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Hopkinson, J.

CONSIDERATIONS

ON THE

ABOLITION

OF

THE COMMON LAW

IN THE

UNITED STATES.

"Is it not as this mouth should tear this hand
For lifting food to't?"

PHILADELPHIA:
PUBLISHED BY WILLIAM P. FARRAND AND CO.
Fry and Kammerer, Printers.
1809.

jurisdictions; the several kinds of temporal offences and punishments at Common Law, and the manner of the application of the several kinds of punishments; *and infinite more particulars which extend themselves as large as the many exigencies in the distribution of justice require.*"

Where now is the man or set of men who will undertake to frame a statute, which shall comprehend and specify in detail, all these important matters, or say, what parts may be dispensed with; or specifically to enact what they shall agree must be retained? Nothing can be more visionary or impracticable! Let us test the project by an anticipated experience. I will suppose that a statute is to be framed which shall be intended to adopt all such parts of the Common Law as are in use in this country, and shall be considered worthy of continuation. After which nothing is to be received as law in our courts, nothing is to be resorted to as a rule of decision, unless it be found in this wonderful statute, or in some written law enacted by the authority of

the legislature. What a task is here for those who are to make this omnipotent, omnipresent statute? I will suppose, however, the law-maker to begin with some common, every day case, for which he is to provide. We will take the case of a bond given for money lent. By the Common Law, and by no other law now existing, money lent upon a bond may be recovered in an action of debt. There is no difficulty in putting this into the statute. But the law maker must go on to specify, precisely, the manner in which this bond is to be made and executed, and the manner in which it shall be proved before a court and jury. Am I told, *every body knows that;* common sense will direct? Take care, *this is Common Law.* Stick to your statute, you have nothing to do with common sense; that, you say, is uncertain; you refuse any rule but the written one. Suppose the form of the bond is given in the act, are we then to exclude every obligation that does not exactly follow the prescribed form? The injustice of such a rule is obvious and infinite. But who is to extend the latitude of

the law and say any thing is a bond, but that which the act declares to be so? Open the door, and we are all at large again, and will, in spite of ourselves, from sheer necessity, be flying for relief to this odious Common Law. But there are more difficulties in fixing the *proof* than the *form* of the instrument. The Common Law, always insisting upon the best evidence the case admits of, and seeking the surest and purest fountains of truth, requires that the bond shall be proved by the subscribing witnesses to its execution; because they can prove the actual execution with more certainty than witnesses who can only testify from a knowledge of the hand writing of the obligor, or from any collateral facts; and because they may be able to relate circumstances or declarations of the parties, attending the execution, essential to the justice of the case. Shall our law-maker then write down in his statute, that a bond shall always be proved by the subscribing witnesses? I hope not. The Common Law is more reasonable. Although the general rule is, and ought to be,

as I have stated it, yet for the full and fair attainment of justice, there are many known and settled exceptions to it. The witnesses to the bond may be dead; they may be removed beyond the power and jurisdiction of the court, and of course out of the reach of the party requiring them; and then reason, justice and the Common Law says, we may use the evidence next in authenticity. Is it credible that any legislator can foresee and provide for all such cases? each depending upon its own circumstances. But the vast expanse of the Common Law, which has gradually grown by experience, providing for every occurring exigency, covers them all. Pray, will this statute declare whether it shall or shall not be indispensable to produce, in court, the bond on which the action is brought? Either rule would be inconvenient and unjust. Will you call upon the plaintiff to exhibit his bond, if it be lost or destroyed by accident, or in the possession of the defendant by fraud or negligence; or will you undertake to specify all the circumstances under which the production may be dispensed

with, and the manner in which such circumstances shall be established or proved.

It is to be remembered that these difficulties and embarrassments are not created by the law or by lawyers; they arise out of the very nature and intricacy of human affairs; from the variety of transactions between man and man; the different circumstances that attend them, and the accidents to which they are liable; constantly changing their equity and requiring different rules of decision. As the human body is subject to various diseases, so are human affairs to various modifications; and the physician, who would prescribe the same remedy for every complaint, is as wise as the legislator, who would enact the same rule for every case.

But we have not yet got through our statute. If the framer, by a success almost superhuman, shall surmount all these impediments, and introduce into his law every thing necessary on the part of the obligee of a bond, in every possible case, let him not imagine his troubles are at an end. They are but begin-

ning. He must now take up the other side of the case, and state, precisely too, every fact and circumstance which shall justly acquit the obligor from the payment of his bond. What a prospect now opens to him! how boundless the field! yet every foot, nay every inch of it, must be explored, surveyed and laid down with exact figure and dimension, or something will be left undone which justice requires to be done. The Common Law completely covers it all; not by the *fiat* of a single act, but by the toil, circumspection and wisdom of ages. These difficulties, let me repeat, are not created by the chicanery of law and lawyers, but by the ingenuity of knaves, ever inventing means to elude the law and defraud the unwary in their contracts. In order to protect the latter, the law must penetrate the labyrinths of the former, follow them in all their windings, expose them to detection and prevent their success.

The law-maker then (if he is to give us the same security we now have,) in setting out the means by which the payment of a bond

may be avoided, and in enacting into written law so much of the common law as is here indispensable, must travel through and accurately mark, all the doctrines of consideration; want of consideration; illegal consideration, as against morals or general policy; frauds, legal and moral; infancy; coverture; bonds, void and voidable. Can human wit or foresight frame a statute that shall embrace the infinite cases under these circumstances? and yet they are, in one shape or another, of daily occurrence. The law must be a mere transcript of the numerous volumes of judicial opinions upon these subjects, or it must fail in providing for very many cases. Most, and perhaps all, of these observations apply to promissory notes of one description or another, which are now the usual vouchers of debt and as current as gold and silver. The tradesman too will find it equally impossible to settle his most simple accounts without the assistance of this Common Law.

But when we look at the various important contracts respecting real estates, and those

arising from our commercial transactions, as bills of exchange, policies of insurance, bottomry and respondentia bonds, with a long train of mercantile negociations, how irresistable is the conviction that an attempt to abolish the Common Law, by which these things are now well regulated and governed, and to substitute a written statute in its place, would be most fatally abortive, and produce a confusion that would destroy the very rights and distinctions of property; rob us of our certain remedies against wrong, and take away the means of obtaining our most simple and obvious rights? We must abandon not only our foreign commerce, but our internal traffic with each other; as in case of a dispute there will be no rule of right to which we can refer for a decision. Thousands of cases will be omitted in the statutes; and those that are introduced will be liable to all the uncertainties of ambiguous construction. Before we can know our rights or remedies or what is the law to which we should conform ourselves, years must pass away to raise a Common Law construction for

this statute, and to fix its meanings, by a course of practice and judicial decisions. So that after wandering a century or two in darkness and doubt, and suffering all the evils which such a state will inflict, we shall be most fortunate indeed if we find ourselves just where we now are. We shall leave the fast land to be tossed on the bosom of a boundless ocean; to be driven about by every tempestuous gust and resistless current, and the utmost of our hope must be to escape ruin and wreck; and regain the shore we so madly deserted. We shall look to it with tears of true sorrow, and in the bitterness of self-reproach.

The dangers and difficulties to be encountered in establishing a complete criminal code by statute, are scarcely less numerous and formidable than those which would oppress us in civil cases. Every crime is now defined with mathematical certainty; and all its various modifications, shapes and circumstances, defences and palliations distinctly provided for, either by general rules and principles, or by particular decisions. So of the modes of trial,