

## “THE LAW OF LAWS”

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From the time when the case of the Daughters of Zelophedad was decided down to the present day, there has probably been no system of law lacking provision for filling unforeseen gaps, in order that unanticipated jural problems might be solved. In the classic days of Roman law this was satisfactorily accomplished by means of the *responsa prudentium*. In the Middle Ages this was attempted by the glossators and commentators. In England it was at one time constitutional for judges to refer knotty problems to parliament for final solution.

In more modern times the solution of such problems is left to the courts wherein they arise. The only exception to this, of which the writer is aware, is that of the old Prussian Code Frédéric, which required the judges to report novel cases to the head of the judicial department for decision by a legislative commission: in the Roman-Dutch system the judges were sworn “to follow the path of reason according to their knowledge and discretion.” This requirement led to the “reception” of Roman law as the common law of the Netherlands.<sup>1</sup> It has been stated that the French method of solving new questions in civil law is by evolutionary interpretation. Louisiana has provided, in part, that:

“In all civil matters where there is no express law the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason or received usages where positive law is silent.”<sup>2</sup>

Spanish law ordains that:

“When there is no law exactly applicable to the point in controversy the custom of the place shall be applied, and in default thereof, the general principles of law.”<sup>3</sup>

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<sup>1</sup> I GROTIUS, JURISPRUDENCE OF HOLLAND (Lee's translation, 1929) c. 2, § 22.

<sup>2</sup> LA. REV. CIV. CODE (Merrick's 3d ed. 1925), art. 21. Cf. Lord Mansfield's identification of the principle *ex aequo et bono* with natural law and equity in *Moses v. Macfarlane*, 2 Burr. 1005, 1012 (Eng. 1760).

<sup>3</sup> WALTON, CIVIL LAW IN SPAIN AND SPANISH AMERICA (1900) art. 6.

Modern Japan fills gaps by a process of extensive interpretation.<sup>4</sup> Argentine's rule is well worthy of attention for it is in effect almost a codification of the Anglican rule for dealing with cases lacking in precedent. It is as follows:

"If a civil question cannot be decided, either by the words or the spirit of the law, the principles of analogous laws shall be followed, and if the question should still remain doubtful, it shall be settled according to the general principles of law, taking into consideration the circumstances of the case."<sup>5</sup>

As a last resort the Austrian Civil Code directs judges to decide cases "*nach den natürlichen Grundsätzen*,"<sup>6</sup> which is presumably the concept of natural law presented in the Pandects as that which arises *ex aequo et bono*.<sup>7</sup> An almost equally succinct provision is that of Switzerland, *viz.*, "*solutions consacrées par la doctrine et la jurisprudence*."<sup>8</sup> In common law jurisdictions novel questions of law are frequently solved by avowedly or impliedly resorting to the Anglican principle *aequum et bonum est lex legum*, foreshadowed in the *ius est ars boni et aequi*,<sup>9</sup> of the Corpus Juris. The general purport of the doctrine is focussed in the old-world phrase "meet and right," of the Book of Common Prayer. Its function is subsidiary to such a degree that it is seldom referred to explicitly even where its force is felt in the determination of a controversy, which may account for the paucity of references to the phrase in works of reference. Some phrases consciously, intuitively or half-consciously used as equivalents of the doctrine are: "just and right";<sup>10</sup> "reason and justice";<sup>11</sup> "good con-

<sup>4</sup> DE BECKER, CIVIL CODE OF JAPAN, INTRODUCTORY NOTE (1909), xxxi, xxxii.

<sup>5</sup> ARGENTINE CIVIL CODE (Joannini's translation 1917) art. 715.

<sup>6</sup> AUSTRIAN CIVIL CODE, art. 7. Cf. the opinion of Farwell, J., in Bradford v. Ferrand, [1902] 2 Ch. 655, 662, in which the conception of *aequum et bonum* is included in *ius naturale*.

<sup>7</sup> JUSTINIAN, DIG., lib. I, tit. I, §§ 10, 11.

<sup>8</sup> SWISS CIVIL CODE, art. 1.

<sup>9</sup> JUSTINIAN, DIGEST, lib. I, tit. I, pr.

<sup>10</sup> Davidson v. Allan, 213 Mo. 293, 300, 111 S. W. 1128, 1130 (1908).

<sup>11</sup> City of Minneapolis v. St. P., M. & M. Ry. Co., 35 Minn. 131, 140, 28 N. W. 3, 8 (1886); Crispe v. Perrit, Willes, 467, 473 (Eng. 1744); Barker v. Lomax, Willes, 659, 662 (Eng. 1752).

science";<sup>12</sup> "plain justice and good faith";<sup>13</sup> "equity in its broadest and most generous sense";<sup>14</sup> "prevailing equity and justice";<sup>15</sup> "equity and good conscience";<sup>16</sup> and "right and justice".<sup>17</sup> Many derivative principles—even many branches of law—are remotely attributable to this somewhat idealistic concept. Among these may be mentioned the well-known principle of public policy *ex dolo malo non oritur actio*; the obligation of good faith in carrying out what is written; the doctrine of undue influence; the golden rule *sic utere tuo ut alienum non laedas*, said to be the source of the police power;<sup>18</sup> the concept *contra bonos mores* which, among other things, forbids marriage-broker contracts; the doctrine of unjust enrichment in quasi-contracts; the criminal law doctrine of *mala in se*; and even the pious fiction underlying the policy of giving a tort remedy to victims of the unauthorized acts of those entering under the protection of the law, may all be traced back to the principle *aequum et bonum*. In general "the common law will not halt or surrender because the situation is novel . . . but will resort to some practical means that will be just to both parties" to a controversy.<sup>19</sup> Although an eminent continental scholar has described our common law system as an ocean of cases, it is not to be forgotten that with us principles are primary and precedents are secondary, the accepted law consisting in its reason and policy more than in particular instances and precedents.<sup>20</sup> In the hierarchy of law *aequum et*

<sup>12</sup> *Bailey v. Railroad Co.*, 22 Wall. 604, 638 (U. S. 1874).

<sup>13</sup> *Master v. Miller*, 4 T. R. 320, 342 (Eng. 1791).

<sup>14</sup> *In re Curtis & Castle Arbitration*, 64 Conn. 501, 512, 30 Atl. 769, 770 (1894).

<sup>15</sup> *Campbell v. Mesier*, 4 John. Ch. 335 (N. Y. 1820).

<sup>16</sup> DILLON, LAWS AND JURISPRUDENCE (1894) 19.

<sup>17</sup> *Com. v. Hess*, 148 Pa. 98, 23 Atl. 977 (1892).

<sup>18</sup> *Munn v. Illinois*, 94 U. S. 113 (1876).

<sup>19</sup> *Industrial & General Trust, Ltd. v. Tod*, 180 N. Y. 215, 231, 73 N. E. 7, 11 (1905). Cf. ". . . the idea of the law is an eternal Becoming, but that which has been must yield to the new Becoming." VON JHERING, THE STRUGGLE FOR LAW (Lalor's translation, 2d ed. 1915) 13.

<sup>20</sup> *Pierce v. State*, 13 N. H. 536 (1843); *Com. v. Hess*, *supra* note 17; *Ashby v. White*, 2 Ld. Raym. 938, 956 (Eng. 1703); *Reg. v. Ramsey et al.*, 15 Cox Cr. Cas. 231, 235 (Eng. 1883); *Nordenfeldt v. Maxim Nordenfeldt Guns & Ammunition Co.* [1894] A. C. 535, 547, 553, 558; DILLON, *loc. cit.* *supra* note 16. Cf. DOMAT-LOIS CIVILES (1835) *liv. prél.*, tit. i, § 2.

*bonum* is a subsidiary principle which frequently yields to conventional and positive rules, certainty being regarded as equality when it comes to the application of fixed rules of law. Where, however, the doctrine forms part of the *ratio legis* it carries considerable weight as was shown by Shaw, C. J., in the case of *Jones v. Robbins*,<sup>21</sup> when he pointed out that most of the rules laid down in Bills of Rights:

" . . . are so obviously dictated by natural justice and common sense, and would be so plainly obligatory upon the consciences of legislatures and judges, without any express declaration, that some of the state constitutions, and even the convention which framed the Constitution of the United States, did not originally prefix a declaration of rights."

Some of the limitations of the rule *aequum et bonum est lex legum* have been defined by Vattel who says:

" . . . it is even necessary at times to deviate from natural justice, in order to prevent fraud and adapt the law to circumstances, and since the sense of duty is so often lacking in mankind, it is requisite that laws be given a penal sanction in order that they may be efficient." <sup>22</sup>

Again, it is submitted that the law leans toward liberty until experience shows a course of conduct to be fraught with mischievous or anti-social consequences. This may be observed in judicial restatement of law. As an illustration, the change of policy from the old rather cynical rule of *caveat emptor*, which assumed that vendors "would stretch the truth", and purchasers would be skeptical, to the modern implied warranty of quality and the present-day implied contract of good faith, may be referred to. At the same time it must not be overlooked that improved standards of commercial honesty and general morality have been a potent factor in this improvement of the law.

The leaning toward conceptions of liberty has sometimes resulted in unsatisfactory decisions in regard to the constitutional-

<sup>21</sup> 8 Gray 329, 240 (Mass. 1857).

<sup>22</sup> I VATTEL, LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE (1916) c. 13, § 159.

ity of regulatory legislation; but usually such cases are subsequently overruled by a process of "reasoning from life", in lieu of the prior reasoning from abstract conception. It is not always easy to strike a golden mean between anarchical *laissez-faire* and tyrannical *verboten*.

For a long time reciprocal obligations such as contracts, purchase and sale, letting and hiring, partnership and agency, have been deemed to be governed by principles *ex aequo et bono*.<sup>23</sup> In the Year Book era such principles were often termed the law of nature. Thus we find Yelverton, J., speaking of "*ley de nature que est ground de tous leys*."<sup>24</sup> Grotius says, "The law of nature is a dictate of right reason";<sup>25</sup> and we find a survival of the idea of natural law in an opinion of Mr. Justice Farwell, in which he identifies that which is *aequum et bonum* with *jus natura*.<sup>26</sup> I say survival, for many writers deny the existence of such a principle as natural law. However this may be, it must be observed that where common law courts refuse to enforce a right claimed under foreign law they often resort to a short-cut statement that the right asserted is not warranted by the law of nature.<sup>27</sup> Those who dislike the term law of nature may prefer the terminology of Richard Hooker, who says:

"Law rational . . . which men commonly use to call the Law of Nature, meaning thereby the Law which human Nature knoweth itself in reason universally bound unto, which also for that cause may be termed most fitly the Law of Reason."<sup>28</sup>

Saint-Germain takes a similar position when he treats "Of the law of reason, the which by doctors is called the law of nature of reasonable creatures."<sup>29</sup> Chancellor Kent defined the law of nature as:

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<sup>23</sup> GAIUS, INST. §§ 135, 137.

<sup>24</sup> Y. B. 8 ED. IV, f. 12 (1456).

<sup>25</sup> I GROTIUS, DE JURE BELLI ET PACIS (1853) c. I. par. 10, § 1.

<sup>26</sup> Bradford Corporation v. Ferrand, 86 L. T. 497 (1902).

<sup>27</sup> E. g., Forbes v. Cochrane, 2 B. & C. 448, 461, 462, 471 (Eng. 1824).

<sup>28</sup> ECCLESIASTICAL POLITY, lib. I, viii, 9.

<sup>29</sup> SAINT-GERMAIN, DOCTOR AND STUDENT (1721) c. 2.

" . . . those fit and just rules of conduct which the Creator has prescribed to man as a dependent and social being, and which are to be ascertained from the deductions of right reason." <sup>30</sup>

Aquinas anticipated Blackstone by ascertaining that "law is nothing but the dictate of reason . . . [it] is a function of reason." <sup>31</sup> In more modern times Mr. Justice Cobb, in the course of recognizing a right of privacy, averred that:

" . . . the absence of a precedent for an asserted right . . . even for all time, is not conclusive as to the existence of the right . . . In such a case although there can be no precedent, the common law will judge according to the law of nature and the public good." <sup>32</sup>

(The learned judge then proceeded to adopt the reasoning of a dissenting opinion in the case of *Roberson v. Box Co.*<sup>33</sup>)

A few generations ago it was the fashion to attribute the existence of established principles of right and justice to a supposed "social compact",<sup>34</sup> but modern scientific investigations have led to a tacit abandonment of any notion of "social compact". A fashionable present-day designation of the common law is judge-made law—a notion which leans towards acceptance of the French jocosity "*le superstition de cas*". If this designation of our law be correct, and it must be conceded that it has very powerful supporters, then the very concept of the word "judge" is false to its etymology which signifies "lawsayer"—a meaning which is crystallized in Bacon's maxim, *jus dicere et non jus dare*. It is submitted that the neat phrase of the late Mr. Carter, which was "law-finder", is a sound statement of the Constitutional function of a common-law judge, and that judicial custom is to declare,

<sup>30</sup> *Wightman v. Wightman*, 4 John. Ch. 343, 349 (N. Y. 1820).

<sup>31</sup> AQUINAS, ETHICS I-II, q. 91.

<sup>32</sup> *Pavesich v. New Eng. Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101 (1904).

<sup>33</sup> 171 N. Y. 538, 64 N. E. 442 (1902).

<sup>34</sup> *Goshen v. Stonington*, 4 Conn. 209, 225 (1822); *University of Maryland v. Williams*, 9 Gill & J. 365, 408 (Md. 1838).

rather than make law. A decision may become no more than the law of the case. Its future fate may be to be overruled, ignored or overlooked, explained or distinguished. It may solve a puzzle which had previously given rise to groping or unsatisfactory opinions; or, as occasionally happens, its *ratio decidendi* may necessarily involve the formulation of a series of rules. It may even sweep away for all time a number of precedents and rules found to be contrary to principle, as in the case of *Omychund v. Barker*<sup>35</sup> in which Chief Justice Willes cited Acts 10, 34 as better authority than Coke in a ruling as to the validity of the oath of a non-Christian. Such action as that of Chief Justice Willes arises under very exceptional circumstances, for, as Mr. Allen has pointed out, no matter how much he may wish to do so, no judge has the power to sweep away what he believes to be the prevailing rule of law and substitute something else in its place.<sup>36</sup> As a rule, Anglican law does not pay much deference to the civil law as such, but it frequently resorts to its use in cases where its determinations are deemed equitable or closely analogous to the local law, in which event it is naturalized or assimilated. This is noticeably the case where the principle of our law is the same as that of the civil law.<sup>37</sup> The attitude of the common law toward a "reception" of the civil law was voiced half a millenium ago, by a resolution of Parliament: "*Que ce royalme d'Angleterre n'estait devant ces heures, ne a l'entent du roy nostre dit seignior et seignors du parlement unque ne serra rulé ne governé par le ley*".<sup>38</sup> This sturdy self-reliance has not dwindled into a parochial self-sufficiency as any one may observe when reading Mansfield, Kent, Storey and Blackburn. As a matter of fact many principles are identical in both systems, such as the maxim, "He who is first in time is first in right";<sup>39</sup> "A man's house is his castle";<sup>40</sup> *res*

<sup>35</sup> 1 Atk. 21, 44 (Eng. 1744).

<sup>36</sup> ALLEN, LAW IN THE MAKING (1927) 173.

<sup>37</sup> Kennedy v. Panama, etc. Mail Co., L. R. 2 Q. B. 579, 588 (1867).

<sup>38</sup> Rot. Parl. II Ric. II (1388) (Selden's Note to Fortescue de Laud. Legg Angliæ, c. xxxiii.

<sup>39</sup> CLARK, EQUITY (1919) § 28.

<sup>40</sup> JUSTINIAN, DIGEST, lib. II, tit. 4, § 18.

*judicata*; <sup>41</sup> *habeas corpus*; <sup>42</sup> the doctrines of gifts *inter vivos*, <sup>43</sup> and gifts *mortis causa*, <sup>44</sup> and the law of alluvion. <sup>45</sup>

It is a truism, overlooked, as are many other common-place expressions, that much of the phraseology of the common law is not to be taken literally, since it is in this respect in marked contrast with the terminology of pure mathematics. In a measure this is true of other legal systems, as may be illustrated by the workings of the cosmopolitan principles *cessante ratione legis, cessat ipsa lex*, and *de minimis non curat lex*. The principle *aequum et bonum est lex legum* is no exception. It is not always the law of laws or a law about laws. Sometimes that function is supplied by the principle of necessity, and frequently ideal justice yields to public convenience or "that unruly horse"—public policy. Nevertheless, the doctrine is of incalculable value, and so frequently resorted to, in fact if not in form, that much of our law is substantially identical with that of alien systems, especially in the field of commercial law. The mischief involved in attempted definitions was recognized as far back as the days of Tribonian. <sup>46</sup> Hence it is often requisite and necessary that a general proposition of law be stated in a variety of forms. It is conceived that no further apology is necessary for referring to two cases, one English and the other Canadian, in which the subject of these notes has been stated in a negative form. The English case just alluded to is *Emmens v. Pottle*, <sup>47</sup> in which it was decided that the vendor of a newspaper is not answerable for a libel contained in the publication of which he is an innocent disseminator for the reason that:

"The question does not depend on any statute, but on the common law, and any proposition the result of which would be to shew that the Common Law of England is wholly

<sup>41</sup> JUSTINIAN, DIGEST, lib. II, tit. 4, § 88.

<sup>42</sup> *Ibid.*, lib. XXXXIII, tit. 29, § 1.

<sup>43</sup> JUSTINIAN, INST., lib. II, tit. VII, § 2.

<sup>44</sup> *Ibid.* § II.

<sup>45</sup> *Ibid.* tit. I, § 20.

<sup>46</sup> *Omnis definitio in lege periculosa*.—JUSTINIAN, DIGEST, lib. 50, tit. 17, § 202.

<sup>47</sup> 16 Q. B. D. 354 (1885).



unreasonable and unjust, cannot be part of the Common Law of England."

The Canadian case of *Reynolds v. Crawford*,<sup>48</sup> laid down the principle that before a plaintiff can succeed in an action for money had and received "he must show that *ex aequo et bono* the defendant should not retain it." Some twenty years later the same court in passing upon a question of the return of an excess payment stated the rule in an affirmative form, *viz.*: ". . . in the absence of direct authority [we] must hold . . . in accordance with what we take to be the dictates of reason, justice and equity".<sup>49</sup>

In the solution of non-statutory questions of law where there happens to be no local precedent, resort is had in many instances to suggestions or solutions contained in various sources. One of these is the opinions of learned men such as are contained in the writings of Storey, Pothier, and the collated opinions in the Digest of Justinian. Another source is found in the decisions of courts of law of cognate systems. A more copious source than is often realized is foreign statute law. Thus Chief Justice Tilghman, in the case of *Clark v. Sanderson*,<sup>50</sup> upon considerations of practical justice and reasonable certainty adopted and extended a rule laid down in the Act of George III,<sup>51</sup> and in like manner Chief Justice Shaw, in the course of ruling that a witness is bound to answer a question pertinent to the issue where his answer will not subject himself to penalty or forfeiture, or expose him to criminal prosecution,<sup>52</sup> attached great weight to another statute of George III,<sup>53</sup> "as strictly a declaratory law". Such foreign elements, so far as adopted by judicial usage, become *leges non scriptae*, as Blackstone has observed with concision. Occasionally in the decision of a case a court will supplement local authority by way of illustration in availing itself of "the little

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<sup>48</sup> 12 U. C. Q. B. 168, 174 (1854).

<sup>49</sup> *Wilson v. Mason*, 38 U. C. Q. B. 14, 30 (1876).

<sup>50</sup> 3 Binn. 192 (Pa. 1810).

<sup>51</sup> 25 & 26 Geo. III, c. 47, § 38 (1786).

<sup>52</sup> *Bull v. Loveland*, 27 Mass. 9, 13 (1830).

<sup>53</sup> 46 Geo. III, c. 37 (1806).

more and how much it is", of foreign law. An outstanding example of this is the case of *St. Clair v. Livingstone*,<sup>54</sup> where Mr. Justice Swayne, in clarifying that important derivative of the principle *de minimis non curat lex*, the doctrine of alluvion, drew upon the Institutes and Digest of Justinian, the Code Napoleon and *Las Siete Partidas* in addition to Blackstone, Bracton, Hale and Kent. Lord Holt's use of the Corpus Juris in the redaction of the law of bailments in the leading case of *Coggs v. Bernard*,<sup>55</sup> has been discussed by many writers. An unprecedented question involved in the pledge of a flock of sheep has been set at rest by drawing upon a passage in Domat.<sup>56</sup> On grounds of "justice and equity", a New York court approved of an important rule laid down in Domat, and held that one whose property is carried upon the land of another without fault or negligence, as in the case of a flood, may elect either to abandon the property, in which case he is not liable to the owner of such lands for any injury occasioned by it; or to reclaim it, in which later case he must compensate such owner for the damages so occasioned.<sup>57</sup> A surety has been granted an equitable defence on the strength of a passage in Justinian's Digest.<sup>58</sup> Justice Blackburn after observing that "though the Civil law is not of itself authority in an English court, it affords great assistance in investigating the principles on which the law is grounded", adopted the principle of *obligatio de certo corpore* discussed in the Digest and Pothier, by holding that there is an implied condition in contracts that the parties shall be excused where, before breach thereof, performance becomes impossible from the perishing of some specific thing without default of the contractor.<sup>59</sup> A few years later the same judge cited passages from the Roman law for the reason that "the principle of our law is the same as that of the civil law", in formulating the rule that a party might rescind a contract, even for an innocent misrepresentation, where there is a complete difference be-

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<sup>54</sup> 23 Wall. 48 (U. S. 1874).

<sup>55</sup> 2 Ld. Raym. 909, 912 (Eng. 1703).

<sup>56</sup> Cahoon v. Miers, 67 Md. 573, 11 Atl. 278 (1887).

<sup>57</sup> Sheldon v. Sherman, 42 N. Y. 484, 487, 488 (1870).

<sup>58</sup> Bechervaise v. Lewis, L. R. 7 C. P. 372 (1872).

<sup>59</sup> 32 L. J. C. L. (N. S.) 164, 166 (1863).

tween the thing bargained for and the thing obtained, so as to constitute a failure of consideration.<sup>60</sup> Chief Justice Lee, cited Domat on a question of partnership law "not as authority . . . but as the opinions of learned men".<sup>61</sup> Justice Best in the case of *Cox v. Troy*,<sup>62</sup> was more positive, for in deciding the legal effect of the obliteration of an acceptance he said, ". . . the authority of *Pothier* is expressly in point. That is as high as can be had, next to the decision of a court of justice in this country". Chancellor Kent, in *Campbell v. Mesier*,<sup>63</sup> drew upon the Digest, Voet, Pothier and the customs of Paris and Orleans and recognized the doctrine of contribution as to party-walls, holding that such a doctrine "falls within the reason and equity of the doctrine of contribution which exists in the common law; and is bottomed and fixed on general principles of justice". An unequivocal recognition of *aequum et bonum* as *lex legum*. The leading case of *Young v. Grote*,<sup>64</sup> which holds that the drawer of a check is liable where his negligence in drawing it has enabled a forger to raise it, was based upon a passage in Pothier's, *Contrat du Change*. The principle that bees which swarm upon a tree are not private property until hived has been supported by a citation of Inst. 2. 1. 14 in the case of *M'Nutt v. Johnson*.<sup>65</sup> Even the realm of profane literature has been scanned for useful material, as in the case of *Millar v. Taylor*,<sup>66</sup> where Milton was cited in determining a question of literary property. At very wide intervals the reports contain decisions in which a novel rule is excogitated from principles of justice where no precedent domestic or foreign can be found. An interesting illustration of this is presented by the decision of Lord Ellenborough in the case of *Rex v. Fisher*,<sup>67</sup>

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<sup>60</sup> *Kennedy v. Panama etc. Mail Co.*, L. R. 2 Q. B. 579 (1867). Cf. CODE NAPOLEON, art. 1110: "A mistake does not make the contract void unless it is one that affects the fundamental object of the contract."

<sup>61</sup> *Ryall v. Rowles*, 1 Ves. Sr. 348, 369 (Eng. 1749).

<sup>62</sup> 5 B. & Ald. 474, 480 (Eng. 1822).

<sup>63</sup> 4 John. Ch. 334, 337, 339, 340 (N. Y. 1820).

<sup>64</sup> 4 Bing. 253 (Eng. 1827). Accord: *London Joint Stock Bank. v. McMillan and Arthur* [1918] A. C. 777.

<sup>65</sup> 7 Johns. 16 (N. Y. 1810).

<sup>66</sup> 4 Burr. 2303 (Eng. 1769).

<sup>67</sup> 2 Campb. 563, 570 (Eng. 1811).

where he held it to be criminal libel to publish the preliminary examinations taken *ex parte* before a magistrate previous to committing a man for trial or holding him to bail, for the reason that :

"The publication of . . . preliminary examinations has a tendency to pervert the public mind, and to disturb the cause of justice, and . . . is therefore illegal".

As has been well stated by Lord Stowell :

"All law is resolvable into general principles. The cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized, by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is never new, nor is it justly chargeable with being an *innovation* on the ancient law; when in fact, the court does nothing more than apply old principles to new circumstances".<sup>68</sup>

Among these principles is to be reckoned the ancient rule, *aequum et bonum est lex legum*; although seldom alluded to by name it has an appreciable influence in modern law, for :

"In determining a case with no precedent in the jurisdiction as a guide a court will adopt that rule which in its opinion best accords with the habits and customs of the people, and which will in the majority of cases be conducive to a determination of controversy in accordance with justice".<sup>69</sup>

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<sup>68</sup> *The Atlanta*, 6 C. Rob. 440, 458 (Eng. 1808).

<sup>69</sup> *Wicker v. Jones*, 159 N. C. 102, 74 S. E. 801 (1912).