

LECTURE #3 – THE COMMON LAW SYSTEM

One of the principles that is unique to the American legal system –actually not just the American legal system, but the Anglo-American legal system, is the method of finding rules and principles of law based on prior court cases or “Precedents”, which is a synonym. We call it the “common law system”. It is used not only in the US, but in England, Canada, Australia, India, all use the Anglo-American Common Law System, which reasons from case to case. We find our legal rules not in codes, not in treatises, not written by scholars, but in the written opinions in decided court cases of Appellate judges. This was the system used in England when America was founded in 1789. It’s the system used in Australia today and the system used in Canada. So many major nations, all of them English speaking nations, use the Anglo-American common law system.

America received the common law and it’s actually referred to in the US Constitution of 1789 (Reading #5) that all cases of common law shall be entitled to trial by jury. There are 2 senses of the common law – one is the law that is common to all of England and was used in England up to 1789 and that is the law that was received into America. From that point on America applied it to the unique and different circumstances of America. But up until then the common law was the common law of England, then it became the common law of America and that’s what we might think of in one sense the common law is today – the common law in the US, common to all Americans and our circumstances in America.. But, when we talk about The Common Law System we are talking about a second sense of it. We’re talking about the Anglo-American system of precedents – the system of looking and finding legal rules by looking to a prior case that is the same or similar and deciding it the same way. That was the method – the system – that was used in England when the colonists formed the US, when the Constitution was adopted, even though America had just broken with England, had a bloody Revolutionary War with England, they adopted the legal system of England at the time.

What is this mysterious system (that the French call “superstition du cas”)? Many people think it’s a requirement that a judge in a case today must decide exactly the way a judge decided the same or similar case yesterday or 2 years ago or 10 years ago. It’s not quite that – the judge today must go and look at what was the ruling in the case 10 years ago or 5years ago or 2 years ago and the closer the facts of the case today are to the facts of the case yesterday, the more that judge is bound to decide by it - not as a matter of requirement, because the US has never done what England did in the 19th century which was to require the judges to decide same cases exactly the same. The US has never done that. The US Supreme Court will come right out and say, “We are not going to follow this precedent”. They have abandoned precedents - they abandoned the precedent that equal schools for black people and equal schools for white people satisfied the US Constitution’s doctrine of equal protection of the law. For 100 years the Supreme

Court judges and cases had said that having separate schools for blacks and separate schools for whites gave the white people and the black people all equal protection of the law and was legal. The US Supreme Court in 1954 did an about-face and said "That is not a valid precedent – the case that the US Supreme Court decided in 1884. We are going to reverse that case" and in 1954 they rejected that precedent and established the precedent that black people must be allowed to go to the same schools as white people. So the US has never been as doctrinaire and insistent as courts in some common law countries have been about the doctrine of precedents and being bound to prior cases. But that is what the doctrine of precedents means. It is called stare decisis – which is Latin for to stand decided. In other words if a principle of law is decided, it is decided and that's the precedent and you are bound to it and all courts below the court that decided it are bound to the court above it that decided that principle of law and the court itself is bound to follow its prior precedent and previous decisions on the same case. It's really a common sense position of consistency and logic. It gives respect to judges for deciding cases the same as other judges, it gives predictability to lawyers and especially to business people so they can predict what is going to happen in a similar case that comes along.

To give you an example of how it compares to the civil law system, let's take a case where a person buys a piece of real estate – a house or apt building. He can't see below the ground when he buys it and he pays a certain amount of money for it; let's say \$100,000 (it could be \$1 million). After the buyer has what we call the closing, and purchases the property and moves into it, he discovers a hidden defect that the foundation in the ground beneath the earth is rotten and he also finds a second thing – that there are termites in the wood that are eating the roof away. So he comes back and says "I want my money back or I want you to pay me for a new foundation and to remove the termites". A civil law lawyer might work with a general code section which says all acts against good morals are invalid and he might be able to work with that and reason that therefore here is an act that is invalid - a seller who has hidden certain defects in the property and has benefited and profited money-wise, financially, because he sold defective property to a buyer. It is an act against good morals, "contra bonos mores". But a common law lawyer does not feel comfortable working with something like a general code principle or general statutory principle or a general principle such as this. A common law lawyer will immediately go to prior cases and try to find a case that has already been decided where a buyer of a house or building had a foundation that was rotting away, a roof that was eaten by termites, and he wants to see what the judge in that case did. And if he finds that the judge was in his favor he will use it as legal authority for his case and the judge who decides the present case will use that prior case as legal authority for his or her decision. Again, if it's a precedent from an appellate court above that court in the hierarchy of courts in that jurisdiction where the court is sitting and the case is pending, it becomes very binding and very persuasive. Whether or not it's binding is the key question. The way lawyers argue in the common law system is that lawyer #1 for the buyer in this case will say, "Your Honor, Judge, I found another court case, a

precedent involving a case where there was a defective foundation and the judge found that the buyer should not have to pay for the defective foundation because it was undiscoverable – it was a rotten foundation which could not have been discovered in advance of the closing.” The lawyer on the other side for the seller will say “No, Judge, that case was distinguishable; the facts were different in that case. In that case the buyer did not have any time or ability to inspect the property. He did not have an engineer go in and inspect it, but in this present case the contract called for the buyer to use an engineer to go in and inspect the property and if he had inspected this property he would’ve found that the foundation was defective and if he would’ve inspected the roof he would’ve found that there were termites in the wood, so the precedent that is relied upon by the buyer’s lawyer is not applicable here, it is distinguishable and therefore should not apply.” And that’s how lawyers in the common law system dispute, they go back and forth over whether the facts of the case at issue are the same or different from the precedent being looked at and relied on. The buyer’s lawyer would say, “Judge, it is inapplicable because he’s referring to facts and distinctions with no difference” and they go back and forth or he’ll find another case that is similar and they’ll try to establish that the weight of precedents is in favor of one side or the other.

You’ll see the words “holding” and “dictum” in my outline. What those mean are the difference between what the actual rule of the prior court case, the precedent, was - that is the holding and what is the dictum – the window dressing, the unimportant words added for discussion but not essential to the case. Because the prior court case may have been a case involving a single family house – today we’re involved with a court case involving a building. so, one lawyer will say, “Judge the holding of the case I rely on as precedent is that whenever a foundation in a piece of real estate is defective and cannot be discovered, the buyer should be able to have the seller pay for the replacement or correction of that foundation or receive a credit for the difference in the value of the 2 properties”. Whereas the other lawyer will say that is only dictum because in fact that case must be limited to its holding on its facts. The holding is limited to the facts of the case. So if the prior case involved only a house then the other lawyer will say that the holding of that case is where a house is defective the homebuyer is entitled to a credit for the value of the defective foundation – whereas in this case we are dealing with a building, an apt or office building – that is a much different case because in an office building we have sophisticated companies who know to look for rotted foundations as opposed to consumer homebuyers who are looking to buy their houses as homes and they do not have the ability or the knowledge to hire engineers and to look for ways to correct them.

So the common law system is based on precedent and that means that a principle of law decided in a previous case is binding on that court and in all courts below it, but the principle of law that is binding is only the holding – only the holding is binding on the court below, and not the dictum. The dictum may be all the flowery words the judge uses about acts against good morals and hidden defects

and attempts to keep the engineer from seeing the defective foundation. I actually was a lawyer for buyers in a case where the sellers had a defective leaking pipe in a bathroom and every time the buyers would come to look at the house there would be someone in the bathroom and the door would be locked so they never had the ability to go into the bathroom. After they purchased the house and moved in they discovered there was a pipe that was broken in the bathroom floor under the tile and it was bubbling up with water. So this is a classic example of a defect that was actually hidden by the seller and you would certainly find that the general principle of buyers not being responsible for hidden defects ought to apply. There the seller agreed to pay for correction, but only after the buyers filed a court case.

So in arguing what the law is to a judge an attorney for an injured Plaintiff will argue and say, “Your Honor, in the case of McPherson vs. Buick the court allowed product liability injuries in a suit and judgment against a manufacturer by an injured third party who was an automobile driver.” The Defendant for the motor company will say to the judge, “That case is different and therefore not binding and judgment was only allowed there because the facts were that the Plaintiff, driver, was wearing a seat belt and in this case here the Plaintiff was not wearing a seat belt. The lawyer for the Plaintiff will come back and say, “Yes, it may be a distinction, but it is a distinction with no difference.” And back and forth the argument will go, but that’s what it means to be part of the common law system of precedent and that’s what the system is.

It’s a system that’s important because it influences everything we do in the law in the US. We have a code for contracts, business and commerce which gives much more certainty and predictability to commercial law. In business law it’s very important because businessmen want to be able to predict what is going to happen when business transactions are equal and when they sell things and buy things. So we have a Uniform Commercial Code that is very important in the US. It has been adopted as the same code in every one of 50 states – it’s very very important and very unusual.(HOLD UP COPY) And yet a common law lawyer like myself or any common law lawyer in America does not want to just read one of the sections in this Code. He does not feel comfortable arguing a code provision unless he sees how it has been interpreted in the past by judges; how did the judge interpret this? What do the judicial decisions and opinions say about this decision / what precedents exist? So the Uniform Commercial Code annotated with court precedents is what a lawyer wants to see. The same is true of the US Constitution, nice short and simple – I’ve printed it out and it’s available on my web site (Reading #5) and you can print it out on the computer –again, how does a lawyer know what the Constitution means when it requires due process? No state may deprive a person of life, liberty, or property except through due process of law. Again, a very general statement. A common law lawyer does not feel comfortable with just that statement. He wants to know how the courts interpreted that and so he will look at the US Constitution, Annotated, we call it, with prior decisions and endless judges’ interpretations of the 5th Amendment and 14th

Amendment for due process, and of any provision of the US Constitution being argued in court in order to know which way he is likely to be able to argue what that provision of the Constitution means.

Even sports authorities in the US are influenced by this common law system of precedents so that I have a book of golfing – the golf rules of the US Golf Association (HOLD UP COPY), a private profit-making association. I don't know how many of you have heard of Tiger Woods, he is the wealthiest athlete in America, and is a golfer. He wins golf tournaments and makes \$70-100 million per year playing golf. The rules for those tournaments are very specific and every single rule is laid out and every situation you could possibly get in is laid out in the US Golf Association's rule book. They don't just set out a bunch of simple rules; they set out examples of rulings from previous golf games and contests, for every single one of their rules. This is the same as a lawyer who wants to see judicial rulings and prior rulings for every section of the statute or the code that he works with. It is the influence of lawyers and the common law system on all rules in America, even in sports and games.

So in comparison, the civil law starts with a code section or a professor's or a scholar's interpretation of it, the common law starts with a statute or a code section, but the common law lawyer needs to know what a prior judicial decision has said about it. The French often will call the common law system "superstition du cas" and I've heard a French lawyer say American lawyers are always looking for other people's opinions of law and not their own.. The French lawyer prefers his own opinion and what it ought to be. And they will say American lawyers are always looking backwards to see what has been decided in the past and French lawyers are looking at law today and looking forward to seeing what it is today and what it should be tomorrow. So I will not say that this is the difference between the civil and common law systems, but it is 1 opinion of the difference, a civil law lawyer's.

Finally, in conclusion, I'd like to give you an example of the US attitude toward precedent as stated by today's Chief Justice of the US Supreme Court. When asked if he believes in precedent he said, "Yes, I do believe in precedent very much – he is a good conservative judge – he believes in following prior cases and not making up his own law. Judges like to say that they don't make law even though they do quite often in the US. And so he said, "No, I believe in following precedent." Then they asked him whether or not he would follow the precedent of *Miranda vs. Arizona*. *Miranda vs. Arizona* is our famous criminal case where a policeman arresting someone must advise the suspected criminal that he has the right to remain silent and anything he says can be used against him and he can even have an attorney present before he answers any questions, and the government will pay for his lawyer if he can't. It is a very aggravating precedent established in the 1960's, fifty years ago, by the US Supreme Court that allows confessions by criminals to be excluded from trials if the policeman did not give proper *Miranda* warnings. So they asked this judge, "Will you follow *Miranda vs.*

Arizona?” and the judge said, “No, I think it’s a bad precedent and I did not believe in it then and I do not believe in it now and I will vote to change that precedent.” So you see the US Supreme Court is free to change precedent just as they changed the precedent having to do with blacks and whites in the same schools. I believe that the system of precedent is a good idea; it’s good to be consistent and to follow prior cases especially in business matters so people can know how to protect their property rights, their business rights, and commercial rights. But when it comes to the Constitution and it comes to certain other things having to do with liberty and even criminal rights, the US has been wise to not follow the doctrine of precedent as some other common law countries that act as if they are bound to follow prior court decisions even if they are bad ones.