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A BRIDGE, A TAX REVOLT, AND THE STRUGGLE TO INDUSTRIALIZE: A COMMENT

JOHN V. ORTH*

All knowledge is of itself of some value.
There is nothing so minute or inconsiderable,
that I would not rather know it than not.
—Dr. Johnson¹

The common law did not begin with a statute or a code. It was developed by the judges in their decisions of individual cases. In consequence, the case and the judge are at the center of common law history. For centuries, lawyers found their law in the reports of decided cases, not in statute books or treatises; to a remarkable extent, they still do. Finding the law in cases means disregarding inessential facts and isolating the reason for the decision, the *ratio decidendi*, from remarks made along the way, *obiter dictum*. Great lawyers distinguish themselves by their perspicuity in discerning the rules and applying them, while great judges make their mark by the effectiveness of their decisions and the forcefulness of their expression.

Teaching the law is not the same as finding it. Law could be taught from treatises or from cases. In fact, teaching from treatises seems the more obvious course. The rule is reduced to black letter, while the commentary explains it in more detail, perhaps giving its history and development, applying it in obvious situations and describing limitations and exceptions. Reported cases are to be found in the footnotes. But learning the rules is not the same thing as learning the law. Finding the rules in books prepared by legal scholars does not provide practice in finding the rules in cases.

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1. 1 JAMES BOSWELL, LIFE OF SAMUEL JOHNSON 533 (Rodney Shewan ed., Folio Soc'y 1968) (1791).

Charles Evans Hughes, a great lawyer and judge, had learned the law from textbooks and lectures but felt that the method had “the disadvantage of leaving the students with an illusion as to the extent of their knowledge.”² And reading treatises is dull work. No less a legal intellectual than John Chipman Gray, author of the monumental *Rule Against Perpetuities*,³ confessed that “[t]o keep the attention fastened and every power of the mind awake when reading continuously a book so severely abstract as a treatise on law, is a very difficult task.”⁴ So law students today typically learn their law from casebooks rather than textbooks.

Cases are used to teach the rules, but—what is more important—they are used to teach legal reasoning, especially reasoning by analogy. Professor Gray, a pioneer of the case method of instruction, had only contempt for the mere “case lawyer,” one who has “a great memory for the particular circumstances of cases, but who is unable to extract the underlying principles.”⁵ Nonetheless, he insisted, “[t]he case gives form and substance to legal doctrine, it arrests the attention, it calls forth the reasoning powers, it implants in the memory the principles involved.”⁶ It is easier to associate a principle established by a case with the name of the parties, like *Marbury v. Madison*,⁷ or with a shorthand reference to the facts, like the case of the “hairy hand,”⁸ than with the abstract “A versus B concerning X.” To the lawyer trained in the civil law tradition derived from Roman law, which has over the centuries grown away from cases and toward

2. AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 55 (David J. Danelski & Joseph S. Tulchin eds., 1973). Charles Evans Hughes (1862–1948) was successively Governor of New York (1907–10), Associate Justice of the United States Supreme Court (1910–16), U.S. Secretary of State (1921–25), and Chief Justice of the United States (1930–41). *Id.* at ix.

3. JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* (Roland Gray ed., 4th ed. 1942) (1884). See generally Stephen A. Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. MIAMI L. REV. 439 (1982) (analyzing Gray’s legacy).

4. J.C. Gray, *Cases and Treatises*, 22 AM. L. REV. 756, 764 (1888); see also Letter from J.C. Gray, in Edward J. Phelps, *Methods of Legal Education*, 1 YALE L.J. 159, 159–61 (1892) (explaining the case method and describing its superiority to dogmatic instruction).

5. Gray, *Cases and Treatises*, *supra* note 4, at 762.

6. *Id.* at 764.

7. 5 U.S. (1 Cranch) 137 (1803). See John A. Garraty, *The Case of the Missing Commissions*, in *QUARRELS THAT HAVE SHAPED THE CONSTITUTION* 7, 7–19 (John A. Garraty ed., rev. ed. 1987); Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look like Victory*, in *CONSTITUTIONAL LAW STORIES* 13, 13–31 (Michael C. Dorf ed., 2004).

8. *Hawkins v. McGee*, 146 A. 641 (N.H. 1929); see also JOHN JAY OSBORN, JR., *PAPER CHASE* 6–9 (1971) (describing a Socratic exchange between a Harvard law professor and a student concerning the “hairy hand” case).

theoretical purity, the lawyer in common law systems seems to operate at a “lower level of abstraction.”⁹

Cases impress upon students the reality of the dispute; they supply the context in which the abstract legal issue arose; and they provide the opportunity to explore other aspects of law or practice. A contest over the proper construction of a will, for example, can be the occasion to consider whether better drafting could have prevented the litigation. Although most legal scholarship will necessarily be about legal rules and policies, applied or proposed, a subset of scholarly writing has developed concerning individual judges and cases. Judicial biography recounts the career path of the judge and the development of an individual jurisprudential philosophy, as well as—in some instances—discovering connections between the two.¹⁰ “Case studies” add details omitted in the official reports, often suggesting further avenues for exploration, and occasionally shading the meaning of the decision.¹¹ The principal Article is just such a study, highlighting aspects of a case that are not normally treated in casebooks.

The *Luten Bridge* case¹² is famous for its holding on anticipatory breach and mitigation of damages, but—as usually edited for the casebooks—ignores the question of why Rockingham County, North Carolina, soon after contracting for the bridge, decided to breach its contract. Richman, Weinstock, and Mehta place the case convincingly in the context of the economic and social history of the county, indeed of the State of North Carolina. Economic development—the hope of the “New South”¹³—demanded infrastructure like roads and bridges, but investment in public goods meant a more activist government and higher taxes than in the past.

9. E. ALLAN FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES 73 (3d ed. 1996).

10. See, e.g., Peter G. Fish, *Crossing Judge Parker's Luten Bridge: Partisan Politics, Economic Visions, and Government Reform in Retrospect and Prospect: A Commentary to Professor Richman*, 84 N.C. L. REV. 1913 (2006) (biography of Judge John J. Parker).

11. See, e.g., John V. Orth, *Russell v. Hill (N.C. 1899): Misunderstood Lessons*, 73 N.C. L. REV. 2031 (1995) (examining the context surrounding and legal precedents influencing the Supreme Court of North Carolina's decision in *Russell v. Hill*); see also John V. Orth, Book Review, 102 AM. HIST. REV. 811 (1997) (reviewing A.W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW) (commenting on Simpson's work, an “extended historical study” of nine leading cases); John V. Orth, Book Review, 16 ALBION 440–41 (1984) (reviewing A.W. BRIAN SIMPSON, CANNIBALISM AND THE COMMON LAW) (reviewing a case study of *Regina v. Dudley and Stephens*).

12. *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301 (4th Cir. 1929).

13. See generally HENRY W. GRADY, *THE NEW SOUTH* (1890) (arguing that Southern development after the Civil War depended on Northern investment in industry).

Agrarianism, the social and economic basis of the Old South, got by with limited government and low taxes.¹⁴ As Richman et al. demonstrate, it was the collision between the two societies that led, first, to the contract with the Luten Bridge Company and, later, to its abrupt cancellation.

It was for this reason that Judge John J. Parker thought the significance of the case lay not in deciding the question of damages, but in resolving “‘an important question of county government.’”¹⁵ Approaching the *Luten Bridge* case from this angle, the authors uncover many fascinating details of county history. But if the traditional treatment of the case in law school drains it of local color, this account scants the legal details. Perhaps readers of law reviews are assumed to know them already. Unmentioned, for example, is the fact that the case was brought in federal, not state court, although some earlier legal skirmishing had been before North Carolina judges.¹⁶ The Luten Bridge Company, based in Knoxville, Tennessee, presumably worried about possible prejudice against it in state court and availed itself of the diversity jurisdiction of the federal court, provided since the first Judiciary Act precisely to address such concerns.¹⁷

Although the State of North Carolina, had it been the contracting party, could have asserted immunity from suit in federal court under the Eleventh Amendment,¹⁸ political subdivisions of the state such as counties were not entitled to that defense.¹⁹ Decided in 1929, a decade before *Erie Railroad Co. v. Tompkins*,²⁰ the *Luten Bridge* case was technically governed by federal common law, not by the common law of North Carolina, although Judge Parker, himself a

14. See I'LL TAKE MY STAND: THE SOUTH AND THE AGRARIAN TRADITION 17–22 (1930) (restating traditional Southern commitment to rural life).

15. See Barak D. Richman et al., *A Bridge, a Tax Revolt, and the Struggle To Industrialize: The Story and Legacy of Rockingham County v. Luten Bridge Co.*, 84 N.C. L. REV. 1841, 1844–45 (2006).

16. See *id.* at 1865, 1880.

17. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (1789) (establishing federal circuits).

18. U.S. CONST. amend. XI.

19. See *Lincoln County v. Luning*, 133 U.S. 529, 529 (1890) (holding that the Eleventh Amendment “does not operate to prevent counties in a State from being sued in a Federal Court.”); *N. Ins. Co. of N.Y. v. Chatham County*, 126 S.Ct. 1689, 1693 (2006); see also JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 110–20 (1987) (discussing the special constitutional status of cities and counties).

20. 304 U.S. 64 (1938) (holding that in cases within the jurisdiction of federal courts because of diversity of citizenship the court should apply the law of the state where the controversy arose rather than a general federal common law).

native North Carolinian, was careful to include citations to North Carolina cases.²¹

Research by Richman et al. does not reveal whether Rockingham County readily satisfied the judgment. Collection from a recalcitrant county could sometimes be difficult. In one case in 1870 President Ulysses Grant actually had to threaten an Iowa county with the use of military force!²²

Perhaps encouraging the county's acquiescence in its loss was the restrictive measure of damages applied by the court, the cause of the case's subsequent fame. The principle, as succinctly expressed by Judge Parker, could be stated abstractly:

If A enters into a binding contract to build a house for B, B, of course, has no right to rescind the contract without A's consent. But if, before the house is built, he decides that he does not want it, and notifies A to that effect, A has no right to proceed with the building and thus pile up damages.²³

—in which A stands for the Luten Bridge Company, B for Rockingham County, and a house for the bridge. The reason the principle is not simply taught with that formula is the reason Professor Gray gave so long ago: "The case gives form and substance to legal doctrine, it arrests the attention, it calls forth the reasoning powers, it implants in the memory the principles involved."²⁴ The "Luten Bridge Case" is easier to remember than A v. B. The question is how much more "form and substance" to give the student.

Once the instructor has caught the students' attention, the question necessarily shifts to the legal reasoning of the case. The measure of damages adopted in *Luten Bridge* is not a logical necessity, as Judge Parker expressly acknowledged. In England, the home of the common law, the rule is otherwise.²⁵ For the legal historian, *Luten Bridge* is yet another example of the development of

21. *Novelty Adver. Co. v. Farmers' Mut. Tobacco Warehouse Co.*, 186 N.C. 197, 198, 119 S.E. 196, 198 (1923); *Heiser v. Mears*, 120 N.C. 443, 445, 27 S.E. 117, 118 (1897).

22. See Letter from U.S. Grant to J.A. Dix (June 20, 1870), reprinted in CHARLES FAIRMAN, *A HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88*, PART ONE, at 985 (1971).

23. *Rockingham County v. Luten Bridge Co.*, 35 F.2d 301, 307 (4th Cir. 1929); see also *RESTATEMENT (SECOND) OF CONTRACTS* § 350, illus. 1 (1979) ("A contracts to build a bridge for B for \$100,000. B repudiates the contract shortly after A has begun work on the bridge, telling A that he no longer has need for it. A nevertheless spends an additional \$10,000 in continuing to perform. A's damages for breach of contract do not include the \$10,000.").

24. Gray, *Cases and Treatises*, supra note 4, at 764.

25. See *Frost v. Knight*, 7 L.R. Exch. 111 (1872).

a distinctively American common law. Although North Carolina, like all American states except Louisiana, had accepted the common law of England,²⁶ that law was subject to development not just by the enactment of statutes but also by judicial decisions. "The common law of England," Justice Joseph Story declared in 1829, "is not to be taken in all respects to be that of America."²⁷ And, a few years later, he added that the decisions of courts concerning the common law "are often reexamined, reversed, and qualified by the Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect."²⁸

As a matter of jurisprudence, the *Luten Bridge* case raises the question of the obligation of contracts. If a promisor has an abstract duty to keep the promise, then, perhaps, anticipatory breach should not be countenanced. The promisee should be able to perform and expect the promisor to do the same. It may be that the promisor will repent the hasty announcement of a decision to rescind and actually perform later as promised. If, on the other hand, the duty is more exactly expressed as a duty to keep the promise or pay damages,²⁹ then attention shifts to the measurement of damages once a settled decision to breach is communicated to the promisee.

Other areas of law are also implicated as the rule in *Luten Bridge* is extended beyond traditional contract law. When a lease of real property was viewed strictly as a conveyance, there was no duty to mitigate damages in case of breach. A lessor could respond to a

26. See N.C. GEN. STAT. § 4-1 (2005) ("All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State."). This statute, based on colonial legislation, was reenacted in 1778 and has been continually in force ever since. See *Steelman v. City of New Bern*, 279 N.C. 589, 592, 184 S.E.2d 239, 241 (1971) (stating that statute adopts the common law as it was on July 4, 1776). Louisiana is a mixed civil and common law jurisdiction. See generally LOUISIANA: MICROCOSM OF A MIXED JURISDICTION (Vernon Valentine Palmer ed., 1999).

27. *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829).

28. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1834). For an essay reflecting on the consequences of this view of the common law operating within a system governed by a written constitution, see JOHN V. ORTH, *Can the Common Law Be Unconstitutional? in HOW MANY JUDGES DOES IT TAKE TO MAKE A SUPREME COURT? AND OTHER ESSAYS ON LAW AND THE CONSTITUTION* 53-72 (2006).

29. See O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.").

lessee's abandonment by periodically suing for rent due and unpaid.³⁰ As the lease is progressively reconceptualized as a contract rather than or in addition to a conveyance,³¹ contract principles naturally migrate into property law. A duty to mitigate is now generally recognized, at least in residential leases.³² Anticipatory breach is awkwardly making its way into the law of long-term leases, raising especially complicated questions concerning the calculation of damages.³³

Knowing more about the particularities of the *Luten Bridge* case is certainly interesting. The question is whether these additional facts affect the teaching and learning of the law. Legal educators, at least in the common law system, have long known that some flesh must be added to the bare bones of the alphabet people A and B in order to bring their dispute to life and make memorable the principle invoked in resolving it. What motivated B's peremptory decision not to perform as promised is useful in the classroom only insofar as it makes credible to the students the fact that a promisor may attempt

30. In case of abandonment by the lessee, "the lessor may let the premises lie idle and collect the rent." 1 AMERICAN LAW OF PROPERTY 392 (A. James Casner ed., 1952); see also RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 12.1(3) (1977) ("[I]f the tenant abandons the leased property, the landlord is under no duty to attempt to relet the leased property for the balance of the term of the lease to mitigate the tenant's liability under the lease.").

31. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075 (D.C. Cir. 1970) (stating that "leases of urban dwelling units should be interpreted and construed like any other contract"). See generally John V. Orth, *Contract and the Common Law*, in THE STATE AND FREEDOM OF CONTRACT 44-65 (Harry Scheiber ed. 1999) (describing the substitution of contract for property as the organizing principle of the common law).

32. See ROGER A. CUNNINGHAM ET AL., HORNBOOK ON THE LAW OF PROPERTY 403-04 (1984).

[T]he tenant's abandonment confers upon the landlord three choices: (1) to complete surrender and termination by re-entering for his own account; (2) to do nothing and so to keep the leasehold, and the tenant's duty to pay rent, going; or (3) to re-enter and re-let 'for the tenant's account,' charging to the tenant any difference between his agreed rent and the rent received from the replacement tenant. Such at least is the traditional view. No question exists that the landlord may effect the first option.

Today the question is whether the second option still exists or whether the landlord has only the first and third.

See also Stephanie G. Flynn, *Duty to Mitigate Damages upon a Tenant's Abandonment*, 34 REAL PROP. PROB. & TR. J. 721 (2000) (discussing the role of the duty to mitigate in landlord-tenant law).

33. ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 10:15 (1980). The warranty of merchantability developed in the law of contracts has also been imported into the law of the sale and lease of residential real estate. See John V. Orth, *Sale of Defective Houses: Cicero and the Moral Choice*, 6 GREEN BAG 2D 163, 163-73 (2003).

anticipatory breach. As law school curricula are increasingly crowded with new courses and as the hours allotted to basic courses are increasingly curtailed, there is ever less time for extraneous matter. Knowing the details is certainly of some value. There is no fact I would rather not know than know.