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## Introductory Note: Revision and Reform in the Common Law Countries

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## SYMPOSIUM

### LAW REFORM IN THE UNITED KINGDOM

#### INTRODUCTORY NOTE. REVISION AND REFORM IN THE COMMON LAW COUNTRIES

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This symposium on recent developments in English law has a dual objective of particular interest to American lawyers. First, it seeks to inform professionals in the United States of some significant steps in the modernization of the common law in England. Second, it attempts to add some perspective to the general movement toward modernization, revision, and reform<sup>1</sup> of law throughout the common law world, including the movement in the United States.

It is an irony of history that so many of the states of the Union, by adopting Virginia's so-called "reception statute" or its equivalent,<sup>2</sup> have tended to cut themselves off from the beneficial effects of the trend toward modernization in the mother country which commenced almost simultaneously with the American Revolution.<sup>3</sup> While the reforms

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1. The terms "modernization, revision, and reform" has no precisely distinguished meanings in law dictionaries. In the context of this article, modernization is used to suggest a movement primarily designed to streamline statutes or rules, usually by eliminating steps which the experience of many years has demonstrated to be superfluous and obstructive. Revision more specifically relates to a planned statutory overhaul of procedural or substantive law. Reform is a term which should be used sparingly, for it suggests, accurately, an attempt to introduce new concepts into existing law. "The term, 'law reform,' has no exact, objective meaning." Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U.L.J. 351 (1969); Lewis, *Needed Changes in the Substantive Law Through a Law Reform Agency*, 34 PA. B.A.Q. 559 (1963).

2. See, e.g., VA. CODE ANN. §§ 1-10, 1-11 (Repl. Vol. 1969); N. Y. CONST. art. 1, § 14; ILL. ANN. STAT. ch. 28, § 1 (Smith-Hurd 1969).

3. See XIII W HOLDSWORTH, A HISTORY OF ENGLISH LAW ch. IV (1952).

advocated by such Englishmen as Jeremy Bentham were well enough known to contemporary lawyers in America,<sup>4</sup> and while some efforts were made to overhaul the feudal heritage which had been "received,"<sup>5</sup> legal modernization in the United States throughout the nineteenth century tended to lag measurably behind the accomplishments of the Parliamentary reformers in England of the 1830's and 1850's.<sup>6</sup> It was not until 1892, when the National Conference of Commissioners on Uniform State Laws was established, that an organized effort aimed at systematic study and drafting of modernizing legislation got underway in the United States.

Other areas of the common law world—primarily the dominions and dependencies of the British Commonwealth—were equally slow in following the mother country's example in law reform. In 1918, the Conference of Commissioners on Uniformity of Legislation in Canada held its organizational meeting. However, it would appear that this was an emulation of the commissioners' conference in the United States rather than a cue taken from the British experience, since the provincial structure of Canadian government is closely analogous to the federal system in the United States.<sup>7</sup> It was, in fact, the creation of the Law Commission in Great Britain—as described in Mr. Norman Marsh's following article—which inspired an organized reform program in several Commonwealth countries.<sup>8</sup>

The establishment of the American Law Institute in 1923 and the

4. See XI J. BENTHAM, WORKS 40 (Bowring ed. 1853); G. DUNNE, JOSEPH STORY AND THE RISE OF THE SUPREME COURT 315-18 (1971).

5. See Legislation abolishing the Rule in Shelley's Case which the "reception" had fixed on the state's common law: VA. CODE ANN. § 55-14 (Repl. Vol. 1969); NEB. COMP. STAT. § 76 112 (1956); KY. REV. STAT. § 381.090 (1970); N.Y. REAL PROP. § 54 (1955); OHIO REV. CODE ANN. § 2107.49 (1967).

6. See XIV W. HOLDSWORTH, A HISTORY OF ENGLISH LAW ch. V (1964).

7. See Historical Note in PROCEEDINGS OF 52ND ANNUAL MEETING OF THE CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA, 10-14 (1970).

8. Overseas law reform agencies in the Commonwealth countries include eight in Canada, five in Australia, two each in Malaysia and Malta, and single agencies in Bahamas, Botswana, Ceylon, Ghana, Hong Kong, India, Jamaica, Nepal, New Zealand, Pakistan, South Africa, Sudan, and Trinidad-Tobago. In the United States, principal state agencies are found in California, Colorado, Florida, Louisiana, Michigan, New Jersey, New York, Oregon, and Tennessee. See 1968-69 LAW COMMISSION, FOURTH ANN. REP. 28-30; Mewit, *Criminal Law Revision in Canada*, 7 ALTA. L. REV. 272 (1969); Newman & Sweeney, *Catalyst for Criminal Justice Reform: The Cleveland Experience*, 2 URBAN LAW. 518 (1970); Sutton, *English Law Commission: A New Philosophy of Reform*, 20 VAND. L. REV. 1009 (1967).

virtually contemporaneous establishment of the Judicial Conference of the United States were other milestones in reform history in this country. The ALI *Restatement* may fairly be said to have anticipated the type of common law study which after World War II suddenly grew to its present magnitude in England.<sup>9</sup> The periodic and sweeping reforms in Parliament commenced during the 1920's and continued in following decades, however, have no equivalent in the legislative annals of the United States.<sup>10</sup>

A qualitative comparison of the achievements of these various movements in modernization, reform, and revision throughout the common law world can only be tentative and suggestive at this point, both because of the essential differences in local frames of reference within which these changes have been worked out and because the documentary material upon which to make a detailed analysis is hard to come by. The important fact at this point in time is that such a movement is now general throughout the common law countries. While each country is proceeding rather independently of the others, which is probably necessary and desirable, hopefully this type of symposium will breed a greater consciousness of the existence of comparable programs in the others.

While factors impelling the movement toward change are variable, it is safe to say that, for the most part, the Anglo-American motivation is pragmatic. The sheer volume of case law, with eventually contradictory precedents in many vital areas, and the lingering inhibitory influence of outworn doctrines ultimately threaten to clog the system.<sup>11</sup> If a judicial remedy is to be taken, something like the *Restatement* is normally attempted as a means of trimming off deadwood and dead-weight.<sup>12</sup> If part of the remedy, at least, is taken to be legislative, as in the United States and Canada, uniform or model statutes are frequently proposed.<sup>13</sup>

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9. See H. GOODRICH & P. WOLKIN, *THE STORY OF THE AMERICAN LAW INSTITUTE 1923-1961 passim* (1961).

10. The great modernizing reforms in estates in land and related property law appear in the Law of Property Act of 1923, 12 & 13 Geo. 5, c. 16, §§ 1-34; the Law of Property and Land Registration Acts of 1927, 15 & 16 Geo. 5, c. 20, §§ 1-36, c. 21, §§ 1-70; and the Landlord and Tenant Act of 1927, 17 & 18 Geo. 5, c. 36, §§ 1-26.

11. See H. GOODRICH & P. WOLKIN, *supra* note 9, at 8-13.

12. *Id.* Note the observations concerning the First and Second Restatements: once launched upon revision and reform, an agency is committed to keeping it up to date. "But without fresh assurance of continuous examination, the user can never depend upon the current authenticity of the statement. Even more, he is in danger of losing out on some new development or re-examination of an old principle." *Id.* at 11.

13. The work of the Commissioners on Uniform State Laws distinguishes between

In the past decade, particularly in the United States, it has become evident that an equally fundamental, almost philosophical consideration is involved in law reform. This is the recognition that American society itself has fundamentally changed in the generation following World War II. After several thoughtful dialogues on this subject,<sup>14</sup> Chief Justice Burger summarized some of the basic propositions in his 1970 "State of the Judiciary" address to the American Bar Association: The "complexities created by population growth and the shift to large urban centers"; the failure of the bench and bar to "bring methods, machinery and personnel up to date"; and the appearance of "entirely new kinds of cases [arising] because of economic and social changes, new laws passed by Congress and decisions of the courts"—all of these factors have accelerated the volume of civil litigation and criminal prosecutions. The automobile now accounts for the largest single category of civil cases, and the rising crime rate, which adds to the business on the criminal side, has been augmented by new criminal sanctions in voting rights and civil liberties laws, habeas corpus petitions for post-conviction relief, and new safeguards and procedures dealing with the committal of drug addicts and the mentally ill.<sup>15</sup>

This specific description of the problem emphasizes that new methods of thinking are required; simply creating more judges will not be a complete remedy in itself when qualitative as well as quantitative change is necessary. "The effort of the legal profession to cling to an earlier structural model," wrote Professor Bayless Manning in 1968, "seems likely to be overtaken by a new diversity of institutional arrange-

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uniform laws, which are submitted to the individual states by the National Conference of the Commissioners with the recommendation that they be adopted *in haec verba* wherever practicable, and model acts, which are offered as guidelines to legislation which need not be uniform. See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 268 (1965). But see Merrill, *Uniformly Correct Construction of Uniform Laws*, 49 A.B.A.J. 543 (1963).

14. The most challenging and widely discussed comments on this subject appear in K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); J. FRANK, *AMERICAN LAW: THE CASE FOR RADICAL REFORM* (1969); D. KARLEN, *JUDICIAL ADMINISTRATION: THE AMERICAN EXPERIENCE* (1970); H. L. ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* (1970). Among representative periodical comments see Cowan, *Divorce in Utopia*, 46 IND. L.J. 186 (1971); White, *Proposal for Reform of Plea Bargaining*, 119 U. PA. L. REV. 439 (1971); Winters, *The National Movements Toward Legal and Judicial Reform*, 13 ST. LOUIS U.L.J. 33 (1968); Symposium, *Law and Poverty*, 32 ALBANY L. REV. 509 (1968).

15. See generally Burger, *The State of the Judiciary*, 56 A.B.A.J. 929 (1970); JUSTICE IN THE STATES (W. Swindler ed. 1971) (a compilation of papers and addresses of the National Conference on the Judiciary 1971).

ments.”<sup>16</sup> Poverty law, as Judge Murphy of the Superior Court of the District of Columbia has remarked, has not merely increased the volume but has fundamentally altered the rationale of the common law of landlord and tenant.<sup>17</sup> Changes in the theory of certain common law torts,<sup>18</sup> in statutory definitions of crimes where social attitudes have substantially altered,<sup>19</sup> and correlatively in the bases for some canons of professional and judicial ethics,<sup>20</sup> are all part of the ferment.

It would appear from the enumeration which follows that a major element of law reform—as distinguished from revision and modernization<sup>21</sup>—is the philosophical element, while in the typical work of agencies such as the uniform laws commissions of either the United States or Canada, pragmatism is the controlling factor. This is, of course, essentially a subjective judgment and hardly susceptible of documentation, except in the commentary of some of the reports of the study groups. Examine, for example, the rationale of the Ontario Law Reform Commission in its recommendations for reform of the common law rule against perpetuities:

From its origins in the early part of the seventeenth century this judge-made rule has served a useful social function, but in the long course of development [it] has acquired unsatisfactory attributes which can now be removed only by legislation. Reform of the rule is long overdue. As has been said, “it is scarcely credible that in the second half of the twentieth century testamentary dispositions offering no threat to the public interest, and reasonable bargains between businessmen dealing with each other at arm’s length, should continue to be struck down in the name of public policy,” yet this is frequently the result of the application of the rule in its present form.<sup>22</sup>

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16. Manning, *New Tasks for Lawyers*, in *LAW IN A CHANGING AMERICA* 9 (Hazard ed. 1968); *THE COURTS, THE PUBLIC AND THE LAW EXPLOSION passim* (Jones ed. 1965).

17. See Greene, *A Proposal for the Establishment of a District of Columbia Landlord-Tenant Agency*, 38 D.C.B.J. 25 (1971).

18. See R. KEETON, *VENTURING TO DO JUSTICE* 169 (1969).

19. See H. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN’S GUIDE TO CRIME CONTROL* chs. 1, 2, 5-7 (1969).

20. See Swindler, *Toward a Restatement of Professional Ethics*, 27 U. PITT. L. REV. 795 (1966); *ABA CANONS OF JUDICIAL ETHICS* (1971).

21. See note 1 *supra*.

22. ONTARIO LAW REFORM COMMISSION REPORT NO. 1, at 1 (1965); see also LAW REFORM COMMISSION OF BRITISH COLUMBIA ANNUAL REPORT 5-6 (1970).

In subject areas unknown to the historical common law—e.g., compensation for victims of crime, and certain limitations upon tenants' liabilities—advocates of reform must rely heavily upon considerations of changing social needs. On the former subject, the authors of an Alberta study observe:

Why should victims of crime be singled out for assistance from the public purse? We base our recommendations on the plight of the victim and *the fact that his injuries have arisen from wrongful acts of an element in society. There is a connection between the social breakdown manifested in crime and injury to innocent citizens.*

A secondary reason for our recommendation is that we are in an era when society recognizes many new obligations: for example, the care of victims of cancer and tuberculosis. A closer parallel is that of compensation for persons injured through the negligence of car drivers as provided in the Unsatisfied Judgment Fund. [Emphasis supplied].<sup>23</sup>

Family or domestic relations law, encrusted in most common law countries with centuries of now obsolete feudal concepts, has been a subject of particularly searching studies in both Canada and Great Britain. In the field of tort liability within family relations, there are long lists of "anomalies and anachronisms which impede the doing of justice in an important sector of our society," as the Ontario Commission points out in its report on the subject.<sup>24</sup> On the subject of marriage contracts, the Commission states in a related report that the original common law interest was in protecting the status of the parties. "While status is still a very important factor in the decision to marry," the report says, "this particular quality is susceptible to so many forms of measurement in a modern pluralistic society that concepts which were developed, at least in part, to protect the status claims of a vanished aristocracy of a bygone era seem somewhat anachronistic today."<sup>25</sup>

An interesting ancillary development in Canada is in the reform program in the province of Quebec which, like Louisiana in the United

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23. INSTITUTE OF LAW RESEARCH AND REFORM, REPORT ON COMPENSATION FOR VICTIMS OF CRIME 3 (1968); see also INSTITUTE OF LAW RESEARCH AND REFORM, REPORT ON OCCUPIERS' LIABILITY 45 (1969).

24. ONTARIO LAW REFORM COMMISSION REPORT ON FAMILY LAW. I—TORTS 114 (1969).

25. ONTARIO LAW REFORM COMMISSION REPORT ON FAMILY LAW. II—MARRIAGE 9-10 (1970).

States, is an island of civil law in a common law complex.<sup>26</sup> A close interrelationship between civil and canon law, reflecting the particular cultural composition of that province, is an added dimension in the exacting task of revision. Deriving its theory from Roman law doctrine in many instances, the law in Quebec has numerous cross-ties, such as family law with its intimate involvement in property law. The 1968 study of "matrimonial regimes" points this out:

The status of consorts in marriage affects both their persons and their property . . . . In the abstract, it would be possible to conceive of a conjugal union which involved no pecuniary consequences, but this outlook would be wholly theoretical and incompatible with reality; the union created by marriage necessarily gives rise to a certain mingling of the material interests of husband and wife, and a matrimonial regime, even one reduced to a few simple rules, appears to be a logical necessity.

. . . .

Added to this is the fact that our entire legislation in the field of matrimonial law has, until very recently, remained subject to the basic principle that the family unit inevitably required the presence of one head—this was a well-established notion of the old law that was adopted by our Code of 1866. To this end, the Code granted the husband special prerogatives, known as "marital authority," and, as a corollary, it denied the wife the right, when unauthorized, to perform certain civil acts which were judged to be of major importance to family life. This supremacy of the husband was imposed without distinction and regardless of the matrimonial regime adopted by the consorts, because marital authority, and the corresponding incapacity of the wife, were treated as the direct consequences of marriage; it was, however, particularly applied in the legal regime, where the husband, already master of the common property, was also granted the administration of his wife's private property.<sup>27</sup>

Not surprisingly, therefore, Quebec law reform studies have dealt at length with a wide variety of problems growing out of this subject, such as adoption, civil marriage, the legal status of married women, and civil rights.<sup>28</sup>

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26. See Tucker, *Source Books of Louisiana Law*, 1 LA. LEGAL ARCHIVES xvii (1937).

27. [Quebec] CIVIL CODE REVISION OFFICE REPORT ON MATRIMONIAL REGIMES 2 (1968).

28. [Quebec] CIVIL CODE REVISION OFFICE REPORTS NOS. 1-5 (1964-68).

In its initial statement of a program in 1965, the British Law Commission set down among its guiding principles the following:

A great deal will have to be done before it can be justly said that our legal system is in harmony with the social and economic requirements and aspirations of a modern state.

This requires, on the negative side, elimination of a certain number of actions which in 1965 are mere anachronisms. On the positive side we recommend examination of certain subjects vitally important to commerce, industry and the public at large such as, in the field of tort, the scope of strict liability and, in contract, the permissibility of exclusion clauses and the doctrine of fundamental breach.

....

It is eminently desirable that the legal system should be capable of making a rapid remedial response to defects exposed, by judicial comment or otherwise, in the course of the day-to-day operation of the law.

....

It is equally important that the law should promptly respond to informed criticism of certain developments of principle, made on the ground that such developments are jurisprudentially unjustifiable or socially questionable. . . .<sup>29</sup>

Mr. Paul Baker's article on land law illustrates the degree to which the Law Commission has devised changes to accommodate these aims. The final article in this symposium, a review of British race relations legislation by Dr. Richard Plender, also illustrates a transition from feudal to modern postulates.

Taken all together, the subjects which have been studied, either in preliminary research or in uniform or model laws proposed or adopted, cover most of the major areas of the common law. Those current in the United States are readily accessible and generally known to American lawyers,<sup>30</sup> while Mr. Marsh's survey of the Law Commission contains a broad list of the subjects which have been taken up in that country. A glance over the list of Canadian studies<sup>31</sup> will provide a general

29. FIRST PROGRAMME OF THE COMMISSION, LAW COMMISSION ACT 4 (1965).

30. See H. GOODRICH & P. WOLKIN, *supra* note 9, App., 2; annual report and studies by the several state agencies cited in note 8 *supra*.

31. ANNUAL MEETING, *supra* note 7, and various studies of the provincial law commissions cited in notes 22-25, 27, and 28 *supra*. A list of representative Canadian studies, which may be taken to complement Mr. Marsh's list of British studies, follows: *Actions:*

view of what is currently under scrutiny in the other parts of the British Commonwealth.

While this ferment in law has been at work for some decades—and for substantially more than a century in the mother country of the common law—it has only been in the period since World War II that it has assumed critical proportions in the eyes of the profession and the general public. The National Conference on the Judiciary, held in Williamsburg, Virginia in March 1971, brought to a climax the efforts of leaders in court modernization which had begun more than 60 years before. Inertia and the lack of a means of exchanging information among the states and the concerned leaders had so long dissipated these efforts at reform that, as Chief Justice Burger stated in the keynote address to the Williamsburg Conference, “[O]ur courts are suffering from a severe case of deferred maintenance.” Equally critical, he warned the assembled representatives of court reform, is the need to modernize substantive law.<sup>32</sup>

#### CONCLUSION

To see what progress has in fact been made in other parts of the com-

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Limitation of Actions (Alberta); Limitation of Actions, Survival of Actions (Dominion). *Agency*: Personal Representatives (Alberta). *Blue Laws*: Sunday Observance Laws (Ontario). *Conflict of Laws*: Conflict of Laws, Domicile, Traffic Accidents (Dominion). *Contracts*: Construction Bond Liability, Mechanics' Liens (Alberta); Frustrated Contracts (Dominion). *Criminal Law*: Compensation for Victims (Alberta); Compensation for Victims (Dominion). *Domestic Relations*: Adoptions, Divorce, Marriage, Torts (Ontario, Quebec); Legitimacy (Dominion). *Evidence*: Evidence, Foreign Affidavits, Photocopies of Records, Proof of Statutes (Dominion). *Highways*: Rules of the Road (Dominion). *Insurance*: Insurance Acts (Ontario); Fire Insurance Policies, Life Insurance (Dominion). *Judgments*: Enforcement of Judgments, Enforcement of Maintenance Orders, Foreign Judgments (Dominion). *Labor*: Labor Contract (Quebec). *Landlord-Tenant*: Occupiers' Liability (Alberta); Landlord and Tenant (Dominion). *Mortgages*: Mortgages (Ontario). *Partnerships*: Partnerships, Partnership Registrations (Dominion). *Persons*: Age of Maturity (Alberta, Ontario); Cornea Transplant, Human Tissue (Dominion). *Prescription*: Prescription (Quebec). *Property*: Compensation for Expropriation, Condominiums, Personal Property Security, Tenancies (Alberta); Devolution of Real Property, Married Women's Property (Dominion). *Sales*: Sale of Real Property (Ontario); Bills of Sale, Bulk Sales, Conditional Sales, Sale of Goods, Warehousemen's Liens, Warehouse Receipts (Dominion). *Securities*: Corporate Security Registration (Dominion). *Sureties*: Guarantors' Acknowledgements (Alberta). *Torts*: Privacy (Ontario); Contributory Negligence, Defamation, Fatal Accidents (Dominion). *Trusts*: Appointments, Pensions, Perpetuities, Trustee Investments, Variation of Trust (Dominion). *Wills*: Uniform Wills (Ontario); Testamentary Additions to Trusts, Testators' Family Maintenance, Wills (Dominion).

<sup>32</sup>. See JUSTICE IN THE STATES, *supra* note 15; ABA SECTION OF JUDICIAL ADMINISTRATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE (1971).

mon law world, then, is the primary purpose of this symposium. In these articles and elsewhere,<sup>33</sup> the American reader should be seeking answers to three questions: First, what are the specific details of obsolescence in the current fabric of the common law? Second, what specific remedies have been proposed by agencies such as the Law Commission, and what have been the arguments these agencies have advanced in support of the remedies? And finally, what have been the lessons of experience now that the remedies, in certain instances, have been applied? If the reader can find some satisfactory answers to these questions from these readings, he may find guidelines to the approach to new and needed reforms in American law.

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33. See Sutton, *supra* note 8; Bridge, *The Reform and Restatement of English Law*, 50 NEB. L. REV. 447 (1971).