The Common Law of Wisconsin

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It is to be noted in the first place that it is purposed to discuss the common law of Wisconsin and not the common law in Wisconsin. It is generally asserted and theoretically, no doubt, it is the fact, that Wisconsin is one of the legatees of the common law of England. To discuss a common law which is distinctively that of Wisconsin, not that of England, is the object of this article.

Generally speaking, it is correct to class this state as a common law state. How much of the common law of England we inherited is very doubtful. Thus, the Ordinance of 1787 provided—"The inhabitants of the said territory shall always be entitled to the benefits * * * of judicial proceedings according to the course of the common law." This appears to be the only provision in that Ordinance which refers at all to the common law and it will be admitted that this is a very indefinite and uncertain bequest.

The constitution of our state seems to have emphasized this legacy by providing that—"Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state, until altered or suspended by the Legislature." (Sect. 13, Art. XIV.)

In some states the English statutes enacted before the Declaration of Independence are considered a part of the common law. This is not true of Wisconsin, because when the state was a part of Michigan that state passed a law abrogating all English statutes and this abrogation of the English statutes was adopted for the territory of Wisconsin by its organic act. It is, hence, quite clear that all English statutes are abrogated in this state, some decisions to the contrary notwithstanding. (66 Wis. 376, 377, note.)

To give a definition of the old English common law will not be attempted. No successful attempt at such a definition has as
yet been discovered. It is universally held that the common law of England was an unwritten law and that the moment those principles denominated as common law were enacted into definite statutes, they ceased to be common law and became the written law. Neither do the decisions of the courts of England contain the common law since it has been decided that such decisions are merely the exposition of the common law but not the common law itself. From this it follows that what is generally known as the common law is an intangible, elastic, elusive, comprehensive and, sometimes, evasive system of principles, nowhere definitely enunciated and never authoritatively compiled and catalogued.

Law is nothing more than enlightened public opinion crystallized into a rule of conduct. A rule of conduct, to be of practical value, should be definite and certain and while it is conceivable that such rule may as well be unwritten as written, nevertheless it is extremely doubtful whether any rule of conduct which is not actually defined by legislative enactment is practical and enforcible. In spite of this, it is here contended that there is an unwritten code or rules of conduct, indigenous to this Commonwealth, developed since its creation in 1848, quite well defined, although not subject to an academic definition, as distinct from the common law of England as are the habits and customs of the people of this state distinct from the habits and customs of the people of the British Islands. Merely a faint outline of the common law of Wisconsin will be attempted.

It may be claimed that a distinctive common law of this state is impossible since it seems to have become the Wisconsin idea to make detailed legislative provisions for every kind of communal conduct. Attention may be called to the many acts that direct in detail the conduct of our people in their intercourse with others, such as the Negotiable Instruments Act, the Warehouse Receipts Act, Uniform Sales Act, Uniform Partnership Act, the many police regulation acts and a large number of public health laws. All of these acts, and many others exist, would be of little practical value as rules of conduct were there not a common law of Wisconsin that interprets and administers these economic rules.

Attention has already been called to the Ordinance of 1787 and to the Constitution of the state. It is a significant fact that
in these two great charters of our Commonwealth are found many detailed provisions as to the ownership of land, property rights and the rights of contract, but very little is found in them that directly protects the social, economic and industrial rights of the individual. When the Ordinance and the Constitution were enacted, people were struggling for an existence and were satisfied if a living could be made, shelter secured and protection against the assaults of savages afforded. The questions that confront us now in our social, economic and industrial life are just as important as those that confronted our fathers, but to solve these questions we are constrained to have recourse, to a great extent, to the common law of our state.

What is the common law of Wisconsin? It cannot be bound by the limitations of a definition. It is like human life, the life of the individual. We know life exists in the case of every person born, but what it is has defied definition. All that we know about life is its manifestations and when life becomes extinct, these manifestations cease, but what is it that has disappeared, no one has as yet been able to tell us. This something in our jurisprudence, resembling that which is called life in the individual, is what is here meant by the common law of our state. Perhaps it might be called the public policy of the state, or the spirit in which our laws have been enacted and are being interpreted and administered. It is the spirit back of the mere letter of the law that constitutes the jurisprudent life of our Commonwealth. While indefinable, it surely exists. While not tangible because not written, it nevertheless is as effective and efficient as any written rule of conduct, constitutional or statutory. It pervades our whole system of jurisprudence and is *sui generis*.

A mere academic discussion is generally without any practical value. It is necessary to illustrate a principle to make the principle itself understandable or intelligible. Hence to illustrate what this common law of our state is, a few manifestations, taken from the highest judicial tribunal of our Commonwealth, of this all prevailing spirit of our laws will be given.

1. Wisconsin Justice does not travel with leaden heel. A defendant in a criminal case is not allowed to play his game with loaded dice, cannot juggle with his constitutional rights and privi-
leagues, remain silent when he should speak, cannot secretly store up some technical error not affecting the merits and when the issue has gone against him claim the benefit of such error, and when he "comes into court with his attorney, fully advised of all his rights and furnished with every means of making his defense" is held to waive every constitutional right or privilege for which he does not ask, save only the right of trial by a jury of twelve in a capital case, former decisions of the Court and decisions of the Supreme Court of the U. S. to the contrary notwithstanding. "Mentors (common law precedents) of my brighter days, farewell!"

2. A private attorney, compensated by private parties, cannot assist the district attorney in the trial of a person charged with the commission of a criminal offense. The Statutes make it the duty of the district attorney to prosecute all criminal actions and consequently he is a quasi-judicial officer, entrusted with broad official discretion, thus insuring justice, if the court cannot. This public policy exists in face of the fact that at the time the English common law was engrafted upon our judicial system, the prosecution by private parties was the rule rather than the exception. This public policy is maintained in spite of the fact that under the Statutes the Governor, the Sheriff, and cities may offer rewards for the apprehension of persons charged with felonies and these Statutes have been interpreted to include persons who obtain possession of facts necessary to secure the arrest and conviction of an unknown perpetrator of crime and give them to some person interested, although they do not themselves make the arrest and although the offer called for "arrest and conviction"; (118 Wis. 537); and even trial courts "on conviction of any person in respect to bribery, forgery, counterfeiting, gambling, houses of ill fame, obscene literature, game and fish, in case the whole or any part of the sentence shall be a fine," may award a part of such fine to the person or persons who informed against and prosecuted any such offender to conviction. (Sec. 4632.) Offers of reward, and especially those in the form of a part payment of the fine to informers, have frequently been condemned as inducements to perjury and it would seem that public policy should "forbid that anything should be accomplished by means of an offer of reward which cannot be accomplished by means of a contract."
3. While non-resident alien friends have the right to take, hold, enjoy, and dispose of property, real and personal, and to make contracts with residents and to invoke legal remedies to maintain their rights, yet a non-resident alien creditor may not seize and carry away property of his alien debtor within the jurisdiction of Wisconsin courts when a resident creditor also stands at the bar of the same court with a judgment and provisional lien and thus force such resident creditor to go to a foreign court to collect his debt; and it makes no difference that the home creditor's claim may have accrued after that of the alien—the question is not to be determined by priority in point of time, but by the situation at the time the court is called upon finally to decide which creditor shall receive its aid. By the rules of comity, the courts of Wisconsin will enforce the laws of a friendly state or nation, provided such enforcement will not violate the public policy or laws of the state or injuriously affect the interests of its own citizens.

4. The right to take property by inheritance or by will is a natural right, which cannot be wholly taken away or substantially impaired by the legislature. This natural right is protected by the first section of our Bill of Rights and in the words "pursuit of happiness."

5. The right to make a will is more sacred than the right to make a contract; the latter, as evidenced by the writing, may be judicially reformed or set aside upon equitable grounds, the former cannot and there is no judicial power even to correct a will. There is further the inherent right to have a will, validly executed, carried out according to the intent of the testator and hence all the beneficiaries or persons beneficially interested cannot by any agreement among themselves, even with the approval of the court, in any wise vary the terms of a will from that intended by the testator.

6. If a board of supervisors does not furnish suitable and convenient quarters for a circuit court and threatens to compel the removal of the court to unsuitable and inconvenient quarters, the judge of such court may issue an ex parte injunctural order, without formally instituting an action, restraining such removal by the board, under the inherent power of a constitutional court
of general jurisdiction to protect itself against any action that would unreasonably curtail its powers or materially impair its efficiency.

7. The common law of Wisconsin has clearly, tersely and concisely defined proximate cause "as the efficient cause, that which acts first and produces the injury as a natural or probable result, under such circumstances that he who is responsible for such cause, as a person of ordinary intelligence and prudence, ought reasonably to forsee that a personal injury to another may probably follow from such person's conduct. It is not necessarily the immediate, near or nearest cause, but the one that acts first, whether immediate to the injury or such injury be reached by setting other causes in motion, each in order being started naturally by the one that precedes it, and altogether constituting a complete chain or succession of events so united to each other by a close causal connection as to form a natural whole, reaching from the first or producing cause to the final result."

8. The average high school graduate may need the efficacy of a non-sectarian prayer at commencement and liberty of conscience is not invaded by holding the graduating exercises in a church, especially when such edifice is the most available and convenient auditorium for such occasion. "It is what is done, not the name of the place where it is done, that is significant."

THE COMMON LAW OF WISCONSIN IS SUBJECT TO CHANGE AND MODIFICATION.

9. Since May 31, 1913, "the right to hold and enjoy a public office is of pecuniary value and in a broad sense is a property right," protected by Art. V of the Amendments to U. S. Federal Constitution (uniformly and universally held to constitute limitation upon Federal powers and not to affect State powers) and Section 1, Art. XIV of same Amendments (originally adopted to extend the privileges of citizenship to the negro race and to protect that race in the enjoyment of these privileges, now extended so as to protect the emoluments and pecuniary value of a public office); that in exercising the power of removal for cause, the Governor as an inferior quasi-judicial tribunal whose acts are reviewable under the supervisory control power
of the courts and even where there is no action at law pending to try title to the office, injunction will lie in favor of the good-faith possessor of the office and in such injunction suit the incidental question as to whether such good faith possessor is entitled to the office at all or may not be litigated to a finality. It is true that previous to the date above mentioned it had been uniformly held that the title to a public office could not be tried in an equity action, that an office is not property, nor the right to hold office a vested right, but merely an opportunity to serve the state, but these precedents were all crucified within two years after their last publication.

THE COMMON LAW OF WISCONSIN HAS ITS HUMOROUS AS WELL AS ITS SERIOUS SIDE.

10. Judicial hindsight is better than legislative prevision. A legislature may mis-write its state of mind and the box of Mrs. Pandora Epimotheus may contain the difficulties the court discovers in sustaining a statute where the legislature so mis-wrote its state of mind. These difficulties may be so insurmountable that a court may forbid the attempt of parties to exercise the rights and privileges supposedly granted by such mis-written statutes, although such parties are not litigants before the court.

11. It is the common law of Wisconsin, and has been for over 32 years, that it is the inherent power of a court of last resort to appoint the janitor charged with the care of its rooms and that the power to remove such janitor is possessed by the court and an order of the superintendent of public property purporting to remove the janitor previously appointed by the court is coram non judice, and should such janitor so non-judicially removed be omitted from the pay roll so that his monthly stipend was not paid as "heretofore," or should the legislature neglect to make the requisite appropriations for the pay of such janitor, "the latter will have his remedy by action against the state in the manner prescribed by law." The reason for such inherent power, among other things, "is the relation of trust and confidence existing between the members of the court and the person engaged in the position of a janitor." A "garrulous, leaky or corrupt" janitor would be an abomination.
12. In Wisconsin a dog is no longer allowed “his first bite” and his owner must respond in damages for such first, intermediate or final, bite whether he knows that his dog was vicious or mischievous or not and whether such dog was so afflicted or not.

13. A “plebeian, having aspirations beyond his humble station in life,” may be guilty of a “somewhat morganatic mesalliance,” by violating the provisions of Section 1482, even though “Martha Pietertje Pauline” consent, and if concrete results follow, the owner of Martha, etc., “having a pedigree as long and at least as well authenticated as that of the ordinary scion of effete European nobility who breaks into this land of democracy and equality and offers his title to the highest bidder at the matrimonial bargain counter,” may recover damages from the owner of him who was responsible for “the sinister birth” of the hybrid which was thus disqualified from “becoming a candidate for pink ribbons at county fairs.”

Numerous other examples of the common law of Wisconsin might be given but let these suffice. It is to be distinctly understood, however, that in giving the above illustrations the writer disclaims any intention to express personal commendation or criticism. *Lex sic scripta est.*

Speaking by and large and in the words of our own Supreme Court it is the spirit of our jurisprudence, the common law of the state, to disregard mere form and to look at the merits of every controversy, to face new situations and solve them in the spirit of justice and equity, disregarding, if necessary, precedents, “looking to the evils intended to be remedied, the object intended to be attained, the effects and consequences, the reason and spirit.” (143 Wis. 477).