COURTS OF LAST RESORT.[1]

In America courts of last resort occupy a unique position. Our written constitutions distribute the powers of government among three departments: the legislative; the executive, and the judicial. Who shall determine the limits of the jurisdiction of these several departments? This question is not answered in express words in any of our constitutions. It was answered, however, at a very early date by Chief Justice Marshall, speaking for the Supreme Court of the United States in the celebrated case of *Marbury v. Madison.* In that case Marshall held that in deciding a controversy according to law, the judiciary—the court of last resort—was bound to apply the higher law found in the Constitution, rather than an opposing law enacted by the legislative department, and consequently to declare unconstitutional, null and void the conflicting legislative enactment. It followed from this decision and this reasoning that any wrong caused by the legislative department of government exceeding its constitutional limitations could be redressed by the judiciary—by the courts of last resort; and that any wrong committed by the executive department of government in exceeding its constitutional limitations could likewise be redressed by those courts. It also followed from this decision that there was no constitutional means of obtaining redress for a wrong committed by courts of last resort in exceeding their jurisdiction. This decision made the judiciary, as has well been said, the keystone of the arch of government.

Many eminent lawyers denied the correctness of Marshall's opinion. Some eminent lawyers today doubt its correctness. The Constitution, it is said, makes each of the departments of government independent and equal. The decision, it is said, destroyed this equality. It made the judiciary, represented by the court of last resort supreme—the executive and the legislative departments of government subordinate. Whether Marshall's opinion was or was not correct—that is, whether he placed upon the Constitution the construction intended by those who framed it—is a question which it would be idle to discuss, for that construction has been universally accepted. It was a wise construction. It furnished a constitutional tribunal to determine

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every question which might arise. It lessened—perhaps it banished—the danger of disruption of government arising from differences between opposing factions. The principle of this decision was not confined to its application to the national government. It applied with full force to the government of the several States. This has been universally recognized. It may be said, therefore, that as the Supreme Court of the United States is the keystone of the arch of the Federal government, so likewise the court of last resort of each State is the keystone of the arch of the government of that State.

It will be observed that this paramount authority of the judiciary rests upon the proposition that it is the duty of the judiciary to determine controversies according to the law; and the possession of this extraordinary authority has never endangered the rights of a free people, because the only way that it could be exercised was by determining controversies according to law. All our Constitutions, both Federal and State, may then be read as if they contained the provision: Upon the faith that our court of last resort will determine controversies according to law, we, the people, grant it supreme authority. Faith that our courts of last resort will determine controversies according to law is then the rock upon which our governments are built. That courts of last resort must determine controversies according to law is the most elementary of legal principles. This is almost the first principle learned by every lawyer, and this means every judge. Yet it is a principle which should be emphasized and re-emphasized, for it should never be lost to view. It should always be appreciated. It is not always appreciated. I will say nothing derogatory of judges. If there is any one who believes that judges never fail to appreciate this fundamental truth, I am immensely pleased, and I will not attempt to destroy his faith. Certain it is that lawyers do not always appreciate it. If they did, they would not, as they often do, urge considerations calculated to incite feelings of sympathy and prejudice, and thereby hide from the view of the courts the legal questions involved. Nor would they seek to justify such conduct by saying, if I can succeed in convincing the judge of the merits of my client's case, I will take my chances on the law. With this conduct on the part of intelligent lawyers, it should not surprise us that laymen should have obscure views on this question. It should not surprise us that at times they should in scathing terms condemn and

denounce a judge for deciding a controversy in which they are interested in accordance with law and opposed to their ideas of justice. It is impossible to believe that the man who utters such denunciation and condemnation understands the fundamental truth which I have tried to enunciate. It cannot be that he understands that judges are bound by the most sacred oath to decide controversies according to law; that faith that he should so decide them is the most fundamental of constitutional principles; that men cannot be accorded equal rights and privileges unless those rights and privileges are all measured by the common standard—the standard furnished by the law. He who appreciates this truth cannot fail to see that any effort made to induce courts of last resort to disregard the law in deciding controversies is an effort to overthrow constitutional government. I plead not for the execration of the man who makes that effort, but for his enlightenment. He should be made to appreciate the truth. Every citizen should be made to appreciate it. A greater endeavor should therefore be made to teach that truth. It should become a popular truth.

It may be asked, what difference does it make that a judge is denounced for faithfully performing the duty reposed in him by the people? His duty is none the less clear. He has no choice. He must perform it. He must say, as Chief Justice Marshall said in a similar case:

"No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace."

It is none the less a lamentable situation if judges of courts of last resort feel that they cannot decide a controversy according to law without losing the popular favor which alone insures their continuance in office. If such a situation confronts a judge, let us hope that he will conduct himself according to the precepts of Marshall. Every one of us can recall instances of judges who have so conducted themselves, and who have been made martyrs because they did their duty. But the people have no right to subject their judges to any such strain, and if they do, it is to be feared that some of them will not stand the test.

It often happens that the judge who fearlessly performs his duty in disregard of what he believes to be the will of his constituents finds that he has increased instead of diminished his popularity. And I think, too, that it sometimes happens that the judge who shamelessly disregards his duty in compliance with what he believes to be the will of his constituents finds that he has lost instead of increased his popularity. Each of these men believed he was making the supreme sacrifice. One, the sacrifice of his life to preserve his honor; the other the sacrifice of his honor to preserve his life. Happily for the perpetuity of American institutions, each found himself mistaken. By losing his life for the sake of duty, the one found it. By saving his life at the expense of duty, the other lost it. These experiences prove as nothing else can the capacity of the American people for self-government. There is an obligation on the part of the judge to decide controversies according to law. There is an obligation on the part of the people to respect him for the performance of his duty. In general it may be said that the people will keep the faith.

The whole duty of courts of last resort, then, is to decide the controversies brought before them according to law. To decide a controversy according to law, the court must perform two duties: first, it must understand the facts so that the real issue is clearly perceived. Second, it must find, state and apply to the determination of that issue the true rule of law. There is a possibility of the court's making a mistake in performing each of these duties. The consequences are more serious if the mistake is made in the performance of the latter duty, for then not only is an erroneous decision made in the particular case, but a precedent is set which affects the rights and duties of every one in the State. Judging from my limited experience as a member of a court of last resort, the mistake most frequently committed, however, is a failure to understand the case; a misconception of the controlling issue, resulting not, it is true, in unsettling the law, but none the less in an erroneous decision. This consequence is, however, serious enough, for I imagine it would afford little consolation to a defeated suitor to be told that the erroneous decision which denied him his right left the rights of his neighbors unimpaired.

Whenever an erroneous decision pronounced by courts of last resort arises from a failure to understand the case, the office of

the argument of counsel has not been performed, for whatever else that argument should do, it should correctly analyze the facts and clearly point out the controlling issue. I think practicing lawyers would be surprised if they knew how often arguments of counsel fail to perform this important service. I am willing to concede that the reason for this failure is sometimes to be found in the inattention of the judges who constitute the court. It must be confessed that judges sometimes do not understand the argument of counsel simply because they do not give it proper attention. I think, however, that it may be said as a general proposition that the failure of courts of last resort to understand a case is chargeable to the imperfect argument of counsel. In their anxiety to achieve a victory, counsel yield to the temptation of stating the facts from the point of view most favorable to their client's interest. Frequently they undertake to state their case in such a way as to appeal to the supposed sympathy or prejudice of the judges and to blind them to the legal questions involved. More often they bring into prominence immaterial facts which they think disclose equities in their client's favor. They place an undue emphasis upon certain material facts, overlooking other essential facts and thus contend for a decision in their client's favor upon an issue which is not the true issue in controversy. In all such cases—and such cases are altogether too numerous—the court of last resort must, without the aid of counsel, discover the true issue and the principle by which it is to be decided. It is not surprising that the court thus compelled to perform the duty of both judge and counsel should sometimes fail to perform one or the other—perhaps both—of these duties. There might be some justice in holding that counsel who improperly place the court in this dilemma are estopped from making any complaint.

The question arises, what can be done to remedy this grievance? Of course, the most obvious remedy is open to counsel. They should correct their practice. They should state the facts clearly and above all, fairly. Instead of endeavoring, as many of them do, to place a construction upon the facts most favorable to their client's interest, they should do their utmost to construe them as they should be construed by a fair-minded judge. I am aware that many lawyers will say: "I owe a duty to my client to win this controversy; that duty justifies the practice you condemn." This is taking too narrow a view of our profession and

of our professional obligations. We have no right to make the winning of suits the supreme object of our professional career. We should be faithful to every duty we owe our client, but we should never forget that we owe duties to society and to ourselves. These latter duties are paramount. Our client has a right to expect that we will do all that an honest lawyer can to win his controversy. He has, however, no right to ask us to do more. If his suit cannot be won by honest endeavor, it should not be won at all. We have no right to overstate his case, we have no right to mis-state his case, because we have no right to try to deceive the court. Nor is it true that the practice under consideration renders valuable service to our clients. A lawyer is not serving his client by advancing an argument based on a misconception of the testimony; an argument which must crumble with the foundation upon which it rests. In that case he presents no argument for his client. He neglects his client's interests. He injures rather than benefits him. Indeed, I believe it may be said generally that a lawyer renders his client most efficient service when he serves him with an enlightened conscience. I think it may also be said that their lack of fair-mindedness explains why so many lawyers of the greatest ability fail to attain the highest place in our profession.

I think, too, that the judges constituting the court can do something to remedy this evil. If they can prove by their decisions that they are never misled by improper statements, they will do much to discourage it. There is no doubt that they are sometimes misled, and this circumstance affords the only adequate explanation for the fact that some lawyers of high rank persist in a reprehensible practice.

An attentive attitude on the part of judges will do much to encourage lawyers to make fair statements and proper arguments. Lawyers will hesitate to make erroneous statements to watchful, attentive and trustful judges. When a lawyer sees that he is receiving the undivided attention of an intelligent, honest, fair-minded judge, he will endeavor to merit the confidence he is receiving. Such attention, it must be confessed he does not always receive. It must be admitted that judges sometimes do not closely attend to the arguments that are addressed to them. No one can justify this, but there is some excuse for it.

While most of the arguments addressed to a court afford aid in reaching a correct decision, it cannot be said that all of them do. Sometimes those arguments—so-called arguments—are mere aggregation of words, emanating from the mouth of a lawyer determined to use every minute of the time given him by the rules of the court. The judge who can sleep in the daytime is to be envied in such a case. He can escape what his wakeful and more unfortunate associate must endure. It is unnecessary to state that a judge is not attentive to such an argument. If you think he is, you are deceived. That, however, is a matter of little consequence, for nothing could be gained by such attention. The serious consequence is that such experiences are often repeated, almost certain to create a habit of inattention—a habit that may persist when arguments should be listened to attentively. It is not true, as was once said by a waggish friend of mine, that he can always identify a member of a court of last resort by the vacant expression of his countenance. If, however, it were true, the experience I have described explains, if it does not justify it. Of course, we will all agree that the judges should correct their habit of inattention and do their utmost in every way to get a clear conception of the issue in controversy. They then reach the more important duty of declaring the law which controls that issue. They must bring to the discharge of this duty all the highest judicial qualities—integrity, learning, wisdom, courage, industry and above all else, fairmindedness. Their commission from the people authorizes them to declare the law applicable to the decision of the controversy, but it does not authorize them to declare law that is not applicable to that decision. If they do that, they usurp an authority that has never been given them.

The successors of these judges when called upon to decide a controversy in which the supposed principle is applicable possess the undoubted and sole authority to determine its correctness. Moreover, without the aid afforded by the actual controversy, the court lacks one of the necessary elements to a correct determination of the controlling legal principle. For, by its application to an actual controversy, the justice of that principle can be tested. Though this test is not the only one which should be applied, it is one which can never be safely omitted. So it often happens that when judges state a legal principle inapplicable to the case under consideration, they state it incorrectly. It may

be said that this mistake is not irremediable, because such a statement is not a precedent binding on the court; the court having entire liberty to repudiate it upon the ground that it is an *obiter dictum.* But I am persuaded that courts should take greater care than they do to guard against such mistakes. Even though they are subsequently corrected, their commission tends to weaken public confidence in the courts that committed them; and the consequence of such a mistake is sometimes disastrous. The reputation of Chief Justice Taney acquired by a long life of usefulness and fidelity was almost destroyed by his decision in the celebrated Dred Scot case. It is true that the principles of that decision were detested by a majority of Americans and they believed them to be incorrect, but the reputation of this eminent jurist would not have seriously suffered had they not been persuaded that these principles were inapplicable to the controversy under consideration. Faith in him was lost because it was believed—I think erroneously believed—that he took advantage of his position to declare a law which he had no authority to declare.

The question arises, what is this law by which controversies are to be determined? Part of that law is in writing—commands made by the people themselves or by those to whom they have delegated authority to make laws. As to this part, it may be emphatically stated, the law applied by the court is the law made by the people. But this part is a very small part indeed of the law applied by the courts in determining controversies. Nearly all the law so applied is unwritten law. The written law, as has well been said, is only "the fringe upon the body of the law," and after its consideration, we have not answered the question, what is the law by which controversies are determined?

Every lawyer should read and re-read Mr. James C. Carter's excellent book, entitled *Law, Its Origin, Growth and Functions.* That book throws great light on the question, What is the law? and, at least, materially contributes to its correct answer. Whoever reads that book intelligently and diligently, though he may not entirely agree with Mr. Carter, will, I believe, be convinced that the law applied by the court in determining controversies is the same law which regulates human conduct. The ordinary individual in his every day affairs regulates his conduct by the same law which the court applies in determining controversies. The man of affairs in deciding what course he will pursue to advance his own interest and at the same time to avoid injury to

his neighbor, is engaged in the same process that the court is engaged in when it determines a controversy involving a similar question. Each is making a decision according to the law which regulates human conduct. What is the law which regulates human conduct? That is a question which I do not believe the wisest man in the world can correctly answer. That is the question the courts are constantly striving to answer, but which they have not yet answered. While we know some of the principles of this law, we do not know all of them—perhaps we do not know its fundamental principle. We can say, however, that it is the law by which a people advance from the lowest and most degraded savagery to the highest civilization—to a civilization higher and more splendid than today is dreamed of. Who made this law? Certainly the courts did not make it. No one ever consciously made it. "It is," says Mr. Carter, "the form in which human conduct—that is, human life, presents itself under the necessary operation of the causes which govern conduct." It is, I add, in the highest sense, the people's law. Courts of last resort alone possess official authority to declare this law. They possess that authority because the people have given it to them. They declare it, as has heretofore been stated, by applying it in deciding a controversy. This declaration is not the law, but it is considered the highest and best evidence of the law. We call it a precedent. It is considered the best evidence of the law because it is ascertained by the best method human ingenuity has been able to devise. If the law so declared is correctly declared; that is, if it really is a rule which regulates human conduct, the court of last resort has rendered a most beneficent service, for it is of the utmost importance that the people should know the law which regulates their conduct—the law by which they advance toward a higher civilization. As by knowing the law of health, people preserve and prolong their lives, so, by knowing the law which regulates their conduct, they make more certain and speedier progress toward their destined—their glorious—end.

This knowledge will contribute to our material, moral and also, I believe, to our spiritual upliftment.

Heretofore I endeavored to emphasize the truth, that faith that courts will determine controversies according to law is the foundation of American government. I now emphasize a truth far more important. Upon this same faith must rest—in part

at least—our hope of advancing toward a higher civilization—our hope of making material, moral and spiritual progress.

But what if courts do not determine controversies according to law? Suppose that instead of correctly declaring the law, they declare it incorrectly: suppose they make a mistake in declaring the rule which regulates human conduct, and that human conduct instead of being regulated by the rule declared is regulated by an opposing rule? Human conduct will in that case be regulated by its own law and not by the declaration of the court. And this decision must sooner or later—the sooner the better—be repudiated by the courts. Fortunately, the court by declaring an incorrect rule, does not materially retard human progress, because, as already said, our conduct will be regulated by its own law and not by the rule incorrectly declared. By declaring an incorrect rule, the court merely misses an opportunity of advancing human progress. Judges sometimes take themselves too seriously. They fear they will change the law if they incorrectly declare it. Of course, they should take every care to correctly declare it. But if a collision occurs between their declaration and the law, the law does not suffer; they suffer.

If any one can prove that the law declared in a judicial decision is not in harmony with human conduct, he should not keep silent. While it is the duty of every one to uphold the judge who decides a case according to law, it is equally the duty of every one to criticise a decision which is not according to law. But the extent or severity of this criticism does not afford the test of the correctness of the law so declared. That test is afforded not by the voice of the people, but by their conduct. The test is not whether the rule is popular or unpopular, but whether human conduct is in fact regulated by it. If, by acting in accordance with this rule, we advance toward a higher civilization, it is the law. That is the test. If it does not stand this test, it is not the law.

There are two sources from which courts of last resort get the law which controls conduct—the law by which they determine controversies. One of these sources is (to quote from Mr. Carter), "a study of conduct and consequence," and by applying in this study principles of reasoning approved by the common judgment of mankind. This is the source from which individuals get the law by which they determine their conduct. When a judge gets his law from this source, he is said to be deciding a case on

principle, or according to the rule of common sense. The other source from which a court of last resort gets the law is from decisions made by itself or by other courts of last resort. When the law is taken from this source, a court is said to be deciding a case upon precedent. It is unsafe for a judge to neglect either of these sources.

The judge who deduces his law entirely from precedent—who, in other words, is a slave to precedent—is the most inefficient of judges. He will delay the decision of the most unimportant question until he finds a case in point. Having no vision of the fundamental principles of the law, he is almost certain to ridiculously misapply the precedent and thus reach a decision erroneous and often absurd.

On the other hand, the judge who never looks at authorities, who has—as he ofen says—a contempt for precedents, but who possesses a vigorous intelligence and sound understanding and decides all cases according to the rule of common sense, will decide the great majority of them correctly, but some of them, he will decide incorrectly. He will decide the majority of these cases correctly, because they are simple cases controlled by some principle of elementary law. He will decide others incorrectly because they are not simple and because they are controlled by a principle of law which can be discovered only by the aid of great wisdom and extraordinary powers of reasoning.

This wisdom and this power of reasoning were possessed by many of the great judges and used by them in making their decisions. The judge who decides difficult cases without examining these decisions, refuses to look at the light. He refuses to get his law from the best source. By implication, he asserts his superiority to all these great judges who have gone before him. He would be convinced if he studied their decisions that their united wisdom exceeded his.

The truth is that to decide the law with even approximate accuracy, a judge must be neither a slave nor an enemy of precedent. He must be a master of precedent and he must also be a diligent student of human conduct and its consequences, possessing a logical mind, able to reason correctly.

The decisions of courts of last resort must, at least, according to our American notions, be in written form. This is done for the double purpose of insuring accuracy—for writing is a great

aid to exactness—and also that the world may know the rule of law delared and applied. Extraordinary care should be used in the preparation of these opinions. They should contain a statement of the facts essential to a clear understanding of the issue involved. Every other fact should be omitted. They should contain a clear statement of the rule applied to the controversy, and they should contain nothing else.

It is a mistake to attempt to discuss every proposition urged by counsel; if the proposition is manifestly frivolous; if it is based upon an erroneous conception of the record, or if it is answered by elementary principles of law, the opinion is disfigured by its consideration. Its discussion tends to conceal other and possibly important principles decided. Opinions should be appropriate to the case. If there is involved no important principle, no opportunity is presented for a great opinion, and judges make a great mistake if they attempt to write one. My limited experience as a member of a court of last resort, convinces me that the great majority of cases present no important question. Many of them are chancery cases where the controlling issue depends upon the credibility of witnesses. In such cases, I think the court does its full duty when it contents itself with the statement that it gives credit to certain testimony. I think it is a mistake to undertake to state why that credit is given. In many cases the only issue presented is determined by a construction of the record. In those cases all that the opinion can do is to state its proper construction. Many other cases are determined by the application of principles of elementary law about which there is not the slightest question. I doubt if it is wise to publish any of these opinions in the report.

Courts should not be unduly solicitous to write opinions that will be convincing. Arguments designed to convince are often selected from considerations of a temporary and transitory nature. They are out of place in a record designed to be permanent. And though these arguments silence adverse criticism and make the opinion popular, they have little tendency to establish its correctness. Its correctness, as I have heretofore endeavored to prove, is to be tested by its application to human conduct.

Seldom is the judge of a court of last resort given the opportunity to write a great opinion. This is most fortunate. That opportunity may come, however, and if it comes, it comes unheralded. It may be found that in some meager record, poorly

briefed, there is presented for decision an issue which requires the declaration and application of a rule of law never before discovered. It may be in a case which must be decided without precedent; it may be in a case which must be decided in opposition to all precedent. No judge should crave such a task; no judge should shrink from the responsibility of performing it. If it comes, he should pray that he may be equal to his opportunity; that he may contribute to the advancement of humanity by correctly declaring the law.

William L. Carpenter.