# THE SPIRIT OF THE COMMON LAW

BY

ROSCOE POUND

CARTER PROFESSOR OF JURISPRUDENCE IN HARVARD UNIVERSITY

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TO

OMER FENIMORE HERSHEY, Esq.

OF THE BALTIMORE BAR

## *FOREWORD*

THE DARTMOUTH ALUMNI LECTURESHIPS have been established upon the theory that the influence of the intellectual life of the College ought to be available, in some degree at least, to others than those who are in residence as students,—as for example, to graduates who are solicitous for some contact with the College which will help to maintain the breadth of their scholarship; or to friends who are interested in the kinds of intellectual interest for which the College wishes to stand.

The suggestion of the particular form which the project of these lectureships has taken was made in my inaugural address in 1916 when statement was made as follows:

"I am very sure that the contribution of the College to its graduates ought to be continued in some more tangible way than exists at present. The tendency of college men to seek careers outside the professions, the tendencies of the professions themselves to become so highly specialized as to necessitate the complete engrossment of thought of the men who follow them, and the ever increasing demand of the age on all, requiring constantly greater intensity of effort and

more exclusive utilization of time in men who wish to do their respective shares of the world's work, impose a duty upon the college which formerly belonged to it in no such degree, if at all. Contacts with what we broadly classify as the arts and sciences are less and less possible for men of affairs. In many a graduate the interest in or enthusiasm for these which the college arouses is, therefore, altogether likely to languish, or even die, for lack of sustenance. If the College, then, has conviction that its influence is worth seeking at the expense of four vital years in the formative period of life, is it not logically compelled to search for some method of giving access to this influence to its graduates in their subsequent years! The growing practice of retiring men from active work at ages from sixty-five to seventy, and the not infrequent tragedy of the man who has no resources for interesting himself outside the routine of which he has been relieved, make it seem that the College has no less an opportunity to be of service to its men in their old age than in their youth, if only it can establish the procedure by which it can periodically throughout their lives give them opportunity to replenish their intellectual reserves. It is possible that something in the way of courses of lectures by certain recognized leaders of the world's thought, made available

for alumni and friends of the College during a brief period immediately following the Commencement season, would be a step in this direction. Or it may be that some other device would more completely realize the possibilities. It at least seems clear that the formal educational contacts between the College and its graduates should not stop at the end of four years, never in any form to be renewed."

The carrying out of the plan, with such purpose in view, was made possible by the hearty endorsement of Mr. Henry Lynn Moore of the class of 1877—and a Trustee of Dartmouth College—and by his promise of generous financial assistance to establish in this form a memorial, to keep alive the memory of his beloved son, Guernsey Center Moore, of the class of 1904, who died early in his college course.

The completion of the plans for the lectureships was originally set for an earlier time, but the World War interrupted. It was, therefore, not until the summer of 1921 that the experiment was finally undertaken with Professor Roscoe Pound, the brilliant and scholarly Dean of Harvard Law School, and Mr. Ralph Adams Cram, noted architect and original thinker, as lecturers upon this Foundation.

It has, of course, been recognized from the beginning that the extension of the influence of

these lectures would be largely increased by publication, which should make the mental stimulation in them available to wider groups than, under any circumstances, could be expected to be in attendance as auditors during any course. It is, therefore, with much satisfaction that there is presented herewith the lectures of Dean Pound for the consideration, on the one hand, of the considerable group who heard him and have since been desirous of the lectures in printed form as well as, on the other hand, that far greater constituency to whom attendance was not possible to hear the spoken word, but whose interest in the speaker and the subject has been keen. To all of these this book on, "The Spirit of the Common Law" from the hands of Dean Pound will be of major interest.

ERNEST MARTIN HOPKINS

## *PREFACE*

IN 1914 I gave a course at the Lowell Institute upon this same subject, summaries of which, based upon reports of the lectures in the Boston Transcript, were published in the Green Bag (vol. 26, p. 166). Also the first lecture of that course was published in the International Journal of Ethics (vol. 25, p. 1). In 1910 I delivered an address before the Kansas State Bar Association upon the subject of the second lecture, which was published in the proceedings of that Association (Proc., 1910, p. 45) and reprinted in the American Law Review (vol. 45, p. 811). An address on the subject of the third lecture was delivered before the Iowa State Bar Association in 1914 and is published in its proceedings (vol. 20, p. 96). It was also delivered before the Worcester County (Mass.) Bar Association which printed it for private circulation. An address on the subject of the fifth lecture was delivered before the Bar Association of North Carolina in 1920 and published in the proceedings of that year. This address was reprinted in the West Virginia Law Quarterly (vol. 27, p. 1). All these materials have been used freely, but all have been revised and much has been wholly rewritten.

As these lectures speak in large part from the second decade of the present century, they show the faith in the efficacy of effort and belief that the ad-

ministration of justice may be improved by conscious intelligent action which characterized that time. The recrudescence of juristic pessimism in the past three years has not led me to abandon that point of view. At the end of the nineteenth century lawyers thought attempt at conscious improvement was futile. Now many of them think it is dangerous. In the same way the complacent nothing-needs-to-be-done attitude of Blackstone, who in the spirit of the end of a period of growth thought the law little short of a state of perfection, was followed by the timorous juristic pessimism of Lord Eldon who feared that law reform would subvert the constitution. Not a little in the legislative reform movement which followed might have proceeded on more conservative lines if he had been willing to further needed changes instead of obstructing all change. The real danger to administration of justice according to law is in timid resistance to rational improvement and obstinate persistence in legal paths which have become impossible in the heterogeneous, urban, industrial America of today. Such things have been driving us fast to an administrative justice through boards and commissions, with loosely defined powers, unlimited discretion and inadequate judicial restraints, which is at variance with the genius of our legal and political institutions.

Nor were the efforts of the decades of faith in progress as futile as it is fashionable for the moment to think them. Sometimes, as in projects for recall, they displayed more zeal than intelligent understanding of the task. But who would do away with the

Municipal Court of Chicago and the modern city courts which have arisen in its image? Who would wipe out the simplifications of practice which were brought about after 1900 at the instance of bar associations? Who would return to the condition of industrial accident litigation at the end of the nineteenth century, or revive the state of things in which every act of administration encountered an injunction, or restore the attitude of the bench from 1890 to 1910 when, in many state courts, any statute which went upon unfamiliar premises or departed from historical lines was *prima facie* unconstitutional?

When eighteenth-century common-law pleading had become impossible in nineteenth-century America, one of the great lawyers of the time was called upon to serve upon the commission which framed the first code of civil procedure. Had he been willing to put his skill and knowledge to the work of rational improvement, legal procedure in the majority of our states might be far different from what it is, and the conflict between legislative endeavor to reform and judicial refusal to walk in new paths, which has marked the history of "code pleading," might have been averted. Moreover, had the judges of the first half of the century possessed sufficient vision to exercise their common-law powers and had they done even some part of what Chief Justice Doe did in New Hampshire, it is not unlikely that the movement for an elective bench which swept over the country about 1850, putting the courts into politics and seriously impairing the judicial indepen-

dence which is vital in our law, might have proceeded more slowly, have extended to relatively few frontier communities and have spared the higher tribunals. When the lawyer refuses to act intelligently, unintelligent application of the legislative steam-roller by the layman is the alternative.

ROSCOE POUND

HARVARD LAW SCHOOL
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## I

## *THE FEUDAL ELEMENT*

PERHAPS no institution of the modern world shows such vitality and tenacity as our Anglo-American legal tradition which we call the common law. Although it is essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules, it succeeds everywhere in molding rules, whatever their origin, into accord with its principles and in maintaining those principles in the face of formidable attempts to overthrow or to supersede them. In the United States it survives the huge mass of legislation that is placed annually upon our statute books and gives to it form and consistency. Nor is it less effective in competition with law of foreign origin. Louisiana alone of the states carved from the Louisiana purchase preserves the French law. In Texas only a few anomalies in procedure serve to remind us that another system once prevailed in that domain. In California only the institution of community property remains to tell us that the Spanish law once obtained in that jurisdiction. Only historians know that the custom of Paris once governed in Michigan and Wisconsin. And in Louisiana not

only is the criminal law wholly English, but the fundamental common-law institutions, supremacy of law, case law and hearing of causes as a whole in open court, have imposed themselves on a French code and have made great portions of the law Anglo-American in all but name. There are many signs that the common law is imposing itself gradually in like manner upon the French law in Quebec. In everything but terminology it has all but overcome a received Roman law in Scotland. The established Roman-Dutch law in South Africa is slowly giving way before it as the judges more and more reason in a Romanized terminology after the manner of common-law lawyers. In the Philippines and in Porto Rico there are many signs that common-law administration of a Roman code will result in a system Anglo-American in substance if Roman-Spanish in its terms.

Whether it is the innate excellence of our legal system or the innate cocksureness of the people that live under it, so that even as Mr. Podsnap talked to the Frenchman as if he were a deaf child, we assume that our common-law notions are part of the legal order of nature and are unable to understand that any reasonable being can harbor legal conceptions that run counter to them, the Anglo-Saxon refuses to be ruled by any other law. Even more, he succeeds in ruling others thereby. For the strength of the common law is in its treatment of concrete controversies, as the strength of its rival, the modern Roman law, is in its logical development of abstract conceptions. Hence wherever the administration of

justice is mediately or immediately in the hands of common-law judges their habit of applying to the cause in hand the judicial experience of the past rather than attempting to fit the cause into its exact logical pigeonhole in an abstract system gradually undermines the competing body of law and makes for a slow but persistent invasion of the common law.

At but one point has our Anglo-American legal tradition met with defeat in its competition with the rival tradition. The contest of French law, English law and German law, in the framing of the new codes for Japan, was won decisively by the German law. And yet this was not a contest of English with German law. It was a competition between systems of legal rules, not between modes of judicial administration of justice. In a comparison of abstract systems the common law is at its worst. In a test of the actual handling of single controversies it has always prevailed. Nor is this all. The American development of the common-law doctrine of supremacy of law, in our characteristic institution of judicial power over unconstitutional legislation, is commending itself to peoples who have to administer written federal constitutions. In the reports of South American republics we find judicial discussions of constitutional problems fortified with citation of American authorities. In the South African reports we find a court composed of Dutch judges, trained in the Roman-Dutch law, holding a legislative act invalid and citing *Marbury* v. *Madison*—the foundation of American constitutional law—along with the modern civilians.