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Frederick G. McKean Jr.

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A USEFUL MAXIM

FREDERICK G. McKEAN, JR.*

In these days when restatement of the law is urged upon legislatures, and some of these in turn, entrust that work to commissions, it is submitted that the principle, *cessante ratione legis, cessat ipsa lex*, will frequently be found a convenient touchstone in eliminating that which is archaic, and adapting that which is serviceable. The application of this rule of logic would involve the study of the basic reasons and policy of the various laws considered, and here both the student of legal history and the authority in social science would have a wide field for the exercise of their talents. A few illustrations of the working of this maxim, always a rule of logic, and sometimes, it is conceived, a canon of construction, may indicate the wide scope of its application.

Beginning in Colonial days, when the settlers of our Atlantic seaboard brought with them the legal system to which they were accustomed they, in great part, retained only such rules and customs as were adapted to their social conditions and physical environment, and discarded that which was inapplicable. Thus the altruistic presumption of the common law that the services of a physician are honorary and gratuitous¹ was never adopted by them.² The ancient Saxon practice of holding sales in market overt conclusive upon the title to personalty never existed in any of the states.³ And it needs no citation of authority to show that the doctrine of ancient lights was never imported into what is now the United States, for numerous "sky-scrapers" are visible evidence of this. Again, the change of sovereignty effected by the Revolutionary war unquestionably swept away political and other laws which thereby became incompatible; and the same consequence has followed whenever the United States has annexed civilized territory. Where the ratio of public advan-

* Mr. McKean is a member of the District of Columbia bar.

¹ *Veitch v. Russel*, (1842) 3 Q. B. 928.

² *Todd v. Myers*, 40 Cal. 355; *Judah v. M'Namee*, 3 Blackf. 269; *Shelton v. Johnson*, 40 Ia. 84; *McCullen v. Adams*, 19 Pick. 333; *Adams v. Stevens*, 26 Wend. 451, 455; *Prince v. McRae*, 84 N. C. 674; *Vilas v. Downer*, 21 Vt. 419; *Garrey v. Stadler*, 67 Wis. 512, 30 N. W. 787.

³ *Ventress v. Smith*, 10 Pet. 161, 176; *Fawcett v. Osborn*, 32 Ill. 411; *Browning v. Magill* 2 H. & J. 308; *Coombs v. Gordon*, 59 Me. 111; *Dame v. Baldwin*, 8 Mass. 518; *Bryant v. Whitcher*, 52 N. H. 158; *Wheelwright v. Depyster*, 1 Johns. 471; *Roland v. Gundy*, 5 Ohio 202; *Easton v. Worthington*, 5 S. & R. 130; *Griffith v. Fowler*, 18 Vt. 380.

tage and private inconvenience varies from that of a jurisdiction whence a body of law has been derived, public policy may reject a rule of the parent body of law whose basic reason is opposed thereto. Such has been the case in those states which have held that the common law duty to fence in cattle does not apply in a grazing community;⁴ as well as in those jurisdictions which have held that the common law doctrine of riparian rights does not apply to the physical condition of territory differing widely from that of the country of origin.⁵ In like manner it has been held that the English rule that the principle of trade fixtures does not extend to fixtures annexed for agricultural purposes is not applicable.⁶

A large group of cases in which application of the maxim *cessante ratione, cessat ipsa lex*, has reversed rules of decision in sundry jurisdictions, is to be found in the law of status. Pennsylvania, for example, whose old common law rule was that an alien could not take real estate by descent, curtesy or dower;⁷ now holds that the common law rule that an alien cannot be tenant by the curtesy, is at variance with the *spirit* of state legislation permitting aliens to acquire real estate.⁸ Various jurisdictions maintain that statutes giving a wife the property rights of a *feme sole*, relieve the husband from liability for all torts committed by her, in which he has had no part.⁹ (A liability which called forth from Mr. Bumble the piteous lament that the law is "a ass—a idiot . . . a bachelor.") New Jersey, some forty-five years ago, laid down the principle that the disability of a *feme covert* to be a suitor as though a *feme sole*, no longer obtained when a statute gave her the right to bind herself by any personal contract except such as relate to suretyship.¹⁰ Connecticut takes a step further, holding that a wife may enforce a promissory note executed to her by her husband, under a statute replacing unity in the husband of his own and his wife's legal identity,

⁴ *Railway Co. v. Geiger*, 21 Fla. 669; *Wagner v. Bissell*, 3 Ia. 396; *Davis v. Davis*, 70 Tex. 123, 7 S. W. 826.

⁵ *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443; *Reno Smelting &c. Works v. Stevenson*, 20 Nev. 269, 21 P. 317; *Moyer v. Preston*, 6 Wyo. 308, 44 Pac. 845.

⁶ *Davis v. Eastham*, 81 Ky. 116; *Dubois v. Kelly*, 10 Barb. 496; *Van Ness v. Pacard*, 2 Pet. 137.

⁷ *Reese v. Waters*, 4 W. & S. 145.

⁸ *Cooke v. Doron*, 215 Pa. 393, 64 A. 595.

⁹ *Hageman v. Vanderdoes*, 15 Ariz. 312, 138 Pac. 1053; *Schuler v. Henry*, 42 Colo. 367, 94 Pac. 360; *Martin v. Robson*, 65 Ill. 129; *Norris v. Corkill*, 32 Kan. 409, 4 Pac. 862; *Lane v. Bryant*, 106 Ky. 138; *Harris v. Webster*, 58 N. H. 481; *Culmer v. Wilson*, 13 Utah 129, 44 Pac. 833.

¹⁰ *Powers v. Totten*, 42 N. J. L. 442.

and giving equal capacity to own property and equal legal identity.¹¹ In the field of testamentary law the Supreme Court of Mississippi has decided "The reason upon which the rule of the common law; that a will made by a *feme sole* is revoked by her subsequent marriage, is based, is that marriage destroys the ambulatory character of the will and leaves it no longer subject to the wife's control. *Garrett v. Dabney*, 27 Miss. 335. But since our statutes removing the disabilities of coverture . . . enacted prior to the execution of the will here in question, have conferred full testamentary capacity upon married women, the reason for the rule has ceased, and consequently so has the rule itself. '*Cessante ratione legis, cessat ipsa lex.*'"¹²

Were any one to attempt to compile rules of decision based upon considerations of juristic necessity, he would assemble a heterogeneous collection of laws. The variant nature of the subject-matter is readily perceived when one assembles such illustrative principles as: the admissibility of dying declarations in cases of homicide; the implied agency of a destitute wife, who has been turned out of doors, to pledge the credit of her husband for her support; the grant of alimony *pendente lite*, where the wife lacks pecuniary resources; and the doctrine of representation of contingent remaindermen not *in esse*. Perhaps as interesting an illustration of the applicability of the maxim *cessante ratione*, etc., to a rule based upon necessity, as can be found without extended research, may be afforded by the North Carolina case of *Card v. Finch*.¹³ In that case a testator devised land to his widow for life, with remainder to devisees named. In proceedings for the sale of real estate to pay debts, the remaindermen were not made parties. Subsequently an action of ejectment was brought by the remaindermen, whereupon the defendant suggested that the widow, life-tenant, being a party to the original proceedings, those in succession were bound by the original judgment of sale, by the doctrine of representation. The court answered this as follows: "It is true that the courts have uniformly held that where there are contingent limitations or bare possibilities, and all of the persons who may, upon possible contingencies, become entitled are not *in esse* they may be barred by decrees made when the owners of the land are parties. This doctrine has well-defined limitations which exclude its application to the plaintiffs. It originated in necessity—to prevent

¹¹ *Matthewson v. Matthewson*, 79 Conn. 23, 63 A. 285.

¹² *Lee v. Blewett*, 116 Miss. 341, 77 So. 147.

¹³ 142 N. C. 140, 54 S. E. 1009.

titles being encumbered for unreasonable periods and the sacrifice of the interests of one or more generations. It is also sustained upon the ground that a bare possibility is not a vested right. It has never been applied to the divesting of a vested remainder, or in any case where those who would be entitled in remainder are *in esse* and may be brought before the court *in propria persona*. In such cases there is no necessity for resorting to the doctrine of representation. *Cessante ratione legis cessat et ipsa lex.*"

A vast body of law arises from the limitation of rules to the principles upon which the latter are founded. In this way various exceptions have been derived from the rule of evidence forbidding direct questions in direct examination, wherever the reason for the general rule ceases to exist, as in the case of hostile witnesses, questions as to introductory matters and facts not in dispute, and other cases where a possibility of improper suggestion is lacking. Similarly the rule that a general legacy in favor of a child will draw interest from the time of testator's death does not apply to cases of adults.¹⁴ In like manner the rule that one tenant in common cannot maintain trover against his co-tenant, for the reason that both are equally entitled to possession, and the one who has it cannot be guilty of conversion by retaining it, does not apply to such commodities as are readily divisible by tale or measure, such as coins.¹⁵ Likewise the maxim that there shall be no contribution among tort feasons, being based upon the principle that no right of action can be based upon a violation of the law, has no application where a plaintiff has incurred a liability not arising from his personal wrong, as in the case of principal and agent.¹⁶ Again, the rule permitting an insurer to defend on the ground of misrepresentation will not be extended to a case where the insurer's agent with full knowledge of the truth or falsity of an application prepared by him, inserts the misrepresentation complained of.¹⁷ Another illustration of the way in which special rules of law, known as exceptions, spring into existence when conditions arise, to which the reason for the general rule of which they are offshoots becomes inapplicable, is afforded by the decision that where a court has directed an officer holding money in his official capacity, to pay the same, such money becomes liable to attachment proceed-

¹⁴ *Hennion's Executors v. Jacobs*, 27 N. J. Eq. 28.

¹⁵ *Weeks v. Hackett*, 104 Me. 264, 71 Atl. 858.

¹⁶ *Bailey v. Bussing*, 28 Conn. 455; *Churchill v. Holt*, 127 Mass. 165; *Armstrong County v. Clarion County*, 66 Pa. St. 218.

¹⁷ *Follett v. U. S. Mut. Acci. Assn.*, 110 N. C. 377, 14 S. E. 923.

ings, because the reason for the rule that property in the custody of the law cannot be made the subject of attachment or garnishment, viz., that the due and orderly administration of the law is not to be interfered with, does not apply in such a case.¹⁸

While research frequently brings to light the original reason for the adoption of a rule of law, it must be observed that in many instances it comes to pass that the old reason disappears, but as it does so, a new one derived from current conceptions of social, political, economic or other phases of public policy, is found to justify the continued existence of the ancient rule.¹⁹ We should also bear in mind that occasionally a rule is found which is based upon more than one reason, and where this is the case we are cautioned that "if several Reasons concur together, and only one ceases, the others do not immediately expire, or become less able to support the Efficacy of the Law."²⁰

Procedure, "the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer; the machinery as distinguished from the product";²¹ is a means by which tribunals have effected many changes and innovations in substantive law.²² Thus, the entire modern law of contract grew up through the medium of the action of *assumpsit*, originally trespass on the case, and much of the law of quasi-contracts originated through an extension of the action of *assumpsit*; limitations of actions have developed into doctrines of prescriptive rights; and presumptions have ripened into recognized rules of substantive law, e. g.—the presumption that the acts of a servant done about his master's business are done with the master's authority, has become the law of employers' liability.²³ While the liberal statutes of jeofails of modern times, have lessened the relative importance of this branch of law, it is still a subject of especial interest to the practitioner, not only because of his liability to his client for mistake

¹⁸ *Boylan v. Hines*, 62 W. Va. 486, 59 S. E. 503.

¹⁹ Holmes, *The Common Law*, 5, 36.

²⁰ von Pufendorf, *Law of Nature & Nations* (Kennett's translation), v. 12, 10.

²¹ *Poyser v. Minors*, L. R. 7 Q. B. D. 555.

²² Digby, *History of Real Property*, 99 (3d ed.); Holland, *Jurisprudence*, 291 (3d ed.); Holmes, *The Common Law*, 253; Keener, *Quasi-contracts*, 14; Pound, *Interpretation of Legal History*, 131; Salmond, *Jurisprudence*, 579.

²³ Holmes, *The Common Law*, 274; Keener, *Quasi-contracts*, 14; Salmond, *Jurisprudence*, 579; Wald's, *Pollock on Contracts* (Williston's ed.), 154.

therein, but also for the reason that: "Regularity, order, is form in part, but in great part it is substance; it makes up much of the difference between organized society and a state of anarchy . . . there is scarcely anything in which a due degree of order can be neglected without grave dangers."²⁴ On the other hand, it has been laid down that "as all rules of procedure are intended to secure the administration of justice in an orderly manner, it does not seem reasonable that a rule of procedure should be observed when it is apparent that a strict adherence thereto will work injustice."²⁵ We thus see that the solution of questions of practice can be approached from two standpoints, one, that of uniformity, convenience and precision, with possible tendency towards rigidity and red tape; the other, that of flexibility, with a tendency towards laxity and uncertainty. In drawing the line, courts are customarily careful to avoid adherence to the letter that killeth, while mindful of the teachings of experience that hard cases make bad law.

The history of the rule of *profert*, as a doctrine of pleading, is not only an illustration of the maxim *cessante ratione legis cessat et ipsa lex*, but it is also a good illustration of practical adaptation to change of conditions. When trial by jury was an inquest of the neighbors presumed to be most likely to have acquaintance with a disputed matter of fact,²⁶ writings under seal were rare and likely to be of common knowledge in the neighborhood. It was then considered fair that a jury in considering its verdict might take notice of such an instrument of which it had knowledge, even though not offered in evidence at the trial. As such instruments became common, experience taught that this practice gave an unfair advantage, for a party having no knowledge that his opponent intended to rely upon some deed, was prevented from presenting to the jury a release or other matter in discharge of the obligation created by the deed. To remedy this difficulty and prevent surprise the rule of *profert*, as a doctrine of pleading, grew up. In turn it was found that the universal application of this rule would be mischievous, and it was held that where the possession of the deed was unjustly controlled by the opponent, the rule of *profert* did not apply, as the reason, prevention of surprise, did not exist.²⁷ A very practical application

²⁴ *Webster v. Thompson*, 55 Ga. 531.

²⁵ *Ransom v. City of Pierre*, 101 Fed. 665.

²⁶ Holmes, *The Common Law*, 262.

²⁷ *Smith v. Smith*, 35 Pa. Super. Ct. 323, *Loyd's Cases on Civil Procedure*, 648.

of the rule of reason to a question of practice is seen in the case of *Costigan v. Trans. Co.*,²⁸ wherein it was decided that "The reason of the rule which requires objections to be made specific is to advise the trial court and counsel of the exact nature of the objection, so as to enable the former to rule intelligently on the question presented, and to enable the latter to present argument in opposition, or else to avoid the force of the objection by remedying the defect complained of. Where, as in this case, it clearly appears from the record that both court and counsel were fully advised of the exact nature of the objection, and discussed it in all its bearings, the reason of the rule falls away; *cessante ratione cessat lex*. We must therefore conclude that the objection to this evidence is properly before us for review." Another exemplification of the working of the maxim in dealing with a point of practice, is afforded by the case of *People v. Healy*,²⁹ whose treatment of the subject of *quo warranto*, may be abridged as follows: At common law information in *quo warranto* was a prerogative remedy, hence the power to determine whether the suit should be brought was in the legal representatives of the sovereign, but where a substantial interest is now given to a private relator, the reason for the rule having failed the rule itself should fail. Hence the state's attorney is not invested in such a case with arbitrary power to refuse the petition of a private relator to seek leave of the court to file an information in the nature of a *quo warranto* for the enforcement or vindication of an individual and personal right of the relator, as distinguished from that of the public, and *mandamus* will lie to enforce the duty of the state's attorney to sign and file a petition for leave to file an information in the nature of a *quo warranto*.

Fictions have played an extensive part in the creation of law in Anglo-American and Roman jurisprudence.³⁰ Lord Mansfield impliedly makes application of the subject of this paper to legal fictions, when he says in *Morris v. Pugh*.³¹ "Fictions of law hold only in respect of the end and purpose for which they were invented: when they are urged to an intent and purpose not within the reason and policy of the fiction, the other parties may show the truth." A

²⁸ 38 Mo. App. 219, 224.

²⁹ 230 Ill. 280, 82 N. E. 599.

³⁰ Enc. Brit. Article, "Fictions" (Anon.); Gray, *The Nature and Sources of the Law* (2d ed.) 30; Keener, *Quasi-contracts*, c. 3; Maine, *Ancient Law*, c. 2; Pound, *Interpretation of Legal History*, 131.

³¹ 3 Burr. 1243.

corollary to this principle laid down by the great jurist is the maxim that "no fiction shall extend to work an injury." It is submitted that many decisions based upon legal fictions, which have been severely criticised because of their harshness and unfortunate results might have been different, had the doctrine of *Morris v. Pugh* been taken into account. Perhaps the best classification of legal fictions is that of Ihering who divides them into two classes, historic and dogmatic.³² Historic fictions are devices contrived for the purpose of adding new laws to old without changing the form of the old law, or invented in order to effectuate change in the substance of the law under cover of its ancient form. A most striking example of a historic fiction is seen in our Presidential elections where the electors play as passive a part in casting votes, as a Church of England cathedral chapter in its election of a previously selected bishop. Many historic fictions have been resorted to for the purpose of extending jurisdiction. The ingenuity of the courts of King's Bench and Exchequer in usurping jurisdiction of cases pertaining to the court of Common Pleas is probably familiar to all readers of Blackstone's *Commentaries*; the feigned imprisonment and imaginary debt are extreme instances of fictions accounted legal.³³ It is believed that no American court has gone to such lengths for the purpose of extending its jurisdiction. The nearest approach to it, of which the writer is aware, is the doctrine of indisputable citizenship for the purpose of taking jurisdiction of suits against corporations on the ground of diversity of citizenship, which Mr. Justice Shiras frankly conceded "went to the very verge of judicial power."³⁴ Professor Gray has called attention to a court being driven to the paradoxical position that a man is and is not at the same time a citizen of Ohio, by the application of this fiction.³⁵ A fiction of law being an allegation in legal proceedings that does not accord with the actual facts of a case should be traversable for any purpose except that of defeating the end and reason for its invention and adoption.³⁶ If this position be correct, Professor Keener has ample justification for his severe criticisms of decisions in which the historical fiction of implied promise in quasi-contracts (invented to give a remedy by action of *assumpsit*), is still held to

³² Gray, *The Nature and Sources of the Law*, (2d ed.) 30.

³³ 3 Blackstone Com. 43, 45.

³⁴ *St. Louis &c. R. Co., v. James*, 161 U. S. 545, 562.

³⁵ Gray, *The Nature and Sources of the Law*, (2d ed.) 185.

³⁶ *Bank v. Cornell*, 2 N. H. 324.

survive in jurisdictions where forms of action have been abolished.³⁷
Cessante ratione legis cessat et ipsa lex.

Dogmatic fictions have a different function from historic fictions for they are not used to screen new law under the disguise of old form, but are abridged expressions of existing legal doctrines such as, constructive notice; accounting civilly dead one who was banished or had abjured the realm; the entity of a corporation; the legal identity of husband and wife; adoption; and the attributed personality of a ship. A startling extension of the last mentioned fiction appears in the case of *The China*,³⁸ in which the fiction of a ship's intelligence was employed to hold it guilty, where the vessel, while under the exclusive control of a pilot, forced upon the owner and master by local port laws, was negligently handled by the pilot so that a collision ensued. Dogmatic fictions, as we have seen, are utilized because of the convenience afforded by their pithy embodiment of legal doctrines; but it is submitted that they are inapplicable wherever the basic reasons of their underlying principles cease to exist, and that in such a case the principle of convenience yields to considerations of justice. Thus the fiction of adoption is not so literal as to permit the adopter to make an adopted child next of kin to the next of kin of the adopter.³⁹ In like manner the fiction that in law there are no divisions or fractions of a day, and its corollaries, being based upon convenience, will not prevail, where substantial justice requires that the truth be shown. This is illustrated by the case of *United States v. Stoddard*,⁴⁰ where the court refused to apply the doctrine that a statute relates back and becomes effective from the first moment of the day on which it was passed and approved; and held that goods imported and entered for consumption on the day of approval of the Dingley Tariff Act, but prior to such approval, were subject to the provisions of the previous tariff laws.

It is a strange fact that accomplished writers on legal topics have interpreted the maxim, *cessante ratione*, etc., as meaning that a law can become obsolete through non-user—a principle which obtains in Scotch law. Mr. Dwarrior, for example, says in his Fourth Maxim,

³⁷ Keener, *Quasi-contract*, c. 3.

³⁸ 7 Wall. 53.

³⁹ *VanMatre v. Sankey*, 148 Ill. 536, 36 N. E. 628; *Meader v. Archer*, 65 N. H. 214, 23 Atl. 521; *Phillips v. McConica*, 59 Ohio St. 1, 51 N. E. 445; *Helms v. Elliott*, 89 Tenn. 446, 14 S. W. 930.

⁴⁰ 89 Fed. 699, 91 Fed. 1005.

“An act of Parliament cannot alter by reason of time; but the common law may, since *cessante ratione cessat lex*.” A very able and useful modern authority on the interpretation of statutes has fallen into the same error and asserts that the rule does not apply to statutes. It is surmised that this error may have arisen from a passage in Coke upon Littleton which seems, at first blush, to restrict this rule of reason to rules grown up in jurisdiction. It is as follows: “But when an act of parliament or a custome doth alter the reason and cause thereof, thereby the common law itselfe be altered, if the act of parliament and custome be pursued, for *Altera causa et ratione legis, alteratur et lex, et cessante causa seu ratione et lex*. . . .”⁴¹ Professor Austin, in a criticism directed against “most modern Civilians,” has this to say on the subject: “Again: One of their convenient rules of interpretation—*cessante ratione legis, cessat lex ipsa*—applies solely to precedents, and does not apply to statute law. For in statute law, the law is one thing, the reason another; the law, as a command, may continue to exist, although its reason has ceased, and the law consequently ought to be abrogated; but there it is, the solemn and unchanged will of the legislator, which the judge should not set aside, though he may think it desirable that it should be altered. But in the case of judiciary law, if the ground of the decision has fallen away or ceased, the *ratio decidendi* being gone, there is no law.”⁴² Sir William Blackstone, however, uses the maxim as a canon of interpretation in statutory law, asserting emphatically that “the most universal and effective way of discovering the true meaning of a law, where the words are dubious is by considering the *reason* and *spirit* of it; or the cause which moved the legislature to enact it. For when this reason ceases, the law itself ought likewise to cease with it. The learned commentator then illustrates this by citing the case in *aequitate*, sect. 3, of the sick passenger who claimed the benefit of a law forfeiting an abandoned ship and cargo to those who stand by.⁴³ The civilian, Baron von Pufendorf, takes a similar position, saying: “But that which *helps* us most in the Discovery of the true meaning of the Law is the *Reason* of it, or the Cause which moved the Legislature to enact it. This ought not to be confounded with the *Mind* of the Law; for that is nothing but the genuine Meaning of it: for the finding out of

⁴¹ Co. Litt. 3568.

⁴² Austin, *Jurisprudence*, lect. xxxvii.

⁴³ 1 Blackstone Com. 61.

which; we call in the Reason of it to our Assistance. And this is of the greatest force, when it evidently appears that some Reason was the only Motive that the Parties went upon, which is no less frequent in Laws than in Pacts. And here that common Saying takes place, that The Reason ceasing the Law itself ceases."⁴⁴ Conversely in Danish and German jurisprudence, where a case arises within the reason of a statute, but is not covered by it, the courts will intend that the legislature would have included such a case had its attention been called to it, and apply the statute thereto.⁴⁵

The Supreme Court of the United States seemingly acquiesced in the views of Blackstone and von Pufendorf, when it decided in the case of *United States v. Kirby*⁴⁶ that: "All laws should receive a sensible construction. General terms should be so limited in their action as not to lead to injustice, oppression or an absurd consequence. It will always therefore be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, should, in such cases, prevail over its letter." Professor Austin's position, that a judge should not take upon himself to set aside a statute because its reason has ceased, is sound; but it is submitted that this is not what is done when courts depart from a literal compliance with the mandate of a statute, where such compliance would violate the statutory intent and purpose. For instance, when American courts admit dying declarations in homicide cases, they recognize, even if they do not so state, that this exception to the hearsay rule is not abrogated by a constitutional provision which gives the accused, in criminal cases, the right to be "confronted by the witnesses against him" or meet them "face to face," for the reason, prevention of secret or *ex parte* testimony, does not apply thereto.⁴⁷ As Professor Salmond would probably express it, the maxim *cessante ratione* etc., applies to the

⁴⁴ von Pufendorf, *Law of Nature and Nations* (Kenneth's translation), v, 12, 10.

⁴⁵ This principle once obtained in Anglo-American law under the guise of applying "the equity of the statute." A celebrated instance of this was the recognition of estates tail male and estates tail female, under the Statute de Donis, though not within the express words of the act.

⁴⁶ 7 Wall. 482.

⁴⁷ The fundamental right of confrontation embodied in this constitutional principle is probably of great antiquity, for we find the procurator, Porcius Festus, referring to it as a principle of the Roman law of his day (c. 62 A. D.) as follows: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him."—Acts, xxv, 16.

constitutional provision as a rule of restrictive interpretation with the reason of the constitutional clause as a guide.⁴⁸ It could hardly be contended that the courts, when they sustain the admissibility of dying declarations, are "setting aside" constitutional provisions by applying the *ratio legis* to the *litera legis*. On the contrary, "it is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its members."⁴⁹ Often, where a case has been decided to be "not within the meaning" of a legislative act, analysis will show that the state of facts was not within the reason although within the wording of the statute. Frequently, circumstances arise in which the reasons upon which a law rests are outweighed by conflicting reasons which have a dominant force, whereupon the old law, while still good as an abstract principle, ceases to be a dominant factor in the new situation. Thus, in the case of *United States v. McCarthy*,⁵⁰ it was held that the rule exempting witnesses from giving compulsory testimony against themselves, was rendered inapplicable by a statute preventing the use of such testimony against themselves by reason of the maxim "*Cessat ratio, cessat lex.*"

Likewise in *Brown v. Walker*⁵¹ a statute compelling witnesses to give testimony against themselves before the Interstate Commerce Commission, but preventing the use of such testimony against them, was decided to be no violation of the Fifth Amendment. "The maxim, *Cessante ratione, cessat ipsa lex*, is of great importance in construing doubtful, impossible, and unreasonable provisions. But it should not override the express language of a statute."⁵² The caution expressed in the last sentence is a reminder of the difference between the common law and statute law as fields for application of the subject of these notes. The former, as we have seen, is liable to modification or abrogation as well as interpretation by the maxim, while the latter is subject to the maxim only as a canon of interpretation. Where, in dealing with a statute, a court says that the rule itself "fails" or "ceases," the true meaning to be taken is that the law is inapplicable. This is readily perceived by a glance at the illustrative cases of *Troy Mining Co. v. White*⁵³ and *Maskell v.*

⁴⁸ Salmond, *Jurisprudence*, 639.

⁴⁹ *Holy Trinity Church v. U. S.*, 143 U. S. 457.

⁵⁰ 18 Fed. 87.

⁵¹ 161 U. S. 591.

⁵² *Railway v. Williams*, 117 Ga. 414, 43 S. E. 751.

⁵³ 10 S. D. 475.

Alexander.⁵⁴ In the former case, the presence of all the directors of a corporation at a special meeting of which written notice had not been given, as required by a statute, was held to make the want of notice immaterial, the court holding that "the object contemplated being accomplished by the actual presence of all of the members, the reason for the notice prescribed by the statute ceasing, the rule itself should cease." In the latter case, the court said: "We have held that the object of the Bulk Sales Act was to prevent the vendor, usually a retail merchant, from selling his stock of goods, pocketing the proceeds, and leaving his creditors remediless. (*McAvoy v. Jennings*, 44 Wash. 79, 87 Pac. 53; *Kasper v. Spokane Merchants Asso.*, 87 Wash. 447, 151 Pac. 800), and in the latter case that no such result followed where the property was so disposed of as to make it available to the creditors; and hence the reason for the rule failing the rule itself failed."

When we consider the far reaching effects of the maxim of reason, we are almost tempted to apply to it the language of the enthusiast, who said of maxims: "And they be of the same strength and effect in the law as statutes be."⁵⁵

⁵⁴ 100 Wash. 16.

⁵⁵ Doctor and Student, 26.