The Day the Common Law Stopped

By Ronald W. Meister

THE common law, as every law student knows, is built up brick by brick, one case at a time, as one open issue after another is closed. This process has been going on for centuries. Almost imperceptibly, the number of open issues has become fewer and fewer. Now, almost without fanfare, the inevitable has happened: the common law is complete.

Taken by surprise

It took most lawyers by surprise. Casual observers knew that almost every conceivable variety of tort already had been committed, almost every contract issue decided. But only the most serious students were aware that the ultimate issue—involving the last obscure question of trespass quaere clausum fregit—was pending in the Calaveras County Superior Court in California. So, on June 15, when Judge Frederick J. Turner issued his historic ruling in *Huck v. Finn*—769 years to the day after the signing of the Magna Carta—lawyers were astounded to learn that the magnificent process begun so long ago on that field at Runnymede had come to an end.

Reactions to the momentous event varied.

In St. Paul, Minn., a small party was held in the offices of West Publishing Co., celebrating the issuance of the last key number.

In the Calaveras County courtroom itself the proceedings were immediately halted. The bailiff handed the gavel that heralded the historic decision to a representative of the Common Law Hall of Fame in Utica, N.Y., where it will be enshrined alongside the scale that fell on Mrs. Palsgraf and the cowbell that hung on the neck of Mrs. Sherwood's beloved Rose 2d.

The organized bar, never caught unprepared, reacted in predictable fashion. The state bar association empaneled a blue-ribbon committee to study the topic "Jurisprudential and Pedagogical Consequences of *Huck v. Finn*: The End of The Adversary System?" The county lawyers' association, always more practical, immediately began a massive letter-writing campaign to the state legislature, urging it to pass as many new laws as possible—any laws—so that statutory causes of action could take up the slack for the loss of common law business. The American Bar Association, in its turn, announced its sponsorship of a new form of professional insurance for lawyers thrown out of work by the lack of issues.

A startling development

Probably the most startling development was the surprise reappearance of New York State Supreme Court Justice Joseph Force Crater, who revealed that he had resolved the disputed issue in 1926, in *Eugene v. Debs*, only to be reversed by the Appellate Division, and had disappeared in protest. "I've been waiting for this day for 58 years," he said, shortly before taking on his new duties as editor of deposition transcripts in *United States v. IBM*, when he promptly disappeared again.

Professional journals also were seriously affected by these developments. Hundreds of law students cite-checking notes on the last common law issue abruptly became unemployed. The American Law Institute, working double shifts, was the first to recover, publishing the *Restatement of the Law (Last)*. Soon the *Stanford Law Review*, in an article that would have broken Dean Prosser's heart, published "The Death of the Citadel." As usual, the final word came from Harvard, where the *Journal of Law and Hasty Pudding*, in the finest tradition of Justice Holmes, dedicated an entire issue to "The Common Law: 30 Generations of Imbecile Decisions Are Enough."

—*Journal*

From ABA Journal, Vol. 71, January 1985. Reprinted by permission.

Illustration by John Hayes