

THE NATURE OF THE JUDICIAL PROCESS

LECTURE I. INTRODUCTION. THE METHOD OF PHILOSOPHY

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The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth. Let some intelligent layman ask him to explain: he will not go very far before taking refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the craft. Such an excuse may cover with a semblance of respectability an otherwise ignominious retreat. It will hardly serve to still the pricks of curiosity and conscience. In moments of introspection, when there {10} is no longer a necessity of putting off with a show of wisdom the uninitiated interlocutor, the troublesome problem will recur, and press for a solution. What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common

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standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. There, before us, {11} is the brew. Not a judge on the bench but has had a hand in the making. The elements have not come together by chance. *Some* principle, however unavowed and inarticulate and subconscious, has regulated the infusion. It may not have been the same principle for all judges at any time, nor the same principle for any judge at all times. But a choice there has been, not a submission to the decree of Fate; and the considerations and motives determining the choice, even if often obscure, do not utterly resist analysis. In such attempt at analysis as I shall make, there will be need to distinguish between the conscious and the subconscious. I do not mean that even those considerations and motives which I shall class under the first head are always in consciousness distinctly, so that they will be recognized and named at sight. Not infrequently they hover near the surface. They may, however, with comparative readiness be isolated and tagged, and when thus labeled, are quickly acknowledged as guiding principles of conduct. More subtle are the forces so far beneath the {12} surface that they cannot reasonably be classified as other than subconscious. It is often through these subconscious forces that judges are kept consistent with themselves, and inconsistent with one another. We are reminded by William James in a telling page of his lectures on Pragmatism that every one of us has in truth an underlying philosophy of life, even those of us to whom the names and the notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not,¹ which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is

¹ {Lecture I, originally page 12, note 1} Cf. N. M. Butler, "Philosophy," pp. 18, 43.

an outlook on life, a conception of social needs, a sense in James's phrase of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice shall fall. {13} In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought – a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter.

I have little hope that I shall be able to state the formula which will rationalize this process for myself, much less for others. We must apply to the study of judge-made law that method of quantitative analysis which Mr. Wallas has applied with such fine results to the study of politics.² A richer scholarship than mine is requisite to do the work aright. But until that scholarship is found and enlists itself in the task, there may be a passing interest in an attempt to uncover the nature of the process by one who is himself an active agent, day by day, in keeping the process alive. That must be my apology for these introspective searchings of the spirit. {14}

Before we can determine the proportions of a blend, we must know the ingredients to be blended. Our first inquiry should therefore be: Where does the judge find the law which he embodies in his judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators. It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which,

² "Human Nature in Politics," p. 138.

however obscure and latent, had none the less a real and ascertainable pre-existence in {15} the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a statute. "The fact is," says Gray in his lectures on the "Nature and Sources of the Law,"³ "that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present."⁴ So Brütt:⁵ "One weighty task of the system of the application of law consists then in this, to make more profound the discovery of the latent meaning of positive law. Much more important, however, is the second task which the system serves, namely {16} the filling of the gaps which are found in every positive law in greater or less measure." You may call this process legislation, if you will. In any event, no system of *jus scriptum* has been able to escape the need of it. Today a great school of continental jurists is pleading for a still wider freedom of adaptation and construction. The statute, they say, is often fragmentary and ill-considered and unjust. The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision — "libre recherche scientifique." That is the view of Gény and Ehrlich and Gmelin and others.⁶ Courts are to "search for light among the social elements of every kind that are the living force behind the facts they deal with."⁷ The power thus put in their hands is great, and subject, like all power, to abuse; but we are not to flinch from granting it. In the long run "there is no guaranty of

³ Sec. 370, p. 165.

⁴ Cf. Pound, "Courts and Legislation," 9 Modern Legal Philosophy Series, p. 226.

⁵ "Die Kunst der Rechtsanwendung," p. 72.

⁶ "Science of Legal Method," 9 Modern Legal Philosophy Series, pp. 4, 45, 65, 72, 124, 130, 159.

⁷ Gény, "Méthode d'Interprétation et Sources en droit privé positif," vol. II, p. 180, sec. 176, ed. 1919; transl. 9 Modern Legal Philosophy Series, p. 45.

{17} justice,” says Ehrlich,⁸ “except the personality of the judge.”⁹ The same problems of method, the same contrasts between the letter and the spirit, are living problems in our own land and law. Above all in the field of constitutional law, the method of free decision has become, I think, the dominant one today. The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them. Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of lawmakers whose collective will has been declared. It supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law. Codes and other statutes may {18} threaten the judicial function with repression and disuse and atrophy. The function flourishes and persists by virtue of the human need to which it steadfastly responds. Justinian’s prohibition of any commentary on the product of his codifiers is remembered only for its futility.¹⁰

I will dwell no further for the moment upon the significance of constitution and statute as sources of the law. The work of a judge in interpreting and developing them has indeed its problems and its difficulties, but they are problems and difficulties not different in kind or measure from those besetting him in other fields. I think they can be better studied when those fields have been explored. Sometimes the rule of constitution or of statute is clear, and then the difficulties vanish. Even when they are present, they lack at times some of that element of mystery which accompanies creative energy. We reach the land of mystery when constitution and statute are silent, and the judge must look to {19} the common law for the rule that fits the case. He is the “living oracle of the law” in Blackstone’s vivid phrase. Looking at Sir Oracle in action, viewing his work in the dry light of realism, how does he set about his task?

⁸ P. 65, *supra*; “Freie Rechtsfindung und freie Rechtswissenschaft,” 9 Modern Legal Philosophy Series.

⁹ Cf. Gnaeus Flavius (Kantorowicz), “Der Kampf um Rechtswissenschaft,” p. 48: “Von der Kultur des Richters hängt im letzten Grunde aller Fortschritt der Rechtsentwicklung ab.”

¹⁰ Gray, “Nature and Sources of the Law,” sec. 395; Muirhead, “Roman Law,” pp. 399, 400.

The first thing he does is to compare the case before him with the precedents, whether stored in his mind or hidden in the books. I do not mean that precedents are ultimate sources of the law, supplying the sole equipment that is needed for the legal armory, the sole tools, to borrow Maitland's phrase,¹¹ "in the legal smithy." Back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn.¹² None the less, in a system so highly developed as our {20} own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. *Stare decisis* is at least the everyday working rule of our law. I shall have something to say later about the propriety of relaxing the rule in exceptional conditions. But unless those conditions are present, the work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute. It is a process of search, comparison, and little more. Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If {21} that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins. He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it

¹¹ Introduction to Gierke's "Political Theories of the Middle Age," p. viii.

¹² Saleilles, "De la Personnalité Juridique," p. 45; Ehrlich, "Grundlegung der Soziologie des Rechts," pp. 34, 35; Pound, "Proceedings of American Bar Assn. 1919," p. 455.

for others. The classic statement is Bacon's: "For many times, the things deduced to judgment may be *meum* and *tuum*, when the reason and consequence thereof may trench to point of estate."¹³ The sentence of today will make the right and wrong of tomorrow. If the judge is to pronounce it wisely, some principles of selection there must be to guide him among all the potential judgments that compete for recognition.

In the life of the mind as in life elsewhere, there is a tendency toward the reproduction of kind. Every judgment has a generative power. It begets in its own image. Every precedent, in {22} the words of Redlich, has a "directive force for future cases of the same or similar nature."¹⁴ Until the sentence was pronounced, it was as yet in equilibrium. Its form and content were uncertain. Any one of many principles might lay hold of it and shape it. Once declared, it is a new stock of descent. It is charged with vital power. It is the source from which new principles or norms may spring to shape sentences thereafter. If we seek the psychological basis of this tendency, we shall find it, I suppose, in habit.¹⁵ Whatever its psychological basis, it is one of the living forces of our law. Not all the progeny of principles begotten of a judgment survive, however, to maturity. Those that cannot prove their worth and strength by the test of experience, are sacrificed mercilessly and thrown into the void. The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them {23} deductively. Its method is inductive, and it draws its generalizations from particulars. The process has been admirably stated by Munroe Smith: "In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of the lawfinding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories

¹³ "Essay on Judicature."

¹⁴ Redlich, "The Case Method in American Law Schools," Bulletin No. 8, Carnegie Foundation, p. 37.

¹⁵ McDougall, "Social Psychology," p. 354; J. C. Gray, "Judicial Precedents," 9 Harvard L. R. 27.

of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.”¹⁶ {24}

The way in which this process of retesting and reformulating works, may be followed in an example. Fifty years ago, I think it would have been stated as a general principle that A. may conduct his business as he pleases, even though the purpose is to cause loss to B., unless the act involves the creation of a nuisance.¹⁷ Spite fences were the stock illustration, and the exemption from liability in such circumstances was supposed to illustrate not the exception, but the rule.¹⁸ Such a rule may have been an adequate working principle to regulate the relations between individuals or classes in a simple or homogeneous community. With the growing complexity of social relations, its inadequacy was revealed. As particular controversies multiplied and the attempt was made to test them by the {25} old principle, it was found that there was something wrong in the results, and this led to a reformulation of the principle itself. Today, most judges are inclined to say that what was once thought to be the exception is the rule, and what was the rule is the exception. A. may never do anything in his business for the purpose of injuring another without reasonable and just excuse.¹⁹ There has been a new generalization which, applied to new particulars, yields results more in harmony with past particulars, and, what is still more important, more consistent with the social welfare. This work of modification

¹⁶ Munroe Smith, “Jurisprudence,” Columbia University Press, 1909, p. 21; cf. Pound, “Courts and Legislation,” 7 *Am. Pol. Science Rev.* 361; 9 *Modern Legal Philosophy Series*, p. 214; Pollock, “Essays in Jurisprudence and Ethics,” p. 246.

¹⁷ Cooley, “Torts,” 1st ed., p. 93; Pollock, “Torts,” 10th ed., p. 21.

¹⁸ *Phelps v. Nowlen*, 72 N. Y. 39; *Rideout v. Knox*, 148 Mass. 368.

¹⁹ *Lamb v. Cheney*, 227 N. Y. 418; *Aikens v. Wisconsin*, 195 U. S. 194, 204; Pollock, “Torts,” *supra*.

is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier.

We are not likely to underrate the force that has been exerted if we look back upon its work. "There is not a creed which is not shaken, not an accredited dogma which is not shown to be {26} questionable, not a received tradition which does not threaten to dissolve."²⁰ Those are the words of a critic of life and letters writing forty years ago, and watching the growing scepticism of his day. I am tempted to apply his words to the history of the law. Hardly a rule of today but may be matched by its opposite of yesterday. Absolute liability for one's acts is today the exception; there must commonly be some tinge of fault, whether willful or negligent. Time was, however, when absolute liability was the rule.²¹ Occasional reversions to the earlier type may be found in recent legislation.²² Mutual promises give rise to an obligation, and their breach to a right of action for damages. Time was when the {27} obligation and the remedy were unknown unless the promise was under seal.²³ Rights of action may be assigned, and the buyer prosecute them to judgment though he bought for purposes of suit. Time was when the assignment was impossible, and the maintenance of the suit a crime. It is no basis today for an action of deceit to show, without more, that there has been the breach of an executory promise; yet the breach of an executory promise came to have a remedy in our law because it was held to be a deceit.²⁴ These changes or most of them have been wrought by judges. The men who wrought them used the same tools as the judges of today. The changes, as they were made

²⁰ Arnold, "Essays in Criticism," second series, p. 1.

²¹ Holdsworth, "History of English Law," 2, p. 41; Wigmore, "Responsibility for Tortious Acts," 7 Harvard L. R. 315, 383, 441; 3 Anglo-Am. Legal Essays 474; Smith, "Liability for Damage to Land," 33 Harvard L. R. 551; Ames, "Law and Morals," 22 Harvard L. R. 97, 99; Isaacs, "Fault and Liability," 31 Harvard L. R. 954.

²² Cf. Duguit, "Les Transformations générales du droit privé depuis le Code Napoléon," Continental Legal Hist. Series, vol. XI, pp. 125, 126, secs. 40, 42.

²³ Holdsworth, *supra*, 2, p. 72; Ames, "History of Parol Contracts prior to Assumpsit," 3 Anglo-Am. Legal Essays 304.

²⁴ Holdsworth, *supra*, 3, pp. 330, 336; Ames, "History of Assumpsit," 3 Anglo-Am. Legal Essays 275, 276.

in this case or that, may not have seemed momentous in the making. The result, however, when the process was prolonged throughout the years, has been not merely to supplement or modify; it has been to revolutionize {28} and transform. For every tendency, one seems to see a counter-tendency; for every rule its antinomy. Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless "becoming." We are back with Heraclitus. That, I mean, is the average or aggregate impression which the picture leaves upon the mind. Doubtless in the last three centuries, some lines, once wavering, have become rigid. We leave more to legislatures today, and less perhaps to judges.²⁵ Yet even now there is change from decade to decade. The glacier still moves.

In this perpetual flux, the problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die.

The first branch of the problem is the one to which we are accustomed to address ourselves {29} more consciously than to the other. Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully. The instance cannot lead to a generalization till we know it as it is. That in itself is no easy task. For the thing adjudged comes to us oftentimes swathed in obscuring dicta, which must be stripped off and cast aside. Judges differ greatly in their reverence for the illustrations and comments and side-remarks of their predecessors, to make no mention of their own. All agree that there may be dissent when the opinion is filed. Some would seem to hold that there must be none a moment thereafter. Plenary inspiration has then descended upon the work of the majority. No one, of course, avows such a belief, and yet sometimes there is an approach to it in conduct. I own that it is a good deal of a mystery to me how judges, of all persons in the world, should put their faith in dicta. A brief experience on the bench was enough to reveal to me all sorts of cracks and crevices and loopholes in my own opin-

²⁵ F. C. Montague in "A Sketch of Legal History," Maitland and Montague, p. 161.

ions when picked up a few months after delivery, {30} and reread with due contrition. The persuasion that one's own infallibility is a myth leads by easy stages and with somewhat greater satisfaction to a refusal to ascribe infallibility to others. But dicta are not always ticketed as such, and one does not recognize them always at a glance. There is the constant need, as every law student knows, to separate the accidental and the non-essential from the essential and inherent. Let us assume, however, that this task has been achieved, and that the precedent is known as it really is. Let us assume too that the principle, latent within it, has been skillfully extracted and accurately stated. Only half or less than half of the work has yet been done. The problem remains to fix the bounds and the tendencies of development and growth, to set the directive force in motion along the right path at the parting of the ways.

The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; {31} this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I will call the method of sociology.

I have put first among the principles of selection to guide our choice of paths, the rule of analogy or the method of philosophy. In putting it first, I do not mean to rate it as most important. On the contrary, it is often sacrificed to others. I have put it first because it has, I think, a certain presumption in its favor. Given a mass of particulars, a congeries of judgments on related topics, the principle that unifies and rationalizes them has a tendency, and a legitimate one, to project and extend itself to new cases within the limits of its capacity to unify and rationalize. It has the primacy that comes from natural and orderly and logical succession. Homage is due to it over every competing principle that is unable by appeal to history or tradition or policy or justice to make out a {32} better right. All sorts of deflecting forces may appear to contest its sway and absorb its power. At least, it is the heir presumptive. A pretender to the title will have to fight his way.

Great judges have sometimes spoken as if the principle of philosophy, i.e., of logical development, meant little or nothing in our law. Probably none of them in conduct was ever true to such a faith. Lord Halsbury said in *Quinn v. Leathem*, 1901, A. C. 495, 506: "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."²⁶ All this may be true, but we must not press the truth too far. Logical consistency does not cease to be a good because it is not the supreme good. Holmes has told us {33} in a sentence which is now classic that "the life of the law has not been logic; it has been experience."²⁷ But Holmes did not tell us that logic is to be ignored when experience is silent. I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly be some consideration of history or custom or policy or justice. Lacking such a reason, I must be logical, just as I must be impartial, and upon like grounds. It will not do to decide the same question one way between one set of litigants and the opposite way between another. "If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an {34} infringement, material and moral, of my rights."²⁸ Everyone feels the force of this sentiment when two cases are the same. Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts. A sentiment like

²⁶ Cf. *Bailhache, J., in Belfast Ropewalk Co. v. Bushell*, 1918, 1 K. B. 210, 213: "Unfortunately or fortunately, I am not sure which, our law is not a science."

²⁷ "The Common Law," p. 1.

²⁸ W. G. Miller, "The Data of Jurisprudence," p. 335; cf. Gray, "Nature and Sources of the Law," sec. 420; Salmond, "Jurisprudence," p. 170.

in kind, though different in degree, is at the root of the tendency of precedent to extend itself along the lines of logical development.²⁹ No doubt the sentiment is powerfully reinforced by what is often nothing but an intellectual passion for *elegantia juris*, for symmetry of form and substance.³⁰ That is an ideal which can never fail to exert some measure of attraction upon the professional experts who make up the lawyer class. To the Roman lawyers, it meant much, more than it has meant to English lawyers or to ours, certainly more {35} than it has meant to clients. "The client," says Miller in his "Data of Jurisprudence,"³¹ "cares little for a 'beautiful' case! He wishes it settled somehow on the most favorable terms he can obtain." Even that is not always true. But as a system of case law develops, the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped. The accidental and the transitory will yield the essential and the permanent. The judge who moulds the law by the method of philosophy may be satisfying an intellectual craving for symmetry of form and substance. But he is doing something more. He is keeping the law true in its response to a deep-seated and imperious sentiment. Only experts perhaps may be able to gauge the quality of his work and appraise its significance. But their judgment, the judgment of the lawyer class, will spread to others, and tinge the common consciousness and the common faith. In default of other tests, the method of philosophy must remain the organon of the courts if {36} chance and favor are to be excluded, and the affairs of men are to be governed with the serene and impartial uniformity which is of the essence of the idea of law.

You will say that there is an intolerable vagueness in all this. If the method of philosophy is to be employed in the absence of a better one, some test of comparative fitness should be furnished. I hope, before I have ended, to sketch, though only in the broadest outline, the fundamental considerations by which the choice of

²⁹ Cf. Génv, "Méthode d'Interprétation et Sources en droit privé positif," vol. II, p. 119.

³⁰ W. G. Miller, *supra*, p. 281; Bryce, "Studies in History and Jurisprudence," vol. II, p. 629.

³¹ P. 1.

methods should be governed. In the nature of things they can never be catalogued with precision. Much must be left to that deftness in the use of tools which the practice of an art develops. A few hints, a few suggestions, the rest must be trusted to the feeling of the artist. But for the moment, I am satisfied to establish the method of philosophy as one organon among several, leaving the choice of one or the other to be talked of later. Very likely I have labored unduly to establish its title to a place so modest. Above all, in the Law School of Yale University, the {37} title will not be challenged. I say that because in the work of a brilliant teacher of this school, the late Wesley Newcomb Hohfeld, I find impressive recognition of the importance of this method, when kept within due limits, and some of the happiest illustrations of its legitimate employment. His treatise on "Fundamental Conceptions Applied in Judicial Reasoning" is in reality a plea that fundamental conceptions be analyzed more clearly, and their philosophical implications, their logical conclusions, developed more consistently. I do not mean to represent him as holding to the view that logical conclusions must always follow the conceptions developed by analysis. "No one saw more clearly than he that while the analytical matter is an indispensable tool, it is not an all-sufficient one for the lawyer."³² "He emphasized over and over again" that "analytical work merely paves the way for other branches of jurisprudence, and that without the aid of the latter, satisfactory solutions of {38} legal problems cannot be reached."³³ We must know where logic and philosophy lead even though we may determine to abandon them for other guides. The times will be many when we can do no better than follow where they point.

Example, if not better than precept, may at least prove to be easier. We may get some sense of the class of questions to which a method is adapted when we have studied the class of questions to which it has been applied. Let me give some haphazard illustrations of conclusions adopted by our law through the development of legal conceptions to logical conclusions. A. agrees to sell a chattel to B. Before title passes, the chattel is destroyed. The loss falls on the

³² Introduction to Hohfeld's Treatise by W. W. Cook.

³³ Professor Cook's Introduction.

seller who has sued at law for the price.³⁴ A. agrees to sell a house and lot. Before title passes, the house is destroyed. The seller sues in equity for specific performance. The loss falls upon the {39} buyer.³⁵ That is probably the prevailing view, though its wisdom has been sharply criticized.³⁶ These variant conclusions are not dictated by variant considerations of policy or justice. They are projections of a principle to its logical outcome, or the outcome supposed to be logical. Equity treats that as done which ought to be done. Contracts for the sale of land, unlike most contracts for the sale of chattels, are within the jurisdiction of equity. The vendee is in equity the owner from the beginning. Therefore, the burdens as well as the benefits of ownership shall be his. Let me take as another illustration of my meaning the cases which define the rights of assignees of choses in action. In the discussion of these cases, you will find much conflict of opinion about fundamental conceptions. Some tell us that the assignee has a legal ownership.³⁷ Others say that his right is purely equitable.³⁸ {40} Given, however, the fundamental conception, all agree in deducing its consequences by methods in which the preponderating element is the method of philosophy. We may find kindred illustrations in the law of trusts and contracts and in many other fields. It would be wearisome to accumulate them.

The directive force of logic does not always exert itself, however, along a single and unobstructed path. One principle or precedent, pushed to the limit of its logic, may point to one conclusion; another principle or precedent, followed with like logic, may point with equal certainty to another. In this conflict, we must choose between the two paths, selecting one or other, or perhaps striking out upon a third, which will be the resultant of the two forces in combination, or will represent the mean between extremes. Let me take as an illustration of such conflict the famous case of *Riggs v.*

³⁴ *Higgins v. Murray*, 73 N. Y. 252, 254; 2 Williston on Contracts, sec. 962; N. Y. Personal Prop. Law, sec. 103a.

³⁵ *Paine v. Meller*, 6 Ves. 349, 352; *Sewell v. Underhill*, 197 N. Y. 168; 2 Williston on Contracts, sec. 931.

³⁶ 2 Williston on Contracts, sec. 940.

³⁷ *Cook*, 29 Harvard L. R. 816, 836.

³⁸ Williston, 30 Harvard L. R. 97; 31 *ibid.* 822.

Palmer, 115 N. Y. 506. That case decided that a legatee who had murdered his testator would not be permitted by a court of equity to enjoy the benefits of the will. Conflicting {41} principles were there in competition for the mastery. One of them prevailed, and vanquished all the others. There was the principle of the binding force of a will disposing of the estate of a testator in conformity with law. That principle, pushed to the limit of its logic, seemed to uphold the title of the murderer. There was the principle that civil courts may not add to the pains and penalties of crimes. That, pushed to the limit of its logic, seemed again to uphold his title. But over against these was another principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man should profit from his own inequity or take advantage of his own wrong. The logic of this principle prevailed over the logic of the others. I say its logic prevailed. The thing which really interests us, however, is why and how the choice was made between one logic and another. In this instance, the reason is not obscure. One path was followed, another closed, because of the conviction in the judicial mind that the one selected led to justice. Analogies and {42} precedents and the principles behind them were brought together as rivals for precedence; in the end, the principle that was thought to be most fundamental, to represent the larger and deeper social interests, put its competitors to flight. I am not greatly concerned about the particular formula through which justice was attained. Consistency was preserved, logic received its tribute, by holding that the legal title passed, but that it was subjected to a constructive trust.³⁹ A constructive trust is nothing but “the formula through which the conscience of equity finds expression.”⁴⁰ Property is acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest. Equity, to express its disapproval of his conduct, converts him into a trustee.⁴¹ Such formulas are merely the remedial devices by which a result

³⁹ *Ellerson v. Westcott*, 148 N. Y. 149, 154; Ames, “Lectures on Legal History,” pp. 313, 314.

⁴⁰ *Beatty v. Guggenheim Exploration Co.*, 225 N. Y. 380, 386.

⁴¹ *Beatty v. Guggenheim Exploration Co.*, *supra*; Ames, *supra*.

conceived of as right and just is {43} made to square with principle and with the symmetry of the legal system. What concerns me now is not the remedial device, but rather the underlying motive, the indwelling, creative energy, which brings such devices into play. The murderer lost the legacy for which the murder was committed because the social interest served by refusing to permit the criminal to profit by his crime is greater than that served by the preservation and enforcement of legal rights of ownership. My illustration, indeed, has brought me ahead of my story. The judicial process is there in microcosm. We go forward with our logic, with our analogies, with our philosophies, till we reach a certain point. At first, we have no trouble with the paths; they follow the same lines. Then they begin to diverge, and we must make a choice between them. History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law, must come to the rescue of the anxious judge, and tell him where to go. {44}

It is easy to accumulate examples of the process – of the constant checking and testing of philosophy by justice, and of justice by philosophy. Take the rule which permits recovery with compensation for defects in cases of substantial, though incomplete performance. We have often applied it for the protection of builders who in trifling details and without evil purpose have departed from their contracts. The courts had some trouble for a time, when they were deciding such cases, to square their justice with their logic. Even now, an uneasy feeling betrays itself in treatise and decision that the two fabrics do not fit. As I had occasion to say in a recent case: “Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result” remain “troubled by a classification where the lines of division are so wavering and blurred.”⁴² I have no doubt that the inspiration of the rule is a mere sentiment of justice. That sentiment asserting itself, we have proceeded to surround it {45} with the halo of conformity to precedent. Some judges saw the unifying principle in the law of

⁴² *Jacobs & Youngs, Inc. v. Kent*, 230 N. Y. 239.

quasi-contracts. Others saw it in the distinction between dependent and independent promises, or between promises and conditions. All found, however, in the end that there *was* a principle in the legal armory which, when taken down from the wall where it was rusting, was capable of furnishing a weapon for the fight and of hewing a path to justice. Justice reacted upon logic, sentiment upon reason, by guiding the choice to be made between one logic and another. Reason in its turn reacted upon sentiment by purging it of what is arbitrary, by checking it when it might otherwise have been extravagant, by relating it to method and order and coherence and tradition.⁴³

In this conception of the method of logic or philosophy as one organon among several, I find nothing hostile to the teachings of continental jurists who would dethrone it from its place and {46} power in systems of jurisprudence other than our own. They have combated an evil which has touched the common law only here and there, and lightly. I do not mean that there are not fields where we have stood in need of the same lesson. In some part, however, we have been saved by the inductive process through which our case law has developed from evils and dangers inseparable from the development of law, upon the basis of the *jus scriptum*, by a process of deduction.⁴⁴ Yet even continental jurists who emphasize the need of other methods, do not ask us to abstract from legal principles all their fructifying power. The misuse of logic or philosophy begins when its method and its ends are treated as supreme and final. They can never be banished altogether. "Assuredly," says François Géný,⁴⁵ "there should be no question of banishing ratiocination and logical methods from the {47} science of positive law." Even general principles may sometimes be followed rigorously in the deduction of their consequences. "The abuse," he says, "consists, if I do not mistake, in envisaging ideal conceptions, provisional and purely subjec-

⁴³ Cf. *Hynes v. N. Y. Central R. R. Co.* (231 N. Y. 229, 235).

⁴⁴ "Notre droit public, comme notre droit privé, est un *jus scriptum*" (Michoud, "La Responsabilité de l'état à raison des fautes de ses agents," *Revue du droit public*, 1895, p. 273, quoted by Géný, vol. I, p. 40, sec. 19).

⁴⁵ *Op. cit.*, vol. I, p. 127, sec. 61.

tive in their nature, as endowed with a permanent objective reality. And this false point of view, which, to my thinking, is a vestige of the absolute realism of the middle ages, ends in confining the entire system of positive law, *a priori*, within a limited number of logical categories, which are predetermined in essence, immovable in basis, governed by inflexible dogmas, and thus incapable of adapting themselves to the ever varied and changing exigencies of life.”

In law, as in every other branch of knowledge, the truths given by induction tend to form the premises for new deductions. The lawyers and the judges of successive generations do not repeat for themselves the process of verification, any more than most of us repeat the demonstrations of the truths of astronomy or physics. A stock of juridical conceptions and formulas is {48} developed, and we take them, so to speak, ready-made. Such fundamental conceptions as contract and possession and ownership and testament and many others, are there, ready for use. How they came to be there, I do not need to inquire. I am writing, not a history of the evolution of law, but a sketch of the judicial process applied to law full grown. These fundamental conceptions once attained form the starting point from which are derived new consequences, which, at first tentative and groping, gain by reiteration a new permanence and certainty. In the end, they become accepted themselves as fundamental and axiomatic. So it is with the growth from precedent to precedent. The implications of a decision may in the beginning be equivocal. New cases by commentary and exposition extract the essence. At last there emerges a rule or principle which becomes a datum, a point of departure, from which new lines will be run, from which new courses will be measured. Sometimes the rule or principle is found to have been formulated too narrowly or too broadly, and has to be reframed. {49} Sometimes it is accepted as a postulate of later reasoning, its origins are forgotten, it becomes a new stock of descent, its issue unite with other strains, and persisting permeate the law. You may call the process one of analogy or of logic or of philosophy as you please. Its essence in any event is the derivation of a consequence from a rule or a principle or a precedent which, accepted as a datum, contains implicitly within itself the germ of the

conclusion. In all this, I do not use the word philosophy in any strict or formal sense. The method tapers down from the syllogism at one end to mere analogy at the other. Sometimes the extension of a precedent goes to the limit of its logic. Sometimes it does not go so far. Sometimes by a process of analogy it is carried even farther. That is a tool which no system of jurisprudence has been able to discard.⁴⁶ A rule which has worked well in one field, or which, in any event, is there whether its workings have been revealed or not, is carried over into another. Instances of such a process I group {50} under the same heading as those where the nexus of logic is closer and more binding.⁴⁷ At bottom and in their underlying motives, they are phases of the same method. They are inspired by the same yearning for consistency, for certainty, for uniformity of plan and structure. They have their roots in the constant striving of the mind for a larger and more inclusive unity, in which differences will be reconciled, and abnormalities will vanish. ❶

⁴⁶ Ehrlich, "Die Juristische Logik," pp. 225, 227.

⁴⁷ Cf. Géný, *op. cit.*, vol. II, p. 121, sec. 165; also vol. I, p. 304, sec. 107.