully as we proceed with our
discussion.

The entire question as to the existence of an independent
system of federal common law has been clouded by an early
and bitter dispute over a claim of general criminal jurisdiction
for the United States courts, which will be examined somewhat
in detail later on; and it is to be feared that the settlement of
this controversy in the negative has affected subsequent discus-
sions concerning the place of the common law in these tribunals,
not unnaturally influencing many writers to generalize thereon
in a manner which causes one to lose sight of the important dis-
tinction between common-law jurisdiction, in its broad sense, and
the applicability of common-law principles in the exercise of a
jurisdiction expressly conferred.

Generalizations are apt to create unwarranted beliefs in
only half-truths, unless one analyzes clearly the terms employed,
and when certain judges and text-writers alike positively assert
that no unwritten law is administered by the federal courts sep-
arate and distinct from the law of the various states, there is produced in the minds of those who do not investigate further the impression that the national courts have no common law of their own, and this probably is the prevalent thought today. Let us see whether an impartial investigation of the sources of information will warrant such a conception.

In starting our investigations, two early judicial statements are of interest, the first by Mr. Justice McLean, in Wheaton v. Peters, and the second by Mr. Justice Mathews, in Smith v. Alabama. The former said:

"It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states [the number at that time—1834], each of which may have its own local usages, customs and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution or laws of the Union. The common law could be made a part of the our federal system only by legislative adoption."

Mr. Justice Mathews asserted that:

"There is no common law of the United States, in the sense of a national customary law distinct from the common law of England as adopted by the several states, each for itself, and applied as its local law subject to such alterations as may be provided by its own statutes."

Statements such as these—which have been more recently repeated in substance by other writers and judges,—necessarily

*8 Peters 591, 658 (U. S. 1834).
*124 U. S. 465, 478 (1887).


The following cases, state and federal, may also be consulted for rather full discussions of the subject: Kendall v. U. S., 12 Peters 524, 614, 621 (U. S.
raise a question as to the existence, or the possibility of the existence, of a federal common law; so, at the outset, we must understand the sense in which that term may be accurately used.

The common law of a particular state is represented, as we have seen, by the body of non-statutory rules announced and administered by its courts when adjudicating points in actions at law, as opposed to equitable and other special proceedings. It includes, therefore, those principles, usages, and rules of action applicable to the government and security of persons—individually and as constituting the social whole—which derive their authority, not from legislative declarations, but solely from the judgments of the courts. Strictly, then, when we speak of the English common law, we mean the body of non-statutory rules announced and administered by the English common-law courts in deciding cases brought before them; and, similarly, the common law of Pennsylvania, or of Massachusetts, is represented by the non-statutory rules announced and administered, respectively, by the like courts of these states. In a loose and popular sense, however, the phrase "common law," has come to connote, among those living under or inheriting Anglo-Saxon jurisprudence, the common law of England. The State of Pennsylvania, for example, is frequently called a common-law state, and in popular understanding the appellation implies English common law, but this is an inaccurate conception of the common law of Pennsylvania, or of any other state in the Union.

In the settlement of America, the colonists brought with them from England, as the natural birthright of British subjects


*Suits where legal rights were to be ascertained and determined in contradiction to those in which equitable or other rights and remedies were controlling.


*I Kent 471.
occupying uncivilized territory, all the laws of the mother country applicable to the conditions of life in their new surroundings, and, prior to the Revolution, English decisions were regarded by our courts as practically binding authorities. Upon the outbreak of the Revolution, the assertion of English common-law rights affecting personal liberty and political privileges, furnished a rallying point against Great Britain; and in the manifesto of the American Congress of 1774, it was unanimously resolved that "the respective Colonists are entitled to the common law of England . . . ; that their ancestors were entitled to all the rights, liberties and immunities of free and natural born subjects within the realm of England." It is clear, then, that principles of the English common law guided and sustained the American Revolution; and each state, which later adopted that system of law, chose as much of it as was suitable to local conditions; so that the spirit of the English common law permeated all our institutions, and its substance forms the basis of our jurisprudence.

In adopting the English common law, the practice of the states varied. Some of them accepted only those English decisions made prior to a certain date, while others took bodily so much of the unwritten law of the mother country, "without regard to any particular period, as would be applicable" to their

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Jefferson, however, said, "I deride the ordinary doctrine that we brought with us from England the common law rights. This narrow notion was a favorite in the first moment of rallying to our rights against Great Britain. The truth is that we brought with us the rights of men, of expatriated men. On our arrival here, the question would at once arise, by what law will we govern ourselves? The resolution seems to have been by that system with which we are familiar, to be altered by ourselves occasionally and adopted to our new situation." 4 Jefferson Correspondence 178.

But, on other occasions, Jefferson admitted that the state of the English law at the date of our emigration constituted the system adopted here. See Jefferson's Works, VI, 65, and VII, 374, where in speaking of the Virginia Commission, of which he was a member, appointed to draft the laws of that State, at the outbreak of the Revolution, he said the English common law was made the basis of the revision.

12 Kent, I, 343.
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conditions and not inconsistent with their own constitutions and that of the United States; but whatever was the original attitude of the various states, none of them can be said to possess, for its common law at the present time, the English common law exclusively. It so happens in the case of Pennsylvania—as can be said of the other states originally composing the Union, and of most of those subsequently added—that the local common law is predominantly English; but, because English decisions have been frequently disregarded and will probably continue to be disregarded in many instances, owing to their inapplicability to different conditions prevailing in this country, and because elements from other systems have from time to time been included, we cannot say, strictly speaking, that any of the states follow the English common law. On the contrary, each state's common law, since it is a growing and continuing system, represents the non-statutory rules which the courts of that particular jurisdiction announce and administer in settling legal disputes between litigants.

That the view just voiced is an accurate one, appears when we consider what would have happened in any particular state if the English common law had been either definitely rejected or not expressly adopted. The courts in such a contingency would have been obliged, in deciding cases, to apply some law, and, in the absence of statutory declarations on particular points, would necessarily administer the principles which, in their opinion, would effect a just decision under the circumstances, without regard to the source whence such principles might be obtained. The significant fact is that, through the repetition of this process, the rules founded on these principles would gradually form a body of unwritten law which would be strictly common law. Hence, the failure of a particular jurisdiction to adopt an existing system of common law, does not necessarily result in the lack of a common law of its own. On the contrary, the continuous application of independently selected principles, appropriate to conditions as they arise, will inevitably develop a separate and distinct system of common law.

In view of the conflicting manner in which various states of the Union today follow, or refuse to follow, not only English decisions, but also those of other jurisdictions, which may or may not have adopted the English common law, we can safely assert that the common law of no one state is the same as that of any other; different conditions produce different rules. Nor is the common law in any particular state identical with the common law of England as originally introduced into that state; this system of law, since its initial adoption by the states, has been moulded to meet local wants, and we find no uniform body of non-statutory rules, with binding authority throughout the country, on which either local or federal courts base their decisions. To be sure, the courts of each jurisdiction, in deciding cases, may, where the statutory law is silent, consult all English and state sources of common law and arrive at a certain conclusion, but the principles administered in such cases, when written into the law of the jurisdiction in question, represent thereafter parts of its own system.

These preliminary distinctions are here dealt with at some length because they seem essential to a proper understanding of the questions we are about to consider—whether there can properly be said to be an independent system of federal common law in the United States courts, and, if such a system exists, what its limitations are.

Those who deny the existence of a federal common law do so on several grounds; they deny it most particularly because the English common law was never adopted, expressly or impliedly, by the national Constitution or by any congressional statute pursuant to it, and, next, because the jurisdiction of the national courts is limited, being only such as is given by the Constitution or statutes passed thereunder. Hence, it is argued,

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14 "The statement that there is no common law of the United States (Wheaton v. Peters, 8 Peters 591, 658 [U. S. 1834]; Smith v. Alabama, 124 U. S. 465, 478) is true only in the sense that the Constitution neither of its own force imposed, nor authorized Congress to impose, the common law or any other general body of laws upon the several states for the regulation of their internal affairs."

Per Mr. Justice Pitney, dissenting opinion in So. Pacific Co. v. Jensen, 244 U. S. 205, 230 (1916).
there can be no federal common law as a source of either criminal or civil jurisdiction; but, as we have seen, the United States courts may still have a common law even though nothing be found in the Constitution or national legislation expressly adopting the English or any other existing system.

Notwithstanding the fact that the Constitution and the Congress both failed to specify the rules which the federal courts should administer in cases coming before them under their authorized jurisdiction, those tribunals would nevertheless be obliged to administer some law, and, in the absence of statutory enactments, they would necessarily apply, as do the state courts, such principles as seem most appropriate to the circumstances in each particular case; these principles would, as judicial pronouncements increased in number, form a system of federal common law. Thus, we see that, even though there may be no common law as a source of jurisdiction in the federal courts, there can nevertheless exist, as a means of exercising jurisdiction already conferred, a federal common law in the sense of a body of non-statutory rules independently announced and administered by those tribunals; it is in this very proper sense that we use the term.

In considering the nature of federal criminal jurisprudence, which we shall first examine, it is essential to keep in mind the distinction, to which we have already referred, between the common law as a source of jurisdiction and the common law as a means of exercising a jurisdiction conferred by statute. When a state court indicts for offenses which are criminal at English common law, but which have not been declared so by state statute, it employs the common law as a source of jurisdiction. If, however, the power to indict is not ex proprio vigore from the common law, but is created by statute, the common law is utilized only as a means of interpreting the statutory power.

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The federal government, under the Constitution, has a limited criminal jurisdiction; it can punish for those offenses only which are directed against places or persons exclusively within congressional control. The question that immediately arose, when considering this phase of federal jurisprudence, was whether the national courts, within the limits of the crimes and misdemeanors over which Congress could exercise authority, possessed power to indict for offenses which are criminal at English common law but have not been declared criminal, nor their punishment prescribed, by federal statutes; and, in connection with this question, it may be interesting to review certain phases of the long and bitter political controversy before mentioned, between the Federalist and the Jeffersonian parties, during which it was frequently maintained by the former that there existed in the United States courts a jurisdiction to punish offenses at common law, and under the law of nations, in the absence of congressional statutes defining such derelictions and penalizing them. The entire subject at present is, of course, one of historical rather than practical interest, but its incidents will serve to illustrate the distinction, so far as the federal government is concerned, between the common law as a source of criminal jurisdiction and as a means of its exercise; furthermore, its consideration will show how near, at one time, we came to having a common-law jurisdiction in the federal courts, even on the criminal side. Hence its value for present purposes.

By the Judiciary Act of 1789, section 9, the federal district courts are given "jurisdiction of all crimes and offenses cognizable under the authority of the United States." The proponents of a federal common-law jurisdiction contended that this grant of power was general in its nature, and that it enabled federal judges, in the absence of statutes, to punish offenses against the sovereignty, the public rights, justice, police and peace of the United States, which were cognizable under its authority, and to apply the principles of the English common law in defining such offenses.

17 Stat. 78, § 11.
The judges who believed that the common law could in this sense be considered a part of our national jurisprudence were certainly patriotic and sincere. They sought justification for sustaining indictments in the fact that recognition of a common law criminal jurisdiction was indispensable to the suppression of offenses directed against the sovereignty and existence of the United States; and, when we recall that, in the beginning of the government under the Constitution, there were few criminal statutes on the books, the attitude of the federal judiciary is understandable—if not sound, it was at least expedient.

The followers of Jefferson, however, regarded this assumption of power by the United States judges—most, if not all, of whom belonged to the opposite political party—as a convenient way of punishing men of French sympathies, who represented a disturbing element in those days; and a great fear was aroused that indictments against political foes would be numerous.

The enforcement of neutrality first presented the problem in a practical manner. As, prior to 1794, there were no criminal statutes concerning breaches of neutrality, the question immediately arose whether a person violating treaty provisions, or the law of nations, could be indicted at common law. Chief Justice Jay, in 1790, had charged a grand jury in Massachusetts that "the objects of your inquiry are all offenses committed against the laws of the United States, and you will recollect that the laws of nations make part of the laws of [our] Nation." A few years later, in 1793, both Chief Justice Jay and Justice James Wilson, the former in a case at Richmond and the latter at Philadelphia, upheld the doctrine that a common-law indictment in the federal courts could be sustained, although Jay does not seem to have specifically mentioned that system of law. At about the same time another case arose in which the power...
to indict for a common-law offense was clearly recognized.22 Ravara, the Genoese consul, had sent an anonymous and threatening letter to the British Minister, and to others, with a view to extorting money from them. It was argued that, inasmuch as the matter charged in the indictment had not been made a criminal offense by any positive law of the United States, there could be no conviction. Chief Justice Jay and Mr. Justice Peters, sitting in the circuit court, held, however, that the indictment would lie at common law. Accordingly, Ravara was tried and convicted but he was later pardoned.23

Not long afterward, one Gideon Henfield, a sailor from Salem, Massachusetts, came to trial for having enlisted on a French privateer which attacked and captured British vessels. He was indicted in the District Court at Philadelphia, his offense presumably being a violation of the Presidential Neutrality Proclamation; and, in the absence of legislation concerning this alleged misdemeanor, the indictment was brought under English common-law rules,24 the jury being charged that the act of Henfield was punishable according to the law of nations and treaties of the United States, and that, since the defendant was “a citizen of the United States,” he “was bound to keep the peace in regard to all nations with whom we were at peace.” Intense bitterness was aroused by this case, and the warning was sounded that, if “the people were prepared to give to an executive proclamation the force of a legislative act,” individual rights were in peril; but Henfield was acquitted,25 and his release seems to have been the occasion for considerable public rejoicing.26

The bitterness toward the federal courts engendered by the Henfield Case and other like prosecutions was mild in comparison with that aroused a few years later (1799) by the decision of Chief Justice Ellsworth in the case of Isaac Williams. In order

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22 U. S. v. Ravara, 2 Dallas, 297, 299 note. (C. C. 1793.)
25 After the Henfield Case, Congress passed a statute applicable to the offense charged in the Ravara and Henfield cases. Beveridge, supra, III, 26; Wharton, State Trials, 93-101.
to evade the neutrality law forbidding Americans to accept service with foreign powers, the practice of renouncing American and accepting French citizenship was then quite popular.\textsuperscript{27} Williams showed that he had for some years been a duly naturalized French citizen, having taken an oath to the Republic of France. Although Congress had not yet acted in such a matter, Williams was indicted in the District of Connecticut, and convicted. The court ruled that an American could not expatriate himself "without the consent of the community,"\textsuperscript{28} because, as the judge stated, "under the English common law no right of expatriation existed, and the common law was binding here."

Resentment toward all previous federal decisions recognizing the common law was "brought to a head" by this new ruling,\textsuperscript{29} and much abuse was heaped on its author. Referring to Chief Justice Ellsworth, the Virginia \textit{Argus} asserted: "Every real American will execrate your name."\textsuperscript{30} Other journals discussed the decision more practically, one saying, "The natural right formerly secured to the citizen of [a] State by law . . . is abrogated; by what? Not by the Constitution of the United States, not by laws made under it, but by the judgment of a Federal Court. . . . By the Chief Justice's opinion, we are still the subjects of Great Britain; we are so by . . . her common law."\textsuperscript{31}

Evidently abuse did not affect the Chief Justice, for, the same year, in another case, he charged the jury that they might indict for "acts manifestly subversive of the national government, or of some of the powers specified in the Constitution," stating in this connection that "an offense consists in transgressing the sovereign will, whether that will be expressed or obviously implied, and, therefore, conduct clearly destructive of a government or its powers, which the people have ordained to exist, must be criminal." Then he said to the jury: "By the rules of

\textsuperscript{27} Warren, \textit{supra}, I, 160.
\textsuperscript{28} Wharton, \textit{supra}, 652.
\textsuperscript{29} Warren, \textit{supra}, I, 159.
known law, matured by the reason of ages and which Americans have ever been tenacious of as a birthright [meaning, of course, the common law, to which he had previously referred], you will decide what acts are misdemeanors on the ground of their opposing the existence of the national government or the efficient exercise of its legitimate powers.”

This recognition of a common-law criminal jurisdiction, the anti-Federalists believed, was but the prelude to a series of judicial assumptions of power to make the national judiciary an “annex of the Federalist party.”

Jefferson, in a letter to Pinckney, referring to Ellsworth’s views, said:

“I consider all the encroachments made on the [Constitution] heretofore as nothing, compared with the wholesale doctrine that there is a common law in force in the United States of which, and of all the cases within its provisions, their courts have cognizance. Ellsworth and Iredell have openly recognized it. Washington has squinted at it, and I have no doubt it has been decided to cram it down our throats.”

To Randolph, he wrote:

“Of all the doctrines which have ever been broached by the federal government, the novel one, of the common law being in force and cognizable as an existing law in their courts, is to me the most formidable. All their other assumptions of un-given power . . . have . . . been . . . timid . . . things in comparison with this audacious . . . and sweeping pretension to a system of law for the United States, without the adoption of their legislature, and so infinitely beyond their power to adopt. If this assumption be yielded to, the state courts may be shut up.”

Virginia, instructing its senators in Congress, January 11, 1800, expressed the view voiced by Jefferson when it said:

“The General Assembly of Virginia would consider itself unfaithful to the trusts reposed in it, were it to re-

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82 Independent Chronicle, June 13, 1799, Warren, supra, I, 162.
83 Quoted in Warren, supra, I, 164.
main silent, whilst a doctrine has been publicly advanced, novel in its principle, and tremendous in its consequences, that the common law of England is in force under the government of the United States; . . . it assumes a range of jurisdiction for the federal courts which defies limitation or definition. In short, it is believed that the advocates of the principle would themselves be lost in an attempt to apply it to the existing institutions of federal and state courts, by separating with precision their judiciary rights, and thus preventing the constant and mischievous interference of rival jurisdictions. . . . Deeply impressed with these opinions, the General Assembly of Virginia instructs the senators and requests the representatives from this state in Congress to use their best efforts . . . to oppose the passing of any law founded on, or recognizing, the principle lately advanced, 'that the common law of England is in force under the government of the United States.' 34

The assumption of the existence of a common-law criminal jurisdiction over offenses not recognized in the Constitution or by congressional enactments, vigorously denounced in these letters and instruction, was soon to be denied by the federal Supreme Court itself; but, up to this time, the only action among judges, contrary to the exercise of such a jurisdiction, had been taken in 1798 by Judge Chase, in United States v. Worrall. 35 There, the defendant was charged with an attempt to bribe a commissioner of revenue, an offense which, it was admitted, did not come within any act of Congress; the indictment was laid under the common law. The court divided in opinion, Judge Chase expressing the view that the indictment was bad and Judge Peters that it was good; the former said:

"It appears to my mind as essential that Congress should define the offense to be tried and apportion the punishment to be inflicted, as that they should erect courts to try the criminal or to pronounce a sentence on conviction. In my opinion, the United States as a federal government have no common law. The United States must possess the common law themselves, before they can communicate it

34 TUCKER'S BLACKSTONE, Appendix, 438.
35 2 Dallas 384 (C. C. 1798); WHARTON, supra, 189.
to the judicial agents; now the United States did not bring it with them from England; the Constitution does not create it; and no act of Congress has assumed it."

Judge Peters, holding the contrary view, reasoned that:

"Whenever a government has been established . . . a power to preserve itself is a necessary and an inseparable concomitant."

He further said:

"The existence of the federal government would be precarious, it could no longer be called an independent government, if, for the punishment of offenses of this nature, tending to obstruct and pervert the administration of its affairs, an appeal must be made to the state tribunals or the offenders must escape with absolute impunity";

and he continued:

"The power to punish misdemeanors is originally and strictly a common-law power, of which I think the United States are constitutionally possessed; it might have been exercised by Congress in the form of a legislative act, but it may, also, in my opinion, be enforced in a course of judicial proceeding."

While there was an equal division of opinion among the judges in the case under discussion, it contains the substance of the arguments on each side of the question, and is of value for that reason. In speaking of this case, Mr. Wharton, in his work on "Criminal Law," 86 points out that Judge Chase did not wait "to learn what had been decided by his predecessors, [and] startled both his colleagues and the bar, by announcing that he would entertain no indictment at common law." His predecessors, who had consistently held otherwise—Chief Justice Jay, Judge Wilson and Judge Iredell—were no longer on the bench, and Chief Justice Ellsworth was abroad. As "there were no reports published then, or for a long time afterwards, of the prior rulings to the contrary, it is not to be wondered," says

86 Wharton, Criminal Law (11th ed. 1912), I, 368.
Mr. Wharton, "that judges who came on the bench after Judge Chase supposed that he stated the practice correctly." 37

That the opinion of Judge Chase, while exercising a certain influence on the public generally, was not considered authority by other contemporary judges, 38 is evidenced by the fact that Judge Peters, his colleague, entertained further indictments at common law, one of these being against B. F. Bache, editor of the *Aurora*, "on a charge of libeling the President in a manner tending to excite sedition and opposition to the law." 39 Judge Peters observed in this case 40 that, "it certainly would be superfluous to discuss the question of jurisdiction before him, as his mind was confirmed in the opinion, which he [had previously] delivered in the case of Worrall, by the maturest reflection." Furthermore, Judge Story, writing in 1816, said, "Excepting Judge Chase, every judge that ever sat on the Supreme Court bench from the adoption of the Constitution until 1804 held the opinion" that the federal courts could exercise a common-law criminal jurisdiction. 41

By 1804, the tide would seem to have slightly turned to Judge Chase's view, for Justice Johnson followed it in that year; but other judges 42 continued to sustain indictments at common law in the absence of statutes, and a few years later, 1807, "eleven indictments [were] found in the [federal] circuit court of Connecticut against various Federalist lawyers, preachers, and editors, for libellous attacks on President Jefferson," 43 all of which were afterward dropped, 44 except

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37 Ibid.
38 See RAWLE'S CONSTITUTION (2d ed. 1829), 258, note.
39 WARREN, supra, I, 434.
40 "The Aurora, June 27, 30, 1798.
41 STORY, W. W., LIFE AND LETTERS OF JOSEPH STORY, I, 299.
42 But in U. S. v. McGill, Judge Washington said that he had often sustained such indictments. 4 Dallas 426, 429 (C. C. 1806).
43 WARREN, supra, I, 435.
44 WARREN, supra, I, 436-7: "The institution of these common law prosecutions has been the subject of severe attack upon Jefferson on the floor of Congress. John Randolph said . . . they 'appeared scarcely to excite a sensation . . . in the men who were most clamorous against the Sedition Law. Such is the difference between men in power and men out of power; such the difference between profession and practice.'"
45 "Jefferson [however], had not known of their existence [and] ordered their dismissal as soon as he learned of them."
one. In this case, United States v. Hudson the judges, as in United States v. Worrall, were divided on the question of jurisdiction. Unlike the Worrall Case, however, it was certified to the Supreme Court of the United States, in 1812; and "inasmuch," says Mr. Warren, "as both political parties now opposed the assertion of a doctrine of common-law jurisdiction" over criminal offenses, and, "as all the other Connecticut cases had been dismissed by presidential order, both the Attorney General, William Pinckney, and counsel for defendants, Samuel W. Dana, declined to argue the matter."

The Supreme Court, Judge Johnson writing the opinion, held that the circuit courts of the United States could not exercise common-law jurisdiction, saying:

"In no other case for many years has this jurisdiction been asserted, and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition."

He decisively added:

"The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense." 

In this manner, the question of jurisdiction was apparently settled—though the decision came at an unfortunate time and had harmful effects. The War of 1812 was in progress, but Congress had not passed statutes to deal with those guilty of trading with the enemy, and the courts, in view of the Hudson

"And would the Federalists [said Randolph], inform the House what phase of the common law they proposed to adopt for the United States? Was it that 'of the reign of Elizabeth and James the First; or . . . that of the time of George the Second?' Was it that 'of Sir Walter Raleigh and Captain Smith, or that which was imported by Governor Oglethorpe?' Or was it that of some intermediate period? 'I wish especially to know' asked Randolph, 'whether the common law of libels which attaches to this Constitution, be the doctrine laid down by Lord Mansfield, or that which has immortalized Mr. Fox?' Let the Federalists reflect on the persecution for libel that had been under the common law, as well as under the Sedition Act." BEVERIDGE, LIFE OF MARSHALL, III, 84, quoting from Annals, 7th Cong. 1st Sess. 652 (1802). Randolph.

46 7 Cranch 32 (U. S. 1812).

47 2 Dallas 384 (C. C. 1798).

48 7 Cranch 32, 34 (U. S. 1812).
Case, were unable to punish such offenses. There were suggestions that the former doctrine be revived, or, if this were not done, that it be recognized by congressional enactment, so as to invest the federal courts with common-law jurisdiction. Judge Story, because of the practical difficulties of law-enforcement which the courts were encountering, urged most strongly that Congress act in the matter, but it failed to do so; then a judicial attempt was made to reopen the controversy.

Story, in a case which came before him in the circuit court, United States v. Coolidge, held that he would sustain an indictment for forcibly rescuing a prize upon the high seas. "Since," he said, "the Circuit Court has jurisdiction of all offenses against the United States, what those offenses are depends upon the common law applied to the sovereignty and authorities confided to the United States; [and] having cognizance, the Circuit Court may punish by fine and imprisonment where no punishment is specially provided by statute." Story's colleague, Judge Davis, did not concur, and the matter was certified to the Supreme Court; but the Attorney General refused to proceed, stating that he had "examined the opinion in U. S. v. Hudson, and, considering the point as decided in that case, desired respectfully to state that it was not his intention to argue it now." No counsel appeared for defendant, and the court, by Judge Johnson, said:

"Upon the question now before [us] a difference of opinion has existed and still exists among the members of the court. We should, therefore, have been willing to [hear] the question discussed, upon solemn argument; but the attorney-general has decided not to argue the case, and no counsel appears for defendant. Under these circumstances, the court would not choose to review their former decision in U. S. v. Hudson, or draw it into doubt; they will, therefore, certify an opinion to the Circuit Court in conformity with that decision."

43 Warren, I, 438.
50 Cf. Rawle, Constitution (2d ed. 1829), 267-270.
51 I Wheaton 415, 416 (U. S. 1816). 
Chancellor Kent thinks this case should not be governed by the same prin-
One might have wished for a more conclusive ending to a controversy concerning which there had existed in previous years, and still existed at the time of the decision of the Coolidge Case, such strong opinion opposed to the final answer which was given. Story lamented the result and endeavored to obtain congressional legislation "to delegate [to the federal courts] authority in general terms over crimes" cognizable under the sovereignty of the United States; and he actually drafted a bill, in 1816, to effect this purpose, but it was not enacted. Later, however, in 1825, a Crimes Act, also drafted by Story, was passed, which gave protection against offenses to the sovereignty of the United States.

Although it is now settled that there is no general common-law criminal jurisdiction in the federal courts, and that, before any offense is indictable not only must it be declared criminal by statute, but its punishment and the courts which shall have jurisdiction in the premises must be prescribed, yet, as late as 1847, there was another attempt to nullify these principles, or at least to pare them down. In the case of United States v. Ramsay, the indictment charged that "certain persons to the grand

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4 Story, Life and Letters, supra, I, 293, 298-300; Warren, I, 442.
5 "There is no federal common law. There are no offenses against the United States, save those declared to be such by Congress. The people could counterfeit with impunity were it not for legislation to the contrary. Murder on the navigable waters of the United States might be a pastime were it not for Congressional action." Carpenter, J., in U. S. v. Grossman, 1 Fed. (2d) 941 (D. C. 1925).
jury unknown" wilfully murdered one Butler, an Indian, and that John Ramsay, a white man, was accessory before the fact. The district attorney contended that, inasmuch as an Act of Congress had already declared the crime of murder in such a case to be punishable with death, though the statute said nothing of accessories, they were necessarily included, since accessories and principals were subject to the same penalty at common law; hence it could not be supposed that Congress meant to exempt the former from punishment, as urged by defendant.

The district attorney's argument for the punishment of an accessory before the fact, under legislation providing for principals alone, while apparently based on an elastic interpretation of a criminal statute, was in reality the old doctrine of a common-law criminal jurisdiction in the federal courts. Had the court adopted this view, the early controversy would have been revived; but it did not do so. The indictment was quashed, the court saying that the question was for the legislative department, and that, since there was no federal common-law criminal jurisdiction, power was given to punish only for "such crimes as Congress expressly or by necessary implication had visited with known and certain penalties."

Before concluding this historical survey, it may be interesting to call attention to a recent discovery made by Mr. Warren\(^{56}\) which brings new light to bear on the early controversy concerning a common-law criminal jurisdiction. He found in the archives of the United States, not only the first draft of the Judiciary Act of 1789, as it was introduced into the senate, but the original amendments thereto and a copy of the bill as it passed the senate. The beginning of section 9 of the statute, as passed, gives the district courts "cognizance of all crimes and offenses that shall be cognizable under the authority of the United States."

In the original draft, the words, "and defined by the laws of the same," were included. From a comparison of the draft of the bill with the statute as finally enacted, it appears that the restrictive clause, "and defined by the laws of the same," was deliberately stricken out by the senate, thus leaving the district court with jurisdiction

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\(^{56}\) *New Light on the History of the Federal Judiciary Act, 37 Harv. L. Rev. 49 (1924).*
over criminal offenses "cognizable under the authority of the United States," without any limitation. "The only rational meaning," says Mr. Warren, "that can be given to this action, striking out the restrictive words, is that Congress did not intend to limit criminal jurisdiction to [offenses] specifically defined by it"; he adds, "Had the Supreme Court consulted these senate files, it is probable that the decisions in United States v. Hudson, in 1812, and United States v. Coolidge, in 1816, might have been otherwise than they were." 57 But that of course, is a surmise, and it is now established that the federal courts have no general common-law criminal jurisdiction.

Perhaps, in the beginning, the eagerness on the part of Story and others to assert such a jurisdiction, would have been lessened had Congress adequately provided by statute for the punishment of offenses against the United States and the law of nations. Certainly, by the time of the Coolidge Case, adequate laws dealing with the offense of trading with the enemy would have helped the situation, although Story's critics, in passing judgment on his later action in civil cases, assume that his love of power made him eager to obtain, for its sake alone, a common-law criminal jurisdiction, and believe he would have been satisfied with nothing short of this. Conjecture on these matters is of no practical value at the present time, however, and the entire historical controversy, which we have been reviewing, is interesting, principally, first, because, as said before, it shows how close we came, during the early years of our judicial history, to establishing a broad common-law criminal jurisdiction in the federal courts, and, next, because the ultimate decision against such jurisdiction probably did much to foster a belief, which still persists on the part of many persons, that there could be no common law of any sort administered in the federal courts.

(To be Continued.*)

Robert von Moschzisker.


*Ibid, 73.

*This is the first of a series of three articles which will appear in successive issues of the University of Pennsylvania Law Review.*