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ECONOMIC SURPLUS AND THE LAW

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I HAVE often amused myself by some theorizing as to the influence of economic surplus and its attempted distribution or re-distribution by lawyers, juries and judges in the administration of the law. Even leaving out of consideration the more patent legislative attempts by way of graduated income and inheritance tax laws and the like, I find that the subject still remains one of delightful and intangible vastness.

Law has been defined as a rule of human conduct, a rule of action. 36 C. J. 957. Or as Judge Burke puts it in 71 Colo. 495, 208. Pac. 465-466 (Travellers Insurance Company vs. Industrial Commission), "A law is a rule of action prescribed by authority." Yet the operation of that law must to some degree rest upon facts, and, in turn, facts may rest upon legal fictions, which are defined by Judge Denison in 74 Colo. 95, 219 Pac. 222-224, as "The assumption for the purposes of justice of a fact that does not or may not exist."

So much for the citation of authority. With these neatly and accurately cited (even if they be not apropos) I may be relieved from further citation or further accuracy throughout the length and breadth of what follows.

If law is a rule of human conduct, and legal fictions, which may be inventions from non-existent facts, may control the rule, and if necessity is the mother of invention, then we may look in turn to the human necessities, as well as to human nature, to play their inevitable part in controlling conduct and inventing new rules or new adaptations of the older rules of law. Moreover, if, as we all know, law is an exact science, we know equally well that such science is swayed by human elements, and what is more human than to compare one person's financial worth with another's lack of it.

Human necessities become such largely by comparisons, and by standards referable to the existence of economic surplus owned by oneself or some one else. And those who have it, in getting and trying to hold on, very naturally look at law and government very much differently than those whose eco-

nomic surplus is featured chiefly by its absence. Political lines between conservatives or reactionaries and liberals, socialists or radicals are thereby drawn. Legal theories and principles are no less so affected.

This tendency is apparent from the beginnings of our common law, even when religion is supposed to have had so much greater influence upon human conduct than at present. And it was almost as though two distinct parties existed. In real property, the clergy and landed nobility evolved and foisted upon us entailed estates, uses, family trusts, restraints on alienation, perpetuities—and the forces opposed, who aimed to make economic surplus, represented by land, freely distributable (alienable was the word) evolved and foisted upon us equally involved rules against perpetuities, against restraints on alienation, unreasonable trusts for accumulation, and methods for barring entails and other future contingent interests. Even the last stronghold (not controlled by statute) appears about to go. The contingent remainder now, by the modern rule in equity, is to be considered as freely alienable as the vested remainder. (See Knutson vs. Hederstedt (Kans.) 264 Pac. 43.)

Modern times with present day business and economic conditions also show the ever present desire to distribute some one else's economic surplus with a fitting reluctance to part with one's own. And changing conditions as to diffusion of wealth or goods, or surplus (which after all is largely relative) results in much changed law—just as the luxury of twenty or forty years ago has become common property and common necessity now. At least if not common property, the same thing is commonly owned.

Among the present day tendencies which occur to me as distinctively changing, or as having changed, from the economic point of view, or diffusion of ownership are the following: automobiles, telephones, oil and gas, aviation, prohibition, big business combinations (the European cartel, and the American trust or holding company) the widespread investment field for corporate and other securities, and various blue and mottled skies, better business bureaus, foreign corporations (covering the country with Maine or Delaware or other favorably disposed state corporations) installment and credit

buying, insurance and old age pensions, woman's economic independence, divorce and alimony, the apathy of the voting class in public and corporate elections, advertising, etc., etc.

This completes the paper. What follows as I have said, amounts to a series of contemplative speculations on the law as it was, is now and ever shall and may be—or the glory of the common law.

An important factor has been the effect of the automobile. In the early days of the industry, only the wealthier members of the community owned, enjoyed or operated them. The horse, the buggy, the livery stable remained for the economically common people—but not so the rule of agency appropriate to the common diffused ownership of the horse and buggy. "A frolic of one's own" with a horse and buggy whereby the owner was only liable for acts of the driver actually in the scope of his employment, was a very different thing where such frolics were done with property belonging only to the wealthy. And the family purpose doctrine was evolved. "Came the Ford" cinematically speaking, and to that extent distributed economic surplus in its own characteristic, care free, and happy way. To hold to the family purpose doctrine against a Ford owner might be to take away from him who already hath not. And now the courts are showing a tendency to back away from that doctrine, and to revert to earlier and more logical rules of Agency—and to deny liability, where the person to whom the machine was loaned was a *competent* driver. Where the driver is of known incompetence, in control of a machine, the earlier rules of agency would still hold the owner liable. (As illustrating this see note, 36 A.L.R. 1141.) The cases and the conflict apparent appear in A.L.R. notes from 5 A.L.R. 226 to 50 A.L.R. 1512. Colorado with a fine disregard for economics and, perhaps, a finer regard for precedent, holds with the family purpose doctrine. (See Boyd vs. Close 257 Pac. 1079, 1081.) And even if the cases nominally retain the family purpose doctrine, courts may and do find that the facts of a particular case do not warrant the application of the rule, or else add other principles upon which recovery may be sustained—and thereby weaken the rule or show the tendency already contended for.

The law of airplane collisions may well follow the law of automobiles. Although my own prognostication is that it will not—not only because of the influence of admiralty law rules relating to collision, but that "family purpose" (there being few travelers in the air except in airplanes, or possibly parachutes), will not find its way in aviation law.

Another tendency in modern business is the widespread use of interstate corporations. The doctrine was evolved that if a foreign corporation had not qualified to do business, it could not invoke the aid or protection of the local courts. That appears to me to be an economic surplus problem. And I also feel that now that companies are largely increasing their activities, by merger and otherwise, and their diffused stock ownership is becoming more widespread, by individual and investment trust buying, whereby the economic surplus is disappearing, that the tendency is and will be to regard such transactions wherever possible as interstate commerce, and so under the protection of the Federal Constitution. Or else if not that, to hold that the business in question is a mere isolated transaction, and not such as to constitute doing business in the state—which appears to be illustrated by the Oregon case of Rushford Lumber Co. vs. Dolan 260 Pac. 224, where there was a sale of lumber in interstate commerce, then on refusal, a storage, then a removal, then a resale to the defendant in the case, under such circumstances that other earlier decisions might have held that the foreign corporation was doing business in the State of Oregon, and hence not entitled to recover judgment in the courts of that state. Perhaps the law of quasi contracts may be developed to allow a recovery in the future in such cases, as an unjust enrichment, or equity may intervene in some way. And I seize upon the law of quasi contract to support my thesis. Particularly those cases which allow a recovery for goods which have changed hands by reason of reliance upon an unsigned contract, in spite of the defense of the Statute of Frauds, because of the otherwise unjust enrichment. And isn't it reasonable to speculate or conjecture that the application of the Statute of Frauds is going to be modified by the predominate use of telephones in transacting business.

Then we have the railroads which have been good eco-

nomic surplus distributors. After "stop, look, and listen" as a defense for railroads in the earlier days, the railroads, by a series of odious comparisons, became so economically superior, that it became the acceptable thing to solve a problem in economic surplus, by the rule of last clear chance, by the aid of which the old defense of contributory negligence could be shunted, and thereby permit the surplus to be painlessly transferred to the party who was economically in the right. And that too in jurisdictions which had abandoned the rule of comparative negligence. I don't recall many cases where last clear chance has amounted to very much where an automobile collision between two cars in the same price class was involved. Now, since the war, we have had a lot of fancy propaganda that railroads are running branch lines, and certain passenger and freight business at a loss, due to apparent competition with trucks, busses and family overland trips. And I seem to notice latterly that "stop, look, and listen" is staging quite a comeback, and is approximating a good deal more its English and railroad meaning. A member of this bar I believe, won a case recently before the Circuit Court of Appeals for the Eighth Circuit (Kutchma vs. A. T. & S. F. Ry. Co. 23 Fed. (2nd) 183) on the proposition that "stop, look, and listen" has a meaning all its own. And the Colorado cases lately do not seem to be quite so willing, ready and able to see that the railroad had the last clear chance to avoid a collision with one in a position of danger who had eyes and ears; but saw and listened not.

We have all of us recently seen some examples of stockholders being considered in corporate reorganizations after the friendly receivership route. Apparently railroad stockholdings potentially may be so widely diffused that even a railroad stockholder is to be given a chance to retain something of his own.

Insurance companies are still good legitimate prey. So that differences in economic status justify a different rule than might be applied to ordinary contracts. The stock of insurance companies is not very widely held. Their loans and investments are widely diffused, but the loans are owned by the company, and even in that they are competing with other businesses of investment. Even a mutual policy holder doesn't

have very much in common with the company's surplus, in a personal way; but only in the "classic sense". Consequently the contract or policy is to be construed most strongly against the insurer. (Jennings vs. Brotherhood etc. 44 Colo. 68; and as to uncertainties, Western Assur. Co. vs. Bronstein 77 Colo. 408. Many other Colo. cases to the same effect.)

Any agent or broker is considered as the agent of the insurer and not of the insured, especially where it is sought to bring home notice to the insurer (general rules of agency here may be somewhat strained). And warranties are not what they used to be. They are representations, now for the most part, and if false are not to avoid the contract unless clearly shown that if the falsehood had been known, the company would not possibly have issued the policy. Short term incontestable clauses, as after one year, should mean incontestable for any cause, as a statute or period of limitation (See notes, 6 A.L.R. 452, and 13 A.L.R. 674). And even fraud which might ordinarily go to the vitiating of most contracts or other relationships sinks in the limbo of the non-contestable. And all very proper. "The business of the insurer is to insure."

So too workmen's compensation may mean a good deal that would surprise you on questions of injury in the course of employment, master and servant and other like matters.

Oil companies may be in a much better case. At one cent a share they have offered so much opportunity for speculative and dreamed of profits, that with some people they have become almost as much of a family necessity as wall paper. And so when recently one company was sued as a trespasser for drilling a dry hole and thereby damaging what might otherwise have had a speculative value the company was excused, even under conditions of some economic disparity. For both plaintiff and defendant may have had the same speculative surplus.

Other suppositions readily come to mind—the discretion of the chancellor in equity cases for specific performance, which is only exercised to maintain so far as possible an even economic balance; economic general prosperity, chain stores, sale on consignment, monopoly and the rules relating to price fixing, and so on, and so on.

Now assuming that there is any basis at all for the conclusions I have been trying to reach—and I don't need to assure you that there isn't—it might appear from the start of the common law down through the ages, that when some new economic force, combination or business system and condition begins to be felt that the person with the economic surplus gets the first break and imposes a rule of law designed to hold his own property—so with entails, restraints, uses, perpetuities, ultra vires as a corporate defense, lack of warranty and the like. Then comes the urge of the dividers and the pendulum reverses itself. And as the industry grows older and more settled, and the law of supply and demand evens up what was once surplus, the pendulum comes back to center, and legal rules come more nearly to logical principles. Consciously and unconsciously judges as well as juries consider economic surplus in deciding cases and making law.

Thus more and more the analysis of the economic status of a client as compared with that of the client of opposing counsel becomes part of a lawyer's task, particularly where new law is involved. In addition, such analysis may be of great service in the pleasant duty of fixing fees.

Although we most of us remember from law school days, a feeling that the number of legal principles is after all very small, yet we have built up a legal system in the practice of law that has become amazingly cumbersome and complex by simply gathering up thousands and increasing thousands of cases together and attempting to attach them to classifications adopted years ago; or even more confusing by making new doctrines that might appear to fit one particular case, without any classification. In spite of the truth that a single case or a number of cases will not prove a principle alone.

Judges, too, exalt cases, and convenient group citation of cases by means of encyclopediae and corpora juris, as though the case were the thing, rather than the principle, and overlook the real consideration of the real spirit of the common law, based upon comprehensive knowledge of the whole social and economic structure—constantly functioning and changing as it is—and illuminated by history and experience and human psychology, which should be our guide if we are to hold fast to that which is good.

In the old days, when judges and lawyers grew up in the simpler social and economic environment it was much easier to evolve rules of human conduct compatible with existing conditions. And the carefully written text-book or a decision based upon logical reasoning was the guide to the legal decision. Now, without that careful study, in the modern spirit of haste, a mass of decisions are piled and cited together in one of the commercial publications. And we let it go at that, a mechanical problem in mass production, without considering new economic facts. And the best, or rather the most conspicuous lawyer tends to be a mere mechanic. No wonder that when a case is finally decided the judge prefers to base his decision on a conflict in the evidence in the court below wherefore it should be affirmed; or by saying something like this: "Plaintiff in error claims that the judgment below should be reversed for three reasons. At least one of those grounds is good. The case will therefore be reversed for a new trial in accordance with this opinion". Or to pick a case at random (and not the most typical of the citation method) look at Model Land & Irrig. Co. vs. Baca Irrig. Ditch Co. 262 Pac. 517, 518, wherein the Court says:

> "The rule of public policy which prevents the running of such statutes against the state, 37C. J. p. 710, Sec. 28, or against the public or a considerable portion of the public, Davidow vs. Griswold 137 Pac. 619, would clearly warrant the court in raising the bar of its own motion and that procedure in a proper case has been upheld 46 Cal. App. 287, 89 Pac. 346."

I quote that without any disrespect, without any view as to whether the authorities cited are right or wrong, pat or irrelevant, and with no bias as to logic in reasoning, but merely to partially illustrate, and not a very good illustration either, a tendency to put a proposition, and base a decision upon some citation contained in Corpus Juris or some case cited therein, rather than from reasoning based on the facts of the case, or the general economic structure. And we all know that in the average encyclopedic work many unrelated subjects are grouped together i.e., leaseholds of dwellings are grouped with leaseholds of railroads; a contract to marry is grouped with

a speculative contract to purchase stocks, and their differences considered as relatively minor. Or again to illustrate: There are two lines of old cases involving the validity of contracts not to compete—often considered in square conflict. But when the facts are examined in accordance with their economic significance, the cases holding the contract invalid are those involving employees' promises not to compete with their employers after the term of employment (according to contemporary guild regulations then in force—if not according to distribution of economic surplus). The cases holding the promises valid, are cases of promises by those selling a business, and promising not to compete with the purchasers: also sound. Still I notice in the late New York Appellate Division case of Ward Baking Co. vs. Tolley Cake Corporation 275 N. Y. Supp. 75, with two justices dissenting the majority of the Court upheld an injunction against a former employee restraining him from competing with his former employer upon a promise made by him not to compete for ten years within one hundred miles of New York City. Unless this may be justified by reason of the change in the economic system caused by national advertising it is contended that this decision is wrong under my previously announced theory, and should be reversed by the Court of Appeals.

Hence it would seem that there may well be evolved a new grouping of legal principles, or a re-classification of present titles under which the subject of law has hitherto been divided, and under which our daily search into the minutiae of the law is conducted. And when, as and if that is done, if a scientific consideration and evaluation of the inter-relation of economic factors and legal principles be made, then the theory of economic surplus may be given its proper place. In such case that great contribution to the administration of justice, and human government, which is the *spirit of the common law,* may replace blind adherence to mass production of mere decisions. Through such a restatement whether by the American Law Institute or otherwise, the problem of the lawyer may be simplified, and dignified beyond that of a mechanic to that of student, thinker, and guide, and his way made clear by the light of modern, seeing and comprehending reason, instead of by unprecedented volume of precedented decision.