Recent Developments in Federal Jurisprudence*

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One of the principal attributes of the law, is that it must of necessity change, grow, and adjust itself to the varying needs of passing generations. The law, is therefore, always in a state of flux. There are periods during which the changes are slow and almost imperceptible. At other times, the modifications and adjustments come at a pace sufficiently fast to render the development visible to the reflecting observer. The past five years have constituted a period of very rapid growth and change in the law. It is, therefore, fitting for the lawyer who is interested in the history of jurisprudence to pause and survey the progress that has been made during the past five-year period. It is my plan to discuss this subject briefly in respect to the growth of Federal jurisprudence.

It is perhaps the very nature of law to lag behind social and economic developments. The law adjusts itself to changes in our society only after such changes become crystallized. It is indispensable, however, that the lag should not be too great. When there is too long a delay between the advance of our social and economic life and the needed adjustment in our legal system, the law becomes a retarding influence. When such a situation arises, as it has at times in the past, it becomes indispensable that appropriate changes be effected without undue delay.

For a great many years there had been but few marked and important changes in Federal jurisprudence. The machinery gradually became inadequate. It revolved too slowly and creaked for want of sufficient lubricating oil. It became impotent to respond to the many demands made upon it.

During the past five years vast strides were taken and improvements of outstanding importance were made in the Federal judicial system. This is true both of the substantive law, by which the Federal courts are governed, as well as of the pro-

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cedural aspects of their activities. If the lawyer accustomed to practicing in the Federal courts fell into a Rip Van Winkle sleep six years ago, he would find himself today, upon awakening from his slumbers, a stranger in the haunts which he had previously been accustomed to frequent.

On the substantive side of the law the changes are striking. This is true both of criminal and civil law. Conditions have radically changed since the day when Benjamin Franklin undertook the perilous journey from New York to Philadelphia that consumed almost a week's time, and during which he was subjected to numerous inconveniences and discomforts, and even hazards. The high-powered automobile, coupled with our modern systems of communications, has made it possible for dangerous desperadoes who live in one State, to betake themselves to a distant commonwealth for the commission of serious crimes, and then rapidly return to their homes. Such conditions have led to the radical revision of the Federal criminal law that took place in the spring of 1934, when the Congress enacted a series of measures which brought under Federal jurisdiction numerous crimes of which theretofore State courts alone had cognizance. The Federal kidnaping statute, the National Stolen Property Act, the antiracketeering statute, the Federal bank robbery statute, the Federal fugitive felon statute, the National Firearms Act—were all enacted at that time, thereby bringing under the authority of the Federal Government many serious offenses which State and local authorities had found themselves powerless to handle effectively.

The modifications in the substantive law governing the activities of the Federal courts on the civil side during the past five years have been equally as important, though less dramatic, than the extensions in the Federal criminal law. For almost a century the Federal courts had been following and applying the principle that on matters of commercial law and general jurisprudence, they may develop doctrines of substantive law independent of those accepted by the State tribunals (*Swift* v. *Tyson,* 16 Pet. 1). The provision of the Judiciary Act of 1789 which enjoined the Federal courts to regard the laws of the several States as rules of decision in trials at common law, was construed as being restricted solely to State statutes. The result has been that in many instances a rule of law governing a Federal court

in a particular case was entirely different from that followed in the State court, held possibly across the street. Litigants were frequently in a position to choose that tribunal whose law was the more suitable of the two to their interests. The revolutionary decision in Erie Railroad Co. against Tomkins, entirely abrogated this time-honored doctrine which was one of the keystones of the edifice of Federal jurisprudence.

Today the Federal courts decide civil cases other than those involving Federal questions, in accordance with the law of the State by which the case is governed, whether such law is expressed in a statute, or is evolved from the decisions of the courts, and whether the subject matter of the litigation is within the realm of general jurisprudence or commercial law, or within the confines of local matters. A Federal judge remarked several months after this decision of the Supreme Court was rendered, that the decision in Erie Railroad Co. against Tomkins, has legally speaking, "turned the world upside down." (*Francis* v. *Humphrey,* 25 F. Supp. 1.) This reversal of a century-old doctrine has many important and far-reaching implications. No matter what forum the parties select for the determination of their rights, the rules of law by which such rights are adjudicated are the same.

The changes in the adjective side of Federal jurisprudence during the past 5 years are equally as basic as those in substantive law. This is true only, however, of the civil side of the courts. Since 1789 the Supreme Court has been endowed with the power to regulate equity and admiralty procedure in the district courts. This authority was wisely exercised. The result was the development of a reasonably simple and uniform system of equity and admiralty pleading and practice throughout the Federal judicial system. The Federal courts were, however, trammeled and restricted by the Conformity Act in respect to practice in actions at law. They found themselves required in that field to conform to the pleading, practice, and procedure prevailing in the local tribunals of the States in which they were sitting. In a number of jurisdictions the Federal courts were required to follow common-law pleading in its pristine vigor, and pure and unadorned form. In the code States the Federal courts adopted code pleading. In a still third or intermediate group various forms of modified common-law pleading were in vogue.

Chaos and confusion reigned. It was not until after many years of agitation that the Congress enacted the act of June 19, 1934, which conferred upon the Supreme Court the same rule-making power in respect to actions at law that it had always possessed in regard to suits in equity and admiralty. The sequel of this statute was the promulgation of the Federal Rules of Civil Procedure, which became effective on September 16, 1938, and which introduced a simple and uniform procedure, binding on all Federal courts, in all those civil actions which had theretofore been comprised in the groups known as actions at law or suits in equity. A single form of action such as is contemplated by the codes, was for the first time introduced into Federal jurisprudence. The distinction between law and equity was abolished, and the differentiations between different types of actions at law were abrogated. Simplicity reigned. Liberality in the manner of joinder of parties and claims and the interposition of counterclaims prevailed. Potent weapons for discovery were introduced with a view to eliminating as far as possible what has aptly been called "the sporting theory of justice." Much laborious and abstruse learning was thrown in the discard.

Contrasted with the revolutionary reform in Federal civil procedure is the archaic criminal procedure by which the Federal courts are still bound. Improvements in this field cannot be made without legislation. Proposals are now pending before both Houses of the Congress to confer on the Supreme Court the same authority to regulate criminal procedure generally that has been conferred upon it in respect to civil procedure, and in respect to criminal appeals. Some progress with this legislation has been attained, and it is hoped that it may be passed during the next session of the Congress.

One important phase of Federal criminal procedure has, however, undergone a vast improvement. I have reference to the treatment of juvenile delinquents. Beginning with the turn of the century, the various States in rapid succession adopted special statutes providing an informal, simple, procedure in dealing with juvenile offenders, with a view to saving them from the brand of the criminal, and making possible the rehabilitation of a youth who had stumbled along his path while still in his formative years. Although 47 States had acted, the

Federal Government remained quiescent and continued to try juvenile delinquents in the same manner as adult criminals. In June, 1938, however, the Federal Juvenile Delinquency Act was placed upon the statute books. It introduced for the first time the humane innovation of according an informal hearing to juvenile offenders against a Federal statute with a possibility of probation, or commitment to a training school or foster home if probation was not suitable. The pompt and circumstance and the publicity that surrounds a formal criminal trial in open court is no longer required in the case of a juvenile delinquent if both the prosecuting attorney and the juvenile agree to proceed by the informal method. Thus was achieved an important humanitarian reform.

A useful element of flexibility was introduced into the field of civil remedies in 1934 by the Declaratory Judge Act, which conferred jurisdiction on the Federal courts to render declaratory judgment. In this instance also the Federal judicial system had lagged behind many of the States.

Vital innovations were introduced, not only in the field of procedure but also in the structure of the judicial system. Little thought had been given to the fact that although the Constitution created the judiciary as one of the three coordinate branches of the Government, the courts were not implemented with administrative machinery that would assist them in functioning effectively and expeditiously. Each district court, frequently each district judge, was regarded as an independent unit and permitted to function within its own orbit in its own way. Since the courts were not supplied with administrative machinery, the budgetary and fiscal matters relating to the judiciary as a result of unintended development devolved on the Department of Justice. Last week, however, the Congress passed a bill to create an Administrative Office for the United States Courts, which, it is contemplated, will perform a twofold function. First, the Director of the Administrative Office will be charged with the duty of studying the conditions of the dockets and devising ways and means for organizing them and speeding the disposition of litigation. This measure will, therefore, have an important bearing on the ever-present evil of law's delays. Secondly, he will have charge of the budgetary and fiscal matters relating to the courts. Although this law is not a picturesque

bit of legislation and has but little dramatic value, it is an important milestone in the growth and development of the Federal judiciary.

Vast changes have been made in dealing with the estates of insolvent persons and corporations. The ingenious contrivance of equity receiverships, which had its fullest growth and development, if not its origin, in the Federal courts, and which was used by them for the purpose of administering the assets of railroads, public utilities, and large industrial and commercial corporations is now out of date. If not entirely obsolete, it is at least obsolescent. With the salutary extension of the Bankruptcy Act to railroad companies and to the reorganization of other classes of corporations, the need for equity receiverships no longer exists.

The extension of the Bankruptcy Act to farmers was regarded by many as a marked innovation and was accompanied by many heart burnings. And yet is there any difference in principle between, according to a railroad corporation what amounts to a moratorium for a number of years through the devise of an equity receivership or a proceeding under Section 77 of the Bankruptcy Act, and extending similar relief by a statutory provision to a farmer struggling under the heavy burden of a mortgage which the fall in agricultural prices makes it impossible for him to liquidate? Municipal corporations and other local governmental units who, because of radical changes in financial conditions, find themselves confronted with inability to meet their bonded indebtedness are likewise permitted to enter the portals of the Federal courts to revise and rearrange their debt structure. Many desirable improvements and much commendable simplicity were introduced by the Chandler Act into the bankruptcy system.

We have been troubled in the past by the cumbersome, slow, and expensive procedure of the courts of bankruptcy. Creditors frequently lamented the fact—with a considerable degree of justification—that the cost of administration consumed too great a percentage of the assets and that too long a time elapsed between the date of institution of a bankruptcy proceeding to the date on which final dividends were received. The entire subject is now receiving thorough study by a committee appointed by Attorney General Murphy.

The administration of the bankruptcy law has been accompanied by an exceedingly anomalous feature. A large part of the work of first instance is conducted by judicial officers who are not paid any stated compensation by the Government, but receive their remuneration on a fee basis out of the assets of the estates which they administer.

The fee system of compensating judicial officers is an anachronism and should be thrown into the discard in this field as it has been in many others. This, however, is not the time nor place to discuss the many advantages of the prevailing system. They can easily be envisaged by every member of this audience. It was with a view to bringing the administration of the bankruptcy law in line with modern concepts in this regard that Attorney General Murphy has urged the enactment of legislation that would place referees in bankruptcy on a salary basis, thereby increasing the dignity and prestige of the important office which they occupy and eliminating some wide discrepancies in the remuneration of these officials.

The 5-year period has been significant not only for the outstanding improvements in private law, but also for its developments in publice law. This is true both of administrative and constitutional law. The administrative process is not a novelty. So far as the Federal Government is concerned, it dates at least as far back as 1886, when the Interstate Commerce Commission was established. During the past few years it has been extended to new agencies. Naturally, the legal profession by the very virtue of its training tends to be conservative, and many of its members have not as yet become accustomed to a frank realization of the proposition that the administrative process must in many respects differ fundamentally from the judicial process. The fact that the judicial process is very much older than modern administrative process by no means necessitates the conclusion that judicial process is more efficient or that it is more likely to attain justice. With the growth of complexities the intricacies of governmental activities, due to the development of modern industrial society, the administrative process must of necessity play a more important role than it has fulfilled heretofore.

I have left until the last the most far-reaching modifications in Federal jurisprudence. I have in mind recent constitutional developments. In dealing with the Constitution, we must ever

bear in mind the admonition of Chief Justice Marshall, that "It is a constitution that we are expounding." In other words, the general terms in which the Constitution was intentionally couched, may not be properly construed with the precision applied in interpreting and applying a detailed code of laws.

In a speech that I delivered in the fall of 1937 I had occasion to advert to the fact that during the first 60 years of the existence of the Republic, which was a period of great national expansion, not a single act of Congress was declared unconstitutional by the Supreme Court. It was an era of broad construction of Federal powers, permeated by the inspiration of Chief Justice Marshall, who was a farsighted statesman, as well as a profound jurist. During that period a wide scope was accorded to the implied powers of the Congress, and a liberal interpretation was given to its authority over interstate commerce.

There is an ebb and flow in constitutional interpretation, as there is in other affairs of men. The period of broad construction was ended in 1857 with the rendition of the decision in the *Dred Scott* case, which marked a turning point in the development of constitutional law. The succeeding 70 years were characterized by a narrowing of the scope of the commerce clause, and by an extension of constitutional limitations on legislative action. This was especially true of the due-process clause. The result was the thwarting of much social welfare legislation. The tendency was the opposite to that which prevailed while the influence of John Marshall was still vital. Instead of according a broad scope to gevernmental powers, the trend of Supreme Court decisions was in the opposite direction.

In the remarks that I made in the fall of 1937, I suggested that another turn in the tide came in the spring of 1937. At that time there seemed to be in the decision of the Supreme Court a reversal of the narrow conception of governmental powers and a welcome revision to the vital doctrines that prevailed in the early years of the Republic. Over 2 years have elapsed since the tide turned, and that time has perhaps been sufficiently long to justify a suggestion that the constitutional historian of the future may perhaps look upon the year 1937 as marking an epoch-making landmark in the development of constitutional law. The limitations on the commerce clause, which seemed to be

somewhat artificial under modern conditions, have been adjusted so that they correspond to realities. This was accomplished largely by a series of decisions dealing with the application of the National Labor Relations Act. Broad construction has been given to the spending power by the decisions upholding the validity of the Social Security Act. The due process clause was construed so as not to hamper or impede the enactment of social-welfare legislation.

The reciprocal immunity of Federal and State employees against income taxes levied by the other Government on their official salaries was brought to an end. The basis for the immunity had been found in the principle that the Federal and State Governments may not impede or burden the activities of each other. It seems clear that a nondiscriminatory tax levied on all incomes is not an interference with the functions of government, merely because it incidentally reaches Government officers together with all of their fellow citizens. By the same token, a general nondiscriminatory income tax was held not to constitute such a diminution or reduction of salaries of Federal judges as is forbidden by the Constitution, since it is not directed solely or principally against judges.

On the other hand, turning aside from the economic field, we find that the Supreme Court has been meticulous in preserving the civil liberties of the individual in a number of decisions in which it vigorously upheld the basic right of freedom of speech, which is fundamental in a democracy.

Some have bemoaned the decisions of the Supreme Court during the past two years as indicating a bewildering lack of consistency. The criticism, however, overlooks the fact that one of the elements of strength in the Constitution is the fact that it speaks in general terms, which must be construed by the Supreme Court to accord with the conditions and the requirements of the times. The law cannot stand still. It cannot become petrified. It must be molded to fit the needs of passing generations. Therein lies one of the glories of the Constitution of the United States and the strength of our democracy.