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The New Chief Justice

Maurice E. Harrison*

From the foundation of the republic until 1910, no Associate Justice or former Associate Justice of the Supreme Court had been appointed Chief Justice of the United States. In that year the precedent was broken by the appointment of Chief Justice White. It was again broken when Chief Justice Hughes was appointed in 1930. The selection of Harlan F. Stone as Chief Justice justifies the conclusion that the precedent has been destroyed. This result cannot be regretted. The advantage of previous service on the Court is obvious. Aside from familiarity with the administrative task and the wisdom gained from experience in dealing with the problems which engage the attention of the Court, a Chief Justice who has already served upon the Court is known to the profession and the public, and his appointment begets a degree of confidence which would otherwise be seldom possible before his work had begun.

This circumstance alone, however, does not account for the universal approval expressed by the profession and the general public when the appointment of Chief Justice Stone was announced. His personality and character were already widely known and the response to the news of his selection was spontaneous and enthusiastic.

A brief reference to his career before he became a member of the Court may be of present interest.

Harlan F. Stone was born in Chesterfield, New Hampshire, on October 11, 1872. After attending Massachusetts Agricultural School, he entered Amherst College, from which he was graduated in 1895, in the class preceding that of Calvin Coolidge. While attending college he was a member of the football team, participated in debating activities, was elected Class President for three years and was a member of Phi Beta Kappa. He spent the year following his graduation from college in earning the money required for his law school course. He was graduated from Columbia Law School in 1898 and

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at once entered practice in New York City, first with the firm of Wilmer & Canfield, and later as a partner in the firm of Satterlee, Canfield & Stone. This latter association he maintained actively throughout his teaching career. He delivered lectures at Columbia Law School from 1899 until 1902, when he was appointed professor of law. For five years after 1905 he was engaged exclusively in private practice. In 1910 he was named Professor of Law and Dean of Columbia Law School. During his incumbency he wrote a series of scholarly articles on various equitable doctrines which were later published and with which the teaching profession is familiar. In 1923 he resigned his law school position to become a member of the law firm of Sullivan & Cromwell. He conducted several cases of importance, among them *Alexander v. Equitable Life Assurance Society,*¹ in which the New York Court of Appeals held, in accordance with his contention, that a contract with an insurance company to pay an annuity to the widow of an officer in consideration of past and future services was *ultra vires* and invalid.

In 1924 he was appointed Attorney General by President Coolidge upon the resignation of Attorney General Daugherty. During his short incumbency in this office, his administrative skill won general recognition. In the 1924 presidential campaign he spoke in favor of the Republican ticket and defended against the attack of Senator LaFollette the power of the Supreme Court to declare acts of Congress unconstitutional. On January 5, 1925, President Coolidge nominated him to fill the place on the Supreme Court left vacant by the retirement of Justice McKenna. Discussion of his nomination in the Senate centered on the fact that his firm had represented the Morgan interests in New York and that the Department of Justice had fixed the District of Columbia rather than the District of Montana as the venue for the pending indictment against Senator Wheeler. Senator Heflin of Alabama and Senator Norris of Nebraska spoke in violent terms against confirmation, and Senator Walsh of Montana was critical of the conduct of the Wheeler prosecution. Senator Borah, however, although admitting the mistake in the Wheeler case, spoke in favor of the nomination, which was confirmed on February 5th by an overwhelming majority.

The new Associate Justice thus entered the Court with a variety and breadth of experience as practitioner and law teacher, as well as in public service, which few nominees to the Court had enjoyed.

¹ (1922) 233 N. Y. 300, 135 N. E. 509.
When his nomination as Chief Justice came before the Senate on June 27, 1941, it was confirmed by unanimous vote. On that occasion Senator Norris said:

"When Mr. Stone was appointed an Associate Justice of the Supreme Court, many years ago, I opposed the confirmation of his nomination and voted against it. In the years that have passed, I became convinced, and am now convinced, that in the opposition to the confirmation of his nomination I was entirely in error.

"I am now about to perform one of the most pleasant duties that has ever come to me in my official life when I cast a vote in favor of his elevation to the highest judicial office in the land . . . . it is a great satisfaction to me to rectify, in a very small degree, the wrong I did him many years ago when I voted against the confirmation of his nomination to be an Associate Justice . . . ."2

The extra-judicial utterances and writings of Mr. Justice Stone disclose a thoughtful interest in the varied phases of the law. He has spoken wisely on the problems of legal education and professional practice. If one were called upon to select for a layman a clear exposition of the nature and processes of our law, no better recommendation could be made than that of Stone's Hewitt lectures on "Law and Its Administration", first published in 1915. But for a consideration of his share as a judge in the development of American law, there is perhaps no better introduction than a perusal of his address on "The Common Law in the United States", delivered by him on the occasion of the Harvard Tercentenary Celebration five years ago.3 This address was a notable one, entirely apart from the author's identity and position. In addition to its intrinsic merit, however, it naturally engages our attention because it indicates his considered view on certain fundamental problems, the solution of which will profoundly influence the law of the future.

The full meaning and implications of this address can only be grasped by reading it in full. For our present purpose, a brief summary, however inadequate, must suffice.

At the outset Mr. Justice Stone considers the rule of *stare decisis* and presents a convincing argument against a too rigid and mechanical observance of the rule. He concedes the value of the traditional common-law theory in that it has given to our institutions "a certain stability and continuity, not without adaptability, of great practical
worth". "...its strength", he goes on to say, "is derived from the manner in which it has been forged from actual experience by the hammer and anvil of litigation, and ... the source of its weakness lies in the fact that law guided by precedent which has grown out of one type of experience can only slowly and with difficulty be adapted to new types which the changing scene may bring." It being clear that the system will not be discarded, the endeavor should be made "to take advantage of its strength and to discern in the manner of its growth the generative principle for the correction of its faults". There is traditional support for the view that the common-law rule of precedent is not an unyielding one. American courts have felt freer than English courts to limit, and occasionally to overrule an undesirable precedent.

"... the most critical and delicate operation in the process of judicial lawmaking", however, occurs in the case which is not directly and necessarily controlled by a precedent. Here the danger lies in finding "analogies and resemblances which will serve as a superficial justification for the extension of a precedent to sets of facts whose social implications may be quite different from any which the precedents have considered". The judge "is often engaged not so much in extracting a rule of law from the precedents, as we were once accustomed to believe, as in making an appraisal and comparison of social values, the result of which may be of decisive weight in determining what rule he is to apply". The conclusion is expressed that "The skill, resourcefulness and insight with which judges and lawyers weigh competing demands of social advantage, not unmindful that continuity and symmetry of the law are themselves such advantages, and with which they make choice among them in determining whether precedents shall be extended or restricted, chiefly give the measure of the vitality of the common-law system and its capacity for growth.”

The author next considers the attitude of our courts towards statutes. This attitude he finds to have been often unsympathetic. "The statute was looked upon as in the law but not of it, a formal rule to be obeyed, it is true, since it is the command of the sovereign, 

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4 Ibid. at 7.  
5 Ibid.  
6 Ibid. at 10.  
7 Ibid. at 9.  
8 Ibid. at 10.  
9 Ibid.
but to be obeyed grudgingly, by construing it narrowly and treating it as though it did not exist for any purpose other than that embraced within the strict construction of its words. . . . A narrow literalism too often defeated the purpose of remedial legislation . . . ."\textsuperscript{10}

Although this extreme tendency has been largely corrected, much, in the opinion of Mr. Justice Stone, remains to be done. A statute should be treated “much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning”.\textsuperscript{11} The civil law deduces legal principles from statutory enactments and applies them by way of analogy; and there is no reason why the common law should not do likewise. The social policy expressed in legislation “would seem to merit that judicial recognition which is freely accorded to the like expression in judicial precedent”.\textsuperscript{12} Judge-made and statute law should be organized into a co-ordinated and harmonious system, and in the process of interpretation consideration may properly be given to the reasons assigned by the legislature itself in the body of the statute.

Finally, the address deals with the function of the courts in matters of constitutional law, and particularly in the determination of the constitutionality of governmental action under the due process clause and similar guarantees. With respect to these guarantees, Mr. Justice Stone states that “The chief and ultimate standard which they exact is reasonableness of official action and its innocence of arbitrary and oppressive exactions”.\textsuperscript{13} This test is to be applied, not on the basis of “an aggregate of hard and fast precepts”,\textsuperscript{14} but rather by the application, in the light of social and economic data, of aims and ideals which will enable the government to function within the bounds of reasonableness. In passing upon the validity of official action, moreover, the courts have been and should be guided by the presumption in favor of constitutionality, which corresponds to the common-law presumption of regularity of official action. The discussion of constitutional questions concludes with this statement:

“Whether the constitutional standard of reasonableness of official action is subjective, that of the judge who must decide, or objective in terms of a considered judgment of what the community may re-

\textsuperscript{10} Ibid. at 14.
\textsuperscript{11} Ibid. at 13.
\textsuperscript{12} Ibid. at 14.
\textsuperscript{13} Ibid. at 23.
\textsuperscript{14} Ibid. at 24.
gard as within the limits of the reasonable, are questions which the cases have not specifically decided. Often these standards do not differ. When they do not, it is a happy augury for the development of law which is socially adequate. But the judge whose decision may control government action, as well as in deciding questions of private law, must ever be alert to discover whether they do differ and, differing, whether his own or the objective standard will represent the sober second thought of the community, which is the firm base on which all law must ultimately rest."

Space does not of course permit any comprehensive discussion of recent decisions, however significant, in which Mr. Justice Stone has participated, without personal expression of his views; much less does it permit a consideration of the issues involved in those decisions. Some idea, however, of the specific contribution which he has made may be had by a reference to the cases in which he has expressed his view and which involve the matters to which his Tercentenary address was directed, as, for instance, the treatment of earlier precedents, the interpretation of statutory law, and the approach to questions involving the great constitutional limitations upon government. Finally, a word may be said on Mr. Justice Stone's attitude toward the extension of federal, as distinguished from state, power.

The subject of Mr. Justice Stone's attitude towards precedents suggests at once the recent decisions which expressly overrule earlier ones with respect to the effect of the due process clause on the statutory regulation of industry and property. But his participation in these later decisions is in essence only a continued statement of the position which he took as a dissenting judge in the earlier ones; he appears now as a member of the majority, announcing or joining in views which he had formerly expressed by way of dissent, usually with the concurrence of Holmes and Brandeis, or Brandeis and Cardozo. More pertinent examples of his treatment of precedents are to be found in the decisions rendered during his incumbency on the constitutional freedom from taxation of federal and state instrumentalities. Reading the decisions now, it is apparent that from the outset he questioned whether the developments and corollaries of the doctrine of Collector v. Day\(^{16}\) did not unduly interfere with the rea-
sonable exercise of governmental power. He had been on the Court for less than a year when he delivered the opinion in *Metcalf v. Mitchell*, holding that consulting engineers employed under contract by a state or its subdivisions to advise them, but whose work was not continuous or permanent, were not exempt from federal income tax upon their compensation. A few years later, in *McCallen Co. v. Massachusetts*, in which the Court held that a state corporation franchise tax, measured in part by net income which included income from United States bonds, was unconstitutional, he dissented vigorously and quoted from his own opinion in the *Metcalf* case the statement that the taxing power of each government, "so far as it affects the other, must receive a practical construction" and that the "limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it". Justices Holmes and Brandeis concurred in the dissent. Within two years the Court was called upon to consider the validity of a state franchise tax measured by net income as applied to a corporation deriving income from a federal copyright. The statute was upheld, Mr. Justice Stone delivering the opinion of the Court, with Justices Sutherland, Van Devanter and Butler dissenting. The *McCallen* decision was distinguished and its value as a precedent was reduced to such an extent that the Court has recently indicated a doubt that it "still has vitality".

This group of decisions illustrates Mr. Justice Stone's theory, stated in his Harvard address, with respect to the treatment of precedents. Regard should be had, of course, for the value of continuity of decision. But in deciding whether a given precedent should be followed or extended or restricted, controlling weight must be given to the reasons supporting the decision and the practical effect of extending or confining the rule already announced. The same thoughtful treatment of other cases involving the question of the taxation of alleged instrumentalities of government is evident in later opinions of Mr. Justice Stone. His dissent in *Burnet v. Coronado Oil &
Gas Co., involving federal taxation of income from oil leases from a state, paved the way for the ultimate overruling of that decision and of an earlier one by which the majority of the Court had felt reluctantly bound.

Even more striking was the ultimate repudiation of Collector v. Day itself. When Helvering v. Gerhardt presented the question whether the salary of an employee of the Port of New York Authority was exempt from income tax, Mr. Justice Stone had been urging for twelve years, in opinion after opinion, that governmental taxing power should not be unduly restricted by unreal theories of the effect of a particular tax. It was there held that the particular employee was not engaged in a sufficiently indispensable function of the state to warrant his claim of immunity. Some possible room was thus left for the doctrine of Collector v. Day. But the coup de grace came in the following term in the case of Graves v. New York ex rel. O'Keefe. The salary of an attorney for the Home Owners Loan Corporation was held to be subject to state income tax, and Collector v. Day was definitely overruled in the opinion by Mr. Justice Stone.

We turn now to the Justice's decisions on questions of statutory construction, as to which very definite views are expressed in his Harvard address. It would be futile, of course, to attempt to summarize in small compass the multitude of questions of this class with which he has dealt during his sixteen years upon the Court. A brief consideration of his activity in connection with cases arising under the Sherman Anti-Trust Act will indicate his approach to the interpretation of statutes. Here the Court has had to deal with a statute expressed in very general terms; the recurring problem was the application of these terms to a changing economic situation. Maple Flooring Association v. United States, a case originally argued while Mr. Stone was Attorney General, was reargued after he joined the Court, and was one of the first important cases in which he delivered the Court's opinion. It held, in effect that trade association activities consisting of the dissemination of statistics with respect to past transactions (without identification of the parties thereto) and the distribution of information showing the average cost of the prod-

22 (1932) 285 U. S. 393, 401.
24 (1938) 304 U. S. 405.
25 (1939) 306 U. S. 466.
26 (1925) 268 U. S. 563; see also the companion case of Cement Mfr's Ass'n v. United States (1925) 268 U. S. 588, opinion by Stone, J.
uct, did not violate the Sherman Act, in the absence of any purpose or necessary tendency to fix prices or limit production. The significance of the *Maple Flooring* decision is well known. It reversed the earlier, more critical attitude toward trade associations. There was no express overruling of the earlier cases—in fact they were carefully distinguished on the facts—but the point of view was essentially that of the dissenting opinions of Holmes and Brandeis in the *American Column Co. v. United States.* The opinion in the *Maple Flooring* case refers to the economic value of trade statistics and indicates a willingness to allow any reasonable cooperative activity which is not directed to price fixing, coercion or monopoly. The next significant antitrust decision by Mr. Justice Stone was in the famous case of *United States v. Trenton Potteries* where price fixing was proved and it was held that the reasonableness of the price fixed was no defense. Aside from cases which, in his view of the statute, came clearly within the evil sought to be reached, Mr. Justice Stone has been willing to consider all the relevant economic facts bearing upon the reasonableness of the cooperative effort; he concurred in *Appalachian Coals, Inc. v. United States,* which upheld a considerable cooperation by non-monopolizing competitors to protect themselves against impending disaster. In *Interstate Circuit v. United States* he allowed a ready inference of conspiracy from concurrent action by persons having knowledge of a proposed restraint. Although he concurred with the majority in *United States v. Socony-Vacuum Oil Co.,* his later opinion in *Apex Hosiery Co. v. Leader* showed that he considered the *Appalachian* case as still authoritative. This *Apex* decision is particularly significant because it holds that wrongful acts (in that case a sit-down strike) which actually interfere with interstate commerce are not violations of the Sherman Act if unconnected with price-fixing or restraint of competition. These are the evils against which the Act was directed; wrongs unrelated to them are not prohibited by it, even though they seem to come within the literal language of its words. But although the words of the statute

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27 (1921) 257 U. S. 377, 412, 413.
28 Another former Attorney General, Justice McReynolds, dissented vigorously in the Maple Flooring case, 268 U. S. at 587.
29 (1927) 273 U. S. 392.
30 (1933) 288 U. S. 344.
31 (1939) 306 U. S. 208.
32 (1940) 310 U. S. 150.
33 (1940) 310 U. S. 469.
must be read in the light of conditions at the time of the enactment and attempted application; nevertheless there are limits beyond which interpretation cannot go. Such at any rate would seem to be the view of the Justice when he refused to agree with the view of the majority in United States v. Hutcheson that a legislative curtailment of equitable jurisdiction to issue injunctions in labor disputes operated to amend the criminal provisions of the Sherman Act; and he preferred, therefore, to base his decision on the broader ground, consistent with his own opinion in the Apex case, that the union activities complained of did not come within the purview of the commercial restraints and monopolies against which the criminal statute was directed.

This hasty view of Mr. Justice Stone's principal decisions on restraint of trade, inadequate as it is, will serve to show that his Harvard address does express a theory of statutory interpretation which his opinions have carried out. Through this series of cases he has developed, on the basis of the statute and the inferences deducible from its philosophy and purpose, a body of law comparable to that which the common law has from time to time developed on the basis of decisions alone. A recent example of the same reasoning from the policy of a statute is the holding that the Wagner Act justifies treating as an unfair labor practice the failure of an employer to sign written evidence of an agreement actually made.

There is no need to comment here upon the Justice's participation in decisions of the last few years which are familiar as leading cases not only to the profession but to all informed laymen. His adherence, particularly in cases involving the regulation of property and business, to the strongest presumption in favor of the constitutionality of government action, is well known; indeed his dissenting opinion in United States v. Butler is perhaps the most forceful recent statement of this view.

On questions of the constitutional division of power between federal and state governments, his influence has been favorable to a

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34 (Feb. 3, 1941) 312 U. S. 219, 237, concurring opinion.

35 H. J. Heinz Co. v. N. L. R. B. (Jan. 6, 1941) 311 U. S. 514. In connection with Mr. Justice Stone's theory that statutory law should be assimilated to the general body of law on a given subject, see his decision in The Arizona v. Amelech (1936) 298 U. S. 110, 123, construing the Jones Act and declaring that its provisions "are to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part".

36 (1936) 297 U. S. 1, 78.
broad view of the federal power. Ample proof of this consistent attitude is to be found in his dissents and concurrences both before and after the recent volumes of reports which a learned and witty federal judge has described as the New Testament of our Supreme Court bible. It is noteworthy that in one of the gold clause cases he announced a more forthright willingness to interpret the federal power generously than did the main opinion of the Court.

Equally significant is the sympathetic attitude of the Justice towards claims based on the personal constitutional rights. His opinion in Hague v. C.I.O. was not surprising to those who were familiar with his protest against the invasion of the rights of aliens after the first World War. Even more notable was his dissent in Minersville District v. Gobitis. In that case the Court actually held, eight justices concurring, that members of a religious sect, believing conscientiously that they should not participate in a ceremony of saluting the national flag, could be deprived of their right to a public school education because in obedience to their conscience they refrained from participating in such a ceremony. Logically it would follow that the same penalty could be imposed for failure to participate hypocritically in such a ceremony if in response to some unpredictable gust of public opinion Congress should order hammer and sickle or swastika placed on the flag. Mr. Justice Stone's lone dissent deserves to rank with the classic dissent of Holmes in Abrams v. United States.

Less well known is the contribution made by Mr. Justice Stone in the mass of Supreme Court cases which attract little general notice. He has delivered opinions in over twice the number of patent cases which would have been assigned to him if these cases had been

37 The facts of N. L. R. B. v. Fainblatt (1939) 306 U. S. 601, in which Mr. Justice Stone delivered the opinion, will show how far the federal power may now be legally extended.

38 Mr. Justice Stone's concurring opinion in Perry v. United States (1935) 294 U. S. 330, 358. His dissenting opinion in Guaranty Trust Co. v. Henwood (1939) 307 U. S. 247, 260, in which Hughes, C. J., and McReynolds and Butler, J. J., joined, is of interest as showing his familiarity with international finance.

39 (1939) 307 U. S. 496. Note the reference in the specially concurring opinion of Stone, J., in this case to the privileges and immunities clause of the Fourteenth Amendment. And in this connection see his dissenting opinion in Colgate v. Harvey (1935) 296 U. S. 404, 436. Colgate v. Harvey was overruled by Madden v. Kentucky (1940) 309 U. S. 83.

40 (1940) 310 U. S. 586, 601.

41 (1919) 250 U. S. 616, 624.
evenly divided among the members of the Court. He has contributed notably to the law of bankruptcy, corporate reorganization, admiralty and taxation. His judicial experience has been broader than was that of either of his predecessors as Chief Justice who had previously served upon the Court.

The bar is deeply gratified that it may now refer to Mr. Justice Stone as Mr. Chief Justice Stone. Tens of thousands of lawyers throughout the country, familiar with his judicial utterances of the past sixteen years, have come to respect and admire his character and learning. They await with confidence the incumbency of another great Chief Justice.