



# SECOND THOUGHTS IN THE LAW OF PROPERTY

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WHEN OLIVER WENDELL HOLMES, then a justice of the Massachusetts Supreme Judicial Court, delivered at the dedication of a new law school building at Boston University the address that was later published as “The Path of the Law,” he touched upon – among many other topics – the then burning issue of employer liability for injuries sustained by workers in the course of their employment. “It is conceivable,” he told his audience, “that some day in certain cases we may find ourselves imitating, on a higher plane, the tariff for life and limb which we see in the *Leges Barbarorum*.”<sup>1</sup> The learned reference was to collections of customary law from the Dark Ages, literally the “laws of the barbarians,” that aimed to stamp out private vengeance by imposing on the party responsible a duty to pay the victim or his family a fixed amount, so much for an eye, a hand, a foot, etc.<sup>2</sup> This was Holmes at his most Olympian, marking the re-

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<sup>1</sup> 10 HARV. L. REV. 456, 467 (1897).

<sup>2</sup> The *Leges Barbarorum* were contrasted with the *Leges Romanae*, the laws of the Romans. The earliest Anglo-Saxon legal compilation was the *Laws of Ethelbert*, promulgated about 600 A.D.

semblance between barbaric law and progressive proposals to establish a cost-effective administrative system to compensate workers injured in industrial accidents – so much for an eye, a hand, a foot, etc.<sup>3</sup> It was also Holmes at his most impish, assuring his complacent late-nineteenth-century listeners that if “some day” and “in certain cases” they ever did imitate the *Leges Barbarorum*, it would surely be “on a higher plane”!

The need for legislation to deal with the cost of accidents was created by the associated common law doctrines of assumption of the risk and the fellow servant rule, dating from the early days of industrialization, which insulated employers from liability if the injured worker had assumed the risk of accident in return for compensation or if the proximate cause of the injury was the fault not of

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Ethelbert's laws are remarkable for the extraordinarily detailed schedules of tariffs established for various injuries: so much for the loss of a leg, so much for an eye, so much if the victim was a slave, so much if he was a freeman, so much if he was a priest. The four front teeth were worth six shillings each, the teeth next to them four, the other teeth one; thumbs, thumbnails, forefingers, middle fingers, ring fingers, little fingers, and their respective fingernails were all distinguished, and a separate price, called a bot, was set for each. Similar distinctions were made among ears whose hearing was destroyed, ears cut off, ears pierced, and ears lacerated; among bones laid bare, bones damaged, bones broken, skulls broken, shoulders disabled, chins broken, collar bones broken, arms broken, thighs broken, and ribs broken; and among bruises outside the clothing, bruises under the clothing, and bruises which did not show black.

Harold Berman, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 54 (1983). James C. Carter believed that the *Leges Barbarorum* with their “tariff for life and limb” were only a specific example of a universal response to disorder in primitive societies. *LAW: ITS ORIGIN, GROWTH AND FUNCTION* 41-47 (1907).

<sup>3</sup> See, e.g., The North Carolina Workers' Compensation Act, N.C. Gen. Stat. 97-31 (16) (12) (14) (providing for the loss of an eye compensation equal to “sixty-six and two-thirds percent of the average weekly wages during 120 weeks”; for the loss of a hand, “sixty-six and two-thirds percent of the average weekly wages during 200 weeks”; for the loss of a foot, “sixty-six and two-thirds percent of the average weekly wages during 144 weeks”).

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the employer but of a fellow employee.<sup>4</sup> The rigor of the rules had eroded over the course of the nineteenth century as plaintiffs' lawyers came up with ingenious arguments to allow juries to nullify the rules' effect by finding that employers were really the ones at fault for employing unskilled workers, failing to supply proper equipment, or providing inadequate supervision.<sup>5</sup> As Holmes knew from his experience on the bench at the end of the century, "in such cases the chance of a jury finding for the defendant [employer] is merely a chance, once in a while rather arbitrarily interrupting the regular course of recovery" by the injured worker.<sup>6</sup>

The common law rules, the legal system's first response to a problem that had ballooned in importance as the pace of industrial development quickened and the risk of accidents increased, were in need of repair or replacement. England, the home of the common law and the world's first industrial nation, responded with legislation in 1897, the year Holmes spoke.<sup>7</sup> In America, federalism led to a fragmented and slow-motion response, with the federal government acting in the first decade of the twentieth century to deal with injuries in interstate commerce and the states slowly following suit with statutes dealing with injuries in local industries over the next four decades.<sup>8</sup> Further complicating the process in the United

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<sup>4</sup> Both doctrines can be traced to *Farwell v. Boston & Worcester RR*, 35 Mass. (4 Metc.) 49 (1842). See also, for England, *Priestley v. Fowler*, 3 M. & W. 1, 150 Eng. Rep. 1030 (Exch. 1837). For a poem ridiculing the fellow servant rule, see Edgar Lee Masters, *Butch Weldy* in *THE SPOON RIVER ANTHOLOGY* (1915). See also John V. Orth, *The Law in Spoon River*, 16 LEGAL STUDIES FORUM 301-32 (1992).

<sup>5</sup> See generally Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

<sup>6</sup> 10 HARV. L. REV. at 467.

<sup>7</sup> 60 & 61 Vict. c. 37 (1897). See David G. Hanes, *THE FIRST BRITISH WORKMEN'S COMPENSATION ACT, 1897* (1968).

<sup>8</sup> Act of June 11, 1906, ch. 3073, 34 Stat. 232 (Federal Employers' Liability Act) (FELA) (carriers in interstate commerce liable to employees for injuries caused by defective equipment or negligent supervision), amended by acts of April 22, 1908 (ch. 149, 35 Stat. 65) and April 5, 1910 (ch. 143, 36 Stat. 291). Beginning with New York in 1910, thirty-seven states had passed workmen's compensation statutes by 1917. In 1948 Mississippi became the last state to adopt a workmen's compensa-

States was the need for legislation to run the gauntlet of judicial review, with several early workers' compensation statutes being held unconstitutional.<sup>9</sup>

The pattern of rule and reaction is not limited to the law's response to the problem of liability for industrial accidents. It repeats as the passage of time reveals dissatisfaction with results in other situations, whether because of deeper analysis, accumulated experience, or the force of contrary opinion. No area of the law offers more examples than property law because of its extraordinary longevity. For centuries, while torts and criminal law were underdeveloped and contract law was most noticeable by its absence, property law was elaborated by an intricate interaction of developing caselaw and interfering legislation. One of the first statutes in the English lawbook, *De Donis Conditionalibus* (1285),<sup>10</sup> the root of the fee tail, was enacted to overturn a line of common law decisions. The oldest treatise on English property law was Littleton's *Tenures* from about 1481, greatly elaborated by Sir Edward Coke's commentaries more than a century later,<sup>11</sup> while the first English book on contracts would not appear for more than three hundred

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tion statute. Latterly the name of the statutes has been changed, in the interest of gender-neutrality, to Worker's Compensation Act. *E.g.*, N.C. Sess. Laws 1979, c. 714, § 1.

<sup>9</sup> *Employers' Liability Case*, 207 U.S. 463 (1908) (holding 1906 FELA unconstitutional because it applied to intrastate as well as to interstate carriers); *Employers' Liability Case*, 223 U.S. 1 (1912) (upholding FELA as amended); *Ives v. South Buffalo Railway Co.*, 94 N.E. 431 (N.Y. Ct. App. 1911) (holding N.Y. Workmen's Compensation Act unconstitutional for violation of the due process clauses of state and federal constitutions); *New York Central R.R. v. White*, 243 U.S. 188 (1917) (upholding Act reenacted after amendment of N.Y. Constitution).

<sup>10</sup> 13 Edw. 1, c. 1 (1285). For its background and subsequent history, see John V. Orth, *Does the Fee Tail Exist in North Carolina?*, 23 WAKE FOREST L. REV. 767, 773-78 (1988).

<sup>11</sup> Edward Coke, COMMENTARY UPON LITTLETON (1628). Following the pattern established by the four books of Justinian's *Institutiones*, comprehensive treatments of law were commonly divided into four books or "institutes." *Coke on Littleton* — cited by generations of lawyers as *Co. Litt.* — is also known as the *First Institute*. Coke's *Second*, *Third*, and *Fourth Institutes* were published posthumously in 1641.

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years,<sup>12</sup> and treatises on tort law were delayed more than sixty years after that.<sup>13</sup>

The joint tenancy and its associated right of survivorship, dating from the thirteenth century, functioned as a will substitute in a world before wills. Originally intended to keep estates intact to facilitate the collection of feudal incidents, the joint tenancy was actually used to subvert that purpose by facilitating the development of feoffments to uses, separating the legal title (held by feoffees in joint tenancy) from the equitable title of the beneficiaries. So widespread was this practice that it came to be assumed that grants to two or more were intended to be in joint tenancy, rather than in tenancy in common. Abolition of the feudal incidents eliminated the need to avoid them, but by then the use (or, as it was then coming to be called, the trust) had proved its utility in other ways. The presumption in favor of joint tenancy had outlived its purpose and became instead a trap for the unwary.<sup>14</sup> Without the advice of a skilled conveyancer, grantees could end up with an estate whose operation they did not understand and whose results they did not want – “a manifest injustice,” as the North Carolina General Assembly put it in 1784, “to the families of such as happen to die first.”<sup>15</sup>

The common law’s response was characteristically devious: applying a relaxed presumption in wills as opposed to deeds<sup>16</sup> and, as to the latter, strictly applying the technical requirements of the so-

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<sup>12</sup> John Joseph Powell, *ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS* (1790). See P.S. Atiyah, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 103 (1979).

<sup>13</sup> Francis Hilliard, *THE LAW OF TORTS* (1859). See G. Edward White, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 4 (1985); S.F.C. Milsom, *A NATURAL HISTORY OF THE COMMON LAW* 13 (2003).

<sup>14</sup> See John V. Orth, *Joint Tenancy Law, Plus ça Change ...*, 5 *GREEN BAG* 2D 173-80 (2002).

<sup>15</sup> Act of 1784, ch. 22, § 6, reprinted in 24 *THE STATE RECORDS OF NORTH CAROLINA* 574 (Walter Clark ed. 1904).

<sup>16</sup> See 2 William Blackstone, *COMMENTARIES ON THE LAWS OF ENGLAND* 193 (1766) (“*Bl. Com.*”).

called four unities to avoid the application of the presumption.<sup>17</sup> The final remedy was legislative. States that confronted the issue first, such as North Carolina and Pennsylvania, abolished the right of survivorship as an incident of joint tenancies,<sup>18</sup> while states that dealt with the issue later, such as Illinois and Iowa, discovered a simpler solution: reverse the presumption.<sup>19</sup> The second legislative thought was better than the first. There was no reason not to allow the creation of a joint tenancy with right of survivorship if the parties knew what they were getting into and wanted it. States in the first group eventually caught up, Pennsylvania by a fairly prompt judicial gloss that the statute only applied in the absence of clearly expressed intention to the contrary, North Carolina by an amendment to the statute two centuries later.<sup>20</sup>

Wills law provides some of the best examples of second, third, and more thoughts on the most expedient rule. A creature of statute, not of the common law, the will first became possible with the adoption of the Wills Act of 1540.<sup>21</sup> Indicative of the complex interaction of statute and common law that would follow, experience over more than a century with evidentiary problems led to further legislation. The Statute of Frauds, best known today for its provisions concerning contracts, had a section on wills that required, in quaint fashion, a writing with “three or four credible witnesses,”<sup>22</sup>

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<sup>17</sup> Although really a description of the nature rather than the creation of the joint tenancy, the Doctrine of the Four Unities – that joint tenants must at all times have “one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession,” *id.* at 180 – could function in the hands of an astute judge as a screen to prevent the recognition of unwanted joint tenancies by finding some defect in the unities.

<sup>18</sup> N.C. Gen. Stat. § 41-2; Pa. Stat. Ann. tit. 68, § 110.

<sup>19</sup> 765 ILCS 1005/1; Iowa Code Ann. § 557.15.

<sup>20</sup> *Arnold v. Jack's Executors*, 24 Pa. 57 (1854). See John V. Orth, *The Joint Tenancy Makes a Comeback in North Carolina*, 69 N.C. L. REV. 491 (1991) (describing amendment to N.C. Gen. Stat. § 41-2).

<sup>21</sup> 32 Hen. 8, ch. 1 (1540).

<sup>22</sup> 29 Car. 2, ch. 3, § 5 (1676).

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the germ of the modern written attested will. Applying standard common law rules on witness competency, the courts then proceeded to invalidate wills witnessed by persons benefiting as devisees or legatees in the will. To remedy this, in 1752 parliament in turn adopted the so-called purging statute, widely copied in American states.<sup>23</sup> Drafted on the assumption that the testator's primary intention was that the will be valid, the statute saved it by purging interested witnesses (and their spouses) of their interests. Thus was the will saved, but oftentimes at the expense of invalidating the very gifts that had been its primary purpose. New legislation was required and is today slowly making its way through the state legislatures.<sup>24</sup>

Wills are delayed-action documents, executed one day to be effective later, often much later, when the testator dies.<sup>25</sup> What if the testator's situation changes but the will remains the same? At common law, subsequent marriage and the birth of issue revoked the will.<sup>26</sup> The rationale was that the ordinary testator would want in such circumstances to make new provisions, that failure to do so

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<sup>23</sup> 25 Geo. 2, ch. 6, § 1 (1752). *E.g.*, Mass. Gen. Laws ch. 191, § 2; N.C. Gen. Stat. § 31-10.

<sup>24</sup> *E.g.*, Cal. Prob. Code § 6112 (allowing interested witnesses but raising a rebuttable presumption that their devises were procured by duress, menace, fraud, or undue influence). *See also* Uniform Probate Code § 2-505 (1990) (accepting interested witness as competent).

<sup>25</sup> Wills are said to be "ambulatory," that is, inoperative until the testator's death; in consequence, they are capable of disposing of property acquired after execution. The same characteristic is referred to in the Bible: "For where a testament is, there must also of necessity be the death of the testator. / For a testament is of force after men are dead: otherwise it is of no strength at all while the testator liveth." Heb. 9: 16-17 (*KJV*).

<sup>26</sup> 2 *Bl. Com.* 502. Indeed, the common law went further: any change in testator's circumstances could revoke the devise. For a survey of the cases, see 4 James Kent, *COMMENTARIES ON AMERICAN LAW* 528-31 (12th ed. by Oliver Wendell Holmes, 1873). Lord Mansfield criticized these results and announced his opinion that "constructive revocations, contrary to the intention of the testator, ought not to be indulged; and that some over-strained resolutions of that sort had brought a scandal upon the law." *Swift v. Roberts*, 3 Burr. 1488, 1491, 97 Eng. Rep. 941, 942-43 (K.B. 1764).

was most likely the result of inattention, and that in such cases the results produced by the canons of descent (that is, by intestate succession) would probably be preferable to the unamended will. That went too far for some and legislation was adopted: subsequent marriage alone should be sufficient.<sup>27</sup> But then, why should the law revoke the will at all? Why not provide for an “overlooked” spouse in other ways? So pretermitted spouse statutes were adopted, reserving a share of the estate for the spouse but otherwise leaving the will in effect.<sup>28</sup>

Divorce (like the will itself) was unknown to the common law, so divorce had no necessary effect on wills. But what if a testator died leaving unchanged a will with provision for a now ex-spouse? Again it was difficult to imagine that the ordinary testator intended this result. Legislation ensued, revoking such testamentary dispositions.<sup>29</sup> But what about gifts to the relatives of ex-spouses, such as former in-laws or step-children? And what about provisions in favor of ex-spouses in all those proliferating means to pass property at death, “will substitutes” like revocable trusts, pay-on-death contracts, joint and survivor accounts? More legislation.<sup>30</sup>

What if a will beneficiary dies before the will becomes effective at the death of the testator? Gifts inter vivos or testamentary cannot be given to the dead, so the gift lapses, that is, fails. But is that the correct inference to draw from a testator’s failure to provide a substitutionary gift in the original will or to add a codicil taking account of the change caused by the death? Legislation was adopted to prevent the effect of the lapse of a gift to a named individual but only if the individual was closely related to the testator and died leaving issue.<sup>31</sup> In the case of a gift to a class, such as a gift to “grandchild-

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<sup>27</sup> *E.g.*, Conn. Gen. Stat. § 45a-257.

<sup>28</sup> *E.g.*, Fla. Stat. § 732.301. *See also* Uniform Probate Code § 2-301 (1990, as amended 1993).

<sup>29</sup> *E.g.*, N.C. Gen. Stat. § 31-5.4.

<sup>30</sup> *See* Uniform Probate Code § 2-804 (1990, as amended 1997) (revoking gifts by will or will substitute to relatives of ex-spouse as well as to ex-spouse).

<sup>31</sup> *E.g.*, Tex. Probate Code Ann. § 68.



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dren,” the common law had provided a sort of anti-lapse protection by providing for distribution among any surviving class members. As the number of class members got smaller, the potential share of each got bigger until final distribution at the testator’s death. Was this what the testator likely intended? Or should the anti-lapse statute be amended to apply in the case of class gifts as well? More legislation.<sup>32</sup>

The list could be extended with examples of other attempts involving repeated legislative efforts to effectuate presumed intent in cases in which a testator failed to make express provision – statutes concerning pretermitted children,<sup>33</sup> ademption by extinction,<sup>34</sup> ademption by satisfaction<sup>35</sup> – although not all gaps are filled. And in some cases deliberately so; that is, in some cases the testator’s actual intention is known, not merely presumed, but crossed nonetheless. The right of survivorship associated with the joint tenancy can be severed by inter vivos conveyance of an undivided share, but not by provision in a will, no matter how plainly expressed. As one respected casebook puts it:

A large number of joint tenants select the tenancy precisely because of the high degree of assurance that there will be no entanglement with probate. To continue this assurance, the right of testamentary disposition must be denied, and the

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<sup>32</sup> *E.g.*, 2001 N.C. Sess. Laws 83 (adding to N.C. Gen. Stat. § 31-42(a) “In the case of the class devise, the issue shall take whatever share the deceased devisee would have taken had the devisee survived the testator” the words “in the event the deceased class member leaves no issue, the devisee’s share shall devolve upon the members of the class who survived the testator and the issue of any deceased members taking by substitution”).

<sup>33</sup> *E.g.*, Fla. Stat. § 732.302; N.C. Gen. Stat. § 31-5.5. *See* Uniform Probate Code § 2-302 (1990, as amended 1993). Like pretermitted spouses, pretermitted children are those born after the execution of a will and left unprovided for.

<sup>34</sup> *E.g.*, Uniform Probate Code § 2-606 (1990, as amended 1997). Ademption refers to those situations in which the subject of a specific gift indicated in a will is absent from the estate at testator’s death, either because it was parted with inter vivos (ademption by extinction) or because it was given during life to the intended donee (ademption by satisfaction).

<sup>35</sup> *E.g.*, N.C. Gen. Stat. § 29-24.

few attempts by ignorant testators to devise their part of joint tenancy property must fail.<sup>36</sup>

The juridical conscience is salved by the thought that such attempts are “few” and the disappointed testators “ignorant,” so the frustration of clearly expressed intention is not so barbaric after all.

What should be the result if a married person deliberately excludes a spouse from the provisions of a will? The common law’s solution to the problem of providing for the surviving spouse (whether there was a will or not) was dower for the widow and curtesy for the widower. Dower was a life estate in one-third of all estates of freehold of which the husband was seized during the marriage,<sup>37</sup> while curtesy was a life estate in all the estates of freehold of which the wife was seized during the marriage, but only on condition that live issue had been produced.<sup>38</sup> For obvious reasons neither estate was convenient except in situations of large and stable land-ownership, the common law’s presumed original position. Even then, both were routinely avoided by private arrangements in the form of strict settlements.

In modern times curtesy was eliminated and dower extended to both sexes, but this eventually proved unsatisfactory. At last, even the old name was erased, replaced by a statutory elective share, granting the surviving spouse the right to demand a portion of the decedent’s estate. At first applicable only to property passing by will, the elective share has been progressively but unevenly extended to property passing outside the will by various will substitutes. Constantly tinkered with by further legislation in an effort to afford more perfect equity and now exhibiting a bewildering array of forms in various states, the modern elective share defies generalization – so much so that one widely used casebook posts a prominent warning: “*Caution.* There is no subject in this book on which there is more statutory variation than the surviving spouse’s elective

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<sup>36</sup> Jesse Dukeminier et al., *WILLS, TRUSTS, & ESTATES* 345 (7th ed. 2005).

<sup>37</sup> 2 *Bl. Com.* 129.

<sup>38</sup> *Id.* at 126. For an historical explanation of why curtesy was greater than dower, see S.F.C. Milsom, *A NATURAL HISTORY OF THE COMMON LAW* 60-61 (2003).

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share.”<sup>39</sup> The operation of federal tax law has actually prompted a revival of life interests for surviving spouses, usually widows, in the form of “qualified terminal interest property,” QTIP for short, leading one scholar to describe it as “the new federal law of dower”<sup>40</sup> – a return, if not to the laws of the barbarians, at least to the laws of the Middle Ages.

And what should be the result if a person named in a will murders the testator? It is difficult to imagine a testator intending the gift under such circumstances. And public policy seems to demand that the wrongdoer be deprived of the benefit. “No one should profit from his own wrong.”<sup>41</sup> But can this untoward result be prevented by common law, or is legislation required? Experience with the so-called slayer statutes has revealed a host of problems. What is to be done with the gift to the murderer? What if the crime was manslaughter rather than homicide? What if no prosecution is possible because the murder was immediately followed by the suicide of the murderer? – in which case no earthly profit is at issue. What of so-called “mercy killings” in which the “victim” requests death at the hands of a loved one in order to shorten a lingering and painful death? And what about will substitutes benefiting the murderer? Particular problems arise with the application of the slayer statutes to joint tenancies with right of survivorship since the theory of the joint tenancy, which long predated the Wills Act, does not concep-

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<sup>39</sup> Dukeminier et al., *WILLS, TRUSTS, & ESTATES* at 425.

<sup>40</sup> Mary M. Wenig, *Taxing Marriage*, 6 *S. CAL. REV. L. & WOMEN'S STUD.* 561 (1997).

<sup>41</sup> Cal. Civ. Code § 3517 (“No one can take advantage of his own wrong.”); N.C. Gen. Stat. § 31A-15 (“no person shall be allowed to profit by his own wrong.”). See also the celebrated common law case of *Riggs v. Palmer*, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889) (“No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.”); Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* 23 (1978) (discussing *Riggs*).

tualize the effect of the death of one joint tenant as passing any interest to the survivor. More and still more legislation.<sup>42</sup>

Second and subsequent thoughts are not unique to the legislature. The judiciary too regularly rethinks the law, although it is somewhat harder to observe. Part of the problem is the slippery nature of the common law itself. Although it originated in England centuries ago, the common law is domesticated in America. “The common law of England,” Justice Joseph Story declared on behalf of the United States Supreme Court in 1829, “is not to be taken in all respects to be that of America.”<sup>43</sup> 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.”<sup>44</sup>

Early in the twentieth century, in an apparent attempt to stabilize the common law and perhaps insulate it from further legislative meddling, the legal establishment commenced the project that resulted in the monumental Restatements of the Law. Although the project seemed to call only for the reduction to black letter of the basic common law rules, the Restaters did not confine themselves to stating (or “restating”) whatever rule was applied by the majority of courts but chose instead the rule they judged best. The adoption of minority rules made the Restatements a vehicle for legal innovation,<sup>45</sup> and the Restaters became, like poets, “unacknowledged legis-

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<sup>42</sup> *E.g.*, 84 Okla. Stat. Supp. 1975 § 231 (effective June 12, 1975) (amending slayer statute to prohibit slayer from “receiv[ing] any interest in the estate of the victim . . . , or as a surviving joint tenant”).

<sup>43</sup> *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829).

<sup>44</sup> *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* ch. 3 (2006).

<sup>45</sup> See David Thomas, *Anglo-American Land Law: Diverging Developments from a Shared History – Part III: British and American Real Property Law and Practice – A Contemporary Comparison*, 34 *REAL PROPERTY, PROBATE & TRUST J.* 443, 479 (1999).

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lators.”<sup>46</sup> Having themselves had second thoughts about some settled doctrines, the first Restaters unintentionally invited still further thoughts.<sup>47</sup> The result has been Second and even Third Restatements, as later generations of Restaters think yet again.



Shortly after Holmes delivered his oration at Boston University, the eminent lawyer James C. Carter prepared lectures for delivery at the Harvard Law School, the culmination of his lifelong campaign against legislative codification of the common law. Concluding his survey of law’s “origin, growth, and function,” Carter complacently announced:

We now come to the last stage in our inquiry concerning what has actually governed the conduct of men in society. This is the stage of full enlightenment, such as is exhibited in Europe and the United States at the present day . . . .<sup>48</sup>

This fatuous statement is simply an unguarded expression of a sentiment that is (and always has been) current in some circles, mainly academic: the belief that after their second or third or more thought the final thought would have been thought.

The point, of course, is not that our law should become like that of the Medes and the Persians, which, if the Bible is to be taken literally, “changeth not.”<sup>49</sup> There is no reason not to think again and

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<sup>46</sup> See Percy Bysshe Shelley, *A DEFENSE OF POETRY* (1821) (“Poets are the unacknowledged legislators of the world.”).

<sup>47</sup> See Grant Gilmore, *THE DEATH OF CONTRACT* 67 (1974) (asking “Why should there be a second series of Restatements?”).

<sup>48</sup> James C. Carter, *LAW: ITS ORIGIN, GROWTH AND FUNCTION* 66 (1907). For repeated references to “the present enlightened age,” see *id.* at 115, 119. Intended for delivery in early 1905, the lectures were never actually delivered because of Carter’s untimely death. For Carter’s place in American legal history, see Bernard Schwartz, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* 337-46 (“James C. Carter: Written Law – ‘Victorious upon Paper and Powerless Elsewhere’”); 353-63 (“Legal Thought in Action: Carter versus Field”) (1993).

<sup>49</sup> Esther 1:19 (*KJV*).

again about improving the existing rules, while at the same time recognizing the value of stability. What really deserves a second thought is the notion that at the next meeting (or perhaps the one after that) of the particular drafting committee, whether of state legislators or of academic experts, the last stage of “full enlightenment” will have been reached.

What history teaches is not some simple and simply applied rule for future behavior, nor is it only the clichéd notion that “everything changes,” or, as Carter would have put it, “progresses.” Instead, by showing with specificity how things have changed – how often, how incompletely, how ultimately unsatisfactorily they have changed – history informs our thoughts about future change and leads us to abandon the pursuit of the ignis fatuus of full enlightenment. Something Holmes said earlier about consistency in the law is also true of the quest for legal perfection:

The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.<sup>50</sup>

What deserves another thought, in other words, is the thought that our last thought is the last possible thought. Holmes knew better.



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<sup>50</sup> Oliver Wendell Holmes, *THE COMMON LAW* 32 (1881).