



# WOE UNTO YOU, LAWYERS!

A lusty, gusty attack on "The Law" as a curious, antiquated institution which, through outworn procedures, technical jargon and queer mummery, enables a group of medicine-men to dominate our social and political lives and our business, to their own gain.

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"Woe unto you, lawyers! For ye have taken away  
the key of knowledge: ye entered not in yourselves,  
and them that were entering in ye hindered." - Luke. XI, 52

## **Contents**

- I - Modern Medicine-Men
- II - The Law of the Lawyers
- III - The Way it Works
- IV - The Law at its Supremest
- V - No Tax on Max
- VI - The Law and the Lady
- VII - Fairy-Tales and Facts
- VIII - More about Legal Language
- IX - Incubators of the Law
- X - A Touch of Social Significance
- XI - Let's Lay Down the Law

## ***Preface***

No lawyer will like this book. It isn't written for lawyers. It is written for the average man and its purpose is to try to plant in his head, at the least, a seed of skepticism about the whole legal profession, its works and its ways.

In case anyone should be interested, I got my own skepticism early. Before I ever studied law I used to argue occasionally with lawyers – a foolish thing to do at any time. When, as frequently happened, they couldn't explain their legal points so that they made any sense to me I brashly began to suspect that maybe they didn't make any sense at all. But I couldn't know. One of the reasons I went to law school was to try to find out.

At law school I was lucky. Ten of the men under whom I took courses were sufficiently skeptical and common-sensible about the branches of law they were teaching so that, unwittingly of course, they served together to fortify my hunch about the phoniness of the whole legal process. In a sense, they are the intellectual godfathers of this book. And though all of them would doubtless strenuously disown their godchild, I think I owe it to them to name them. Listed alphabetically, they are:

Thurman Arnold, now Assistant Attorney-General of the United States; Charles E. Clark, now Judge of the U.S. Circuit Court of Appeals; William O' Douglas, now Justice of the U.S. Supreme Court; Felix Frankfurter, now Justice of the U.S. Supreme Court; Leon Green, now Dean of the Northwestern University Law School; Walton Hamilton, Professor of Law at Yale University; Harold Laski, Professor of Political Science at the London School of Economics; Richard Joyce Smith, now a practicing attorney in New York City; Wesley Sturges, now Director of the Distilled Spirits Institute; and the late Lee Tulin.

By the time I got through law school, I had decided that I never wanted to practice law. I never have. I am not a member of any bar. If anyone should want, not unreasonably, to know what on earth I am doing – or trying to do – teaching law, he may find a hint of the answer toward the end of Chapter IX.

When I was mulling over the notion of writing this book, I outlined my ideas about the book, and about the law, to a lawyer who is not only able but also extraordinarily frank and perceptive about his profession. "Sure," he said, "but why give the show away?" That clinched it.

F.R.

## CHAPTER I

### MODERN MEDICINE-MEN

*"The law is a sort of hocus-pocus science."* Charles Macklin

In TRIBAL TIMES, there were the medicine-men. In the Middle Ages, there were the priests. Today there are the lawyers. For every age, a group of bright boys, learned in their trade and jealous of their learning, who blend technical competence with plain and fancy hocus-pocus to make themselves masters of their fellow men. For every age, a pseudo-intellectual autocracy, guarding the tricks of its trade from the uninitiated, and running, after its own pattern, the civilization of its day.

It is the lawyers who run our civilization for us – our governments, our business, our private lives. Most legislators are lawyers; they make our laws. Most presidents, governors, commissioners, along with their advisers and brain-trusters are lawyers; they administer our laws. All the judges are lawyers; they interpret and enforce our laws. There is no separation of powers where the lawyers are concerned. There is only a concentration of all government power – in the lawyers. As the schoolboy put it, ours is "a government of lawyers, not of men."

It is not the businessmen, no matter how big, who run our economic world. Again it is the lawyers, the lawyers who "advise" and direct every time a company is formed, every time a bond or a share of stock is issued, almost every time material is to be bought or goods to be sold, every time a deal is made. The whole elaborate structure of industry and finance is a lawyer-made house. We all live in it, but the lawyers run it.

And in our private lives, we cannot buy a home or rent an apartment, we cannot get married or try to get divorced, we cannot die and leave our property to our children without calling on the lawyers to guide us. To guide us, incidentally, through a maze of confusing gestures and formalities that lawyers have created.

Objection may be raised immediately that there is nothing strange or wrong about this. If we did not carry on our government and business and private activities in accordance with reasoned rules of some sort we would have chaos, or else a reversion to brute force as the arbiter of men's affairs. True – but beside the point. The point is that it is the lawyers who make our rules and a whole civilization that follows them, or disregards them at its peril. Yet the tremendous majority of the men who make up that civilization, are *not* lawyers, pay little heed to how and why the rules are made. They do not ask, they scarcely seem to care, which rules are good and which are bad, which are a help and which a nuisance, which are useful to society and which are useful only to the lawyers. They shut their eyes and leave to the lawyers the running of a large part of their lives.

Of all the specialized skills abroad in the world today, the average man knows least about the one that affects him most – about the thing that lawyers call The Law. A man who will discourse at length about the latest cure for streptococci infection or describe in detail his allergic symptoms cannot begin to tell you what happened to him legally – and plenty did – when he got married. A man who would not dream of buying a car without an intricate and illustrated description of its mechanical workings will sign a lease without knowing what more than four of its forty-four clauses mean or why they are there. A man who will not hesitate to criticize or disagree with a trained economist or an expert in any one of a dozen fields of learning will follow, unquestioning and meek, whatever advice his lawyer gives him. Normal human skepticism and curiosity seem to vanish entirely whenever the layman encounters The Law.

There are several reasons for this mass submission, One is the average man's fear of the unknown – and of policemen. The law combines the threat of both. A non-lawyer confronted by The Law is like a child faced by a pitch-dark room. Merciless judges lurk there, ready to jump out at him. ("Ignorance of the law is no defense.") Cowed and, perforce, trusting, he takes his lawyer's hand, not knowing what false step he might make unguided, nor what punishment might then lie in wait for him. He does not dare display either skepticism or disrespect when he feels that the solemn voice of the lawyer, telling him what he must or may not do, is backed by all the mighty and mysterious forces of law-and-order from the Supreme Court on down on the cop on the corner.

Then, too, every lawyer is just about the same as every other lawyer. At least he has the same thing to sell, even though it comes in slightly different models and at varying prices. The thing he has to sell is The Law. And it is as useless to run from one lawyer to another in the hope of finding something better or something different or something that makes more common sense as it would be useless to run from one Ford dealer to another if there were no Chevrolets or Plymouths or even bicycles on the market. There is no brand competition or product competition in the lawyers' trade. The customer has to take The Law or nothing. And if the customer should want to know a little more about what he's buying – buying in direct fees or indirect fees or taxes – the lawyers need have no fear of losing business or someone else if they just plain refuse to tell.

Yet lawyers can and often do talk about their product without telling anything about it at all. And that fact involves one of the chief reasons for the non-lawyer's persistent ignorance about The Law. Briefly, The Law is carried on in a foreign language. Not that it deals, as do medicine and mechanical engineering, with physical phenomena and instruments which need special words to describe them simply because there are no other words. On the contrary, law deals almost exclusively with the ordinary facts and occurrences of everyday business and government and living. But it deals with them in a jargon which completely baffles and befuzzles the ordinary literate man, who has no legal training to serve him as a trot.

Some of the language of the law is built out of Latin or French words, or out of old English words which, but for the law, would long ago have fallen into disuse. A common street brawl means nothing to a lawyer until it has been translated into a "felony," a "misdemeanor," or a "tort"; and any of those words, when used by a lawyer, may mean nothing more than a common street brawl. Much of the language of the law is built out of perfectly respectable English words which have been given a queer and different and exclusively legal meaning. When a lawyer speaks, for instance, of "consideration" he is definitely not referring to kindness. All of the language of the law is such, as Mr. Dooley once put it, that a statute which reads like a stone wall to the lawman becomes, for the corporation lawyer, a triumphal arch. It is, in short, a language that nobody but a lawyer understands. Or could understand --if we are to take the lawyers' word for it.

For one of the most revealing things about the lawyers' trade is the unanimous inability or unwillingness, or both, on the part of the lawyers to explain their brand of professional pig Latin to men who are not lawyers. A doctor can and will tell you what a metatarsus is and where it is and why it is there and, if necessary, what is wrong with it. A patient electrician can explain, to the satisfaction of a medium-grade mentality, how a dynamo works. But try to pin down a lawyer, any lawyer, on "jurisdiction" or "proximate cause" or "equitable title" --- words which he tosses off with authority and apparent familiarity and which are part of his regular stock in trade. If he does not dismiss your question summarily with "You're not a lawyer' you wouldn't understand," he will disappear into a cloud of legal jargon, perhaps descending occasionally to the level of a non-legal abstraction or to the scarcely more satisfactory explanation that something is so because The Law says that it is so. That is where you are supposed to say, "I see."

It is this fact more than any other – the fact that lawyers can't or won't tell what they are about in ordinary English – that is responsible for the hopelessness of the non-lawyer in trying to cope with or understand the so-called science of law. For the lawyers' trade is a trade built entirely on words. And so long as the lawyers carefully keep to themselves the key to what those words mean, the only way the average man can find out what is going on is to become a lawyer, or at least to study law, himself. All of which makes it very nice – and very secure – for the lawyers.

Of course any lawyer will bristle, or snort with derision, at the idea that what he deals in is words. He deals, he will tell you, in propositions, concepts, fundamental principles – in short, in ideas. The reason a non-lawyer gets lost in The Law is that his mind has not been trained to think logically about abstractions, whereas the lawyer's mind has been so trained. Hence the lawyer can leap lightly and logically from one abstraction to another, or narrow down a general proposition to apply to a particular case, with an agility that leaves the non-lawyer bewildered and behind. It is a pretty little picture.

Yet it is not necessary to go into semantics to show that it is a very silly little picture. No matter what lawyers deal *in*, the thing they deal *with* is exclusively the stuff of living. When a government wants to collect money and a rich man does not want to pay it, when a company wants



to fire a worker and the worker wants to keep his job, when an automobile driver runs down a pedestrian and the pedestrian says it was the driver's fault and the driver says it wasn't – these things are living facts, not airy abstractions. And the only thing that matters about the law is the way it handles these facts and a million others. The point is that legal abstractions mean nothing at all until they are brought down to earth. Once brought down to earth, once applied to physical facts, the abstractions become nothing but words – words by which lawyers describe, and justify, the things that lawyers do. Lawyers would always like to believe that the principles they say they work with are something more than a complicated way of talking about simple, tangible, non-legal matters; but they are not. Thus the late Justice Holmes was practically a traitor to his trade when he said, as he did say, "General propositions do not decide concrete cases."

To dismiss the abstract principles of The Law as being no more, in reality, than high-sounding combinations of words may, in one sense, be a trifle confusing. Law in action does, after all, amount to the application of rules to human conduct; and rules may be said to be, inevitably, abstractions themselves. But there is a difference and a big one. "Anyone who pits on this platform will be fined five dollars" is a rule and, in a sense, an abstraction; yet it is easily understood, it needs no lawyer to interpret it, and it applies simply and directly to a specific factual thing. But "Anyone who willfully and maliciously spits on this platform will be fined five dollars" is an abstraction of an entirely different color. The Law has sneaked into the rule in the words "willfully and maliciously." Those words have no real meaning outside of lawyers' minds until someone who spits on the platform is or is not fined five dollars – and they have none afterward until someone else spits on the platform and does or does not get fined.

The whole of The Law – its concepts, its principles, its propositions – is made up of "willfully" and "maliciously," of words that cannot possibly be pinned down to a precise meaning and that are, in the last analysis, no more than words. As a matter of fact, the bulk of The Law is made up of words with far less apparent relation to reality than "willfully" or "maliciously." And you can look through every bit of The Law – criminal law, business law, government law, family law – without finding a single rule that makes as much simple sense as "Anyone who spits on this platform will be fined five dollars."

That, of course, is why a non-lawyer can never make rhyme or reason out of a lawyer's attempted explanation of the way The Law works. The non-lawyer wants the whole business brought down to earth. The lawyer cannot bring it down to earth without, in so doing, leaving The Law entirely out of it. To say that Wagner Labor Act was held valid because five out of the nine judges on the Supreme Court approved of it personally, or because they thought it wiser policy to uphold it than to risk further presidential agitation for a change in the membership of the Court – to say this is certainly not to explain The Law of the case. Yet to say this makes a great deal more sense to the layman and comes a great deal closer to the truth than does the legal explanation that the Act was held valid because it constituted a proper exercise of Congress' power to regulate interstate commerce. You can probe the words of that legal explanation to their depths and bolster them with other legal propositions dating back one hundred and fifty years and they will still mean, for all practical purposes, exactly nothing.

There is no more pointed demonstration of the chasm between ordinary human thinking and the mental processes of the lawyer than in the almost universal reaction of law students when they first encounter The Law. They come to law school a normally intelligent, normally curious, normally receptive group. Day in and day out they are subjected to the legal lingo of judges, textbook writers, professors – those learned in The Law. But for months none of it clicks; there seems to be nothing to take hold of. These students cannot find anywhere in their past knowledge or experience a hook on which to hang all this strange talk of "mens rea" and "fee simple" and "due process" and other unearthly things. Long and involved explanations in lectures and law books only make it all more confusing. The students know that law eventually deals with extremely practical matters like buying land and selling stock and putting thieves in jail. But all that they read and hear seems to stem not only from a foreign language but from a strange and foreign way of thinking.

Eventually their confusion founded though it is in stubborn and healthy skepticism is worn down. Eventually they succumb to the barrage of principles and concepts and all the metaphysical refinements that go with them. And once they have learned to talk the jargon, once they have forgotten their recent insistence on matters-of-factness, once they have begun to glory in their own agility at that mental hocus-pocus that

had them befuddled a short while ago, then they have become, in the most important sense, lawyers. Now they, too, have joined the select circle of those who can weave a complicated intellectual riddle out of something so mundane as a strike or an automobile accident. Now it will be hard if not impossible ever to bring them back to that disarmingly direct way of thinking about the problems of people and society which they used to share with the average man before they fell in with the lawyers and swallowed The Law.

Learning the lawyers' talk and the lawyers' way of thinking – learning to discuss the pros and cons of, say, pure food laws in terms of "affectation with a public contract" – is very much like learning to work cryptograms or play bridge. It requires concentration and memory and some analytic ability, and for those who become proficient it can be a stimulating intellectual game. Yet those who work cryptograms or play bridge never pretend that their mental efforts, however difficult and involved, have any significance beyond the game they are playing. Whereas those who play the legal game not only pretend but insist that their intricate ratiocinations in the realm of pure thought have a necessary relation to the solution of practical problems. It is through the medium of their weird and wordy mental gymnastics that the lawyers lay down the rules under which we live. And it is only because the average man cannot play their game, and so cannot see for himself how intrinsically empty-of-meaning their playthings are, that the lawyers continue to get away with it.

The legal trade, in short, is nothing but a high-class racket. It is a racket far more lucrative and more powerful and hence more dangerous than any of those minor and much-publicized rackets, such as ambulance-chasing or the regular defense of known criminals, which make up only a tiny part of the law business and against which the respectable members of the bar are always making speeches and taking action. A John W. Davis, when he exhorts a court in the name of God and Justice and the Constitution – and, incidentally, for a fee – not to let the federal government regulate holding companies, is playing the racket for all it is worth. So is a Justice Sutherland when he solemnly forbids a state to impose an inheritance tax on the ground that the transfer – an abstraction – of the right to get dividends – another abstraction – did not take place *geographically* inside the taxing state. And so, for that matter, are all the Corcorans and Cohens and

Thurman Arnolds and the rest, whose chief value to the New Deal lies not in their political views nor even in their administrative ability but rather in their adeptness at manipulating the words of The Law so as to make things sound perfectly proper which other lawyers, by manipulating different words in a different way, maintain are terribly improper. The legal racket knows no political or social limitations.

Furthermore, the lawyers – or at least 99 44/100 per cent of them – are not even aware that they are indulging in a racket, and would be shocked at the very mention of the idea. Once bitten by the legal bug, they lose all sense of perspective about what they are doing and how they are doing it. Like the medicine men of tribal times and the priests of the Middle Ages they actually believe in their own nonsense. This fact, of course, makes their racket all the more insidious. Consecrated fanatics are always more dangerous than conscious villains. And lawyers are fanatics indeed about the sacredness of the word-magic they call The Law.

Yet the saddest and most insidious fact about the legal racket is that the general public doesn't realize it's a racket either. Scared, befuddled, impressed and ignorant, they take what is fed them, or rather what is sold them. Only once an age do the non-lawyers get, not wise, but disgusted, and rebel. As Harold Laski is fond of putting it, in every revolution the lawyers lead the way to the guillotine or the firing squad.

It should not, however, require a revolution to rid society of lawyer-control. Nor is riddance by revolution ever likely to be a permanent solution. The American colonists had scarcely freed themselves from the nuisances of The Law by practically ostracizing the pre-Revolutionary lawyers out of their communities – a fact which is little appreciated – when a new and home-made crop of lawyers sprang up to take over the affairs of the baby nation. That crop, 150 years later, is still growing in numbers and in power.

What is really needed to put the lawyers in their places and out of the seats of the mighty is no more than a slashing of the veil of dignified mystery that now surrounds and protects The Law. If people could be made to realize how much of the vaunted majesty of The Law is a hoax and how many of the mighty processes of The Law are merely logical legerdemain, they would not long let the lawyers lead them around by

the nose. And people have recently begun, bit by bit, to catch on. The great illusion of The Law has been leaking a little at the edges.

There was President Roosevelt's plan to add to the membership of the Supreme Court, in order to get different decisions. Even those who opposed the plan – and they of course included almost all the lawyers – recognized, by the very passion of their arguments, that the plan would have been effective: in other words, that by merely changing judges you could change the Highest Law of the Land. And when the Highest Law of the Land was changed without even changing judges, when the same nine men said that something was constitutional this year which had been unconstitutional only last year, then even the most credulous of laymen began to wonder a little about the immutability of The Law. It did not add to public awe of The Law either when Thomas Dewey's grand-stand prosecution of a Tammany hack was suddenly thrown out of court on a technicality so piddling that every newspaper in New York City raised an editorial howl – against a more or less routine application of The Law. And such minor incidents as the recent discovery that one of Staten Island's leading law practitioners had never passed a bar examination, and so was not, officially, a lawyer, do not lend themselves to The Law's prestige.

Yet it will take a great deal more than a collection of happenings like these to break down, effectively, the superstition of the grandeur of The Law and the hold which that superstition has on the minds of most men. It will take some understanding of the wordy emptiness and irrelevance of the legal process itself. It will take some cold realization that the inconsistencies and absurdities of The Law that occasionally come into the open are not just accidents but commonplaces. It will take some awakening to the fact that training in The Law does not make lawyers wiser than other men, but only smarter.

Perhaps an examination of the lawyers and their Law, set down in ordinary English, might help achieve these ends. For, despite what the lawyers say, it *is* possible to talk about legal principles and legal reasoning in everyday non-legal language. The point is that, so discussed, the principles and the reasoning and the whole solemn business of The Law come to look downright silly. And perhaps if the ordinary man could see in black and white how silly and irrelevant and unnecessary it all is, he might be persuaded, in a peaceful way, to take

the control of his civilization out of the hands of those modern purveyors of streamlined voodoo and chromium-plated theology, the lawyers.

## CHAPTER II

### THE LAW OF THE LAWYERS

*"The law is the true embodiment*

*Of everything that's excellent.*

*It has no kind of fault or flaw." -- W.S. Gilbert*

The Law is the killy-loo bird of the sciences. The killy-loo, of course, was the bird that insisted on flying backward because it didn't care where it was going but was mightily interested in where it had been. And certainly The Law, when it moves at all, does so by flapping clumsily and uncertainly along, with its eye unswervingly glued on what lies behind. In medicine, in mathematics, in sociology, in psychology – in every other one of the physical and social sciences – the accepted aim is to look ahead and then move ahead to new truths, new techniques, new usefulness. Only The Law, inexorably devoted to all its most ancient principles and precedents, makes a vice of innovation and a virtue of hoariness. Only The Law resists and resents the notion that it should ever change its antiquated ways to meet the challenge of a changing world.

It is well-nigh impossible to understand how The Law works without fully appreciating the truth of this fact: -- The Law never admits to itself that there can be anything actually new under the sun. Minor variations of old facts, old machines, old relationships, yes; but never anything different enough to bother The Law into treating it otherwise than as an old friend in a new suit of clothes. When corporations first came on the legal scene, The Law regarded them as individual persons, in disguise, and so, for most legal purposes, a corporation is still considered, and even talked about, as a "person." A transport airplane, so far as The Law is concerned, is nothing but a newfangled variety of stagecoach. Such things as sit-down strikes, holding companies, Paris divorces, were treated with almost contemptuous familiarity by The Law when they first appeared, and the same fate undoubtedly awaits television when it grows up and begins to tangle with The Law. For all this is part of a

carefully nurtured legend to the effect that The Law is so omniscient that nothing men may do can ever take it unawares, and so all-embracing that the principles which will apply to men's actions 500 years from now are merely waiting to be applied to whatever men happen to be doing in 2439 A.D.

What The Law purports to be is a tremendous body of deathless truths so wide in scope and so infinite in their variations that they hold somewhere, and often hidden, within their vastnesses the solution of every conceivable man-made dispute or problem. Of course the truths are phrased as abstract principles, and the principles are phrased in the strange lingo of The Law. And so only the lawyers – especially those who have become judges or ordained interpreters of The Words – can ever fish the proper solution out of The Law's vastnesses. But it is the very keystone of the whole structure of legal mythology to insist that all earthly problems can and must be solved by reference to this great body of unearthly abstractions --or, in short, that they can and must be solved by the lawyers.

The chief reason why it is so hard for the ordinary man to get the lawyer's picture of The Law – as a supreme mass of changeless abstract principles – is that the ordinary man generally thinks of law as a composite of all the little laws that his various governments are forever passing and amending and, occasionally, repealing. Congress and state legislatures and city councils keep laying down rules and changing rules. Is this not clear proof that The Law moves with the times? Briefly, it is not.

To the lawyer, there is a vast difference between The Law and the laws. The Law is something beyond and above every statute that ever has been or could be passed. As a matter of fact, every statute, before the lawyers allow it to mean anything – before they let it have any effect on the actions of men – has to be fitted into The Law by "interpretation" of what the statute "means." And any apparently harmless little statute is likely to mean plenty to a lawyer, just as a statute which seems to carry dynamite in its words may mean nothing by the time the lawyers are through with it.

A few decades ago when the famous Clayton Act was passed, which was intended to preserve competition and crack down on monopolies,



a strong labor lobby got Congress to write Section 20 into the new law. Section 20 had practically nothing to do with competition or monopolies. Section 20 was intended to restrict federal courts from granting so many injunctions against union activities. Samuel Gompers, who was then the head man of the unions, called Section 20 "labor's Magna Charts." But Samuel Gompers was no lawyer.

By the time the lawyers, headed by the Supreme Court, got through with Section 20 it meant exactly nothing. Chief Justice Taft, speaking for the lawyers, said it was *intended* to mean exactly nothing. Referring to The Law as authority, he said that it was clear that Section 20 was no more than a restatement of The Law as it had existed before the Clayton Act was passed. Now, Chief Justice Taft was in no position to know, and would have considered it irrelevant if he had known, that the Clayton Act might not have been passed at all if it had not seemed clear to labor that Section 20 gave strikers the right to picket without constant interference by the federal courts. But Chief Justice Taft and his court of lawyers had the last word. They made of labor's "Magna Charta" something strangely resembling Germany's "scrap of paper." And all in the name of The Law.

Of course, Chief Justice Taft and his court would have found it far more difficult to do this if other lawyers had not played a leading part in writing the Clayton Act. Section 20 was full of those typically meaningless words, like "willfully" and "maliciously." It said, for instance, that federal courts could not stop strikers from picketing "lawfully." "Lawfully," according to Chief Justice Taft, meant in accordance with The Law before Clayton Act was passed. Before the Clayton Act was passed, the lawyers had ruled that just about all picketing was against The Law. Therefore it still was. Q. E. D. And, incidentally, the Supreme Court did almost the same thing with the whole of the Clayton Act by picking on other meaningless legalistic words to prove that most trusts were not trusts and most monopolies were not monopolies – according to The Law. You can change the laws all you please, but you can't change The Law. And The Law is what counts.

It would, moreover, be a mistake to jump to the conclusion that Chief Justice Taft and his court "interpreted" Section 20 of the Clayton Act into complete oblivion merely because they didn't like

unions or strikes or picketing. For Taft, in the course of explaining at great length why Section 20 did not really mean a thing, went out of his way to include in his opinion a rousing defense of labor unions. Of course, this defense did not do the unions any good after Taft got through with it. The point is that Taft was insisting to his fellow-lawyers – the only people who ever read or understand judicial opinions – that is disappointing the unions he was merely following The Law. The choice, however distasteful, was forced upon him. For it is part of the legal legend that no lawyer – not even when he becomes a Supreme Court justice – ever does any more than explain what The Law is and how it applies. He is merely the voice through which the great gospel is made known to men.

Moreover, The Law can do strange things to man-made laws even when, as very rarely happens, such laws are not so full of "willfullys" and "maliciouslys" and "lawfullys" that they practically invite the lawyers to write their own ticket. For example, there was the Guffey Coal Act, involving federal regulation of the coal industry. The Supreme Court first said that most of the important parts of the Act were unconstitutional. Now, saying that a law is unconstitutional is really no more than a convenient way of saying that it goes against The Law. But the whole idea of constitutionality and unconstitutionality is so mixed up with notions like patriotism and politics, as well as with the most sacred and complicated of all legal rules, that it deserves and will get full treatment a little later on. The point here is that, after saying part of the Guffey Act was unconstitutional, the judges went on to say that the good part had to be thrown out with the bad part. Not unreasonable perhaps, on the fact of it. Not unreasonable until you learn that Congress, foreseeing what the Supreme Court might do with part of the Act, had taken particular pains to write very clearly into the Act that if part of it should be held unconstitutional, the rest of it should go into effect anyway. And so in order to throw out the whole Act, the Court had to reason this way: -- Part of this law is unconstitutional. The rest is constitutional. Congress said the constitutional. Part should stand regardless of the rest. But that is not our idea of a proper way of doing things. We do not believe Congress would want to do things in a way that does not seem proper to us, who really know The Law. Therefore, we do not believe Congress meant what it said when it said to let the

constitutional part stand. Therefore, we will throw it out along with the unconstitutional part. In the name of The Law.

That reasoning is not a burlesque. It is a shortened version of part of what the Supreme Court actually said, though the Court phrased it in multi-syllabic legal language, in the case of Carter against the Carter Coal Company. And the result is an example, more obvious but no more extreme than thousands upon thousands of others, of how little the laws written by our so-called lawmakers really mean until the lawyers have decided what those laws mean – or don't mean – in the light of The Law.

Thus, the common man is dead wrong when he thinks of law as a conglomeration of all the laws that are passed by legislatures and written down in books – even though it is true that practically all those little laws are phrased by lawyers in legal language. Those little laws, those statutes, are, to a lawyer, the least important and least respectable of three kinds of rules with which the lawyers deal. The other two kinds of rules are those that make up what lawyers call "the common law" and those that make up "constitutional law."

Now, the common law is actually closer to The Law with a capital L than any constitution or statute ever written. The common law is the set of rules that lawyers use to settle any dispute or problem to which no constitution or statute applies. There is, for instance, no written rule to tell the lawyers (or anybody else) whether a Nevada divorce is good in Pennsylvania. There is no written rule to tell whether a man who orders a house built with a bathroom between the kitchen and the pantry has to take the house and pay the builder if everything else is fine but the bathroom is between the living room and the coat-closet. In both cases, the lawyer-judges write their own answers without interference from any constitution or statute. In both cases, the answers are said to be fished directly, non-stop, out of the mass of abstract principles that make up The Law.

Constitutional law is something else again. A constitution, in this country at least, is halfway between The Law and an ordinary statute. Like a statute, it is phrased by men, a few of whom are usually not lawyers, and is written down in definite if often nebulous-meaning words; (though in England the Constitution isn't written down anywhere

and so is indistinguishable from The Law of England). But like The Law, constitutions, except where they deal with the pure mechanics of government – as in giving each state two senators or listing the length of a governor's term of office – are made up of abstract principles which mean nothing until brought down to earth by the lawyers. If this sounds like heresy, consider, for instance, the U.S. Constitution's well-known guarantee of freedom of speech. What does that guarantee mean, practically speaking? It did not stop the federal government from putting people in jail during the World War because they talked against war. It did not stop the police of Harlan County, Kentucky, from beating up people who tried to make speeches in favor of unions in Harlan County. On the other hand, that constitutional guarantee does prevent the extreme restrictions of free speech which are common abroad today. How tell, then, which free speech is good and which is bad, under the Constitution? Only by asking the lawyer-judges. And how can they tell; how do they decide? Simply by referring to our old friend, The Law, in order to "interpret" the Constitution.

The Law is thus superior to constitutions, just as it is superior to statutes. And according to the legal legend, it is neither constitutions nor statutes which finally determine the rules under which men live. It is The Law, working unimpeded to produce the common law, working through the words of constitutions to produce constitutional law, working through the words of both statutes and constitutions to produce statutory law. All three kinds of law are merely obedient offspring of that great body of abstract principles which never changes and which nobody but a lawyer even pretends to understand.

Justice Holmes was in effect talking about The Law as a whole, when he said of its nearest and dearest offspring; "The common law is not a brooding omnipresence in the sky." But Justice Holmes, as he well knew when he said that, was dissenting not only from a decision of the Supreme Court but from the opinions of most lawyers about The Law. For practically every lawyer thinks and talks of The Law as a sort of omnipotent, omniscient presence hovering around like God over the affairs of men. Yet every lawyer purports to be able to understand and interpret a large part of that presence for the benefit of those who are not lawyers – at a price.

The strange thing is, however, that lawyers, for all their alleged insight into the great mystery, are never able to agree about the presence or its interpretation, when it comes down to applying The Law to a simple, specific factual problem. If the lawyers agreed, we would not have appellate courts reversing the judgments of trial courts and super-appellate courts reversing the judgments of appellate courts, and super-super-appellate courts – or supreme courts – reversing the judgments of super-appellate courts. The fact is that every lawyer claims to know all about The Law to a specific dispute. Whereas no non-lawyer cares in the slightest degree what The Law is until it comes down to applying The Law to a specific dispute.

It is all very well for a lawyer to say, out of his knowledge of The Law, that a "mortgagor" has "legal title" to a building. That is very pretty and sounds very impressive. But if the mortgagor then wants to know if he can sell the building, and on what terms, and if he has to pay taxes on it, and if he can kick the mortgagee out if the mortgagee comes snooping around, the lawyers will begin to disagree. It is all very well, too, for a lawyer to say that The Law forbids "interference with the freedom of contract." But when 57 respectable lawyers of the late Liberty League declare unanimously that employers need pay no attention to the Wagner Labor Act, because it interferes with freedom of contract, and then the Supreme Court tells them they are 100% wrong, the 57 lawyers undoubted knowledge of The Law begins to look just a trifle futile.

The Law, as a matter of fact, is all things to all lawyers. It is all things to all lawyers simply because the principles on which it is built are so vague and abstract and irrelevant that it is possible to find in those principles both a justification and a prohibition of every human action or activity under the sun.

And how does The Law, then, ever get brought down to earthly affairs? In what way does it actually succeed in building regulatory fences around men's conduct? The answer is just as simple as it is complex. The answer is that the last bunch of judges which gets a shot at the solution of any specific problem has the decisive word on The Law as it affects that problem. The solution which that last bunch of judges gives to that problem *is* The Law so far as that problem is concerned – even though every other lawyer in the world might suppose The Law was

different. It might not then be irrelevant to ask just what a judge is. And it was an unusually candid judge who recently gave the best answer to that question. "A judge," he said, "is a lawyer who knew a governor."

The lawyers who knew governors – or who knew presidents – or who knew enough ward-leaders (where judges are elected) – bring The Law down to earth in all sorts of different and conflicting ways. A homeowner who beats up a trespassing hobo may be a hero in one state and a criminal in another. But no matter which he is, the legal appraisal of his actions will fit perfectly into the great and ubiquitous framework of The Law. For, no matter how differently different judges in different places may decide the same human problem, or decide it differently in the same place at different times, the great legend of The Law as steadfast and all-embracing is always adhered to. Decisions may change or differ or conflict but The Law budges not.

And it is necessary to understand this keystone of legal reasoning – and to accept it as a fact no matter how silly it may sound – before it is possible to understand the strange processes of The Law. It is necessary to realize that The Law not only stands still but is proud and determined to stand still. If a British barrister of 200 years ago were suddenly to come alive in an American court-room, he would feel intellectually at home. The clothes would astonish him, the electric lights would astonish him, the architecture would astonish him. But as soon as the lawyers started talking legal talk, he would know that he was among friends. And given a couple of days with the law books, he could take the place of any lawyer present – or of the judge – and perform the whole legal mumbo-jumbo as well as the. Imagine, by contract, a British surgeon of 200 years ago plopped into a modern hospital operating room. He would literally understand less of what was going on than would any passer-by brought in from the street at random.

The law, alone of all the sciences, just sits – aloof and practically motionless. Constitutions do not affect it and statutes do not change it. Lawyers talk wise about it and judges purport to "apply" it when they lay down rules for men to follow, but actually The Law – with a capital L – has no real relation to the affairs of men. It is permanent and changeless – which means that it is not of this earth. It is a mass of

vague abstract principles – which means that it is a lot of words. It is a brooding omnipresence in the sky – which means that it is a big balloon, which has thus far escaped the lethal pin.

## CHAPTER III

### THE WAY IT WORKS

*"...the lawless science of our law,*

*That codeless myriad of precedent*

*That wilderness of single instances."* -- Alfred, Lord Tennyson

In order to demonstrate up to the hilt that the whole of The Law is a hoax, a balloon, a lot of empty words, it would presumably be necessary to take each principle and sub-principle and counter-principle of The Law in turn and divest each one of its dazzling legal trappings so that the non-lawyer could see that there was nothing inside any of them. Plainly, that would be impossible. The lawyer-judges alone turn out each year hundreds upon hundreds of books full of nothing but refinements of The Law and its principles. Tremendous libraries overflow with volumes which are not even about The Law but which *are* part of The Law. (Lawyers, incidentally, spend most of their working lives trying to make a small dent in the mountains of literature that help make up The Law.) Yet it may perhaps serve the general deflating, or disrobing, purpose to take the legal pants, step by easy step, off a few simple and entirely typical examples of The Law in action.

The field of Law known as Contracts is one of the most settled, most venerable, and least politically complicated fields of Law. It is the field of Law that deals with the agreements, business or otherwise, that men – or companies (but companies, remember, are nothing but men to The Law) – make with each other. Those agreements usually consist of one man promising to do one thing, such as to dig a ditch, and another man promising to do another thing, such as to hand over \$50. Of course, if men could be trusted to keep their promises there would be no excuse for a Law of Contracts – but then if men could be trusted to act decently in general there would be little need for Law of any kind. As a matter of fact, only gamblers trust each other to keep their promises, for The Law will not stoop to enforce a gambling agreement or bet. The whole Law of Contracts is based on the idea that men in general cannot



be trusted to keep their promises, and around this area of mutual mistrust The Law lays down its principles.

The first principle is that before you can have a Contract that The Law will uphold, you must have an Offer by one party and an Acceptance by another party. (Only The Law insists on making a "party" out of a single person.) What then, in the first place, is a legal Offer? It is something quite different from an ordinary non-legal offer, in the sense that the man in the street might use that word. A lawyer would scoff at the notion that most offers were Offers.

For instance, if a man says to his gardener, "Tony, I'll give you fifty dollars," that is not a legal Offer. If a man says to his gardener, "Tony, I'll give you fifty dollars if you'll dig a ditch for me," that is not an Offer either. But if the man says to his gardener, "Tony, if you'll dig a ditch for me, two feet deep and three feet wide, running from the northwest corner of the house to the pigpen, and finish it by Wednesday week (though The Law would frown on such colloquial phrasing), I'll pay you fifty dollars when you get it done," that *is* an Offer. And incidentally, if Tony says "O.K., Boss," that's a full-fledged Acceptance.

What is it that makes the third proposition a legal Offer, whereas the first two were not? Briefly, it is the fact that it is definite enough so that when Tony says, "O.K., Boss," the boss knows and Tony knows and, most important, any judge would know exactly what Tony was expected to do. Of course, the whole question of whether something is an Offer or isn't an Offer is based on the assumption that Tony and his boss may some day end up in court over their conversation. And on that basis, it seems fair enough to say that if Tony promised to do something definite, he made a Contract (which means only that a court will hold him to his promise or soak him for breaking it) and if he did not promise to do something definite, he did not make a Contract. But the phony part is the way The Law brings into the picture one of its irrelevant generalities – here, the abstract idea of a legal Offer – in talking about and dealing with a simple business arrangement.

If Tony and his boss should ever get into court over the undug ditch, The Law of the case would be solemnly stated like this: -- The proposition was definite; *therefore* it was a valid Offer; *therefore* once it

was accepted, there was a valid Contract; *therefore* Tony must dig or pay. Or else: -- The proposition was too indefinite; *therefore* there was no valid Offer; *therefore* there was no Contract; *therefore* Tony need do nothing. The point is that the question of there being or not being an Offer is utter nonsense. The whole business could be reduced very simply to – the proposition was definite, therefore Tony must dig or pay; or, the proposition was indefinite, therefore Tony need do nothing. But of course, to simplify legal reasoning even to this small extent would make the case immediately much more comprehensible to the non-lawyer, and would leave the lawyers with no special and mystifying lingo in which to discuss a simple little problem. Moreover, it would leave The Law out of the picture. The Law, remember, is that before you have a Contract, you have to have not an offer, not even a definite offer, but a legal Offer.

To get back to the ditch, suppose Tony, instead of saying, "O.K., Boss," had said, "I dig him for sixty bucks, Boss," and the boss had then said, "O.K., Tony." The average man would say that they had come to terms and if The Law enforces that kind of thing, that' fine. The Law would enforce it, all right, but not in those words. To The Law, Tony' comment would first have to be a Counter-Offer, involving an Implied Rejection of the Original Offer, and the boss's "O.K." would then become an Acceptance of the Counter-Offer. And if, by any chance, the boss had come back at Tony with "How about fifty-five?," *that* would have been a Counter-Counter-Offer involving an Implied, etc. It takes three years to get through law school.

The Acceptance of an Offer is not always so simple as an "O.K., Boss," or an "O.K., Tony," either. For instance, the boss might have described the ditch he wanted and how much he would pay for it, and Tony might have said nothing, and then the boss might have set out for the 8:20 train leaving his Offer, as it were, hanging in mid-air. Three days later he comes back and finds the ditch all dug. Does he have to pay the fifty dollars he Offered for it? Any moron would say, of course he does. But why, according to The Law? Apparently there was no Acceptance, and you can't have a valid Contract without an Acceptance, and may be by this time the boss has decided he doesn't want the ditch anyway, or that fifty dollars is too much to pay for it.

The Law slides out of this one neatly and easily. The digging of the ditch, says The Law, amounts to an Acceptance. Now the digging of the ditch amounted to Performance too – another, and more or less obvious, legal concept – but that does not stop it from being an Acceptance at the same time. And if The Law could not find an Acceptance somewhere, there would be no valid Contract and Tony might never get his fifty dollars. Which would be obviously silly. Just about as silly as looking all around for an acceptable Acceptance before you see to it that he does get paid.

Suppose, though, that when the boss gets home Tony has dug not the whole ditch but half of it. And the boss then says, "I don't want the ditch and I won't pay for it so don't finish it," and Tony says, "But Boss, you promised," and proceeds to finish the ditch and sue for his fifty dollars. The court will then settle down to deciding, under The Law, not whether it was fair for the boss to take back his promise after the ditch was half dug, but whether digging *half* the ditch did or did not amount to an Acceptance of the Offer. For before Tony gets paid the court must find a valid Contract and before it finds a valid Contract it must find an Acceptance.

Probably Tony would get his fifty dollars if he had dug half the ditch by the time his boss backed down. But if Tony had only shoveled a few spadefuls of earth by the time his boss got home and said the ditch wasn't wanted, those few spadefuls would never amount to enough Acceptance to satisfy a court. Thus it becomes apparent that somewhere along the ditch's projected course, somewhere between the start and the finish of the job, The Law, stooping to earth, first finds a magic line. Then, if the boss catches Tony one inch on one side of the line, The Law will intone – no Acceptance, no Contract, no fifty dollars; whereas if Tony is one inch on the other side of the line, The Law will intone – Acceptance, Contract, pay up. But neither The Law nor any lawyer can ever tell you in advance where that magic line is. A lawyer can only tell you what The Law is. The Law, you may remember, is that you have to have an Acceptance of an Offer before you have a Contract.

Another great abstract concept in the Law of Contracts is something called Consideration. There has to be Consideration, as well as Offer and Acceptance and a number of other solemn-spoken legalisms, before

a Contract is good in the eyes of The Law. Putting it very roughly; Consideration generally means that a contract has to be two-sided;; each "party" to it has to have something given him or promised him or done for him in return for what he gives or promises or does. In *l'affaire* Tony-and-boss, the Consideration for Tony's promise to dig a ditch was his boss's promise to pay Tony fifty dollars, and the Consideration for the boss's promise was, in turn, Tony's promise – or, if Tony didn't promise, the actual digging of the ditch became the Consideration. (Thus, a common-or-garden digging of a ditch can be dignified by The Law into an Acceptance, a Consideration, and a Performance, all at the same time.)

Theoretically, the purpose of insisting on Consideration is to see to it that a Contract is a fair bargain. Actually however, The Law time after time finds Consideration in an extremely unfair bargain – and fails to find Consideration where the proposition looks relatively fair. If a man says to a panhandler, "I like your face, so tomorrow I'm going to give you a dollar," there is no Consideration for the promise, and so there is no Contract, since The Law does not take such esthetic values into account. But if a man says to a panhandler, "If you'll give me that cigarette in your hand, I'll give you a hundred dollars tomorrow," and the bum hands over the cigarette, then there *is* Consideration for the promise, and there may well be a valid Contract, and if there were enough witnesses to the transaction who will swear to it in court, the panhandler may even get his hundred dollars.

For the Law of Contracts rarely pays attention to surrounding circumstances. So far as The Law is concerned, a man offered to pay a hundred dollars for a cigarette and got the cigarette. For all The Law knows, the two men may have been lost in the middle of a desert and the cigarette their last smoke, or the cigarette may have belonged to Franklin Roosevelt or may have been autographed by Babe Ruth. At any rate, someone offered a hundred dollars for it and got it. And a cigarette – or a match, for that matter – can be pretty good Consideration, even for a promise to pay a hundred dollars.

Now, a good half of the voluminous Law of Contracts is concerned with what is good Consideration and what is not good Consideration. As a matter of fact, once Offers and Acceptances and a few other little things are out of the way, the whole question of whether a court will or will

not uphold a promise comes down to a question of whether there was or wasn't good Consideration for it. At least, that is the legal way of putting it. But a non-lawyer, untrained in legal logic and trying to find a definition of Consideration that made sense to him, might well put the whole business completely in reverse. He might say that, so far as he can see, Consideration is what there *is* when a court upholds a promise and what there *isn't* when a court refuses to uphold a promise. In other words, the whole question of whether a court is going to say there is Consideration or not comes down to a question of whether the court is going to uphold the promise or not. And though to a lawyer, such a notion would amount to blasphemy, there is no doubt at all that from a practical standpoint, the apparently naïve non-lawyer is exactly right. For example: -

Suppose a chorus girl has two wealthy admirers. One of them promises her a fur coat for Christmas. The other promises a diamond bracelet. On Christmas day, the fur coat arrives but the bracelet doesn't. Can the chorus girl, do you suppose, go into court and sue for the bracelet and get it, on the theory that the first admirer's promise of a fur coat was good Consideration for the second admirer's promise of a bracelet? Briefly, she cannot. And the whole idea of taking two promises, made by separate people to a third person, and calling one of them Consideration for the other sounds, of course, utterly fantastic.

Yet suppose the two admirers frequented not only the same girl but the same church. And suppose the church was putting on a subscription drive for funds. And each man agreed to contribute a thousand dollars. And the man who promised the bracelet paid up but the man who gave the fur coat did not – presumably because he could no longer afford to. Could the church go into court and sue for the thousand dollars and collect it? Briefly, it could. It could, moreover, on the theory that each of the promises to pay a thousand dollars was good Consideration for the other one.

A cynic might explain all this on the ground that The Law approves of gifts to churches and does not approve of gifts to chorus girls. The cynic would not be far wrong. Certainly the strange doctrine whereby mutual promises to give money to worthy causes are considered good legal Consideration for each other developed out of nothing more complicated than a desire on the part of the courts to keep people from

welching on such promises. The Law, in order to uphold such promises, had to find Consideration somewhere, and found it. Or as the naïve layman would put it, Consideration was what there *was* when the courts wanted to uphold a promise and what there *wasn't* – and isn't – when the courts just plain don't care.

Perhaps the strangest of the many things that The Law lumps together as amounting to Consideration for a Contract is a seal on a piece of paper. A man can write down, "I, John Dough, promise to pay Richard Rogue five hundred dollars on the first of January," and sign it and give the paper to Rogue and still never pay a cent, provided Rogue cannot prove that Dough got something – some Consideration – in return for the promise. But if Dough drops a blob of sealing wax next to his signature and makes a mark in it, or if he just draws a circular squiggle by his name and puts in it the initials L.S. (which are the abbreviation for the Latin, and therefore legal, words for "seal") then Dough will have to pay. He will have to pay even though he got absolutely nothing in return for his promise. He will have to pay because The Law long ago decided that a seal, real or imitation, attached to a promise, amounted to good Consideration for that promise, despite the fact that the man who makes the promise puts the seal there.

This, of course, is a long way away from the original idea of Consideration as something given to or promised to or done for the man who makes the promise. The Law's excuse may be to the effect that no man would be fool enough to seal a promise unless he *were* going to get something out of it for himself. Yet it happens that seals were first used on contracts as Xs might be used today – as substitutes for the signatures of those who could not sign their names. And so The Law, in honoring the seeming solemnity of a seal, is in effect making a stupid substitute for a signature worth more than the signature itself. It is also saying, as our naïve layman would put it: -- The Law wants to uphold promises with seals attached; since The Law cannot find any other Consideration for such promises it will just treat the seals themselves as Consideration and let things go at that.

Without piling up examples any further, it is, then, apparent that Consideration can mean the digging of half a ditch, it can mean a cigarette, it can mean a promise by a total stranger to give money to a church, or it can mean a piece of sealing wax on a sheet of paper. Yet it

is also apparent that none of these things has the slightest conceivable relation to any of the others. And the list of unrelated things that lawyers may label Consideration or that judges *have* labeled Consideration runs literally into the millions.

The point is that the so-called concept of Consideration is both meaningless and useless until you know every one of the countless fact situations about which courts have said: Here, there is Consideration, or Here there is no Consideration. But once you know all those fact situations, what has Consideration become? It has become an enormous and shapeless grab-bag, so full of unrelated particulars that it is just as meaningless and just as useless as it was before.

That same mass of particulars might just as well be lumped together and called Infatuation, or Omskglub, or Bingo. Any of these words would be just as helpful as the word Consideration in trying to solve, or guessing how the courts will solve, any new problem that comes up – which is after all the sole legitimate function of The Law. The new problem itself will involve a set of facts. That set of facts will look something like other sets of facts about which the courts have intoned Consideration. It will also, inevitably, look something like other sets of facts about which the courts have intoned No Consideration. Until a court intones Consideration or No Consideration about the new problem, no lawyer in the world can know whether this new set of facts belongs inside or outside the Consideration grab-bag.

What is true of the word Consideration is, moreover, equally true of the words Offer and Acceptance and of every so-called concept in the Law of Contracts. It is equally true of every so-called concept in the Law. Period. For no legal concept means anything or can mean anything, even to a lawyer, until its supposed content of meaning has been detailed, in terms of its precise practical application, right down to the case that was decided yesterday. And once the concept *has* been so detailed, it is the details, not the concept, that matter. The concept—no more than a word or set of words in the strange vocabulary of The Law – might just as well be tossed out the window.

Thus, the layman who would have defined Consideration as what there *is* when a court upholds a promise and what there *isn't* when it refuses to uphold a promise is absolutely right. Consideration – and every other

so-called concept or principle of The Law – amounts to a vague legal way of stating a result, applied to the result *after* the result is reached, instead of being, as the lawyers and judges stoutly pretend, a reason for reaching the result in the first place.

By the use of these concepts, the lawyers bewilder the non-legal world and, too often, themselves, into supposing The Law and its rulings are scientific, logical, foreordained. Yet no concept, or combination of concepts, or rule built out of concepts – as all legal rules are built – can of itself provide an automatic solution to the simplest conceivable human problem. Like the symbols on a doctor's prescription, it can provide no more than an impressive after-the-decision description of what the judges order. And what the judges order is The Law.

Now a super-intelligent and super-outspoken lawyer or judge may occasionally admit that his legal brethren are either fools or liars when they claim that the words and concepts and principles of The Law are any more than statements of results in legal language. But this same rare member of the profession will probably go on to defend the vast vocabulary of The Law – the Considerations and Malices and Domiciles and all the rest – on the theory that it provides at least a sort of legal shorthand, a convenient medium in which lawyers can talk to each other about their trade.

When one lawyer, discussing a case at a cocktail party as lawyers always do, shoots Interstate Commerce or Privileged Communication at a fellow member of the bar, with that well-known air of studied nonchalance which children affect when talking pig Latin before their elders, the second lawyer has a general idea what the first is talking about. So too, does a judge get a general idea of which way the argument is drifting when a lawyer tosses off a legal phrase in court. And when the judge in turn packs his opinions with such phrases, the lawyers who read those opinions get, if nothing more, a vague sense of trading-familiar-ground. Shorthand if you will; though it is a shorthand which all too easily becomes unbearably long-winded, as anyone who has ever tried to read a lease or a statute or a judicial opinion well knows.

Yet, it is precisely out of the constant and careless use of a loose craft lingo that the lawyers' blind faith in the sacredness of words has grown.



Meticulously trained in the mumbo-jumbo of legal concepts, subjected to it every minute of their working lives, the law boys passionately believe in the words they have learned to use. To them, Due Process of Law is not just a handy way of referring to a bunch of old decisions; it is a fighting principle. And even such legal lovelies as a Covenant Running With the Land, or an Estate in Fee Tail, take on substance and dignity.

Nor is it only the plaint, ordinary lawyers who take their funny words and their word-made abstractions seriously. So too do the lawyers who have been canonized as judges. Most judges are more likely than not to suppose, when they order a payment made "because" there was Consideration for a Contract, that they have actually reasoned from the abstract to the concrete; that the unearthly concept called Consideration has actually dictated their judgment. As though the abstraction, Consideration, had substance, meat, body. As though it were possible for the human mind to pull a specific result out of an abstract concept, like a rabbit out of a hat, without first, knowingly or unknowingly, putting the result *into* the concept, so it can later be found there.

A court will solemnly purport to decide whether Tony is going to be paid for digging a ditch – on the basis of whether there was Consideration to support a Contract, just as though the idea of Consideration contained within itself, like a command from God, the right answer (or *any* answer). A court will solemnly purport to decide that the State of New Jersey may not regulate ticket scalpers – for the reason that the sale of theater tickets is a business Not Affected With a Public Interest. A court will solemnly purport to decide that the federal government may not supervise wages in the coal industry – on the ground that those wages have only an Indirect Effect on Interstate Commerce; (and then the same court will solemnly purport to decide that the federal government may force a steel company to deal with a union – on the ground that steel wages have a Direct Effect on Interstate Commerce). As though, in each case, the legal phrase used were anything more than a circumloquacious statement of the result, rather than a reason for arriving at it. As though, in *any* case, any abstract legal phrase could conceivably contain the right key – or any key – to the solution of a concrete social or political or human problem.

Dealing in words is a dangerous business, and it cannot be too often stressed that what The Law deals in is words. Dealing in long, vague, fuzzy-meaning words is even more dangerous business, and most of the words The Law deals in are long and vague and fuzzy. Making a habit of applying long, vague, fuzzy, general words to specific things and facts is perhaps the most dangerous of all, and The Law does that, too. You can call a cow a quadruped mammal if you want to; you can also call a cat a quadruped mammal. But if you get into the habit of calling both cows and cats quadruped mammals, it becomes all too easy to slip into a line of reasoning whereby, since cats are quadruped mammals and cats have kittens and cows are also quadruped mammals, therefore cows have kittens too. The Law, you may remember, calls both cigarettes and sealing wax Consideration.

## CHAPTER IV

### THE LAW AT ITS SUPREMEST

*"We are under a Constitution, but the Constitution is what the judges say it is."* –Charles Evans Hughes

The Supreme Court of the United States is generally rated the best court in the country if not in the world. Its decisions are supposed to be the wisest, the most enlightened. Its members are kowtowed to as the cream of the legal profession, steeped not only in the technicalities of legal logic but in the wondrous ways of abstract justice as well. Its powers are enormous. By the margin of a single vote, its nine members can overturn the decisions of mayors, governors, state legislatures, presidents, congresses, and of any other judge or group of judges in the United States. Even the direct will of the people as expressed in the Constitution and its amendments can be brought to naught by Supreme Court "interpretation" of constitutional language. The nine men in black robes hold the entire structure of the nation in the hallowed hollows of their hands.

It would not, then, seem too unreasonable for any citizen to suppose that the decrees of these solons must of course be as impregnable to criticism or ridicule as man-made decrees can ever be. Even if it be true that The Law in the main amounts to the manipulation of impressive, irrelevant words by a closed corporation of well-trained word-jugglers, The Law as handed down from Supreme Court heights should surely have more sense and substance to it. Even if it be true that the mass of practicing attorneys and little judges are fooling themselves and the public when they claim that The Law as they know and use it is a logical science instead of a pseudo-scientific fraud, surely the nine top men of the craft must leave few, if any, loopholes in their logic and few, if any, cracks in the intellectual armor of their decisions.

But if, by any change, the solemn legal incantations of the Supreme Court itself can be shown up as empty, inept, or illogical rationalizations based on nothing more substantial than big words with blurred

meanings, then it would not seem too unreasonable for any citizen to suppose that The Law as a whole is a lot of noxious nonsense.

Practically all the cases that reach the Supreme Court – and reaching the Supreme Court often means going through three or four lower courts in turn, over a period of years – are of one of three kinds. There are, first, the otherwise ordinary law cases which happen to involve people or companies from different states. An Iowa farmer makes a contract to sell his hogs to a Chicago packing-house, and they get into a fight over the terms. Or a California tourist runs down a pedestrian in Mississippi. Or a New York newspaper publishes a libelous story about a Virginia gentleman (and the gentleman prefers lawyers to pistols).

Ordinarily, little disputes of this nature are handled in the state courts. If the farmer had sold his hogs in Des Moines or the careless driver had run down a fellow-Pasadenan or the newspaper had written about a Park Avenue debutante, not even the American Bar Association itself could have carried the case to the Supreme Court. But in the early days of the nation, it was supposed – and with some reason – that any state court, disposing of a dispute between a local litigant and a resident of another state, might tend to favor the home boy and give the stranger a raw deal. So it was written in the Constitution that cases involving litigants from two or more states might be tried by the federal courts; and any case tried in the federal courts may eventually get up to the Supreme Court. Incidentally, this privilege of taking certain legal squabbles out of the hands of the state courts is all that lawyers mean when they talk gravely of "invoking diversity of citizenship."

When the Supreme Court deals with a case of this kind, it tosses around such abstract concepts as "consideration" and "contributory negligence" and the rest with the same abandon as does any other court, and it regularly purports to find the specific answer to the problem in some vague but "controlling" general principle. Yet it is perhaps unfair to examine or judge the Court on the score of these cases. In the first place, they are the least important that come before the Court. Furthermore, in most of these cases, the Court is handicapped – although by a rule of its own making – in being bound to follow The Law as laid down by the state courts in previous similar cases. In other words, the Court is merely seeing to it that state Law is fairly applied. It is in the other two kinds of cases that come before it – and these

include practically all the significant and publicized decisions – that the Supreme Court is really on its own.

The second kind of case that regularly reaches the Court is the kind that involves some dispute about the meaning of the written laws of the United States. Not it might seem that Congress, which has nothing else to do but write laws, should be able to set down clearly in black and white what it is ordering done or not done, so that the services of a court would not be needed to tell people what the laws mean. But the first catch is that these statutes are always phrased by lawyers, in Congress or out, so that it frequently does require the serves of other lawyers to disentangle the meaning from the verbiage. And when the other lawyers disagree, as they are sure to do if there are fees on both sides of the dispute, then it takes a court, and it may take the Supreme Court, to tell the second group of lawyers what the first group of lawyers meant when they wrote the statute.

There is, moreover, another catch, and it was referred to a couple of chapters back. Even when the words of a statute appear, at least to a no-lawyer, to have a perfectly plain and definite meaning, you can never be sure that a court will not up and say that those words mean something entirely different. The Supreme Court is no exception. There was the time it said that Section 20 of the Clayton Act meant, literally, nothing at all. There was the time the Court ruled that the clause of the Guffey Coal Act, directing that if part of the Act be declared unconstitutional the rest of the Act should go into effect anyway, meant the exact opposite of what that clause said. And there have been countless other examples of meaning-mangling when the Court has undertaken to "interpret" the statutes of the United States.

For instance, when Congress first passed an estate tax, taxing the transfer of money or other property at death, rich men rushed to their lawyers to find out how they could get around the tax without giving away their wealth before they died. The commonest and, by and large, the most effective dodge suggested and used was for the rich man to put his property in trust – which of course only meant giving the property to someone else to keep for him by the use of the proper legal rigmarole – and still to keep several strings on the property himself. He might keep the right to take the property back any time he wanted it. He might give up this right but insist on getting the income from the

property, which was usually stocks and bonds, as long as he lived. He might keep the right to direct the management of the property, or to say who should get it at his death. At any rate, the idea was that since he no longer "owned" the property legally, (legally the trustee "owned" it for him) he couldn't be taxed for giving it to his wife or his children at his death, even though that might be exactly what he had ordered the trustee to do.

But Congress, foreseeing some such subterfuge from the start, had written into the estate tax law, in legal but comparatively comprehensible language, a special provision. The provision was that any transfer of property, even though not done in the usual way of making a will, which was "intended to take effect in possession or enjoyment at death" should be soaked under the estate tax. And very soon the question arose – and was carried up to the Supreme Court – whether an estate tax had to be paid on property that a man had put in trust, ordering the trustee to pay him the income as long as he lived and then to turn over the property to his son at his death.

Certainly this would seem to be one of the exact situations that Congress had been talking about. The man kept right on enjoying his interest and his dividends until he died. The son was not even privileged to smell the stocks and bonds until, at his father's death, they were turned over to him. From his standpoint it was the, and not until then, that his "possession and enjoyment" of the property "took effect."

Not at all, said the Supreme Court, in substance, when it was asked to "interpret" and apply the statute. In the first place, we have a general principle to the effect that tax statutes are to be strictly construed in favor of the taxpayer. True, we also have a general principle of statutory construction to the effect that words are to be read in the light of their customary and accepted meaning (presumably the Court did not care to deny that "enjoyment" meant "enjoyment") but the prior principle seems here to carry more weight. The fact that various state courts have interpreted identical words in their state death tax statutes so as to cover the type of transfer here at issue (the state courts had, almost unanimously) is not controlling upon us (the *Supreme Court*). Finally there is the compelling fact that the decedent (i.e. the dead man) had completely divested himself of title to the property before his death. (Indeed he had, according to The Law, but Congress had said

nothing about legal title; it was the taking effect of enjoyment that was supposed to matter.) At any rate, concluded the nine solons, the dodge works; the statute doesn't cover this case; no tax.

The pay-off came the very day after the decision was handed down. On that day Congress amended the statute so that the estate tax even more specifically applied to transfers of property in which the original owner hung on to the income for himself until his death. Of course a couple of tax lawyers hopefully asked the Supreme Court to rule that, under certain circumstances at least, this didn't mean what it said either. But this time the Court upheld the tax; this time the second principle of statutory construction as outlined above outweighed the first principle.

For yet another example of Supreme Court "interpretation" of written laws, take the old Congressional statute, still on the books, which says that collection of federal taxes may not be enjoined "in any court" – a legal injunction being, of course, no more than a court order forbidding someone from doing something. The idea, whether wise or unwise, was to keep innumerable injunction suits from holding up the collection of federal revenues; if a man, or a company, thought a tax was too big or too raw or just plain illegal, he was supposed to pay it anyway and then sue to get it back. Certainly the statute itself was, and is, so short, blunt, and simple that no sensible person, no non-lawyer, could possibly miss its meaning. But strangely enough, the commonest way of protesting a new federal tax today is to sue for an injunction. The Supreme Court, in the course of "interpreting" the statute in the light of general principles of Law, has so cluttered it with exceptions that the exceptions all but blot out the statute.

Examples could be multiplied almost indefinitely. For when the Supreme Court sets out to tell Congress and the world what an act of Congress really means, only the sky and such abstract legal principles as can be drawn from the sky are the limit. And all that Congress can do, after such an "interpretation," is patiently to amend or rewrite the statute with the fervent hope that maybe this time the words used will mean the same thing to the Supreme Court that they mean to Congress.

But in the third kind of case that takes up the time of the Supreme Court, there is no getting around, afterward, what the Court has

decided. There is no getting around these decisions, that is, short of amending the Constitution, changing the judges who make up the Court, or, most difficult of all, changing the judges' minds. The third kind of case – the most important of all – includes all those disputes in which someone claims that a state law or a federal law – or some action taken under such a law – "offends" the U.S. Constitution. Here the Supreme Court has the final word. What it decides and what it says in these cases make up that holy hunk of The Law known as Constitutional Law.

From the practical or non-legal viewpoint, Constitutional Law adds up, simply, to a list of all those instances where the Supreme Court as said to Congress or to a state legislature, "You mayn't enforce that statute," – or where it has said to a federal or state executive officer or administrative board, "You mayn't carry out that ruling." The instances where the Court has said, "You may" don't count – from a practical viewpoint. There, the situation would have remained exactly the same if the Supreme Court had never said anything.

And it is worth noticing that only governments, or people who are performing government jobs, ever get spanked by the Court for being unconstitutional. The Constitution protects, within certain limits, free speech; but a man who holds his hand over another man's mouth to keep him quiet, though he may get hauled into court for minor assault and battery, will never get charged with violation of the Constitution. Thus, what Constitutional Law deals with is the restrictions on certain forms of government action which are laid down, in the name of the Constitution, by the Supreme Court, which is – although many people are prone to forget this, -- no more than one branch of the federal government itself. And all that Constitutional Law, taking it in the more legal sense, amounts to is the cumulative efforts of the Supreme Court to explain, justify, or excuse the restrictions it lays down.

Now the basic theory of all Constitutional Law is both simple and sensible. It is that if Congress or any state or city or village enacts a law that is forbidden by the Constitution, that law might just as well never have been enacted. It can be ignored; it is no good; it is unconstitutional. But the fireworks start when it comes down to a question of who is going to tell whether laws are unconstitutional – and how.



For the Constitution itself, as is little realized, nowhere gives that right to the Supreme Court. The Supreme Court early assumed that right, so far as state laws were concerned, and nobody objected much because neither Congress nor the President wanted to bother to check up on state laws. But the Supreme Court was much more cautious when it came to telling Congress and the President that federal laws were unconstitutional. Only once in more than sixty years after the birth of the nation did the Court dare to peep that it thought an act of Congress was improper. And the habit of informing the other two branches of the government that some measure they had approved was downright illegal never really blossomed into full flower until the twentieth century. It is still at least arguable that Congress or the President or the two of them together have as much right and as much ability to decide whether a proposed federal statute disobeys the Constitution or not as have the nine bold men.

Yet, granting that by custom if by nothing more, the last word does belong to the Supreme Court, the question remains – how, and how well, has the Court exercised this powerful privilege, as applied to the laws of the states as well as to those of the nation? Have its constitutional decisions been models of logic, statesmanship, and justice? Or have they, perhaps, been cut out of the same old legal cheese-cloth – abstract concepts, ambiguous words, and ambidextrous principles?

There are some parts of the Constitution that are written in such plain language that nobody, not even a lawyer, could very well mistake what they mean. There is, for instance, the provision that the United States shall not grant titles of nobility. There is the provision that each senator's term shall be for six years. There is the provision that the states shall not coin money. Obviously, if Congress had voted to make Charles Lindbergh a duke instead of an army colonel, or if a federal statute were passed extending all senators' terms to eight years, or if the Oklahoma legislature were to enact a bill to set up a state mint and start turning out silver dollars, any of those laws would be clearly unconstitutional. But it would scarcely be necessary to ask the advice of the Supreme Court on such matters. Any sub-moron could give the right answer.

There are other parts Constitution that are not written so plainly. It may be that they use hazy legal words or it may be that the words they use, though fairly clear at the time of writing, have since acquired a nebulous quality through constant legal mastication of their meaning. It is out of these parts of the Constitution – and, for that matter, out of parts that are nowhere written in the document at all – that Constitutional Law is really built.

Whenever a lawyer appears before the Supreme Court and asks the Court to declare a state statute unconstitutional, the chances are better than ten to one that he is basing his plea on the Fourteenth Amendment to the Constitution. The chances are almost as good that he is basing his plea on one little clause out of one of the five sections of that longest of all the amendments. The chances are, in short, that he is claiming that, by the statute in question, his client has been "deprived of property without due process of law."

For most of Constitutional law as applied to state statutes, and as laid down by the Supreme Court, revolves around that little phrase. On the basis of that phrase alone, the Court has killed hundreds upon hundreds of state attempts to regulate or tax business and businessmen. As a matter of fact, it is practically impossible for a state to pass such a statute today without having a legal howl carried to the Supreme Court to the effect that the statute "violates the due process clause of the Fourteenth Amendment."

What the, according to its official interpreter, does the little clause mean? When is a deprivation of property not a deprivation of property? Surely every tax is, in a sense, a deprivation of property and some state taxes are perfectly legal. And what is implied by that lovely limpid legalism, "due process of law"?

To help it answer these questions the Supreme Court has evolved – and this will be a big surprise – a batch of general principles. There is the general principle that a regulation which is a proper exercise of the state police power is valid but that a regulation which does not fall within the police power is deprivation of property without due process of law. There is a general principle that businesses affected with a public interest may, by and large, be regulated but that to regulate a business not so affected is a d.o.p.w.d.p.o.l. There is a g. p. that a tax

on anything over which the state has jurisdiction is proper, but that a tax on something over which the state has no jurisdiction is a d.o.p., etc. And so on.

Of course, just what state police power is and just what a business affected with a public interest amounts to and just what state jurisdiction to tax means is, in each case, another and longer story. There are sub-principles and sub-sub-principles and exceptions. And of course, too, there is not a word in the Constitution about police power or businesses affected with a public interest or state jurisdiction to tax. But this fact does not stop the Supreme Court from using such concepts as the basis of Constitutional Law. Even the Highest Court of the Land laying down the Supreme Law of the Land reverts to the same old hocus-pocus of solemn words spoken with a straight face, and meaning, intrinsically, nothing.

If this indictment sounds too strong, consider what a member of the Court once had to say about the uses to which his brethren put that little clause of the Fourteenth Amendment. These are the words of the late Justice Holmes: --

"I have not yet adequately expressed the more than anxiety that I feel at the ever-increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the states. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. -- Of course the words 'due process of law' if taken in their literal meaning have no application to this case; -- we should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass."

Justice Holmes' brief warning about the temptation to follow personal preferences where The Law is so amorphous and indeterminate was spoken, as usual, in dissent. But what did he imply by his reference to "the words 'due process of law' if taken in their literal meaning"? What did that little clause of the Fourteenth Amendment, since inflated by the Supreme Court to tremendous significance, originally mean? It makes an interesting story.

The Fourteenth Amendment was one of three amendments added to the Constitution shortly after the Civil War to protect the civil rights of the Negroes. The first of its five sections included the command, presumably intended to prevent persecution of the ex-slaves: -- "nor shall any state deprive any person of life, liberty, or property without due process of law." But the words used in that clause had appeared in the Constitution before.

They had appeared in the Fifth Amendment as part of the original Bill of Rights. There, seventy-seven years before the Fourteenth Amendment was adopted, it was decreed: -- "nor shall (any person) be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property without due process of law." Because the Fifth Amendment was said to restrict only the *federal* government, it was felt necessary to place the same restriction on the states, in the Fourteenth.

What, then, was the "due process" business intended to mean? How did it happen to have been coupled with the prohibition against making a man take the stand against himself in a criminal trial? It was no accident. For "due process," before the Supreme Court began to build general principles around it, meant nothing more complicated than "proper procedure." And being deprived of life, liberty, or property without due process of law meant only being hanged (deprived of life), jailed (deprived of liberty), or fined (deprived of property) without a proper trial.

Thus, the "due process" clause was originally intended to apply only to criminal cases. The idea that any statute, much less a non-criminal one like a tax or a regulation of business, after being properly passed by a legislature, signed by a governor, and enforced according to its terms by judges, could amount to a deprivation of anything *without due process of law* would once have been laughed out of court. Yet the Supreme Court has built the bulk of its Constitutional Law, as applied to the states, on precisely that strange supposition. It has taken a simple phrase of the Constitution which originally had a plain and precise meaning, twisted that phrase out of all recognition, ringed it around with vague general principles found nowhere in the Constitution, and then pontifically mouthed that phrase and those principles as excuses for throwing out, or majestically upholding, state laws.

Nor should it be supposed that the silly house-of-cards logic of Constitutional Law works only in what might be called unprogressive ways. True, most of the state statutes the Supreme Court has condemned as "violating" the "due process" clause of the Fourteenth Amendment have been such measures as minimum wage laws, laws protecting labor union activities, laws and rulings setting public utility rates, certain types and uses of income and inheritance taxes, and other restrictions on the business of making money and keeping it. But, as mentioned before, the word-magic of legal processes recognizes no socially significant limitations. Constitutional Law can be just as illogical and irrelevant on the liberal side.

There are, for instance, as few people are aware, no words anywhere in the Constitution protecting freedom of speech, freedom of the press, freedom of religion, or freedom of assembly against infringement by the *states*. The sole reference to these civil liberties in the whole Constitution is in the First Amendment. All that the First Amendment says is that "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

Yet, as almost everyone is aware, the Supreme Court has on occasion protected civil liberties against infringement by state law or by city ordinance (cities being considered, legally, as merely sub-divisions of states, subject to the same constitutional taboos). Huey Long's attempt to gag the opposition press under a Louisiana statute was called unconstitutional by the Court. So were Mayor Hague's efforts to clamp down on freedom of speech under a Jersey City ordinance. Why unconstitutional – inasmuch as it was surely not Congress that passed either of these measures? The answer lies once more in the well-worn "due process" clause of the Fourteenth Amendment. Laws such as these, said the Court, deprive people of liberty without due process of law. A worthy sentiment unquestionably, but just as illogical and just as unwarranted by the true meaning of the constitutional phrase as all the other and less popular "due process" decisions.

There is, moreover, a clear danger in leaving the protection of civil liberties against state infringement to the whims and general principles

and legal logic of the Supreme Court – instead of writing into the Constitution, as should have been done long ago, a broad and definite protection of those liberties against all infringement. For, just as the Court has held that some state restrictions of freedom of speech and the rest are bad, under the "due process" clause, so it can hold, and has held, that other restrictions are *not* outlawed by the Fourteenth Amendment. Where the logic of the legal rule is so tenuous, the Court can blow now hot, now cold. As is true of practically all Constitutional Law, it is impossible to tell what the Court is going to call unconstitutional, until the Court has gone into its trance and evoked a spirit in the shape of a "controlling" principle.

Though the bulk of Constitutional Law as applied to the states stems in a mystic manner from the "due process" clause of the Fourteenth Amendment, its parent clause in the Fifth Amendment has not been used or needed so often as an excuse for calling federal laws unconstitutional. Railway workers were doubtless interested to learn that the Congressional outlawing of yellow dog contracts – contracts forbidding membership in a labor union – deprived the railroad companies of liberty and property without due process of law. Women who worked in Washington, D.C., were doubtless fascinated to hear that their employers had been similarly deprived, by a Congressional act setting minimum wages for women. Both the railway men and the Washington women were probably especially impressed to be told by the Supreme Court that anti-union discrimination and sweatshop wages were protected against Congressional interference by none other than the American Bill of Rights – of which the Fifth Amendment is, of course, a part.

But the Supreme Court's pet reason for calling federal laws unconstitutional is even more complicated than the "due process" gag, and even harder to trace back to the Constitution itself. The general idea is that the federal government may not do anything that the Constitution does not specifically say it may do. This notion is what is known as "strict construction" of the Constitution, and it is all mixed up with the slogan of "states' rights" which is a very nice and very handy political slogan for those who do not like what the federal government happens to be doing at the moment.

The chief reasons usually given by the Supreme Court for backing the strict construction principle – instead of the contradictory "loose construction" or let – the – federal – government – do – anything – the Constitution - doesn't – say – it - mayn't – do - principle – are two in number. The first reason is that the Founding Fathers, in person, were strict constructionists and intended to hog-tie the federal government when they wrote the Constitution. But that, as every historian knows, is utter nonsense. The Founding Fathers, almost to a man avowed enemies of "states' rights," were out to give the federal government all the rope they could possibly give it. Still, as the present uses of the "due process" clauses indicate, a little matter like historical inaccuracy is never allowed to interfere with a general principle of Law.

The second reason the Court gives for its zealous protection of "states' rights" is the Constitution's Tenth Amendment. (Those amendments begin to look more important than the whole original Constitution; and to any of the legal tribe they are.) What the Tenth Amendment says is: -- "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." So far, so good. But the question remains – what powers *are* delegated to the United States by the Constitution? And it is in answering that question, which is left hanging in mid-air by the Tenth Amendment and which is more confused than clarified by the rest of the Constitution, that the Court has so often performed back somersaults of logic right into the camp of the strictest strict constructionists. All, of course, in the name of The Law – and the Founding Fathers.

There is, for instance, a clause of the Constitution (the original Constitution, for a change) to the effect that "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the ... general welfare of the United States." Lawyers and law professors and judges have written tracts and treatises and whole books about the meaning of this clause. The strict construction boys say it means that Congress can collect taxes, etc. *in order to* pay the debts and provide for the general welfare of the people. The loose construction boys say it means that Congress can collect taxes *and also* pay debts *and also* – with laws that aren't necessarily tax laws – provide for the general welfare. You can guess which side the Supreme Court is on. Why? Why, because that's what

the Founding Fathers meant – which, as a matter of historical record, they almost surely didn't; and because of the Tenth Amendment – which obviously has nothing whatsoever to do with the case.

It was on a line of so-called reasoning of this sort, only more extreme, that the Supreme Court threw out the original Agricultural Adjustment Act. And this despite the fact that Congress, well aware that the Court would only let it provide for the general welfare in *tax* statutes, had passed the Act *as a tax* on farm products, the proceeds to go as bounties to those farmers who cut down the acreage of their crops. Now, many people thought the A.A.A. unwise and rejoiced at the Supreme Court decision. But even they would admit that it is certainly not the job nor the right of the Supreme Court to judge the wisdom or the foolishness of laws. That, supposedly, is Congress' business. The Court, as it has proclaimed countless times, can only decide whether a law is constitutional. Here is why, according to the Supreme Court, the A.A.A. was unconstitutional:

It used federal tax money to accomplish an unconstitutional purpose. What was that? Federal regulation of farmers. Why is federal regulation of farmers unconstitutional? Because regulation of farmers is exclusively the right of the states. Why? Because of the general principle that the federal government is a government of limited powers (strict construction), because of the Founding Fathers (yes?), and specifically because the Tenth Amendment reserves to the states those powers not delegated to the federal government. Well, isn't one of the powers delegated to the federal government the power to collect taxes (and, obviously, spend them) to promote the general welfare? Granted. Then why isn't the A.A.A., whether you like it or not, an exercise of that power; or do you mean that giving bounties to certain farmers does not, in your judgment, promote the general welfare? "No," said the Court, "we are not now required to ascertain the scope of the phrase "general welfare of the United States' or to determine whether an appropriation in aid of agriculture falls within it." Then why, in heaven's name, isn't the A.A.A. perfectly constitutional as a tax to promote the general welfare, which you grant Congress has the right to enact? Because it uses the tax money to accomplish an unconstitutional purpose, namely, federal regulation of farmers.



And there sat the Supreme Court at the end of its opinion, exactly where it had started, after one of the most perfect examples of arguing – in – a - circle that any court has ever indulged in. But plenty of long words and solemn-spoken principles of Law gave this circular reasoning an air of great depth and respectability. After all, the Court was only patiently explaining that the Constitution clearly forbade Congress to enact the A.A.A. Any lawyer, at least, would understand.

Another power given to the federal government by the Constitution is the power to regulate interstate commerce. Because that power is granted very specifically and plainly, many of the most important federal statutes are fashioned around it. But you can't get by the Supreme Court that easily, when the Court is out to lay down Constitutional Law.

When Congress tried to discourage child labor by forbidding the shipment of things made by child labor in interstate commerce, the Court calmly said *this* is no regulation of interstate commerce. It's just a nasty old invasion of states' rights and it's unconstitutional. There were, of course, general principles which "controlled." When Congress then put a high tax on child labor, figuring that it still retained the power to levy taxes at least, the Court said *this* is no tax; it's a regulation and it's still unconstitutional. In so saying, the Court conveniently ignored the fact that it had previously let Congress, by exactly the same device of a high tax, put an effective stop to the issuance of state bank notes and to the sale of yellow oleomargarine (which was passed off as butter) and to the interstate shipment of opium and other narcotics. In those cases, presumably, the "controlling" principles were different.

It is, moreover, worth noticing – as indicating the tremendous power of those nine anointed lawyers – that, despite efforts to amend the Constitution, child labor still flourishes in this country more than twenty years later, just because the Court once said that the Constitution protects the sacred right to employ child labor against any nefarious attempts by Congress to interfere with that right. And similarly it took almost twenty years before the Constitution was amended to allow a federal income tax, after the Court had solemnly figured out, through a series of abstractions too involved to be recounted here, that the original Constitution forbade Congress to tax citizens' incomes.

It was under the Court's "interpretation" of what the interstate commerce clause did *not* mean that such New Deal laws as the National Industrial Recovery Act and the Guffey Coal Act met their death. It seems there are two principles. One is that Congress may regulate anything that affects interstate commerce directly. The other is that Congress may not regulate anything that affects interstate commerce only indirectly. Of course, there is not a word in the Constitution itself about direct or indirect effects on interstate commerce but that does not keep those effects from being a very vital consideration in Constitutional Law.

Applying these principles, the Court said that working conditions in companies doing interstate business affected interstate commerce only indirectly. So it was perfectly apparent that the N.I.R.A. and the Guffey Coal Act, both of which made bold to regulate those working conditions, were downright unconstitutional. But by the time the Wagner Labor Act came along a couple of years later, working conditions in companies doing interstate business had suddenly acquired a direct effect on interstate commerce, and so a law regulating those conditions was perfectly constitutional. The relevant principles of Constitutional Law remained, of course, unchanged. It was merely that, this time, a different principle was "controlling."

There was, moreover, a second reason why the N.I.R.A. was unconstitutional – for the Court is not always content to kill a law with one shot of Constitutional principle. The second reason is especially interesting because it involves one of those chunks of Constitutional Law that is not even remotely derived from anything written in the document that most people think of as the Constitution. The Court just made this up all by itself.

The basic principle that the Court made up is that Congress may not delegate or hand over any of its lawmaking power to anyone else. Now it is clear that if this principle were really followed there wouldn't be any United States government. All the thousands of rules and regulations and orders, little laws every one of them, that are formulated day after day by every branch of the government – by the commissions, like the Interstate Commerce Commission and the Federal Trade Commission, by the departments, all ten of them, and by the branches and bureaus of the departments, like the Patent Office and the Coast Guard and the

rest – all these rules and regulations would have to be passed by Congress itself. It is only because Congress has always delegated the largest part of its lawmaking power, after laying down the broad, general outlines of a law, that the federal government has been able to function at all.

But the Supreme Court, as might be expected, has an answer to all this. It is in the form of sub-principle or exception to the primary principle. It is that Congress may delegate to other people the power to fill in the details of a law, but not the power really to *make* a law. That lets out all the commissions and the departments and the rest, and doubtless lets Congress breathe a lot easier. But when the N.I.R.A. came up for review, despite the fact that Congress had certainly passed the law, and, as usual, filled numerous pages with its written provisions, the Court said Congress was handing over its law-making power to the keepers of the Blue Eagle. Why the Recovery Administration was really *making* laws whereas the National Labor Board, for instance, is merely filling details, only the Supreme Court knows and it won't tell. It is much too busy expounding Constitutional *Law*.

Perhaps the best-known of those pieces of the Highest Law of the Land that the Court has manufactured out of ethereal logic with no help at all from the words of the document is the piece that deals with the federal government taxing the state governments and vice versa. It all started with Chief Justice Marshall's famous bromide that "the power to tax involves the power to destroy." Therefore, argued Marshall, with his Court chiming in, we can't have the states laying taxes on the property or the activities or the bounds or the employees of the federal government and we can't have the federal government levying taxes on the states either. For if we allowed such taxes, one of our governments might insidiously destroy the other. Even if there isn't anything about it in the Constitution, such taxes are unconstitutional. As a matter of principle.

It developed, as it always does, that there were sub-principles. The Court discovered one to the effect that the federal government, while it could not tax the "governmental functions" of the state governments, *could* tax the "non-governmental functions" of the state governments – which may sound confusing to a non-lawyer in that it is hard to think of something done by a government being non-governmental, but which

was perfectly clear to the Supreme Court. Also, while a "direct" tax levied by a state on something connected with the federal government was all wrong, an "indirect" tax was all right. Now, for some reason wrung from the metaphysical reaches of Constitutional Law, the Court considers an inheritance tax an "indirect" tax. Therefore any state can slap on a tax when a man dies and leaves his federal bonds to his wife. But since an income tax is a "direct" tax, no state can tax the man – or his wife either – on the income he makes from those federal bonds. Presumably – going back to the primary principle – such a tax might destroy the federal government.

The corresponding immunity of state bonds from the federal income tax raises yet another question. Can you necessarily change the Supreme Court's notions about Constitutional Law even by amending the Constitution? Apparently not. For the income tax amendment gave Congress the power to tax incomes "from whatever source derived." The words could scarcely be plainer or stronger, and part of the reason for writing them in was to put an end to the immunity rule so far as the federal income tax was concerned. But the Court still says that it is unconstitutional for the federal government to tax the income from state bonds. Thus, the unwritten piece of the Constitution that the Court discovered all by itself carries more weight with the Court than the written words of the document.

Finally, there was the time the Court was called upon to decide the delicate question whether the salaries of federal judges could be taxed under the federal income tax. The judges were not part of any *state* government, so they could not come in under the mutual immunity rule. But there was another opening. The Constitution says that the salaries of federal judges may not be reduced while the judges are in office. Aha, said the Court; to make us pay an income tax on our salaries the way everybody else does would clearly be *just* the same thing as making us take a salary cut. And that, obviously, would be unconstitutional. Of course, there was still that little phrase in the amendment – about incomes "from whatever source derived." But by a strange reversal of customary reasoning, the Court seemed to feel that the old no-salary-cuts clause amended the amendment instead of vice versa. Again, doubtless, a matter of principle.

So runs in brief the story of how Constitutional Law, the Highest Law of the Land is laid down by the Supreme Court of the Land. Here is The Law at its best; here are the lawyers at their most distinguished, their most powerful. Still comparing piles of abstract, indecisive, and largely irrelevant principles as though they were matching pennies on a street corner. Still draping in the longiloquent language of a generalized logic the answers – some good, some bad – to specific social problems. And purposing all the while to be applying the commands and prohibitions of the U.S. Constitution. No wonder Charles Evans Hughes, long before he became the Supreme Court's Chief Justice, once blurted out with a bluntness that is rare in lawyers" – "We are under a Constitution, but the Constitution is what the judges say it is."

And of course the judges themselves, as could scarcely fail to occur when the rules of the game are so vague, are forever disagreeing about what the Constitution is. Every man-on-the-street has heard of five-four decisions and dissenting opinions. But a dissenting opinion, though it may make its author feel a lot better for having written it, is in essence no more than a critical and occasionally literary essay. What is said by the five or six or seven or eight justices who voted the other way is The Law. It is just as much The Law so far as that case is concerned as if the decision had been unanimous.

Thus it can happen – and has often happened – that one man, one judge, holds the "meaning" of the Constitution in his hands. This possibility was never more strikingly illustrated than when, less than a year after the Court called a New York minimum wage law for women unconstitutional, it called a Washington state minimum wage law for women constitutional – all because one man, Justice Roberts, voted on the other side. It seems that the New York statute deprived employers of their property without due process of law and therefore violated the Fourteenth Amendment, whereas the almost identical Washington statute was a proper exercise of the state police power and therefore didn't violate anything. Of course, it was not the principles, the basic Law, that changed with Justice Roberts' mind. It was merely that in one case, one principle was "controlling"; in the other case, it gave way to a different principle.

And it is worth repeating, and remembering, that the alleged logic of Constitutional Law is equally amorphous, equally unconvincing, equally

silly whether the decisions the Court is handing down are "good" or "bad," "progressive" or "reactionary," "liberal" or "illiberal." The principles under which the Washington minimum wage statute was blessed had no more to do with the problem, or with the Constitution, than those under which the New York minimum wage statute was damned. The Wagner Labor Act was called constitutional for no more solid reasons than those for which the Agricultural Adjustment Act was called unconstitutional. Freedom of the press in Louisiana was defended by logic no less far-fetched than that which upheld the freedom to employ child labor. No matter in which direction the legal wand is waved, the hocus-pocus remains the same.

There is one more principle of Constitutional Law that is worth mentioning, although it has been rather sadly neglected. It is that any law, state or federal, is entirely proper and valid unless clearly and unmistakably forbidden by the words of the Constitution. But then, if this principle were regularly followed, there would not be much use for any of the other principles. There would not be much Constitutional Law either.

## CHAPTER V

### NO TAX ON MAX

*"If the law supposes that," said Mr. Bumble...*

*"the law is a ass, a idiot."* –Charles Dickens

In case anyone should suppose that the exalted acme of the lawyers' art known as Constitutional Law can not possibly be so unconvincing, so inept, so silly as a quick summary of Supreme Court logic perhaps makes it sound, it might not be too bad an idea to take one of the Court's ukases about the-Constitution-and-what-it-really-means, and give that ukase, or opinion, a thorough going-over. The subject of this little experiment in vivisection will be a case known to the lawyers as Senior v. Braden. It was decided by the Supreme Court in the spring of 1935.

No, Senior v. Braden was not, of course, chosen at random. It is, for a Supreme Court opinion, mercifully short. It involves the Court's favorite constitutional springboard, the good old "due process" clause of the Fourteenth Amendment. It reveals the Court at its most legalistic, its most vacuous, its most unsubstantial – though for that purpose any one of a thousand cases might have served equally well.

Furthermore, Senior v. Braden was not a unanimous decision; it was a six-three decision. But the existence of a dissent in any case involving "interpretation" of the Constitution has been, for some time now, the rule rather than the exception. And the dissent, be it remembered, doesn't count anyway. The majority opinion is The Law, the gospel – so much so that even the dissenting judges must accept it, as with Senior v. Braden they have accepted it, when the case is used as the basis of legal argument in the future.

In short, Senior v. Braden is today an integral and respectable part of The Law of the Land as set forth by the top craftsmen of the profession. Here, then, interspersed with an almost literal translation of each paragraph into non-legal language, and with a few pertinent (or maybe

impertinent) comments, is the Supreme Court's opinion in Senior v. Braden. Hang on to your hats: --

"January 1, 1932 – tax listing day – section 5328-1, the Ohio General Code provided that all investments and other intangible property of persons residing within the state should be subject to taxation. Section 5323 so defined 'investment' as to include incorporeal rights of a pecuniary nature from which income is or may be derived, including equitable interests in lands and rents and royalties divided into shares evidenced by transferable certificates. Section 5638 imposed upon productive investments a tax amounting to 5 per centum of their income yield; and section 5389 defined 'income yield' so as to include the aggregate income paid by the trustee to the holder, etc...."

(Under Ohio law, anyone who lived in Ohio and owned stocks or bonds or such had to pay a tax of 5% on the income from them, even if he got the income through a trustee or keeper-of-the-property-for-him.)

"Appellant owned transferable certificates showing that he was beneficiary under seven separate declarations of trust, and entitled to stated portions of rents derived from specified parcels of land – some within Ohio, some without. On account of these beneficial interests he received \$2,231.29 during 1931...."

(The man who brought this case up to the Supreme Court – and by way of introduction, through no courtesy of the Court, meet Max Senior – had some pieces of paper showing he had a stake in seven plots of land, in Ohio and elsewhere. His stake was worth over \$2,000 to him in one year.)

"The tax officers of Hamilton County, where appellant resided, threatened to assess these beneficial interests, and then to collect a tax of 5% of the income there from. To prevent this, he instituted suit in the Common Pleas Court. The petition asked that section 5323, General Code, be declared unconstitutional and that appellees be restrained from taking the threatened action. The trial court granted the relief as prayed; the Court of Appeals reversed, and its action was approved by the Supreme Court."



(The local tax-collectors – one of whom, incidentally, was named Braden – tried to get one hundred-odd dollars out of Max. He – through his lawyer, naturally – claimed the Constitution protected his hundred-odd dollars, took the case to court, and got licked – so far.)

"With commendable frankness, counsel admit that under the Fourteenth Amendment the state has 'no power to tax land or interests in land situate beyond its borders; nor has it power to tax land or interests in land situate within the State in any other manner than by uniform rule according to value.' Consequently, they say 'if the property of appellant, which the appellees seek to tax in this case, is land or interest in land situate within or without the State, their action is unconstitutional and should be permanently enjoined.'"

(The lawyers for the state of Ohio say – with a sort of double-dare in their tone – that if the Court should by any chance call this a tax on land, then they give up. They know that the Court won't let Ohio tax land in, say, West Virginia; that any such attempt would be labeled a taking of property without due process of law in violation of the Fourteenth Amendment. And – still with a double-dare – they're willing to throw up the whole case and admit that Ohio can't even tax Ohio land in this way – *if* this is a tax on land. –Notice, incidentally, that here, in a rather casually phrased reference to some of the lawyers' arguments, is the only mention of the Fourteenth Amendment in the whole opinion.)

"The validity of the tax under the federal Constitution is challenged. Accordingly we must ascertain for ourselves upon what it was laid. Our concern is with realities, not nomenclature. *Moffitt v. Kelly*, 218 U.S. 400, 404, 405; *Macallen Co. v. Massachusetts*, 279 U.S. 623, 625, 626; *Educational Films Corporation v. Ward*, 282 U.S. 379, 387; *Lawrence v. State Tax Commission* 286 U.S. 276, 280. If the thing here sought to be subjected to taxation is really an interest in land, then by concession the proposed tax is not permissible. The suggestion that the record discloses no federal question is without merit."

(This is a serious matter because somebody brought up the Constitution. Therefore we, the Supreme Court, are going to have to

make up our own minds whether this is a tax on land or not. As we've said at least four times before – and if you don't believe us, here's where to look it up – you can't fool us with words; we want to know what's really going on. But if we decide this *is* a tax on land, then we *don't* have to bother to make up our own minds whether the Constitution forbids it; we're perfectly willing to take the lawyers' word on that little matter. And incidentally, the idea that this might not be any business of ours at all is beneath serious consideration.)

"Three of the parcels of land lit outside Ohio; four within; they were severally conveyed to trustees. The declaration of trust relative to the Clark-Randolph Building Site, Chicago, is typical of those in respect of land beyond Ohio; the one covering East Sixth street property, Cleveland, is typical of those where the land lies in Ohio, except Lincoln Inn Court, Cincinnati. Each parcel has been assessed for customary taxes in the name of legal owner or lessee according to local law, without deduction or diminution because of any interest claimed by appellant and others similarly situated."

(To go back to Max Senior and his profits – each piece of land he had a stake in was being kept and managed, for all the people who had stakes in it, by another fellow. Also, each piece of land had been soaked for the regular local property taxes, regardless of the fact that a lot of people were making money out of it.)

"The trust certificates severally declare: -- That Max Senior has purchased and paid for and is the owner of an undivided 340/1275 interest in the Lincoln Inn Court property; that he is registered on the books of the trustee as the owner of 5/3250 of the equitable ownership and beneficial interest in the Clark Randolph Building Site, Chicago; that he is the owner of 6/1050 of the equitable ownership and beneficial interest in the East Sixth street property, Cleveland. In each declaration the trustee undertakes to hold and manage the property for the use and benefit of all certificate owners; to collect and distribute among them the rents; and in case of sale to make pro rata distribution of the proceeds. While certificates and declarations vary in some details, they represent beneficial interests which, for present purposes, are not substantially unlike. Each trustee holds only one

piece of land and is free from control by the beneficiaries. They are not joined with it in management. See *Hecht v. Malley*, 265 U.S. 144, 147."

(The legal language of the documents under which friend Max holds his stake in these plots of land all refer to him as the owner of something. He doesn't, however, own a little chunk of any of the plots in the sense that he could go and build a fence around it and sit there. He hasn't even anything to say about the way it's run. All he gets is his share of the profits when they come in. – "Our concern," remember, "is with realities, not nomenclature.")

"The state maintains that appellant's interest is 'a species of intangible personal property consisting of a bundle of equitable choses in action because the provisions of the agreements and declarations of trust of record herein have indelibly and unequivocally stamped that character upon it by giving it all the qualities thereof for purposes of the management and control of the trusts. At the time the trusts were created, the interests of all the beneficiaries consisted merely of a congeries of rights etc., and such was the interest acquired by appellant when he became a party thereto. . . . The rights of the beneficiary consist merely of claims against the various trustees to the pro rata distribution of income, during the continuance of the trusts, and to the pro rata distribution of the proceeds of a sale of the trust estates upon their termination."

(Ohio, out to collect its tax, claims that since Max not only can't put a fence around any of the land in question but hasn't even anything to say about the way the land is run, he doesn't own anything but a chance of getting profits if there are any. – "*Our* concern is with realities, not nomenclature.")

"Appellant submits that ownership of the trust certificate is evidence of his interest in the land, legal title to which the trustee holds. This view was definitely accepted by the Attorney General of Ohio in written opinions Nos. 3640 and 3869 (Opinions 1926, pp. 375, 528) wherein he cites pertinent declarations by the courts of Ohio and of other states. See, also, 2 *Cincinnati Law Rev.* 255."

(Max claims that, since he has some pieces of paper and collects money on them, he must own something in the way of land, even though he admits that legally the fellows who run the land for him are supposed to own it. Some ex-Attorney General of Ohio once agreed with this idea in a general way and as applied to someone else. – "Accordingly we must," remember, "ascertain *for ourselves* upon what it – the tax – was laid.")

"The theory entertained by the Supreme Court concerning the nature of appellant's interests is not entirely clear. The following excerpts are from the headnotes of its opinion which in Ohio constitute the law of the case:"

(Even we, the Supreme Court of the United States, can't make much sense out of the legal language in which the Supreme Court of Ohio told what it thought Max Senior owned. Try some of it yourself:)

" 'Land trust certificates in the following trusts (the seven described above), are mere evidences of existing rights to participate in the net rentals of the real estate being administered by the respective trusts.' "

(What Max owns is nothing by the right to collect some of the profits. – Not so hard, was it, after some of the U.S. Supreme Court's own language.)

" 'Ascribing to such certificates all possible virtue, the holder thereof is at best the owner of equitable interests in real estate divided into shares evidenced by transferable certificates. Section 5323, General Code (114 Ohio Laws, p. 715), does not provide for a tax against the equitable interests in land, but does provide a tax against the income derived from such equitable interests.' "

(Still the Ohio Supreme Court talking: -- Even if we were to admit that Max does own something in the way of land, Ohio isn't out to tax whatever it is that Max owns; Ohio is taxing the income Max made out of it.)

"Apparently no opinion of any court definitely accepts the theory now advanced by appellees, but some writers do give it approval

because of supposed consonance with general legal principles. The conflicting views are elaborated in articles by Professor Scott and Dean Stone in 17 Columbia Law Review (1917) at pp. 269 and 467."

(Back to the U.S. Supreme Court now: -- The state's idea that all Max owns is the right to get profits has never, so far as we know, been sanctified as The Law by any court anywhere – perhaps because "we" couldn't understand what the Ohio Supreme Court said in this very case. We admit that mere lawyers and law teachers have played with the idea, including one of our own august number, long before what he thought made any difference so far as The Law was concerned. – Note, too, the reference to "general legal principles.")

"Maguire v. Trefry, 253 U.S. 12, much relied upon by appellees, does not support their position. There the Massachusetts statute undertook to tax incomes; the securities (personality) from which the income arose were held in trust at Philadelphia; income from securities taxable directly to the trustee was not within the statute. The opinion accepted and followed the doctrine of Blackstone v. Miller, 188 U.S. 189, and Fidelity & Columbia Trust Co. v. Louisville, 245 U.S. 54. Those cases were disapproved by Farmers' Loan & Trust Co. v. Minnesota, 280 U.S. 204. They are not in harmony with Safe Deposit & Trust Co. v. Virginia, 280 U.S. 83, and views now accepted here in respect of double taxation. See Baldwin v. Missouri, 281 U.S. 586; Beidler v. South Carolina Tax Commission, 282 U.S. 1; First National Bank v. Maine, 284 U.S. 312."

(The state of Ohio has tried to throw our own words back at us by reminding us of a case in which we once said that it was perfectly all right for a state to tax a man, who lived in the state, on profits that came to him through someone who was keeping property for him in another state. But that case was really quite different. One of the differences was that in that case, the tax was on income. – And here, by pretty definite implication, the Court seems to be saying, for the only time in the whole opinion, that the Ohio tax is *not* a tax on Max's income. – Anyway, the "controlling" principles of that case don't control any longer, as we've said in several cases since then. The principle that

usually controls these days is that is we see anything getting taxed twice, it's probably unconstitutional.)

"In *Brown v. Fletcher*, 235 U.S. 589, 599, we had occasion to consider the claim that a beneficial interest in a trust estate amounts to a chose in action and is not an interest in the *res*, subject of the trust. Through Mr. Justice Lamar we there said:"

(To get back to the real problem, which is what does Max Senior own anyway, somebody else once asked us to decide, as a general principle, whether a man who makes money, out of property that is being kept and managed for him, owns only the right to get money, or whether he sort of owns some of the property. This is what we – meaning the nine lawyers who then made up the Supreme Court, most of them now being dead – had to say:)

" 'If the trust estate consisted of land, it would not be claimed that a deed conveying seven-tenths interest therein was a chose in action within the meaning of section 24 of the Judicial Code. If the funds had been invested in tangible personal property, there is, as pointed out in the *Bushnell* case (*Bushnell v. Kennedy*, 9 Wall. 387, 393), nothing in Section 24 to prevent the holder, by virtue of a bill of sale, from suing for the "recovery of the specific thing, or damages for its wrongful caption or detention." And if the funds had been converted into cash, it was still so far property – in fact instead of in action – that the owner, so long as the money retained its earmarks, could recover it or the property into which it can be traced, from those having notice of the trust. In either case, and whatever its form, trust property was held by the trustee, not in opposition to the *cestui que* trust, so as give him a chose in action, but in possession for his benefit, in accordance with the terms of the testator's will.--"

(If a man with some land that was being held for him by somebody else should transfer part of his stake in the land to a third person, no one would be fool enough to claim that the piece of paper involved in the transfer was a "chose in action" – a "chose in action" being, roughly, a piece of paper that entitles its owners to certain rights, including usually the right to collect money from someone – in the sense that the words "chose to action" are used in one section of the federal statute that tells

the federal courts how various kinds of lawsuits should be handled. If, instead of land, it had been goods or cash that was being held, and someone had swiped the goods or the cash, then the man with a stake in them could bring a lawsuit to get the stuff back. At any rate, whoever might have been holding the property for whoever had a stake in it would, in truth, have been holding the property for whoever had a stake in it. – And just *try* to figure out what any of this, whatever it means, has to do with Max Senior and the tax he doesn't want to pay.)

" 'The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action. For he had an admitted and recognized fixed right to the present enjoyment of the estate, with a right to the corpus itself when he reached the age of 55. His estate in the property thus in the possession of the trustee, for his benefit, though defensible, was alienable to the same extent as though in his own possession and passed by deed. *Ham v. Van Orden*, 84 N.Y. 257, 270; *Stringer v. Young, Trustee*, 191 N.Y. 157, 83 N.E. 690; *Lawrence v. Bayard*, 7 Paige (N.Y.) 70; *Woodward v. Woodward*, 16 N.J. Eq. 83, 84. The instrument by virtue of which that alienation was evidenced – whether called a deed, a bill of sale, or an assignment – was not a chose in action payable to the assignee, but an evidence of the assignee's right, title, and estate in and to property.'"

(The man who was having some property held for him in this case – namely, the case that had been decided 15-20 years before – owned something more than a "chose in action." This fellow, as a matter of fact, had the right to any profits from the property that was being held for him and also the right to take over the property into his own hands when he reached a respectable age. He also had a perfect right to sell his rights – and, apparently, he had done just that. The paper that represented the sale of these rights was not a "chose in action"; it was proof that the man who bought the rights now had certain rights in the property in question.)

"The doctrine of *Brown v. Fletcher* is adequately supported by courts and writers. *Narragansett Mutual Fire Ins. Co. v. Burnham*, 51 R.I. 371, 154 Atl. 909; *Bates v. Decree of Judge of Probate* 131 Me. 176, 160 Atl. 22; *Bogert, Handbook of the Law of Trusts*, 430; 3 *Pomeroy*

Equity Jurisprudence Fourth Ed., 1928, sec. 975, p. 2117; 17 Columbia Law Review, 269, 289. We find no reason for departing from it."

(Judges and others have from time to time agreed with the general principles just quoted. So do we.)

"The challenge judgment must be Reversed."

(Therefore, Max Senior – remember him? – doesn't have to pay his tax.)

And that, ladies and gentlemen, is the opinion of the Supreme Court of the United States in the case of Senior v. Braden.

\* \* \* \* \*

In order to find out what the Supreme Court was talking about – and also what it wasn't bothering to talk about – in the case of Senior v. Braden, it is necessary to go back a little into the general principles of Constitutional Law that presumably "controlled" the decision. They start in the Fourteenth Amendment – despite the fact that the Fourteenth Amendment played very little part in the Court's opinion. And of course they start in the "due process" clause.

The primary principle involved is to the effect that when a state tries to tax something which it has no "jurisdiction" to tax, that amounts to an attempt to deprive somebody of property without due process of law. Inasmuch as "jurisdiction" means, loosely, "power," such a rule seems not too unreasonable. At least, it seems not too unreasonable once you have swallowed the Court's habit of using the Fourteenth Amendment for other purposes than the protection of Negroes, and others, against unfair criminal trials. But obviously that leaves it entirely up to the Supreme Court to decide what a state has power or "jurisdiction" to tax and what it hasn't power or "jurisdiction" to tax. And in the course of deciding, the Court has laid down a lot of sub-principles which give "jurisdiction" a special, if sometimes indefinite, meaning.

The first sub-principle is that a state has no "jurisdiction" to tax land outside its borders. And that – regardless of what relation it has or hasn't to the Fourteenth Amendment – seems eminently sensible and



fair. It also seems eminently pointless. For New Hampshire, for instance, would no more try to slap a property tax on a farm in Iowa than the United States would try to tax a ranch in Argentina. There wouldn't be any way of collecting the tax and no state would be idiotic enough to try.

But, starting from that fair, if pointless, principle, the Court has gradually built up other principles about what a state has or hasn't "jurisdiction" to tax. A lot of property today, like stocks and bonds and I.O.U's and mortgages and trust certificates, is not so solid and stationary as land, and so, occasionally, different states try to tax that kind of property at the same time and the owners of the property don't like it. The Supreme Court has obligingly enshrined in The Law various complicated sub-principles telling which states have "jurisdiction" to tax that kind of property and which haven't. And these "jurisdiction" rules have been carried over, with refinements and exceptions, to other kinds of taxes than property taxes – especially to inheritance taxes.

Where inheritance taxes are concerned, the Court has laid down the principle that if two states try to tax the transfer of the same property at the death of its owner, then invariably one of the states has no "jurisdiction" to tax that transfer – even though the owner may have lived in one state and kept the property in another. This is what the Supreme Court was talking about in *Senior v. Braden* when it mentioned "views now accepted here in respect of double taxation" and named several cases. All the cases named dealt either with inheritance taxes, or else with the application of various sub-principles of the "jurisdiction" rule to property taxes on other kinds of property than land.

The state of Ohio, not unnaturally, had assumed that all these cases had very little to do with the problem in *Senior v. Braden*. The state of Ohio thought it was arguing about an income tax, since the tax it was trying to collect from Max Senior was computed by taking 5% of part of his income. And the Supreme Court had never before stretched any of its "jurisdiction" rules so far as to stop a state from taxing the income of someone who lived in the state. That is why the state of Ohio thought the case of *Maguire v. Trefry*, which allowed an income tax very much like the tax on Max Senior, was, even though older, more to the point than all the inheritance tax and property tax cases the Court named.

The Court, however, seemed to say that the principles of *Maguire v. Trefry* were no longer "controlling" because the inheritance tax and property tax cases decided since then had made other principles more important – even for income taxes. But as a matter of fact, the Court seemed to forget what it had decided in an even more recent case called *Lawrence v. State Tax Commission* – although the *Lawrence* case was actually mentioned in the opinion, in another connection. For in *Lawrence v. State Tax Commission*, which dealt with an income tax, the principles of *Maguire v. Trefry* had been followed as perfectly good Law. In short, the Court had held, even after laying down the principles that limited state "jurisdiction" to tax in the inheritance tax and property tax cases named, that it was quite all right – and no violation of the Fourteenth Amendment – for a state to tax the income of someone who lived in the state.

So, in order to make any sense at all out of *Senior v. Braden*, the Supreme Court must have been saying that the tax on Max Senior *wasn't* an income tax but a property tax. And indeed the Court implied as much in its opinion and has said so, definitely, since.

Now as everybody knows, a property tax is universally considered to be a tax measured by the value of the property and collected every year whether the owner makes profits out of the property or not. The tax on Max Senior was measured by his profits, and if there hadn't been any profits there wouldn't have been any tax. But that little practical matter didn't stop the Supreme Court from calling it a property tax anyway.

The Court's excuse presumably was (and notice how often you have to guess what the Court means just to make its decision fit its own principles of Law) that the Ohio legislature, in writing the tax statute, had inadvertently labeled it a property tax, even though it was measured by income. The fact that the *Ohio* Supreme Court had ignored this slip and treated the tax as what, practically speaking, it was, didn't phase the U.S. Supreme Court. Nor did the fact that it is strictly the business of the Ohio courts and no concern at all of any federal court to "interpret" the statutes of Ohio. For the U.S. Supreme Court blithely treated the tax as a property tax, meanwhile proclaiming, you may remember, "Our concern is with realities, not nomenclature." In Constitutional Law, a rose by any other name does not always smell so sweet.

Even granting then, with a gulp, that it was a property tax that Max Senior didn't want to pay, why had Ohio no "jurisdiction" to collect it? For one of the cardinal sub-principles of the "jurisdiction" rule is that a state *has* "jurisdiction" to put a property tax on property owned by someone who lives in the state, if that property, instead of being land or goods, consists of pieces of paper, such as stocks or bonds, which give the owner certain rights. And surely what Max Senior owned was a few pieces of paper, called trust certificates, that entitled him to some of the profits from seven plots of land, on which he had no right at all to go build a fence, or a house. There is at least no doubt that if Max had bought, instead of trust certificates, shares of stock in a corporation that managed plots of land, just as the trustees managed the plots Max had a stake in, then the state of Ohio could have taxed those shares of stocks without the Supreme Court raising a finger to stop it. What difference?

The difference, and the only difference, is in the legal wording of the pieces of paper that did give or might have given Max a right to Share in the profits. If he had held shares of stock he would have been nothing but a stockholder. But since he held trust certificates, he was, in legal language, a "cestui que trust." And being a "cestui que trust" – which only means someone-who-trusts-someone-else-to-hold-property-for-him – Max Senior claimed he was, in a sense, the owner of some of the land that was being held for him. He claimed he was the owner of land despite the fact that he had no right whatsoever to build a fence on the land or to manage it, but only to collect some of the profits.

If it was land that Max owned (some of that land being outside Ohio) and if the tax the state was trying to collect was a property tax, *then*, argued Max, Ohio has no "jurisdiction" to collect the tax. For, by the very first sub-principle of the "jurisdiction" rule, a state has no "jurisdiction" to tax land outside its borders. And so, at long last, appears the question to which the Supreme Court devoted almost its entire opinion in Senior v. Braden, taking the problems and principles discussed thus far almost entirely for granted. The question was this: -- Does Max own land, or does he merely own the right, written on some pieces of paper, to get some of the profits from certain plots of land that are being held by somebody else?

In seeking the answer to this question, the Court, despite its vaunted "concern for realities," paid no attention whatsoever to the practical set-up of the business arrangement under which Max Senior had collected \$2,000 in one year. Instead, the Court looked back to an old Supreme Court case of almost 20 years before, in order to find a general principle. The case was *Brown v. Fletcher*. Yet it happens that the problem presented and solved in *Brown v. Fletcher* had not the remotest relation to the Fourteenth Amendment, to taxes on land, or to taxes on anything else.

The problem of *Brown v. Fletcher* was purely a problem of the proper legal procedure in the federal courts under the federal statute governing such procedure. The statute denied the privilege of bringing suit in the federal courts to certain "assignees of choses in action" – or people to whom had been transferred pieces of paper entitling their owners to certain rights. The central character of *Brown v. Fletcher* claimed that a piece of paper that had been transferred to him was *not* a "chose in action" and that he *was* privileged to sue in the federal courts. (His piece of paper, incidentally, though something like Max Senior's trust certificates in its legal language, gave him many more rights than Max Senior ever got from the trust certificates.) The Supreme Court agreed that the paper was not a "chose in action" and that its owner was entitled to bring suit in the federal courts. And that was all *Brown v. Fletcher* amounted to.

In the course of deciding this, the Supreme Court wrote the two long and rather incomprehensible paragraphs that were quoted verbatim in the *Senior v. Braden* opinion. And it was on the basis of those two paragraphs, as expressing a relevant general principle, that the Supreme Court of a generation later concluded that Max Senior *did*, in a sense, own land, and so could not be taxed by the state of Ohio.

Thus, the reasoning of the Court in *Senior v. Braden* boils down to something like this: -- The nine judges who held our jobs almost 20 years ago, in deciding a problem of federal court procedure, expressed the general principle that certain pieces of paper, giving their owner certain rights, were not, technically, "choses in action." Therefore, what Max Senior, whose trust certificates read something like those pieces of paper, *really* owns is land. Some of that land is outside Ohio. Ohio is trying to tax some of the profits Max Senior made

out of his stake in that land. The tax, even though it is measured by the profits so that it works like an income tax, is called a property tax in the statute. Therefore it *is* a property tax. Since it is a property tax it is a tax on what Max Senior owns. But what Max Senior really owns is land, some of it outside Ohio. Therefore Ohio is trying to tax land outside Ohio. But we have a principle that no state has "jurisdiction" to tax land outside its own borders. We also have a principle that a state tax on something which the state has no "jurisdiction" to tax deprives the taxpayer of his property without due process of law and so violates the Fourteenth Amendment. Therefore, Ohio's attempt to collect a tax from Max Senior is forbidden by the Constitution. Therefore, Max can keep his hundred-odd dollars.

Nor, if you can hold on just a little longer, is that all there is to *Senior v. Braden* – although it is all that can be explained even by the circular, irrelevant abstractions of legal logic. For Max was allowed to keep every cent of the hundred-odd dollars that Ohio was trying to take from him in taxes. Yet part of the land that Max had a stake in was not outside Ohio at all; it was inside Ohio. So even if it was a property tax, and even if what Max owned was really land, why couldn't Ohio tax the land inside its own borders? What was unconstitutional about that?

There isn't even a legal answer. The Supreme Court's "jurisdiction" principles under the Fourteenth Amendment allow – as they would obviously have to allow – a state to tax its own land. True, the Ohio land that Max had a stake in had already been taxed once that year under a regular property tax. So, considering the tax in the case as a property tax, that made two property taxes on the same land. But there is nothing in the Constitution that forbids a state to do that if it wants to. There is not even a Supreme Court principle that forbids it, the Court's rule against double taxation applying only to taxation of the same thing by two states. The *Ohio* constitution might well have forbidden it. But the job of saying what the Ohio constitution forbids or doesn't forbid is, in legal tradition, exclusively the job of the Ohio courts. And the Supreme Court of Ohio had said that, so far as it was concerned, the tax on Max Senior was entirely constitutional.

Of course, there was that double-dare of the state's lawyers in the case, to the effect that if the Supreme Court was crazy enough to call the tax a tax on land, then the Court might just as reasonably throw out the

whole tax. Apparently what the Court did was simply to take the dare – despite the fact that there was not so much as a shadow of even a legal excuse for throwing out that part of the tax that applied to Ohio land. Thus not only the inaccurate interpretation of a phrase of the Constitution, or the invoking of vague general principles about "jurisdiction" or the dependence on tax nomenclature in the face of a contradictory reality, or the muddled language of a case about something entirely apart from the issue that was decided many years ago – not only any of these but even the foolish bravado of a lawyer – can serve as a foundation on which the Supreme Court may build a chunk of Constitutional Law.

Here, in miniature, is the whole vast structure of sacred abracadabra that makes up the Highest Law of the Land. And any non-lawyer with half a brain in his head, if only he could penetrate the smoke-screen of legal language, would recognize the alleged logic, not only of Senior v. Braden but of almost any Supreme Court case you could name, as nothing more nor less than an intellectual fraud. The fraud may have been more obvious in Senior v. Braden than in most, simply because the manipulation of legal lingo and logic was more inept and clumsy than usual. But even when the nine master jugglers are working at their smoothest, it requires only a trained eye to see that those weighty thoughts they seem to be tossing around are in reality no more than balloons, full of hot air and easily punctured.

And the worst of it is that the Supreme Court – like all courts and all lawyers – is all the time dealing with and settling practical problems. There was a very real problem in state finance involved in Senior v. Braden. By virtue of the Court's decision, Ohio lost in revenue not only Max Senior's hundred-odd dollars but the thousands upon thousands of dollars it would otherwise have collected as taxes from other Ohioans who had been making money the same way Max had been making money. Should Ohio then look to another kind of tax to make up the lost revenue? Or should it amend the old statute, call the tax an income tax this time, and hope that the Supreme Court, three or four years later when a case gets that far, will be impressed by the label and hold the statute now constitutional?

Regardless of the right answer, the Court's solemn consideration of the type of property Max Senior owned or didn't own seems scarcely

pertinent to a solution of Ohio's – or Max Senior's – fiscal difficulties. Even if the Court had snapped that Ohio was taxing legitimate investment too heavily and ought to cut down on its spending anyway and that, therefore, the tax under dispute might not be collected, such a decision, though hardly judicial in manner, would at least have made a great deal more common sense than any discussion of "choses in action" and interests in land and similar irrelevant ambiguous abstractions.

Furthermore, the larger question which the Court has been gaily disposing of, in the name of the Fourteenth Amendment, under its general principles about state "jurisdiction" to tax involves an extremely practical problem too. From the angle of the state governments, the problem is simply: -- Now that the people and companies and property we have to collect taxes from in order to keep running are spreading themselves over a dozen or 48 states, as most of them are today, how are we supposed to keep up with them and what kind of taxes can we impose on them without either chasing them out of our reach entirely or else going so easy on them that we don't collect enough money to keep going? From the angle of the taxpayers, whether people or companies, the problem is simply: -- Just because our business or our property spreads over a lot of states, is it fair or right that every one of those states, or most of them, should soak us with the same kind of taxes so that we have to pay tribute a dozen times for doing, or owning, one thing? Whether it is income taxes, property taxes, or inheritance taxes that are involved, the basic practical problem is the same.

Toward the efficient solution of that problem, the Supreme Court's "jurisdiction" principles contribute, literally, nothing. A categorical statement that the Fourteenth Amendment denies to any state but the state of domicile (what is domicile, who is she – these days?) the "jurisdiction" to impose an inheritance tax on the transfer of intangible property (when is intangible property not intangible, as with Max Senior's trust certificates?) may sound very learned. As may the rule that acquisition of a business site within a state by intangibles gives even a non-domiciliary state "jurisdiction" to tax. But neither the formulation nor the application of such principles and their sub-principles and the exceptions sheds even the dimmest light on the basic difficulties of the state governments and the taxpayers.

The fact is that the Supreme Court has neither the power nor the ability to find, for the problem in government here involved, a thorough or intelligent or workable solution. Which fact does not bother the Court in the slightest degree. It just goes merrily on laying down and applying its silly little abstract rules about "jurisdiction" to tax. And giving each of those silly little rules as much potency and prestige as if it had been adopted by the people as an amendment to the Constitution.

As in *Senior v. Braden*, so in all the "jurisdiction" to tax cases. The meat of the real problem is passed by; The Law sinks its teeth into the fluff of abstract logic. As in the "jurisdiction" to tax cases, so in all the cases under the "due process" clause of the Fourteenth Amendment. As in the cases under the "due process" clause of the Fourteenth Amendment, so in all Constitutional Law. As in Constitutional Law, so in all the lesser branches of legal learning. So in the whole of The Law. And only the solemn and mystifying mumbo-jumbo of legal language keeps the non-lawyers from catching on.

For instance, the citizens who directly and indirectly voted the Fourteenth Amendment into the Constitution to protect the rights of the Negroes just after the Civil War might be a little surprised to learn that under The Law they had forbidden the state of Ohio to collect a tax of one hundred-odd dollars from Max Senior.



## CHAPTER VI

### THE LAW AND THE LADY

*"Women have, commonly, a very positive moral sense; that which they will, is right; that which they reject, is wrong."* – Henry Adams

The lawyers have made such a complicated mess out of the word-game they call legal reasoning that any effort to dissect even a tiny part of that reasoning and show it up for the fake that it is, inevitably makes tough going. In a sense, that fact has been the intellectual Maginot Line of The Law. Plenty of people have long suspected that the lawyers with their long words were indulging in nothing more nor less than wholesale flimflam, but when it comes down to trying to take the flimflam, with all its myriad trappings, apart, people just can't be bothered. And even a personally conducted tour through the mirror mazes of legal logic becomes tiring and confusing.

It may, however, be possible to indicate something of the futility and irrelevance of legal processes merely by an imaginary application of the legal way of settling problems to a field in which decisions are customarily made in a more direct and efficient manner. Suppose, just for instance, a housewife – by repute one of the more practical species of human being – were to run her affairs for a day according to the legal pattern of principles, counter-principles, and concepts. Suppose ---

In the first place, she would of course be guided, from afar, by a dim and conveniently ambiguous ideal of personal justice. She would be bothered about doing the right thing, making the right decision, but since she would be her own Supreme Court, anything she did would be right – after she did it. The difficulty would lie in deciding beforehand what to do and what not to do, in accordance with the inexorable rules of her personal Law.

That Law would have two primary principles. The first would be that anything which seems presently desirable is right. The second would be that anything which seems presently desirable is likely, in the long run, to be wrong. Of course, the two principles might occasionally seem to conflict in their application to a specific fact situation, but that would be of minor importance since both, in the abstract, would be entirely valid legal principles. Each, moreover, would be buttressed with sub-principles and sub-sub-principles which might come in handy in making certain sorts of decisions.

The lady's day begins. Her first decision, obviously, is whether to get up or lie in bed a little longer. She remembers that The Law is that anything which seems presently desirable is right and certainly lying in bed seems presently very desirable. Yet before rushing to a snap judgment, she must dispose of the principle which holds that anything which seems presently desirable is likely, in the long run, to be wrong. That principle, of course, has certain exceptions and qualifications. One is to the effect that any action, or inaction, which seems presently so desirable that a failure to indulge the desire may affect the disposition over a period of hours will, in such circumstances, be the right action, or inaction, at least if that period of hours is taken as controlling for the future. Clearly, that exception now applies.

Yet, in all fairness, the lady must admit that there is an exception to the desirable-equals-right rule, to the effect that the denial of whatever seems desirable may, by imparting a sense of nobility, become desirable in its own right and therefore proper. There seems to be a deadlock. It will be a close decision.

Perhaps precedent will help. Yesterday the lady arose immediately. But yesterday's decision is not necessarily controlling because yesterday the sun was shining; today is an ugly day. Such a disparity in the relevant facts cannot fairly be ignored. The problem remains unsettled.

Then the lady remembers that she has an appointment with her hairdresser that morning. Manifestly, this brings into play the well-recognized legal rule, a sub-principle of the desirable-equals-right principle, that appointments, voluntarily made and in which time is of importance, must be kept on time. The sub-sub-principle that appointments voluntarily made in haste and later regretted need not be

kept on time and the sub-sub-sub-principle that appointments involuntarily made need not be kept at all are both obviously beside the point here. The Law, finally tracked to earth, seems to decree that the lady must rise.

And so she gets up. Not, of course, because she wants to keep an appointment with her hairdresser. Rather, because all the relevant legal principles point to such a decision. Anything which seems presently desirable is right – and she wants to get her hair done. Anything which seems presently desirable is likely in the long run to be wrong – and she would still like to lie in bed a little longer. Anything so desirable that a failure to indulge the desire will affect the disposition, is right, in at least a limited sense – and if she doesn't get her hair done today she'll go mad. The denial of what seems desirable can impart a sense of nobility which makes the denial proper – and she will indeed feel noble if she gets right up. Appointments must be kept on time if you want to keep them on time – and the lady is afraid her hairdresser would be unable to fit her in later. Moreover, yesterday's precedent, although not here controlling, points suggestively to the same decision. There is thus no doubt at all about The Law of the case. And the decision automatically follows The Law.

The lady's next two problems are comparatively easy, their answers dictated by long lines of solid precedent. Should she bother to brush her teeth? Yes, because she has always interpreted her Law that way, under the general principle that whatever is said to be good for the health is right. Should she turn her hot shower cold before she gets out? No, because she has always interpreted her Law that way, under the general principle that whatever is said to be good for the health is likely to be undesirable and therefore, by simple legal logic, wrong.

The choice of a dress to wear downtown, a choice which narrows down to a practical black number, two months old, and a brand-new blue and white print, brings other legal concepts into the picture. There is the concept of economy – embodied in the principle that what is economical is right and also in the sub-principle that what is economical in the short run is probably extravagant in the long run – and this concept seems to favor the black dress which will not get dirty so easily. But the concept of smartness, a typical legal concept in that its contents and meaning

are constantly changing from time to time and from place to place, seems to favor the blue and white dress.

The lady's decision in this matter is judicial in the extreme. She bows to the paramount principle that in question of dress, whatever is smart is right, recognizing as she does so that this is one of her few rules of Law to which there is almost no exception, the only legal question which ever arises concerning it being what is smart. But in deference to the principle of economy, she determines to keep her dress clean by riding downtown in a taxi instead of on a street car. In thus reconciling a conflict between two apparently irreconcilable principles, the lady has displayed her mastery of the legal process.

Once downtown, the lady is aware that she has entered a different legal jurisdiction. The same general principles are, in the main, still good Law, but their interpretation tends to vary. For instance, what seems presently desirable is still right and what seems presently desirable is still likely, in the long run, to be wrong, yet the question as to what *is* presently desirable involves a greater emphasis on the rule that what other people believe to be proper is desirable, and a correspondingly lesser insistence on the home rule that what other people believe to be proper is usually undesirable.

Thus the lady, after careful consideration of the question whether to give her hairdresser a generous tip or merely an adequate tip, finds the solution in the principle that what other people believe to be proper is desirable, especially when outside the home jurisdiction. Narrowing down this principle so that "people" means "person" and "person" refers to the hairdresser – a simple legal deduction – she leaves a generous tip. This ruling is also in strict conformity with the abstract legal ideal of economy, when considered in the light of the well-recognized legal tenet that what is economical in the short run is probably extravagant in the long run; clearly the hairdresser might do a careless job on her next time if she left a stingy tip.

At lunch, the lady is confronted with the problem whether to order or refrain from ordering a rich pastry dessert. Here, the primary principle concerning desirability and the secondary principles concerning what is said to be healthy appear to be both cogent and conflicting. But only on the surface, of course. Reaching into the recesses of her legal system,

the lady recalls that there is a pertinent and useful corollary to the sub-principle that the denial of whatever seems desirable may, by imparting a sense of nobility, become desirable and therefore right. The corollary is to the effect that whatever seems desirable but not too desirable may be denied with greater impunity than whatever seems extremely desirable, since the sense of nobility imparted by the denial depends on the denial itself and not on the degree of desirability of that which is desired. Accordingly, the lady passes up the cream-puff.

The lady's luncheon companion is going shopping. Will the lady come along? Decision, of course, must be dictated not by whim but by Law. It is The Law that to waste time is wrong. It is, further, The Law that to devote oneself to trivial matters when important matters demand attention is to waste time – and various household chores await the lady at home. Yet it is an accepted rule that, outside the home jurisdiction, household chores take on the color of triviality. The exception to this rule, that household chores assume extreme importance, especially outside the home jurisdiction, in the face of an unwanted invitation, is clearly inapplicable here. Furthermore, there exists an equitable principle, frequently superseding the more rigid rules of Law, that accommodation to the requests of others may be proper, *per se*. The "*per se*" settles it.

In the course of the shopping, the lady sees a hat. She does not need the hat but she likes it and wants to own it. Decision here is extraordinarily simple – in line with basic legal principles. The obviously relevant principle has the sanctity of constitutional doctrine and involves one of the most sacred of civil liberties. For freedom of contract may not under any circumstances nor under any guise of pseudo-legality be denied. All the precedents and the entire history of her personal Law point unswervingly to the conclusion that failure to purchase a becoming hat amounts to no less than an infringement of contract. The decree in the case is therefore automatic.

And so it goes. Throughout the day, the lady's problems, major and minor, are subjected to a system of abstract and solemn-sounding principles which for her make up The Law. Decision in each case is made in strict accordance with those principles. In fact, the principles dictate the proper answers.

Finally, after dinner, the question arises whether the lady and her husband should go to the movies or should instead stay home and listen to the radio and go to bed early. She wants to go to the movies. Her husband wants to stay home. But clearly her husband's decision is not and should not be controlling. Like the decree of a lower court, it must be given due weight and yet the whole problem must be carefully examined *ab initio* in order to insure that final decision be rendered in accordance with The Law.

She remembers that The Law is that anything which seems presently desirable is right, and certainly going to the movies seems presently very desirable. Yet before rushing to a snap judgment, she must dispose of the principle which holds that anything which seems presently desirable is likely, in the long run, to be wrong. That principle, of course, has certain exceptions and qualifications. One is to the effect that any action, or inaction, which seems presently so desirable that a failure to indulge the desire may affect the disposition over a period of hours will, in such circumstances, be the right action, or inaction, at least if that period of hours is taken as controlling for the future. Clearly that exception now applies.

Yet, in all fairness, the lady must admit that there is an exception to the desirable-equals-right rule, to the effect that the denial of whatever seems desirable may, by imparting a sense of nobility, become desirable in its own right, and therefore proper. There seems to be a deadlock. It will be a close decision.

Perhaps precedent will help. Last night the lady and her husband went to the movies. But last night's decision is not necessarily controlling because last night it was Gary Cooper; tonight it is some foreign film. Such a disparity in the relevant facts cannot fairly be ignored. The problem remains unsettled.

Then the lady realizes that she is quite tired and has a busy day ahead of her tomorrow. Manifestly, this brings into play the well-recognized legal rule, a sub-principle of the desirable-probably-wrong-in-the-long-run principle, that it is safer, even at some inconvenience, to look one's best at a tea party. Various sub-principles and exceptions and qualifications, concerning the amount of inconvenience which the rule will tolerate, are obviously beside the point here. The Law, finally

tracked to earth, seems to decree that the lady and her husband must stay home.

And so they stay home. Not, of course, because the lady wants to look well at her tea party tomorrow. Rather, because all the relevant legal principles point to such a decision. Anything which seems presently desirable is right – and she wants to get enough sleep. Anything which seems presently desirable is likely in the long run to be wrong – and she would still rather like to go to a movie. Anything so desirable that a failure to indulge the desire will affect the disposition is right, in at least a limited sense – and if she doesn't look well tomorrow, she'll never forgive herself. The denial of what seems desirable can impart a sense of nobility which makes the denial proper – and she will indeed feel noble if she accedes to her husband's wish to stay home. It is safer to look one's best at tea parties – and the lady is afraid it might be unpleasant to flout this principle. Moreover, last night's precedent, although apparently pointing to the opposite decision, is clearly distinguishable. There is thus no doubt at all about The Law of the case. And the decision automatically follows The Law.

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Now, this resume of a lady's day in which all decisions are directed by abstract principles, or rules of Law, may sound absurd in the extreme. It is plain that most of the principles are couched in such vague, general language that they cannot possibly be guides to a specific decision on a specific matter. It is plain that practically every principle can be countered with another principle or exception which contradicts in whole or in part the first principle. It is plain that not one of the lady's decisions necessarily follows from the principle or concept which is said to dictate it. It is plain that in every instance, the "controlling" principle, or principles, resembles nothing so much as a loose rationalization of what she is going to do, applied after the actual decision is made.

Furthermore, it is plain that if someone else, say the lady's husband, had been acting as Supreme Court for her, many of the rulings would have gone the other way, even though the same set of guiding principles had been rigidly adhered to. In any conflict between the concepts of smartness and economy, for instance, the decision might have favored economy and yet done the proper obeisance to smartness

under the rule that it is smart to be economical. Freedom of contract might well have been interpreted as freedom to refuse to buy a hat, no matter how becoming. Despite its limited scope, the lady's legal system would hardly have needed stretching to do double duty all the way down the line.

Absurd indeed. But not one iota more absurd than the system of Law under which we actually live. For most legal principles, too, are couched in such vague, general language that they cannot possibly be guides to a specific decision on a specific matter; practically every legal principle, too, can be countered with another principle or exception which contradicts in whole or in part the first principle; scarcely ever does a court decision necessarily follow from the principle or concept which is said to dictate it; and in just about every instance, the "controlling" principle, or principles, resembles nothing so much as a loose rationalization of what a court orders done, applied after the actual decision is made.

If the lady's legal system and the way that system worked for her seems more patently ridiculous than the workings of The Law, it is only because most of the principles of The Law are phrased in unfamiliar and therefore impressive language, so that their vagueness, their contradictions, their frequent and obvious use merely to justify desired results, all these are concealed from the non-lawyer's untrained eye. Substitute "within the legislative intent" for "desirable," substitute "executory contract contemplating adequate consideration" for "appointment with the hairdresser," and the lady's legal principles begin to take on a fake dignity, an air of solemnity and importance. This dignity, moreover, has no relation at all to the meaning, or lack of meaning, of the words used.

Or, going at it from the opposite angle, take the well-bolstered legal principle that state regulation of private enterprise amounts to deprivation of property without due process of law unless sanctioned as a proper exercise of the state police power. Substitute for it the simple and equally enlightening statement that certain state laws are bad unless they are good – and The Law begins to sound as silly as the lady.



As a matter of fact, The Law and those who lay it down are often considerably sillier than the lady. For the lady, as was perfectly apparent, knew what she wanted and decided accordingly, unbothered by the requirement that she justify each of her decisions with a broad generalization of principle. That requirement was easily satisfied because all the decisions she was called on to make affected her, the judge, directly and immediately, and because the business of fitting a principle to a ready-made decision was, as it always is in law and elsewhere, a simple matter.

But the judges who make legal decisions frequently have not the slightest interest in the outcome of the cases they are deciding. Of course if they have such an interest – and even judges are not immune from political and social emotions; they like or hate the New Deal, they approve or disapprove of labor unions, they trust or mistrust big business – then they can and often do, consciously or unconsciously, revert to the legal procedure of the lady. They judge first and justify afterward. And in so doing they are acting, if not in a judicial, at least in a practical manner. (Being practical and being judicial in the cold legal sense are just about mutually exclusive anyway.)

In run-of-the-mine cases, however, the sort that make up much of the business of The law, the judges don't care who wins nor what the eventual decision will be. The lawyers in the case always care; they know beforehand what decision they want and so they, in the practical manner of the lady, can fit their generalizations, their legal pleading, to the desired result. Not so the judges. How then do the judges ever achieve an answer?

What the judges do, actually, is what the lady pretended to do – and, for that matter, what the judges themselves pretend to do when the answer is of any concern to them. They balance – don't laugh – one set of abstract principles against another and, through some sort of trance-like transference, come out with a specific decision. They take the long words and sonorous phrases of The Law, no matter how ambiguous or empty of meaning, no matter how contradictory of each other; they weigh these words and phrases in a vacuum – which is the only way they could be weighed; and then they "apply" the weightier to the dispute in question with all the finality that might be accorded a straight wire from God.

It is as though a court were to have considered, with complete disinterest, the case of our friend, the lady; were to have balanced against each other the principles put forth by opposing counsel to the effect that what is desirable is right and that what is desirable is wrong; were to have decided, in the abstract, of course, that what-is-desirable-is-wrong was the more compelling of the two; and were then to have informed the lady that *since* it is The Law that what is desirable is wrong, *therefore* the lady must get out of bed. Certainly, time and time again, in actual law cases, opposing counsel will put forth as the bases of their arguments legal principles which are respectable and yet are directly contradictory. Equity – will – act – when – there – is – no – adequate – remedy – at - law and equity – need – not – act – even – though – there – is – no – adequate – remedy – at - law. Peaceful – picketing – is - legal and all – picketing – is - illegal. Contributory – negligence – on – the – part – of – the – plaintiff – absolves – the – defendant – of - responsibility and contributory – negligence – on – the – part – of – the – plaintiff – does – not – absolve – the – defendant – of – all - responsibility. And time and time again a court will grab one of the two contradictory principles and, with some slight elaboration, use it as the basis of decision.

For it is the legend of The Law that every legal dispute can, and must, be settled by hauling an abstract principle down to earth and pinning it to the dispute in question. The last thing any court will ever admit, even when it is being quite practical about what it decides, is that practical considerations have anything to do with the decision. To admit this would be to admit that it was not The Law – that pile of polysyllabic abstractions – that dictated the answer.

Then too, as judges are doubtless smart enough to realize, a man – or a lady – would scarcely need to be learned in The Law in order to sit and hand down practical answers to what are, in the last analysis, no more than practical problems.

## CHAPTER VII

### FAIRY TALES AND FACTS

*"What do you know about this business?" the King said to Alice.*

*'Nothing,' said Alice.*

*'Nothing whatever?' persisted the King.*

*'Nothing whatever,' said Alice.*

*'That's very important,' the King said, turning to the jury." –  
Lewis Carroll*

No single fact is so essential to the life and lustiness of the legal racket as the sober pretense on the part of practically all its practitioners – from Supreme Court judges down to police court lawyers – that The Law is, in the main, an exact science. No pretense was ever more absurd. The basic assumption behind the settlement of every legal dispute, whether it be settled by a judge's sacred words or out of court, is that, according to The Law, there is only one right answer, one preordained answer, to the problem. Lawyers and judges, so the fairy tale goes, are merely trained mechanics in the manipulation of that tremendous and complicated adding-subtracting-multiplying-dividing-and-square-root-computing machine known as The Law. They take a problem, any problem, translate it into the appropriate legal symbols, push the buttons on the big machine that correspond to those symbols, and the right answer automatically pops out at the bottom.

Certainly it is only because of their passionate belief in the machine-like and inexorable quality of The Law that non-lawyers continue to submit their civilization to legal decree. Certainly too, the law boys themselves are anxiously aware that they must keep up the pretense if they would keep their prestige and their power. Even the Supreme Court, from time to time in its opinions, feels it imperative to state that it is The Law, that infallible automatic machine, and not the Court, those nine fallible men, that really dictates decisions. For the lawyers know it would be woe unto the lawyers if the non-lawyers ever got wise to the fact that their

lives were run, not by The Law, not by any rigid and impersonal and automatically-applied code of rules, but instead by a comparatively small group of men, smart, smooth, and smug – the lawyers.

Yet it should not, at this point, be necessary to pile up any more examples of how The Law works, nor to examine in detail any more of The Law's mealy-mouthed concepts and principles and elaborate logic, in order to show that Law is a very inexact and teeter-totter "science"; that none of The Law's answers to problems is preordained, precise, or inevitable; and that it is indeed the lawyers, with their dreary double-talk, and not The Law, that mass of ambiguous abstractions, that run the show. Even if The Law still be considered a big machine that gives automatic answers to legally-worded questions, it is the lawyers and the lawyer-judges who phrase the questions and decide which buttons to push. And anyone who has ever worked a cigarette slot-machine knows that if you want Chesterfields, you push the Chesterfield button. The machine does the rest.

Thus the Supreme Court knows that if it pushes the "deprivation of property without due process of law" button, the answer will come out – unconstitutional. If it pushes the "state police power" button, the answer will come out – constitutional. But the machine of The Law does not tell the Court which button to push.

Again, any judge, engaged in deciding a dispute over an alleged business agreement, knows that if he pushes the buttons marked "offer," "acceptance," "consideration," and a couple of others, the answer will come out – valid contract. But if he pushes the "no offer" button, the answer will be – no contract. It is just as simple as that.

The point is, of course, that in every case the real decision is made, The Law of the case is laid down, not after the machine gets to work but before. The crux of the whole matter lies in the choice of which button or buttons to push, which principle or principles or concepts to follow. In *Senior v. Braden*, the Supreme Court decided to push the buttons marked "property tax" and "interest in land." Whereupon the machine whirred smoothly through "no jurisdiction to tax" and "deprivation of property without due process of law," right up to the answer – unconstitutional. But if the Court had instead laid its venerable finger on the "income tax" button, or had skipped the "interest in land" button,

the machine of The Law would have whirred just as smoothly to the exactly opposite conclusion.

And there are always at least two buttons, two principles, between which a choice must be made. Often there are several such choices. In no law case, in no legal dispute, is such a choice not presented.

Take one of the coldest, cut-and-dried cases imaginable. A sane man deliberately kills another man in the sight of several reliable witnesses. All the relevant written statutes and all the principles of Law which encrust those statutes seem to point toward one answer – first degree murder. Yet, as everyone knows, some lawyer will take the killer's case, will dig up accepted and respectable principles of Law which, if followed, would declare the killer innocent of crime, and may – for it has often happened – convince the court that the right legal answer is – not guilty. No wonder, then, that in less spectacular and less apparently open-and-shut legal controversies, a principle or series of principles can always be found to lend the benediction of The Law to either side of any case. No wonder there is no such thing as a legal problem which does not have, in the eyes of The Law, two sides to it – up to the point when some judge applied just *one* set of principles to the problem, and thereby settles it "according to The Law."

What are, then, all these abstract principles of which The Law is built, these rules so diverse and complicated and contradictory that some combination of them can be used as push buttons to obtain any result under the sun? What are these great and guiding truths that can override written statutes and even constitutions? What are these indispensable counters of all legal thinking and legal action? Where do they come from – once the stork-brought-them theory that they sit in some jurisprudential sky, waiting to be brought to earth, has been dispensed with?

The simple truth is that each of them originated as the out-loud cogitation of some judge, slightly worried as to which *old* set of principles – or cogitation's of other judges – to apply to the case before him, and still wanting to make his decision sound as inevitable, as automatic, as scientific and logical as possible. Every legal principle begins its existence as a rationalization, a justification, an honesty – this – is - why of some legal decision. And the more it is subsequently

used to justify other decisions, the more respectable it grows. Legal principles, like meerschaum pipes, improve with use and age.

There is a principle that equitable relief – a special kind of legal remedy – will not be granted to anyone who comes into court with "unclean hands." It originated, centuries back, in the desire of some judge to bolster with a high-sounding excuse his decision for the defendant in a case in which the plaintiff seemed, at first, to have the best of The Law on his side. The excuse came in handy in other cases. Today it is a primary principle of "equity law."

So with the principle that the states may regulate businesses "affected with a public interest." A Supreme Court judge, in upholding such a regulation, once helped give his opinion an authoritative sound by stating that the business in question was affected with a public interest and consequently was properly subject to regulation. The words stuck. The rationalization became an accepted principle. Moreover, by reversing the rationalization, other judges made an even more useful and more used legal rule out of the idea that businesses *not* affected with a public interest are generally *not* subject to state regulation.

So, too, with the principle that consideration is essential to a valid contract. So with the principle that Congress may not regulate industrial activities which affect interstate commerce only indirectly. So with all the thousands upon hundreds of thousand of principles of The law. Each got its legal baptism as part of the random rationalizings of some judge, trying to make a specific decision sound more learned and logical to his fellow lawyers and to himself.

And of course, once a principle has been accepted – or, as the lawyers would have it, "discovered" – as part of The Law, its use is no longer restricted to the kind of problem it was originally dressed up to deal with. It might be supposed that, even if the messianic mutterings of a judge in a specific case can become proud principles of The Law, quoted and followed in other cases, at least the legitimate use of those principles would in the future be limited to the kind of case the judge was muttering about. Not at all. A legal principle, once let loose, is never restricted to its own back-yard, but is allowed and often encouraged to roam over the whole field of Law.

Thus, a principle born of a judge's patten in settling a financial dispute between two business men can, like as not, become a bulwark of constitutional interpretation. A principle first mouthed to bolster up a decision in a suit for slander may later turn up as the key to The Law in a murder case. In *Senior v. Braden*, for instance, a case centering around state taxes and the U.S. Constitution, the "controlling" principle was borrowed from a case which had nothing to do with state taxes nor with the U.S. Constitution but involved instead a little problem of property law and of proper legal procedure under a federal statute.

Not only are legal principles – and concepts – so vague and so abstract that they make as much sense, or nonsense, when applied to any of a dozen vitally different kinds of legal dispute; they are also so treacherous of meaning that the same principle can often be used on both sides of the same dispute. There is a famous legal principle which disparages "interference" with a famous legal concept called "freedom of contract." Both the principle and the concept are genuine and typical examples of The Law, in that neither comes out of any constitution or statute. They come straight out of the judges' heads, and mouths. Yet in a labor dispute arising out of a strike, the workmen's lawyer may well plead in a court that any interference with the strike will, by weakening the workmen's bargaining power, amount to an interference with their "freedom of contract," while the boss's lawyer is arguing that the strike should be stopped or crippled by legal decree because *it* interferes with the boss's "freedom of contract." Like most legal concepts, "freedom of contract" can mean very different things to different people, or even to different judges. Like most legal principles, the principle built on that concept means exactly nothing – as a guide to the settlement of a specific controversy.

The sober truth is that the myriad principles of which The Law is fashioned resemble nothing so much as old saws, dressed up in legal language and paraded as gospel. When Justice Marshall intoned "The power to tax involves the power to destroy," and on the basis of that principle declared that a certain state tax was illegal, he might just as well have said "Great oaks from little acorns grow" and founded his decision on that – except that he would not have sounded quite so impressive. "The burnt child dreads the fire" could substitute for many a principle of criminal law. And "Waste not, want not," or perhaps "A penny saved is a penny earned," would be as useful and as pertinent to

the solution of a business squabble as the principle that consideration is necessary to validate a contract.

All that The Law is, all that it amounts to, all that it is made of, all that lawyers know and non-lawyers don't know, is a lot – a miscellaneous and tremendous lot – of abstract principles. And every one of those principles is, in essence, no more than a generalized gem of alleged wisdom that some judge has spoken in order to rationalize a decision of his and that other judges have later picked up and repeated.

Moreover, even if those gems of alleged wisdom were – as usually they are not – relevant and reasonable justification for deciding a legal problem one way or the other, there would still be the same old catch in the whole procedure. For the gems, as well as being so generalized, are so many, so motley, and so confusing. And the catch comes in matching the right gem or gems, the right principle or principles, to any given set of specific facts.

That is the crucial step, the key move, in the settlement of any legal dispute. That is the move that the prestidigitators of The law always make behind their backs – no matter how vigorously and triumphantly they may later flaunt the principles they have picked. That is why The law not only *is* not an exact science, but *cannot* be an exact science – so long as it is based on abstract principles and deals with specific problems. Just as the devil can always cite Scripture to his purpose, so can any lawyer on either side of any case always cite The law to his.

As would of course be expected, any lawyer will arise to the defense of his trade and hotly dispute all this disparagement of The Law's vaunted dignity, majesty, and preciseness. He will tell you that most legal principles, though abstractly phrased, have acquired, through long usage, a specific content of meaning and application – in lawyers' and judges' minds at least. He will tell you that The Law must have two qualities, continuity and certainty; (he will not put it that The Law must *seem* to have continuity and certainty – in order to survive.) He will tell you that, in order to achieve continuity and certainty, The Law must be based on general or abstract principles which can be carried over from one year to the next and from one decision to the next. And he will tell you, if you press him about the way in which abstract principles can be carried over continuously and certainly, that problems and fact



situations, by reason of their similarity or dissimilarity, fall naturally into groups; one group will be governed by one legal principle, another group by another or possibly a contradictory principle. In short, each new case or problem that comes up is enough like some batch of cases and problems that have come up before to be controlled by the same principle that was used to control them. There is your certainty. There is your dignity, majesty, and preciseness.

In the abstract – and coming from a lawyer it is of course abstract – it makes a pretty theory. There are a few little practical matters, though, that it does not explain. It does not explain why – if there is a quality of certainty about The Law dependent in part on the fact that legal principles acquire a specific content, in lawyers' and judges' minds – so many hundreds of thousands of law cases seem to keep coming to court, with full-fledged lawyers arguing on opposite sides. Nor – if it be said that some lawyers just don't know The Law as well as they should – does the theory explain why lower courts are constantly being reversed by appellate courts. Nor why there are so many dissenting opinions. Nor how it happened that fifty-seven of the nation's top-ranking lawyers were unanimously wrong in advising their clients about the Wagner Labor Act.

The theory does not explain, either, why a promise by a stranger to give money to the same church is more like a cigarette than it is like a promise by a stranger to give a present to the same girl; for the first two, remember, are valid considerations for a contract, while the third isn't. Nor does the theory explain why the tax problem of *Senior v. Braden* fell naturally into the same batch of cases that included the *Brown v. Fletcher* problem in legal procedure, and so was controlled by the same general principle. Still, it makes a pretty theory – in the abstract.

The joker in the theory is the assumption that any two, much less twenty, fact situations or legal problems can ever be sufficiently alike to fall naturally – that is, without being pushed – into the same category. The very existence of two situations or problems means that there are differences between them. And here, perhaps, the lawyer defending his craft may pop up again to say that the differences can be major or minor, important or unimportant. It is when the "essential" facts are the same, he will tell you, that the same general principles apply.

But which facts in any situation or problem are "essential" and what makes them "essential"? If the "essential" facts are said to depend on the principles involved, then the whole business, all too obviously, goes right around in a circle. In the light of one principle or set of principles, one bunch of facts will be the "essential" ones; in the light of another principle or set of principles, a different bunch of facts will be "essential." In order to settle on the right facts you first have to pick your principles, although the whole point of finding the facts was to indicate which principles apply.

Yet if the "essential" facts do *not* hinge on the principles involved, then somebody must pick the "essential" facts of any situation from the unessential ones. Who? Well, who but the lawyers and the judges? And the picking of the "essential" facts, which are going to determine the "similar" group of old cases, which group in turn is going to determine the appropriate legal principles, then becomes as arbitrary and wide-open a choice as if the lawyers or judges had just picked the appropriate principles to begin with.

Suppose, to take a simple example, a man driving a 1939 Cadillac along the Lincoln Highway toward Chicago runs into a Model T Ford, driven by a farmer who has just turned onto the Highway from a dirt road, and demolishes the Ford but does not hurt the farmer. The farmer sues, and a local judge, on the basis of various principles of Law which are said to "control" the case, awards him \$100. A week later, another man driving a 1939 Cadillac along the Lincoln Highway toward Chicago runs into a Model T Ford driven by another farmer who has just turned onto the Highway from the same dirt road, and demolishes the Ford but does not hurt the farmer. This farmer also sues. The facts, as stated, seem to make this case quite similar to the previous case. Will it then fall into the same group of fact situations? Will it be "controlled" by the same principles of Law? Will the second farmer get \$100?

That all depends. For of course there will be other facts in both cases. Some may still be similar. Others, inevitably, will be different. And the possibilities of variation are literally endless.

Maybe the first Cadillac was doing sixty miles an hour and the second one thirty. Or maybe one was doing forty-five and the other one forty. Or maybe both were doing forty-five but it was raining one week and

clear the next. Maybe one farmer blew his horn and the other didn't. Maybe one farmer stopped at the crossing and the other didn't. Maybe one farmer had a driver's license and the other didn't. Maybe one farmer was young and the other was old and wore glasses. Maybe they both wore glasses but one was nearsighted and the other farsighted.

Maybe one Cadillac carried an out-of-state license plate and the other a local license plate. Maybe one of the Cadillac drivers was a bond salesman and the other a doctor. Maybe one was insured and the other wasn't. Maybe one had a girl in the seat beside him and other didn't. Maybe they both had girls beside them but one was talking to his girl and the other wasn't.

Maybe one Cadillac hit its Ford in the rear left wheel and the other in the front left wheel. Maybe a boy on a bicycle was riding along the Highway at one time but not the other. Maybe a tree at the intersection had come into leaf since the first accident. Maybe a go-slow sign had blown over.

The point is, first, that no two fact situations anywhere any time are entirely similar. Yet a court can always call any one of the inevitable differences between two fact situations, no matter how small, a difference in the "essential" facts. Thus, in the second automobile accident, any one of the suggested variations from the facts of the previous accident might – or might not – be labeled "essential." And a variation in the "essential" facts means that the case will be dumped into a different group of cases and decided according to a different legal principle, or principles.

When the second accident case came to court, the judge might call entirely irrelevant the fact that a caution sign along the highway had blown down since the week before. Or he might pounce on that fact to help him lay the legal blame for the smashup, not on the Cadillac driver this time, but instead on the farmer, or on both of them equally, or on the state highway department, – according, of course, to accept principles of Law. Moreover, the mere fact that one driver was doing forty-five miles and the other forty might easily be enough to induce the judge to distinguish the second accident from the first accident and group it instead with a bunch of cases involving railroad trains that had

run over stray horses and cows. The "essential" facts being similar, the judge would put it, the same principles of Law are "controlling."

As with the two automobile accident, so with any two legal disputes that ever have come up or could come up – except that most legal disputes are far more complicated, involve many more facts and types of facts, consequently present the judges with a far wider selection from which to choose the "essential" facts, and so open up a much greater range of legal principles which may be applied or not applied. And since no *two* cases ever fall "naturally" into the same category so that they can be automatically subjected to the same rules of Law, the notion that twenty or thirty or a hundred cases can gather themselves, unshoved, under the wing of one "controlling" principle is nothing short of absurd.

Yet the embattled lawyer may have one final blow to strike in defense of The Law and its principles and its supposed certainty. The Law, he will tell you, is concerned with a great deal more than the problems that actually get into court and are settled by judges. The Law is chiefly concerned with maintaining a constant code of rules and behavior under which men can live and handle their affairs and do business together in a civilized manner. Only the freak situations, the rare situations, ever develop into law cases, he will tell you. For the most part, men's affairs run smoothly and certainly along, without litigation or legal squabbles, under the trained and watchful (and paid) guidance of the lawyers and their Law.

For instance, he will go on, of all the many business contracts and legal agreements of every sort that are drawn up and signed every day, only a very small fraction are eventually carried into court. Bond issues, sales contracts, insurance policies, leases, wills, papers of every kind, all these are in constant use yet comparatively rarely do they become the center of a legal dispute. (And notice, incidentally, how claims concerning the certainty of unlitigated Law always seem to stress its use in business dealings and commercial affairs.) Why do so few legal documents end up in court cases? Simply, the lawyer will tell you, because they are drawn up and phrased by lawyers in accordance with The Law and in the light of recognized legal principles. That is what makes them safe and sure and workable and what keeps the people with whose affairs they deal from constantly going to court about them.

And *that* is where the certainty of The Law really comes in and really counts.

Well, don't you believe a word of it. In the first place, those legal papers of all kinds and descriptions are phrased the way they are, not in order to keep the people whose affairs they deal with *out* of court, but in order to give somebody a better chance of winning if the affair gets *into* court. If the document is an installment-plan contract or a lease or an insurance policy or a mortgage, you can guess who that "somebody" is. If it is the result of a really two-sided business dicker, with lawyers working for both sides, then some of the clauses of the contract will be for the benefit of one side and some for the other – in case they go to court over it. At any rate, every legal agreement is drawn up *in contemplation* of a court fight. It is therefore phrased with an eye to the same old ambiguous, abstract principles that the judges use for Law. And no matter how hard the lawyers may try to make their legal language favor one side or the other, they can no more wring certainty out of abstractions than they could wring blood out of a cauliflower.

But there is a far more important reason why the lawyer is dead wrong when he claims that legal advice and guidance keep most business arrangements and affairs out of court. People do not go to court over their mutual dealings simply because their contracts are un-legally or uncertainly worded, and they do not keep out of court simply because the relevant documents are drawn up in the approved style. A man who is convinced that he is getting the raw deal, or that the other side is not living up to its bargain, or who is just dissatisfied with the way the whole arrangement is working out, will just as likely take his troubles to court though the papers involved had been prepared by a special committee of the American Bar Association. And he will find a lawyer to take his case, too – and support it with accepted principles of Law.

Most business transactions, however, run off smoothly of their own accord. Both sides more or less live up to their promises and neither side feels aggrieved or cheated. This is just as true, moreover, even though the relevant documents be written in execrable legal taste. And, very briefly, it is this fact, not the fact that lawyers are always hovering around advising and charging fees, that is responsible for the small percentage of business affairs that find their way into a courtroom.

As a matter of fact, the lawyers, with their advice and their principles and their strange language, no doubt increase, instead of decreasing, the number of transactions that end up in dispute and litigation. If they would let men carry on their affairs and make their agreements in simple, specific terms and in words intelligible to those involved, there would be fewer misunderstandings and fewer real or imagined causes for grievance. Moreover, to jump to another legal field, if written laws, statutes, were worded in plain English instead of being phrased by lawyers for lawyers, there would unquestionably be fewer cases involving the "interpretation" of those statutes and the question whether they do or do not apply to various specific fact situations.

No, the asserted certainty of The Law is just as much of a hoax out of court as in court. And how could it not be – inasmuch as the whole of The Law, whether it be glorified in the opinion of a Supreme Court justice or darkly reflected in the conversation of two attorneys about to draw up a deed of sale, is built of abstract principles, abstract principles and nothing more?

There is an old tale that is told of three men who were walking through a wood when they came upon a tremendous diamond lying on the ground. All of them had seen it at the same instant and yet, clearly, it could not be divided between them. They were peaceful men and so, rather than fight over its possession, they determined to present their claims in a logical fashion.

"You will recall," said the first man, "that as we approached the spot where the diamond lay we were walking, not in single-file, but abreast. The two of you were on my left and that fact is of the utmost importance. For as neither of you, I am sure, would care to deny, the right must always prevail. Therefore, the diamond is clearly mine."

"Indeed," said the second man, "I should not care to deny that the right must always prevail. But you have omitted, in your brief summary of the situation, one highly significant point. It is the diamond, after all, which is the crux, the center, the whole sum and substance of our problem. And from the standpoint of the diamond it was / who was on the right, and who must, therefore, prevail."

"You are both very clever," said the third man, "but your cleverness, I fear, has undone you. Observe that the first one of you, who walked on one side of me, and then the other, who walked on the other side, has claimed he was on the right. I too will grant that the right must always prevail. Yet it is, I believe, an accepted truth that in any contest between two extremes, the middle ground is likely to be, in fact, the right one."

It is not told which one of the men got the diamond and it does not much matter.

They must have been lawyers.

## CHAPTER VIII

### MORE ABOUT LEGAL LANGUAGE

*"They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters."* – Sir Thomas More

The Chief Justice of the Supreme Court of the United States, several years ago, was elucidating in the course of the Court's opinion a little point of Law. "Coming to consider the validity of the tax from this point of view," he wrote, "while not questioning at all that in common understanding it was direct merely on income and only indirect on property, it was held that, considering the substance of things it was direct on property in a constitutional sense since to burden an income by a tax was, from the point of substance, to burden the property from which the income was derived and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent. . . .

Moreover in addition the conclusion reached in the Pollock case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it . . . . From this in substance it indisputably arises, . . . that the contention that the Amendment treats the tax on income as a direct tax although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the



beginning, is wholly without foundation since the command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived, forbids the application to such taxes of the rule applied in the Pollock case by which alone such taxes were removed from the great class of excises, duties, and imposts subject to the rule of uniformity, and were placed under the other or direct class."

This could go on for hours. As a matter of fact it did. And incidentally, the legal point which the learned justice was making so crystal clear had not the slightest bearing on the decision in the case.

But it would be far too easy to pile up example after example of the nonsense that is legal language. The quoted tidbit is, of course, an exaggerated instance. But it is exaggerated only in degree and not in kind. Almost all legal sentences, whether they appear in judges' opinions, written statutes, or ordinary bills of sale, have a way of reading as though they had been translated from the German by someone with a rather meager knowledge of English. Invariably they are long. Invariably they are awkward. Invariably and inevitably they make plentiful use of the abstract, fuzzy, clumsy words which are so essential to the solemn hocus-pocus of The Law.

Now it is generally conceded that the purpose of language, whether written, spoken, or gestured, is to convey ideas from one person to another. The best kind of language, the best use of language, is that which conveys ideas most clearly and most completely, Gertrude Stein and James Joyce notwithstanding. But the language of The Law seems almost deliberately designed to confuse and muddle the ideas it purports to convey. That quality of legal language can itself be useful on only one supposition. It can be useful only if the ideas themselves are so confused and muddled and empty that an attempt to express those ideas in clear, precise language would betray their true nature. In that case muddiness of expression can serve very nicely to conceal muddiness of thought. And no segment of the English language in use today is so muddy, so confusing, so hard to pin down to its supposed meaning, as the language of The Law. It ranges only from the ambiguous to the completely incomprehensible.

To the non-lawyer, legal language is, as mentioned before, to all intents and purposes a foreign tongue. It uses words and phrases which are totally unfamiliar to him. Or it uses words and phrases which he can find in his vocabulary but uses them in such a way that he is immediately aware that they must mean, in The Law, something quite different from what they mean to him. Or, on the rare occasions when a whole legal sentence seems to be made up of familiar words taken in their accustomed meaning, the sentence itself is likely to be so constructed that it doesn't make common sense. Oh well, the non-lawyer will say with a shrug, I suppose it means something to a lawyer.

That is why people rarely bother to read insurance policies or mortgages or acts of Congress. They know perfectly well that they will never be able to grasp most of the ideas that are allegedly being conveyed. Even if a legally-phrased document of one kind or another is of the utmost personal importance to the man who signs it or hears of it, he will seldom make the painful effort of trying to get clear in his head what the funny language in which it is written is supposed to mean. He will just trust his lawyer – or somebody else's lawyer – that it does mean something, that it means something definite, and that there is a good reason for saying it in a way that prevents him from understanding it. Sometimes, moreover, he will later have cause to regret that blind trust.

Yet why – if you think it over for a minute – should people not be privileged to understand completely and precisely any written laws that directly concern them, any business documents they have to sign, any code of rules and restrictions which applies to them and under which they perpetually live? Why should not the ideas, vitally important to someone as they always are, which are said to lie behind any glob of legal language, be common property, freely available to anyone interested, instead of being the private and secret possession of the legal fraternity?

As pointed out previously, The Law, regardless of any intellectual pretensions about it, does not at bottom deal with some esoteric or highly specialized field of activity like the artistic valuation of symphonic music or higher calculus or biochemical experimentation. If it did, there would be reason and excuse for the use of language unfamiliar and unintelligible to ninety-nine people out of a hundred. Nor would the

ninety-nine have any cause to care. But the fact is that Law deals with the ordinary affairs of ordinary human beings carrying on their ordinary daily lives. Why then should The Law use a language – language being, remember, no more than a means of communicating ideas – which those ordinary human beings cannot hope to understand?

Certainly a man who enters a business deal of any kind, whether he is buying a radio on the installment plan or setting up a trust fund to take care of his family, would seem entitled to know, to his own complete intellectual satisfaction, just what he is getting out of it and just what he may be getting in for. The legal document he signs won't tell him. Certainly a man whose democratically elected government enacts a law which will regulate him or tax him or do him a favor would seem entitled to know, if he wants to know, exactly how the new statute is going to affect him. His lawyer may "advise" him – and may be right or wrong – but reading the statute won't tell him. Certainly a man who loses a law suit would seem entitled to know why he lost it. The court's opinion won't tell him. Why? Why doesn't and why shouldn't legal language carry its message of meaning as clearly and fully as does a cook book or an almanac or a column of classified advertisements to anyone who wants to know what ideas the words are intended to convey?

The answer is, of course, that the chief function which legal language performs is not to convey ideas clearly but rather to so conceal the confusion and vagueness and emptiness of legal thinking that the difficulties which beset any non-lawyer who tries to make sense out of The Law seem to stem from the language itself instead of from the ideas – or lack of ideas – behind it. It is the big unfamiliar words and the long looping sentences that turn the trick. Spoken or written with a straight face, as they always are, they give an appearance of deep and serious thought regardless of the fact that they may be, in essence, utterly meaningless.

Moreover, as has been mentioned previously, the lawyers themselves, almost without exception, are just as thoroughly taken in by the ponderous pomposity of legal language as are the laymen. They actually believe and will stoutly maintain that those great big wonderful ideas – to the initiated. If you can't talk Greek, they say, in effect, to the non-lawyers, then you really can't expect to understand us when we

talk Greek. But don't for a second suppose that we don't understand each other, perfectly and precisely.

The catch is, of course, that the lawyers are not talking Greek – or Russian or Sanskrit either. They are talking, in a fashion, English. Moreover they are talking about matters – business matters, government matters, personal matters – which any non-lawyer is quite capable of comprehending. Furthermore, if they *were* talking Greek, they could presumably translate it accurately and intelligibly into a familiar tongue without spoiling or losing any of the sense. But they can't – or won't – translate the jargon of The Law into plain workaday English. The communication of legal ideas, it appears, cannot be trusted to any conveyance but the lawyers' private patois. Which is, unfortunately, all too true.

For The Law, as you may have heard before, is entirely made up of abstract general principles. None of those principles has any real or necessary relation to the solid substance of human affairs. All of them are so ambiguous and many of them are so contradictory that it is literally impossible to find a definite and sure solution (regardless of whether it might be a good solution or a bad solution) to the simplest, smallest practical problem anywhere in the mass of principles that compose The Law. And the sole reason why that fact is not generally appreciated by either lawyers or non-lawyers is that the principles are phrased in a language which is not only bafflingly incomprehensible in its own right but which is composed of words that have no real or necessary relation to the solid substance of human affairs either.

Thus the whole abracadabra of The Law swings around a sort of circular paradox. Legal language – in statutes, documents, court opinions – makes use of strange unfamiliar words because those words tie up to the abstract principles of which The Law is composed. Except in reference to those principles the words, as used, mean even less than nothing. But the principles themselves are utterly unintelligible except in terms of the legal words in which *they* are phrased. Neither words nor principles have any direct relation to tangible, earthly things. Like Alphonse and Gaston, they can do no more than keep bowing back and forth to each other.

No wonder, then, that the lawyers can never translate their lingo into plain English so that it makes any sense at all. Asked what any legal word means, they would have to define it in the light of the principle, or principles, of Law to which it refers. Asked what the principle means, they could scarcely explain it except in terms of the legal words in which it is expressed. For instance, the legal word "title" doesn't signify anything except insofar as it refers, among others, to the abstract principles that are said to determine to whom "title" belongs. Whereas the legal principle that "title belongs to the mortgagor," or the legal principle that "title belongs to the mortgagee" – for either may be "true" – doesn't signify anything either unless you know what "title" means.

Of course there *is* one way, and only one way, to explain something of what a legal principle is supposed to mean in plain English. That is to describe the specific lawsuits in which courts have made specific decisions and have said they were making them on the basis of that principle. But the necessity of such a procedure immediately gives away the fact that the principles are intrinsically meaningless. For how on earth can a principle be the *reason* for a decision if it can only be defined by listing the decisions it was the reason for?

No matter which way you slice it, the result remains the same. Legal language, wherever it happens to be used, is a hodgepodge of outlandish words and phrases because those words and phrases are what the principles of The Law are made of. The principles of The Law are made of those outlandish words and phrases because they are not really reasons for decisions but obscure and thoroughly unconvincing rationalizations of decisions – and if they were written in ordinary English, everybody could see how silly, how irrelevant and inconclusive, they are. If everybody could see how silly legal principles are, The Law would lose its dignity and then its power – and so would the lawyers. So legal language, by obstructing instead of assisting the communication of ideas, is very useful – to the lawyers. It enables them to keep on saying nothing with an air of great importance – and getting away with it.

Yet the lawyers, taken as a whole, cannot by any means be accused of *deliberately* hoodwinking the public with their devious dialectic and their precious principles and their longiloquent language. They, too, are blissfully unaware that the sounds they make are essentially empty of

meaning. And this is not so strange. For self-deception, especially if it is self-serving, is one of the easiest of arts.

Consider the fact that the lawyers – and that includes the judges – have been rigorously trained for years in the hocus-pocus of legal language and legal principles. They have been taught the difficult technique of tossing those abstract words around. They have had drilled into their heads, by constant catechism, the omniscience and omnipotence of The Law. They have seen and read that important people like Supreme Court justices and Wall Street law partners treat The Law as seriously and deferentially as they treat the Scriptures. They discover, too, that all non-lawyers seem terribly impressed by this language which sounds so unfamiliar and so important. So why ask questions? Why doubt that the world is flat when everyone else takes it as a matter of course? And especially, why doubt it if it is to your own personal advantage to accept and believe it? Why not, instead, try to become a Supreme Court justice or a Wall Street law partner yourself?

Every once in a while, however, a lawyer comes along who has the stubborn skepticism necessary to see through the whole solemn sleight-of-mind that is The Law and who has the temerity to say so. The greatest of these was the late Justice Holmes, especially where Constitutional Law was concerned. Time and time again he would demolish a fifty-page Court opinion – written in sonorous legal sentences that piled abstract principle upon abstract principle – with a few words of dissent, spoken in plain English. "The Law as you lay it down," he would say in effect, "sounds impressive and impeccable. But of course it really has nothing to do with the facts of the case." And the lawyers, though they had come to regard Holmes as the grand old man of their profession and though they respected the Legal writing he had done in his youth, were always bothered and bewildered when he dismissed a fine spun skein of legal logic with a snap of his fingers.

Strange as it may seem, it is his similar unwillingness to swallow the sacredness of The Law that has turned the lawyers, in a body, viciously against Justice Black today. They do not hate him because he is a New Dealer; so is Justice Reed whom they respect. They do not hate him because he was a Ku Kluxer; Justice McReynolds' notorious and continuing racial intolerance has brought no squawks from the legal clan. The lawyers hate Black because he, too, without the age or the

legal reputation of a Holmes to serve him as armor, has dared to doubt in print that there is universal truth behind accepted legal principles or solid substance behind legal language. "Why," they say of him, "that Black doesn't even know The Law." Which only means that he knows The Law too well – for what it really is.

What the lawyers care about in a judge or a fellow lawyer is that he play the legal game with the rest of them – that he talk their talk and respect their rules and not go around sticking pins in their pretty principles. He can be a New Dealer or a Ku Kluxer or a Single Taxer or an advocate of free love, just so long as he stays within the familiar framework of legal phraseology in expressing his ideas and prejudices wherever they happen to impinge on The Law. A lawyer who argues that sit-down strikes are perfectly legal, basing his argument entirely on legal principles and phrasing it in legal language (and it can, of course, be done) will be accorded far more respect by his brethren than a lawyer who argues that men ought to be made to keep their business promises but neglects to drag in the Law of Contracts to prove it.

The kind of lawyer who is never lost for legal language, who would never think of countering a legal principle with a practical argument but only with another legal principle, who would never dream of questioning any of the process of The Law – that kind of lawyer is the pride and joy of the profession. He is what almost every lawyer tries hardest to be. He is known as the "lawyers' lawyer."

Except in a purely professional capacity, in which capacity they can be both useful and expensive, you will do well to keep away from lawyers' lawyers. They are walking, talking exhibits of the lawyers' belief in their own nonsense. They are the epitome of the intellectual inbreeding that infests the whole legal fraternity.

And since lawyers' lawyers are the idols of their fellows, it is small wonder that lawyers take their Law and their legal talk in dead earnest. It is small wonder that they think a "vested interest subject to be divested" or a frankly "incorporeal hereditament" is as real and definite and substantial as a brick outhouse. For the sad fact is that almost every lawyer, in his heart and in his own small way, is a lawyers' lawyer.

Thus legal language works as a double protection of the might fraud of The Law. On the one side it keeps the non-lawyers from finding out that legal logic is so full of holes that it is practically one vast void. On the other side, the glib use of legal language is so universally accepted by the lawyers as the merit badge of their profession – the hallmark of the lawyers' lawyer – that they never stop to question the ideas that are said to lie behind the words, being kept busy enough and contented enough trying to manipulate the words in imitation of their heroes. The truth is that legal language makes almost as little common sense to the lawyers as it does to the laymen. But how can any lawyer afford to admit that fact, *even to himself*, when his position in the community, his prestige among his fellow craftsmen, and his own sense of self-respect all hang on the assumption that he does know what he is talking about?

There is one more argument that lawyer is likely to make in defense of the confusing and artificial words that make up legal language and, through legal language, legal principles, and, through legal principles, The Law. Watch out for it. Of course, he will grant, The Law is built of abstract ideas and concepts and principles. And abstract ideas have to be expressed in special words. And the special words, because they deal with abstract ideas, cannot be as precise of meaning as words that deal with solid things like rocks or restaurants or kiddy-cars.

But what, he will ask, is wrong with that? Men are always thinking and talking in abstractions and using words like "love" or "democracy" or "confusion" or "abstraction" to convey their ideas. A "contingent interest" means as much to us lawyers as a "friendly interest" means to you. You can't define "friendly interest" very clearly or precisely either. "Due process of law" is just as definite as "dictatorship." "Constitutional" or "unconstitutional" isn't any more ambiguous than "good" or "bad."

Moreover, he will go on, the whole ideal and purpose of The Law is to maintain, in human relations and affairs, a well-known popular abstraction called "justice." Try to define "justice" any more accurately than you can define any legal concept you can think of! As a matter of fact, the chief intent of The Law, as a complicated science, is to make the idea of "justice" *more* precise, to make it more readily and more certainly applicable to any fact situation, any problem, any dispute that may ever arise. And you can't split an abstract ideal into separate parts



– you can't reduce it to principles and sub-principles – without phrasing them in abstract and therefore somewhat imprecise terms. Hence, legal language.

The answer to this defense of The Law and its language is contained right in the defendant's own plea. Even leaving aside the obvious fact that The Law time after time produces results that strike most people as wickedly unfair or "unjust" – in which case the lawyers invariably say: "Th, th; too bad; but that's The Law all right" – the answer is still there. The answer is that you can't split an abstract ideal into separate parts – you can't reduce it to principles and sub-principles. Period.

The whole business of trying to split up "justice" into parts, or principles, in order to get a better, surer grasp of it is absurd as cutting up a worm in order to get a better hold of it. In the first place, the original animal is quickly disintegrated in the process. In the second place, each new little piece, each sub-principle, becomes a squirming abstraction in its own right. Each is now as hard to grab hold of, as hard to pin down to preciseness, as was the mother abstraction.

Thus you will rarely find the lawyers, or the judges either, trying to apply the concept of "justice" to the settlement of a legal problem. Instead, you will find them fighting over a dozen equally abstract concepts, all phrased in legal language of course, and trying to decide which of those should be applied. And, as noted before, the choice of the "right" concepts or of the "controlling" principles is a highly haphazard and arbitrary business, no matter how simple the facts of the problem. For facts don't fit into "consideration" or "affection with a public interest" any more automatically or certainly than they fit into "justice."

Moreover, and this is even more important, the concentration of The Law on its own pet brood of concepts and principles has meant the sad disintegration of the old-fashioned non-legal idea of "justice." Lawyers are always so absorbed in their little game of matching legal abstractions that they have all but forgotten the one abstraction which is the excuse for there being any Law at all. They take "justice" for granted and stick to their "contracts" and their "torts." But you can no more take "justice" for granted than you can cut it up and stuff it into cubbyholes of legal language.

The lawyer who would defend the abstract language of The Law is right as rain when he says that people think and talk of human conduct in abstract ways, in terms of "right" and "wrong," "fair" and "unfair." But he is dead wrong as soon as he asserts that the strange-sounding abstractions of The Law have any more real or necessary relation to ideals about human conduct than they have to the facts of human conduct. Legal words and concepts and principles float in a purgatory of their own, halfway between the heaven of abstract ideals and the hell of plain facts and completely out of touch with both of them.

Any that is why, in the last analysis, the language of The Law is inherently meaningless. It purports on the one hand to tie up in a general way with specific fact situations. It purports on the other hand to tie up in a general way to the great abstractions, "justice." Yet, in trying to bridge the gap between the facts and the abstraction, so that "justice" may be "scientifically" and almost automatically applied to practical problems, The Law has only succeeded in developing a liturgy of principles too far removed from the facts to have any meaning in relation to the facts and too far removed from the abstraction to make any sense in terms of "justice."

Still, legal language is a great little language to those who live by it – and on it. And you don't even have to use words like *trover* or *assumpsit* to have a lot of fun out of it. For instance, a bill recently before Congress contained this charming provision: -- "Throughout the act the present tense includes the past and future tenses; and the future, the present. The masculine gender includes the feminine and neuter. The singular number includes the plural and the plural the singular."

Only to a lawyer might, "The men are beating him" mean, among other things, "She is going to beat it."

## CHAPTER IX

### INCUBATORS OF THE LAW

*"The legal apprentice he sweats and he strains*

*To memorize every principle;*

*He'd learn a lot more in the end for his pains*

*By studying something sinciple."* – Anon.

As every good fascist knows, the perpetuation of the fascist fraud depends, in the long run, on the training of fledglings in the faith. The dictators catch their conscripts young and discipline them to think in goose-step. Promises of reward for the faithful and ominous warnings about the dangers of nonconformity play their part in making apprentices firmly believe a mass of lies, half-lies, and nonsense. Doubt, even the tiniest wondering doubt, is the cardinal sin. There are few heretics.

The Law cannot catch its communicants so young. But the same mental goose step and the same kind of hopes and fears are used, perhaps not so purposefully but just as efficaciously, to instill a fighting belief in the nonsense of The Law. And of course it is on the rigid training of apprentices in the art that the perpetuation of the legal legend depends.

There was a time when The Law, like other more substantial and more useful trades, was learned in the shop of a full-blown practitioner. An aspiring lawyer studied his precepts and his principles while serving a term as office assistant to some member of the bar. Today the members of the bar must usually pay for their assistance with something more than a lot of legal language dressed up as words of wisdom. The trade has acquired academic pretensions, and those citadels of logical legerdemain known as law schools are not the incubators of The Law.

Consequently, the hope of The Law – that is, the hope of the lawyers that their game will go on indefinitely, undiminished and undisputed – lies with the law schools. And conversely, the one slim hope that the big balloon of inflated nonsense may ever be exploded by internal combustion lies with the law schools too. Once the professional gibberish-jugglers have proceeded beyond the training stage, it is almost always too late. They have to be caught young-in-The-Law to be turned into disciples – or heretics.

In order to teach apprentices how to talk the language and how to reason in the proper abstract circles, the law schools have divided The Law's mass of principles into big chunks. Each chunk represents a "field" of Law and is taught in a separate course, or courses. There are Contracts and Torts and Trusts. There are Constitutional Law and Criminal Law and Labor Law. There are "fields" and courses by the score. Of course, an actual case may fall into several "fields" at the same time. It may involve, for instance, the Constitution, and a crime and a labor dispute. But that will not faze the law schools. So far as they are concerned, it is the principles, not the cases, that really matter. And so the same case will show up in Constitutional Law and in Criminal Law and in Labor Law. It will not, however, show up in the same way. In Constitutional Law, the relevant principles of Constitutional Law will be examined. In Criminal Law, the relevant principles of Criminal Law will be examined. In Labor Law, the relevant principles of Labor Law will be examined. In each one of the courses, the aspects of the case that fall into the other two course-categories will be either glossed over or omitted entirely. A student may thus have to take three courses in order to understand thoroughly, even from the legal standpoint, what one decision is all about. But not in order to learn any one "field" of Law. Thus, law school courses, since they are cut out of the pseudo-science of Law, inevitably focus on generalities and abstractions rather than on the solution of specific problems. A student might even study a case in a dozen different courses – and thus learn all about The Law of the case – and still not have the slightest comprehension of, or insight into, the real down-to-earth factual difficulty or controversy that brought the case into court.

Sometimes a "field" of Law is too big to be stuffed into one course. For example, Property Law is commonly divided into Real Property and Personal Property (neither "real" nor "personal," of course, means what

it means in everyday conversation) and Wills and Mortgages and Negotiable Instruments and several more. But then, Property Law is for the most part only a big branch of Contract Law. Moreover, Corporation Law, a "field" extensive enough to have various subdivisions of its own, is in essence nothing but a branch of Property Law. It is almost as hard to keep straight the hierarchy of legal "fields" and courses as it is to sort out the abstract principles of which the different courses are constructed. And either process is like trying to cut water with a knife.

One of the biggest and strangest "fields" of legal learning is something known as Pleading and Procedure. The law schools divide Pleading and Procedure into many courses, and some of these courses, like Evidence, are rated as "fields" unto themselves. But the strange thing about Pleading and Procedure is not its size; Property Law is at least as big as full of principles. The strange thing is that the lawyers and the law schools do not even pretend to themselves that the principles and rules of Pleading and Procedure have anything to do with the solution of practical problems. Pleading and Procedure is, *admittedly*, just a lot of verbal complications and technicalities that lawyers have to memorize – or know where to look up – before they can practice their trade. And that admission is, of course, unique in The Law. As a matter of fact, the lawyers and the law schools lump the whole remainder of The Law together – Contracts and Criminal Law and Trusts and Torts and the rest of the card catalogue of abstract principles – and call it all "substantive law," as opposed to the "adjective" or "procedural law" of the Pleading and Procedure courses. The term "substantive law" is supposed to imply that the principles of Contracts and Torts and the rest really cope with the substance of human or social problems. But even the lawyers can't make such a claim for Pleading and Procedure.

Pleading and Procedure covers all the principles and rules of Law which govern the way lawyers may make use of other principles and rules of Law. If that sounds complicated, so is Pleading and Procedure. For P. and P. encompasses the code of precepts according to which the legal game is played, once a dispute actually starts on its way into court. And when you begin dealing with a lot of abstract principles about the proper manipulation of other abstract principles, you can't help getting somewhat confused.

Don't suppose, either, that the principles and rules of P. and P. are, for the most part, any more precise or any less ambiguous than other principles of Law. A bit of evidence at a trial does not fall into the famous "irrelevant, incompetent, and immaterial" classification any more automatically than a killing falls into "second degree murder." A legal dispute does not involve "two separate causes of action" – which only means that it will probably have to be tried in two separate lawsuits – any more readily or scientifically than a piece of paper with writing on it involves an "executory contract." The principles of P. and P. are just as slippery when you try to apply them to the facts of trying a lawsuit as are other legal principles when you try to apply them to the facts that lie behind a lawsuit.

Moreover, even though the P. and P. principles admittedly contribute nothing at all to the actual solution of the problems that The Law is called on to solve, the decision in any law case is as likely to be hung on a "procedural" rule as on a "substantive" principle. All too often, not only "justice" but also the regular principles of "substantive" Law are thrown out the window simply because some lawyer, in handling his client's case, has forgotten or violated a "procedural" rule. Thus a killing may be, without so much as a legal doubt, a punishable murder, and still the murderer may go free, for a time or even for good, just because a bit of evidence used in the trial is labeled "irrelevant, incompetent, and immaterial." A man with a legal claim so clear and valid that neither a lawyer nor a non-lawyer would question his right to have that claim satisfied may get nothing out of it except a bill for counsel fee, simply because his lawyer, at some stage of the case, has been caught using the wrong words, according to the principles of Pleading and Procedure.

Perhaps all this discussion of the P. and P. "field" may seem irrelevant, incompetent, and immaterial to the question of how the law schools go about producing consecrated devotees of The Law. Yet, there is this to remember: -- The Lawyers, and the law schools, admit that P. and P. – or Practice, as this alliterative "field" is sometimes called – deals exclusively with the tricks of the trade. The legal neophytes are told that what they learn under the heading of P. and P. constitutes the technique of the lawyer's art. As a dentist learns how to handle his drill so a lawyer learns his P. and P.

By contrast, the rest of The Law, the "substantive" principles of Property and Quasi-Contracts (oh yes, there is that, too) and Corporations and all, are pounded into the young legal brain as Ultimate Truths about Life. Even after the apprentice graduates from law school, when he comes to take his bar examination, he will find the distinction carefully preserved. One part of his ordeal will test his knowledge of "substantive" Law; the other part will test his knowledge of Pleading and Procedure. One represents wisdom; the other represents skill.

What The Law's apprentices rarely learn and are rarely given half a chance to find out is that the *whole* of The Law is nothing but a technique to be mastered, an adroitness to be achieved. That technique, reduced to its simplest terms, is the technique of using a new language. That is all the law student learns in his courses on P. and P. That is also the law student learns in his courses in "substantive" Law. But because the former are frankly labeled Technique and the latter are labeled Truth, the student comes to believe implicitly that there is a gaping difference in kind where actually there is scarcely so much as a difference in degree. "The original burden of proof is on the plaintiff" is a principle of P. and P. and may help a lawyer win a lawsuit. "If the defendant's action was not the proximate cause of the injury then the defendant is not legally responsible" is a principle of Torts and may help a lawyer win a lawsuit. All that a student ever learns about either of these principles – or about any other principle of either division of Law – is how to say them and when and where it may be useful to say them.

The point is that the law schools, by admitting that one segment of legal education deals with the devices of the trade, make quite plausible the fable that the rest of The Law represents something much more solid. With the procedural courses frankly set to one side as technique, the big empty words and the vague abstract principles of the other courses assume a more credible aura of depth and reality to the newcomer. He can – and does – then believe that the words have meaning and that the principles are nuggets of wisdom – and it is essential to the perpetuation of the legal legend that he should believe this. For it would be fatal to the profession – to its self-respect and its solemnity and its power – if any generation of rising lawyers were allowed or encouraged to discover the real truth about the stuff they study. Which is that *all* the legal principles they ever learn amount to no

more than tricks of the trade and that *all* the courses they ever take are courses in P. and P.

And so the law schools stick to their principles, and to the pretense that the principles stand for eternal verities which lawyers – after learning how to do it – graciously apply to the hurly-burly of man's earthly affairs. The principles, as a matter of fact, used to be dished at the students without so much as any trimmings around them. That was when law schools were an innovation, scorned by most lawyers as an effete and none too efficient preparation for the practice of law, just as schools of journalism are scorned by most newspapermen today.

In those days, and for some time after, law students learned practically nothing but naked principles. The principles of each "field" of Law were sorted out and arranged by sub-principles and counter-principles in a "hornbook" of Torts or Trusts or whatever. The students studied their hornbooks, listened to lectures devoted mainly to explaining and "reconciling" the principles so that they appeared to fit into one neat little ball of abstract knowledge, and religiously memorized the principles. They might never so much as read the record of a single lawsuit. Why should they clutter their minds with disconcerting and trivial facts when they were engaged in learning great and general truths?

But late in the last century, a reputed revolution in the manner of teaching Law began to take the law schools by storm. The new idea was to feed the students the opinions written by judges in actual cases and let them fish for principles among the judges' words. Obviously, it was not the intention of this new approach to legal education to minimize the importance of principles as such. The purpose was to let the students ponder how The Law in action made use of its principles, for judicial opinions amounted to no more than explanations of actual legal decisions in terms of the principles that "controlled." The students still had to learn their principles but they had to find them first.

Of course, the students did not have to fish in the dark. In each "field" of Law, a big bunch of opinions was gathered together by some recognized authority in that branch of legal learning and was then arranged, according to the principles illustrated by the opinions, in a "casebook." The students then read the right cases in the right order



and the principles practically popped out at them from the pages. The facts behind any case did not really matter and were often omitted entirely from the reprint of the judge's opinion, as were the parts of the opinion that dealt with other "fields" of Law. What was important, still, was to learn the deathless principles, enhanced a bit in impressiveness by the fact that they were now taken right out of the judges' mouths.

The "casebook method" of teaching Law is still the vogue in the law schools. Fledgling lawyers are no longer encouraged to take their principles straight. In order to learn that Acceptance of an Offer is essential to the validity of a Contract, they must plough through half a dozen verbose judicial outpourings which say just that in one thousand times the space. In order to learn that it is unconstitutional for a state to attempt to tax property outside its "jurisdiction," they must worry through five or ten judicial gems like *Senior v. Braden*. But when they have finished, they will usually have learned no more than that Acceptance of an Offer is essential to the validity of a Contract, or that it is unconstitutional for a state to attempt to tax property outside its "jurisdiction."

In many ways, the old-fashioned hornbook method of legal education made more sense. It was more direct and more straightforward and you could learn more principles faster. Law students today pay tribute to it when, after taking a course from a casebook, they study for their examination in the course from a hornbook. Moreover, it is an interesting commentary on the most "advanced" law schools, which have carried the casebook method to such extremes that the principles do not always come quite clear to the students, that their graduates invariably have to take special "cram courses" in the bare principles of Law in order to pass their bar examinations and be admitted to membership in the legal fraternity.

As a matter of fact, these "advanced" law schools – and there are only a handful of them – with their extreme use of the case method of teaching, deserve a special word. Despite the fact that they do not teach their students The Law any too well, they do teach something else. In so doing, they are traitors to the legal legend and a potential threat to the perpetuation of the racket of The Law. For they actually encourage their students to dig out of the cases a little more than abstract legal principles. The bald human facts that bring any dispute

into court are rated as worth consideration, not merely as an excuse for the application of The Law, but their own right.

These few law schools still divide legal education into courses based on different "fields" of Law. But the courses and the "fields" are more likely to be cut out according to types of practical problems – Government Control of Business, or Corporation Management – instead of according to tables of abstract principles. More significantly though, regardless of course names, the courses themselves (or most of them, for even the most "advanced" law schools cannot entirely avoid Law-consecrated teachers) are taught with a different emphasis. That emphasis is on the non-Legal aspects of earthly affairs and problems which the facts of any lawsuit bring to light. Students are trained not to discard these matters as irrelevant but rather to concentrate on them, to think about fair and reasonable solutions that might be applied to various kinds of problems, still from the practical standpoint.

If, for instance, a milk company goes to law to protest against a state statute setting the price of milk, the past profits – or lack of profits – of the milk distributors, the medical need of milk for slum children, the present financial shape of dairy farmers, the personnel and liability of the government agency doing the price-setting, all may be treated as just as important as the "due process clause" of the Fourteenth Amendment, the "police power" of the state in question, or the "affectation" or non-affectation of the milk industry with a "public interest." If a widow sues a railroad company because her husband was killed at a grade crossing, the annual toll of grade crossing fatalities and the cost of eliminating such crossings altogether and the well-known weakness of both judges and juries when confronted with weeping widows may all come into the discussion along with the doctrines of "contributory negligence," "proximate cause," and "the last clear chance."

Not that the principles of Law are altogether neglected in these "advanced" law school courses. The students, inevitably, still read and memorize and try to "reconcile" the same old concepts and abstractions. But the tough meat of factual problems is mixed into their educational diet. The cases become more than settings for the sanctification of legal principles.

Now the results of this kind of teaching are strange and varied. In the first place, the fledgling lawyers do not learn their principles nearly so well as their predecessors used to learn them by the hornbook method nor as their contemporaries learn them by the regular casebook method. The intrusion of factual issues and of other considerations which touch The Law only remotely make the principles harder to concentrate on and harder to remember. That is why they have to take cram courses after they graduate from law school in order to pass their bar examinations. The bar examination – and the cram courses – deal almost exclusively with The Law.

Moreover, the attempt to tie together the real problems that lie behind all law cases and the abstract principles on which decisions in law cases are said to be based usually results in one of two things. For the less intellectually sturdy students, the result will be utter confusion. They will neither understand the problems nor learn the principles. But for the brighter boys, the result will likely be a realization that the problems and the principles have very little in common. From that realization, it is but a short step to a sort of unformulated contempt for The Law and its principles. And if legal neophytes should ever begin to realize, *en masse*, that legal principles are largely constructed of long words and irrelevant abstractions, it would be the beginning of the end of the legal legend.

That is the way and the only way that the inflated mass of hokum known as The Law might ever be exploded from the inside. But it is a possibility so remote that it is ridiculous to contemplate. For the vast majority of legal apprentices in the vast majority of law schools still go blissfully on pulling principles out of judges' opinions, being taught in mental goose-step the sacred language of concepts and precepts, to emerge as doughty and undoubting defenders of the legal tradition and perhaps to become eventually Wall Street law partners or Supreme Court justices.

Those comparatively few students of those comparatively few law schools who do learn to recognize the great gap between worldly problems and legal principles – and who do not later fall prey to the propaganda of the trade they are practicing and forget all they once knew – can become extremely useful citizens. They have been trained to look at every legal problem as what it really is – a practical problem

in the adjustment of men's affairs. They have been taught how to throw aside the entangling trappings of legal language in seeking a fair and reasonable and workable solution; and then, having found such a solution, how to wrap it up again in respectable legal clothes and work for it in terms of principles of Law. In short, they have learned how to treat the whole of The Law as a technique, as a means to an end, as Pleading and Procedure. And, more than that, they have learned something woefully rare among the modern medicine men. They have learned to concentrate on the end, which is the practical solution of a human problem, instead of on the means, which is The Law.

Nor is it merely a question of being able to phrase a desired result in legal language and to support it with accepted legal principles. That, because of the nature of legal principles, is a push-over. Every lawyer can do that. Every lawyer does that every time he handles a case, although he may not always be aware that he is using a tool rather than Fighting for the Right in the Realm of Ultimate Truth. It is instead a question of going at the solution of human problems in an intelligent and practical and socially useful way, and *then* – and only then – reverting to the medium of The Law. It is a question of applying to any set of facts a combination of common sense and technical information and "justice," undiluted by ambiguous principles – and letting The Law fall where it may.

Yet, one bothersome query remains about the rare law school products who have learned how to do this. Why should their minds and their courses and their subsequent work be constantly encumbered with a lot of fool principles? Why, after all, should they have had to learn The Law, too?

## CHAPTER X

### A TOUCH OF SOCIAL SIGNIFICANCE

*"Laws grind the poor, and rich men rule the law."* – Oliver Goldsmith.

In case it should not yet be perfectly apparent, it may be worth stating here and now that the purpose of this inquiry into The Law and its mysterious ways has not been – and is not – what today would be called a "socially significant" purpose. That is, it has not been to prove that The Law, in terms of its results, oppresses the poor and favors the rich and is a tool of the big corporations and is almost always found on the side of wealth, Wall Street, and the Republican Party. Practically every critical book on The Law ever written attempts to prove just that – and there are hundreds of them. The trouble with them all is not by any means that they are not, for the most part, quite right. The trouble is that they get just that far and no farther. Their authors, who are usually lawyers, have no basic quarrel with The Law as a method, a science, a technique of running the world. They merely want to see it work for their side. They are not out to tear down The Law. They are out to remodel it slightly so that its results suit them better.

The purpose of this little inquiry has rather been to show that the whole pseudo-science of The Law, regardless of its results, is a fraud. It is just as much of a fraud when it sends Dick Whitney to jail as it is when it sends to jail a starving man who steals a loaf of bread. It is just as much of a fraud when it favors share-croppers as when it favors coupon-clippers. It is just as much of a fraud when it protects civil liberties as when it protects the profits of holding companies. It is just as much of a fraud when handed down by a "liberal" court as when handed down by a "conservative" court. It is a fraud, not because of its results but because of the manner in which it purports to arrive at them.

Yet no inquiry into The Law could pretend to be complete without at least some slight consideration of The Law's famous tautological boast about "equal justice for all." For the boast is a lie. The Law not only can be bought – although usually not in so direct a fashion as it was bought

from ex-Judge Manton – but most of the time it *has* to be bought. And since it has to be bought, its results tend to favor those who can afford to buy it.

Moreover, the fact that The Law is constantly for sale, and generally to the highest bidder, ties right into the fact that The Law as a whole is a fraud. For The Law could not be bought and it would not favor those who can afford to buy it if the vaunted principles of which it is fashioned really were the ready keys to certainty and justice which the lawyers claim them to be. It is because those principles are so many and so meaningless – because they can be chosen and twisted and sorted out to support any result under the sun – that The Law does *not* produce justice (which, in itself, implies equality of treatment for all).

In considering how and why The Law has to be bought, it might be well to remember once more that The Law is not the laws, as most people think of the laws. It is true that legislatures and members of Legislatures and members of Congress have been bought, or at least paid for, so that they would vote for or against proposed statutes which would affect the interest of those who did the paying. But this practice, though deplorable, is a minor phenomenon compared to the day – in – and – day - out purchase of The Law. For The Law is that body of abstract, amorphous rules which supersede written statutes and even constitutions and under which the lawyers and the lawyer-judges resolve all our problems, settle all our disputes, and run all our lives. It is well worth buying.

How, then, is The Law bought? How is it regularly turned to the account of those men and those companies who have money enough to pay what it costs? The Law is bought, to put the answer bluntly and briefly right at the start, by hiring the services and the advice of the smartest lawyers, of the professional soothsayers who are most adept at manipulating the principles of which The Law is made. It is bought by paying a premium, in court and out of court, to the twentieth century medicine men who can best cast spells of legal language to protect and defend the personal and financial interests of those who would be hard put to protect and defend such interests in terms of justice, undiluted by Law.

Now most people, if they think at all about what money can do in the way of legal protection, think exclusively about criminal law. They think about Leopold and Loeb being able to hire Clarence Darrow to keep them from the electric chair. They think about the Mitchells and the Insulls, the captains of industry who get caught doing strange things with other people's money, and who can then buy the services of the cleverest and yet most respectable members of the bar to save them from legal punishment. People contrast such goings-on with what happens daily to the ordinary murderers and ordinary thieves who can only afford the cut-rate prices charged by poorer lawyers, or who have to have their lawyers supplied them free, and third-rate – just so that the outward appearance of the justice-for-all ceremony may be maintained. And most people realize that there is something distinctly unfair about all this. There is – but it is only a very small part of the story.

In the first place, criminal cases, although they take up most of the newspaper space devoted to The Law, take up only a fraction of the time of the courts. The bulk of the business of the courts is given over to what the lawyers call "civil" suits, in which one person sues another person or one company sues another company, usually over some financial or business squabble. In these cases, just as in criminal cases – and it is particularly noticeable when a corporation is on one side of the dispute and a lone individual on the other – the most money buys the best legal assistance. And the better your legal assistance, the better your chance of ending up with The Law in your favor.

For, as cannot be repeated too often, The Law is not by several long shots the certain and exact science as which it masquerades. If it were, even the richest corporation in existence would not throw its money away on the tremendous fees that the leading lawyers charge their clients. Any lawyer, or perhaps no lawyer at all, would do just about as well. But the corporations know and the lawyers know that a master manipulator of legal mumbo-jumbo is a far more useful thing to have on your side in a lawsuit than all the certain and impartial justice in the world.

True, in a great many legal disputes, there will seem to be more principles of Law or more compelling – in the abstract – principles of Law available to one side than to the other. But the other side will

always have some principles left to play with. And just as in the game of bridge, so in the game of Law, an expert player will beat a run – of – the – mill player nine times out of ten despite the fact that he may hold worse cards.

Yet it is not only and not chiefly in the purchase of smart counsel to represent you in actual court cases that The Law has to be bought. The Law, although it oversees all human affairs, does not apply itself automatically to the settlement of human grievances. The man who thinks he is being cheated in a personal or business way, who thinks he is being deprived of his just rights so clearly that it is even a violation of the legal system of far-fetched principles, must go to court to try to get any satisfaction at all from The Law. And it costs money to go to court. It costs money even before the bills for lawyers' fees begin to come in. That is why most people never in all their lives become plaintiffs in a lawsuit. Farmers and factory-workers and housewives and unemployed people have their legal grievances just as rich men and big corporations have their grievances. But they cannot afford to buy so much as a shot at The Law.

A man who is pretty sure the agreement he made is being broken, when the finance company takes away his car or his radio because a couple of payments have been delayed, would not think of hiring a lawyer and going to court about it. It costs too much. A clerk in a big department store who thinks that some new government statutes hits him in an unfair and perhaps illegal way would not dream of going to court about it. But the store would go in a minute if *it* felt cheated by some written law. A workman's wife who is desperately unhappy with her husband and has perfectly adequate grounds for divorce will not sue for one. Divorces, like suits against the government and legal efforts to get a fair deal in ordinary business arrangements and like almost every kind of law case in the book, are the exclusive luxuries of those – and there are very few of them – who have money enough to pay for The Law.

A several-million-dollar corporation recently complained in print about the terrific cost of carrying to and through the courts a protest against a ruling of the National Labor Relations Board. The point was well taken. Yet it serves quite nicely to emphasize the utter helplessness of the ordinary man with a grievance that he would like to expose to The Law.



The corporation at least could and did afford to pay the thousands of dollars necessary to get a legal hearing on the wrong that it thought had been done it. But what chance, for instance, would an employee, or a customer, of the corporation have to air his complaint in court if he thought he had been unfairly and illegally treated by the U.S. Government – or, for that matter, by the corporation itself? The disadvantages of the corporation, up against the U.S. Government in a matter involving The Law, are as nothing compared to the advantages the corporation holds over every individual who works for it, buys from it, or invests in it wherever The Law is or might be concerned.

Still, it is not in buying smart soothsayers to talk for you in court, nor even in buying your way into court in the first place, that The Law is most commonly and most effectively sold and purchased. Most of the business that lawyers handle and live on is made up of matters that never get near a courtroom. Most of the business that lawyers handle and live on is made up of what is called legal advice, usually about financial matters, that is tendered, at a price, to those men and those companies that feel it will be well worth-while to get The Law safely on their side before they embark on any money-making or money-saving deals of any kind. Any legal advice amounts, for the most part, to casting spells of legal language over the wording of business documents so that the documents, if they ever *should* be dragged into court, will show that, regardless of where non-legal justice may seem to lie, The Law is pretty clearly on the side that bought the legal advice.

To take a very simple example, suppose a man should set up a parking lot and hand out plain numbered tickets, like the checks you get when you check your hat in a restaurant, to everyone who parks his car in the lot. Suppose a woman should park her car and leave her fur coat in the back seat and should come back to find the fur coat gone. Suppose, moreover, that she should be mad enough and wealthy enough to sue the parking lot owner for the loss of her coat. The chances are strong that The Law, after tossing abstract principles around in profusion, might hold him responsible for the loss and make him pay her the value of the coat.

Yet most people who lose articles out of cars left in parking lots have scarcely a Chinaman's chance of getting a cent out of the lot owners. Most parking lots are owned by people or companies with money

enough to buy legal advice beforehand. And so most parking checks are not plain pieces of cardboard with numbers on them. They have numbers on them all right, but on the back of the check or at the bottom is printed in small type "The owner of the car covenants that the bailee will not be held liable or responsible for the loss, theft, and/or damages of articles, etc." – or words to that effect. Courtesy of the legal advice, The Law has been carefully placed on one side of the potential lawsuit – without so much as the knowledge of one of the "parties to the contract" that it has been placed there – just in case.

It is the same – on a much larger and more complicated scale – with leases. It is the same with mortgages. It is the same with insurance policies. It is the same with stock issues and bond issues and all the other legal devices by which business concerns of all kinds and shapes earn, beg, borrow, or steal other people's money to use for themselves. There is always that big block of small type, sometimes running to several pages, which the ordinary purchaser or tenant or borrower or lender or investor does not bother to read and probably could not understand if he did read it. That block of small type is put there at the advice of lawyers, and what it means is that if any trouble should arise over the little business arrangement, the ordinary purchaser or tenant or borrower or lender or investor is almost surely going to lose if he should be fool enough to carry his complaint to The Law. For the other fellow – the company or the individual with money enough to afford it – has been canny enough to buy The Law in advance.

Of course it often happens in the world of finance and industry that both sides of a business deal are able to hire legal advice right from the start. That is the lawyers' heyday. Counsel for each side, without so much as a minor lawsuit anywhere in prospect at the time, will fight to outdo each other in the clever manipulation of legal language and the careful building of legal fences, so that their clients' interests may later be defended, if necessary, in strict accordance with principles of Law. Yet unless one set of lawyers is much smarter than the other set of lawyers, both sides might just as well dispense with their lawyers altogether, so far as driving a reasonable and profitable and fair business bargain is concerned. The hitch is that as soon as one side resorts to legal advice, the other side has to use it too in self-defense. Thus everybody loses except the lawyers, who go merrily on selling The Law.

But since most business transactions involve a big fellow and a little fellow – a company, for instance, that can afford legal advice and a customer who can't – The Law is usually weighted to one side from the very beginning. It is weighted by lining up beforehand, in the written terms of the transaction, the legal language that will fit right into legal principles in any lawsuit that might later arise out of the transaction. And it is in this fashion, even more than by the hiring of smart word-jugglers to represent you in court or by the purchase of a court hearing to begin with, that The Law is regularly bought and, therefore, regularly tends to favor those with money enough to buy it.

That is why the center of the nation's law business is in New York City and why the bulk of the nation's influential and profitable law practice is carried on in the Wall Street law factories. People and companies in other parts of the country have their legal grievances and disputes and their court squabbles, and they have them in much greater proportion than the proportion of the nation's law business that is carried on outside New York. But the richest people and the biggest companies make almost all their financial arrangement and their important business deals in New York. And financial arrangements and important business deals, even more than actual legal disputes, are what the lawyers thrive on.

Most New York lawyers spend most of their time working out legal advice for the business titans that make their financial headquarters in the city. It may be advice about how to word a series of mortgages or conditional-sale contracts or leases or stock certificates, so that the little fellows on the other side of the deals will have little or no chance for legal redress if they should later feel themselves cheated. It may be advice about an inter-corporate transaction, where the sole real usefulness of the advice will be to counter any tricks of legal language that the other side, also advised by high-paid lawyers, might try to pull. It may be advice about how to get around a bothersome government regulation and still keep on good terms with The Law, which of course is more almighty than any government regulation – advice that thousands of smaller companies or less wealthy people would love to have too, if only they could afford it. It may be advice about how to make use of legal language so as to get out of paying taxes – as when J.P. Morgan, for all his yacht and his grouse-shooting, perfectly Legally

avoided the federal income tax for a couple of years while hundreds of thousands of \$1500-a-year men had to chip in to the U.S. Treasury.

In any case, it will be advice which has a dollars-and-cents value, to the person or the company that buys it, somewhat greater than the stiff price the lawyers charge for it. And the direct or indirect losers in the whole affair will be the companies and people by the millions who cannot afford thus to buy The Law. There is no more striking parody of The Law's boast that it represents "equal justice for all" than in the work of those top men of the legal trade who cluster and prosper in New York City.

Moreover, most good lawyers go to New York before they die. They go to New York because that is where they can make the most money out of their knack of tossing around legal principles and legal language. As a matter of fact, herds of them are coaxed straight to New York from the law schools every year. And thus, incidentally, the profession gets in another telling blow for the perpetuation of the legal legend. For whatever slight doubts about the reasonableness, practicability, and majesty of the legal process may have been left in the smart youngster's heads, after three years of rigid drilling in the sacredness of abstract concepts, quickly evaporate in an atmosphere where The Law is acknowledged king – and the king and his pet courtiers are so handsomely rewarded.

Here too is the kernel of another reason why The Law is kinder to the rich than to the poor. Not only are the most promising young hocus-pocus artists immediately lured to the service of those who pay them the highest wages for the magic, but out of this group spring, eventually and almost automatically, most of the acknowledged leaders of the profession. For, as in other trades and professions, earning capacity is universally and blindly accepted as the hallmark of real ability. (Benjamin Franklin once paid tribute to this fact when he suggested that the lawyers appoint the judges, on the ground that they would always pick the *ablest* of their clan so that they might most *profitably* divide each new judge's practice among themselves.) And – despite the fact that Franklin's scheme has never been put to the direct test – it is out of the acknowledged leaders of the profession, who are acknowledged to be leaders because they make so much money, that most judges are chosen.

Now when a lawyer becomes a judge, he no longer has a direct financial incentive to manipulate The Law in favor of the rich people and the big corporations. But he will usually have spent most of his professional life, before he became a judge, doing just that. What is more, he will not have admitted, even to himself, that he was doing anything other than apply an exact and impartial science to the orderly management of men's affairs. In inevitable protection of his own self-esteem he will perforce have swallowed most of the legal legend whole. And consequently he will have hardened into a habit of mind whereby justice and the legal principles he is used to using are just about synonymous.

When he becomes a judge, he cannot easily shake off this set slant toward The Law. The principles and concepts he once flung about and fought for, mouthed now by other lawyers trying cases before him, will still have a familiar and authoritative ring. Such phrases as "freedom of contract" and "*caveat emptor*" and "the sanctity of written (by lawyers) agreements" and "deprivation of property without due process," along with all the minor and equally vague abstractions with which lawyers customarily defend, in and out of court, the interests of their wealthy clients, will strike the eyes and ears of the judge as good sound legal doctrine. By contrast, the phrases and principles of Law customarily used to argue against such interests will seem less familiar, less orthodox, less compelling. Conditioned by his own past habits of legal speech and thought, the judge will unconsciously lean, in laying down The Law, toward the side that talks his old brand of legal dialect. Which means that he will lean toward the side where the money lies – and The Law will lean with him.

There is one more important reason why The Law regularly tends to favor the rich, the conservatives, the people and companies with plenty of money and property who, not unnaturally, want to keep all their money and property and keep on getting more of it in the same old ways. This reason is inherent in the very nature of The Law itself. For The Law, you may remember, purports to be a great body of changeless abstract truths. Times change, and ways of living change, and the facts of human affairs change, but the principles of The Law remain unmoved and steadfast. In short, The Law, by its own definition, is a stand-pat science.

And of course it is the wealthy and well-to-do who are always stand-patters; the poor and the not-so-well-to-do are the progressives and the radicals. The moneyed groups are for the most part very nicely satisfied with the old arrangements of things. Justice or no justice – in the original Christian sense of the word – they don't want to see the rules shifted in the game of getting ahead in the world. And they find in The Law a philosophical and less obviously selfish defense of their resistance to change.

They also find in The Law something more solid and more useful than a philosophical defense of conservatism. For The Law, mysteriously brought to earth by lawyers and judges, does control all earthly affairs. And in being transmuted from abstract principles into specific decisions about human disputes and problems, it retains its reactionary flavor. New rules of the game, new arrangements in men's activities, new considerations of what is practical and what is fair, fit less smoothly and less snugly into The Law's scheme of principles than do the old considerations, the old arrangements, the old rules.

That is one reason why so much "progressive legislation" – meaning laws that try to change the rules to favor the poor at the expense of the rich – is either damned entirely or "interpreted" into ineffectiveness by the courts. The novel arrangements just don't slide easily into the old unchanging principles of Law. For instance, the newfangled notion that a worker ought to be paid a living wage didn't stand a chance when it first came up against the age-old Law-encrusted right of a corporation to pay its workers as little as it pleased. There might have been a law about it, but The Law had never heard of such a thing. Similarly, the idea that a homeless man might be legally justified in breaking into an empty house to sleep – an idea that could certainly be argued from the standpoint of pure, unadulterated justice – would be laughed out of court today. As would the idea that a bond salesman, whose glib assurances had led an old lady to invest her savings, could be sued by the old lady for what she lost when the bonds later became worthless.

For the judges will not, if they can help it, go to the trouble of reshuffling The Law's huge deck of abstract principles in order to reach, and rationalize, a radically different set of practical results. Only rarely and reluctantly will they turn the stream of legal logic in a really new

direction. Only rarely and reluctantly will they tolerate, in The Law's name, far-reaching or basic changes in the manner of adjustment of human problems. Thus not only The Law but the general trend of legal decisions remains the same. And by remaining the same it favors the interests of those who stand to benefit by a retention of the old rules. It favors the conservatives. It favors the rich.

Yes, the "socially significant" books about the inequalities and injustices of The Law in action are right – as far as they go. And incidentally, a prominent member of the bar recently summed up a large part of their theme in a phrase when he described the ideal client, the lawyer's dream, as "a rich man who is scared to death."

But still it is the fact that The Law as a whole is a fraud that lies behind all the inequalities and all the injustices. It makes it worth-while for those with money enough to afford it to buy the court services and the pre-court advice of those mumbo-jumbo chanters and scribblers who can best wring desired results out of legal language and legal principles. It makes it worth-while for those with money enough to afford it to buy their way into court, if the results they want wrung out of The Law cannot be otherwise attained. It is responsible for the myopic inability of most judges to see beyond the one-sided principles they used to use when their own services were for sale to the highest bidders. It is responsible for the inherent inertia, the congenital conservatism, of The Law in action. For if The Law were really the exact and impartial science it purports to be, instead of being an uncertain and imprecise abracadabra devoted to the solemn manipulation of a lot of silly abstractions, none of these bases of inequality and injustice would, or could, exist.

The Law is indeed a menace when it works so as to pervert its own boast of "equal justice for all," when it favors the rich and oppresses the poor, when its results, in the mass or in the particular, seem to be plain denials of ordinary non-legal impartiality and fairness. The point is that even when The Law works, as it sometimes does, so as to produce fair and impartial and practical results, it is nothing but an unnecessary and expensive nuisance. Those results might have been achieved much more simply and easily and painlessly without recourse to the metaphysical nonsense of The Law. And it is the point which the "socially significant" boys invariably miss.

The "socially significant" plot has grown stale in the telling. It always revolves around the conventional triangle of the rich, the poor, and The Law. And the villain always walks off with Lady Law in the end. Which is supposed to show that she is a villain too, whereas actually she is only an empty-headed fool who neither knows nor could be taught any better.



## CHAPTER XI

### LET'S LAY DOWN THE LAW

*"The first thing we do, let's kill all the lawyers."* – William Shakespeare

What is ever to be done about it? What is ever to be done about the fact that our business, our government, even our private lives, are supervised and run according to a scheme of contradictory and nonsensical principles built of inherently meaningless abstractions? What is to be done about the fact that we are all slaves to the hocus-pocus of The Law – and to those who practice the hocus-pocus, the lawyers?

There is only one answer. The answer is to get rid of the lawyers and throw The Law with a capital L out of our system of laws. It is to do away entirely with both the magicians and their magic and run our civilization according to practical and comprehensible rules, dedicated to non-legal justice, to common-or-garden fairness that the ordinary man can understand, in the regulation of human affairs.

It is not an easy nor a quick solution. It would take time and foresight and planning. But neither can it have been easy to get rid of the medicine men in tribal days. Nor to break the strangle-hold of the priests in the Middle Ages. Nor to overthrow feudalism when feudalism was the universal form of government. It is never easy to tear down a widely and deeply accepted set of superstitions about the management of men's affairs. But it is always worth trying. And, given enough support, the effort will always succeed. You can fool some of the people all the time, etc. The difficulty lies only in convincing enough people that they are being fooled.

Nor is this, in any sense, a plea for anarchy. It would not be necessary to do away with constitutions or statutes or with the orderly settlement of disputes and problems in order to do away with the lawyers and their Law. It would only be necessary to do away with the present manner of phrasing and later "interpreting" written laws, and with the present manner of settling disputes and solving problems. It would only be

necessary to do away with all the legal language and all the legal principles which confuse instead of clarifying the real issues that arise between men. This is not a plea for anarchy. It is rather a plea for common sense.

And the first step toward common sense is a realization that certainty and consistency, or any close approximation to them, is utterly impossible in the supervision of men's affairs. It is in its refusal to recognize or accept this fact that The Law makes its gravest and most basic error. It preens itself as being both certain and consistent. It purports to have a sure answer ready-for-application to any factual problem or squabble that may arise. Yet even a cursory examination is enough to show that The Law's alleged certainty and consistency lie entirely in the never-never land of abstract principles and precepts. The Law has been forced to retreat from the world of facts into its own world of fancy in order to maintain the pose that it is a precise and solid science.

Moreover, it is in feigning certainty and consistency in its settlement of flesh-and-blood problems while striving desperately to keep up the illusion in the irrelevant realm of legal abstractions, that The Law has lost touch with justice unadorned. As mentioned before, justice can't be cut up into convenient categories. And The Law, in reaching for certainty with one hand and justice with the other, has fallen between the two into a morass of meaningless and useless language. As though any actual dispute could be settled either certainly or justly by reference to the words "consideration is essential to a valid contract" or to the words "no state may constitutionally tax property outside its jurisdiction!"

Since certainty and consistency are impossible of attainment in the orderly control of men's affairs, the sensible thing to do would seem to be to go straight after justice in the settlement of any specific question that comes up for solution. Now justice itself is concededly an amorphous and uncertain ideal. One man's justice is another man's poison. But that is where written laws come in. Wherever different people's different ideas about what is fair and what is right clash head-on, written laws, enacted by democratic processes, should contain, in so far as possible, the answer. Wherever written laws cannot or do not contain the answer, *somebody* has to make a decision. And that

decision might better be made on grounds of plain, unvarnished justice, fairness, humanitarianism – amorphous though it be – than on any other.

Today it is the lawyer-judges who make such decisions. Even when some part is taken by a jury – that last and waning vestige of recognition that the ordinary man's ideas about justice are worth something – the jury has to act within the rigid framework of The Law and the judges' orders. But the ordinary man knows as much about justice as does the ordinary judge. As a matter of fact, he usually knows more. For his ideas and ideals about human conduct are more simple and direct. They are not all cluttered up with a lot of ambiguous and unearthly principles nor impeded by the habit of expressing them in a foreign language.

A training in The Law cannot make any man a better judge of justice, and it is all too likely to make him a worse one. But there is one kind of training, one kind of knowledge, that can fit a man to handle more ably and more fairly the solution of specific human problems. In any common-sense system, that kind of training and that kind of knowledge, instead of adeptness in the abstract abracadabra of The Law, would be a prerequisite to the right to sit in judgment on other men's affairs.

The kind of knowledge that could be really useful, that would really equip a man for the job of solving specific problems fairly, is technical factual knowledge about the activities out of which the problems arise. Not that such knowledge would impart a keener sense of justice. Rather that such knowledge would enable him to understand the problems themselves more clearly, more intimately, and more thoroughly, and therefore to apply his sense of justice to their solution in a more intelligent and more practical way.

A mining engineer could handle a dispute centering around the value of a coal-mine much more intelligently and therefore more fairly than any judge, untrained in engineering, can handle it. A doctor could handle a dispute involving a physical injury much more intelligently and therefore more fairly than any judge, untrained in medicine, can handle it. A retail merchant could handle a business dispute between two other retail merchants much more intelligently and therefore more fairly than

any judge can handle it. A man trained in tax administration could have handled *Senior v. Braden* much more intelligently and therefore more fairly than the Supreme Court handled it. In short, even discounting for the moment the encumbrances of legal doctrine that obstruct the straight-thinking processes of every judge, the average judge is sadly unequipped to deal intelligently with most of the problems that come before him.

And why, after all, should not the orderly solution of our business and government and private difficulties – practical problems all – be entrusted to men who have been trained to understand the practical problems and to appreciate the difficulties? Why should we continue to submit our disputes and our affairs to men who have been trained only in ethereal concepts and abstract logic, and who persist in pursuing that will-o'-the-wisp, certainty? Why should we keep on sacrificing both justice and common sense on the altar of legal principles? Why *not* get rid of the lawyers and their Law?

It would take, of course, a peaceful revolution in the system of rules under which we live. Constitutions, in part at least, would have to be rewritten, without benefit of lawyers. Why not? The machinery exists for doing it in an orderly and peaceful way. Where constitutional commands and prohibitions make sense to the average man, they could be kept unchanged. Anyone understands, for instance, what the federal constitution's requirement of a census every ten years means. Where constitutional commands and prohibitions are completely incomprehensible except in the light of legal "interpretation,," they should be clarified so that they do make sense or else omitted entirely. Why should the lawyers have a monopoly on the understanding of any part of any constitution?

Statutes would all have to be redrafted too, again without benefit of lawyers. And that would be a tougher job, but by no means an insuperable one. The lawyers themselves have often done it with a whole body of written laws; they call it "codifying" the laws. There is no reason why a chosen group of non-lawyers should not codify the present laws of every state, and of the federal government as well, and codify them so that it no longer takes a lawyer to translate them into significance. Any law that means something definite and tangible in relation to human affairs can be written so that its meaning is plain for

all to read. Any law that means nothing except as lawyer and lawyer-judges put content into its inherently content-less language has no business staying on the books.

Furthermore, any law which, instead of laying down rules itself, turns over the solution of certain factual types of problems to a group of experts or administrators should say perfectly frankly what it is doing and should define in factual instead of legal language the field within which the experts are to make rules and decisions. Why conceal behind vague generalities the fact that the Securities and Exchange Commission has been given, within vague limits, the power to make rules for the running of the New York Stock Exchange? Why not make the granting of power simple and direct; and why not make the limits of the power specific instead of leaving their determination to the lawyer-judges' subsequent and haphazard "interpretation" of the statute's legal language?

Similarly, any written law which, though laying down a broad rule, leaves to a court or some such deciding body the precise application of its rule to the fact of any particular problem should say that it is doing just that. "First degree murder is punishable by death" makes no real sense as a statute because "first degree murder" makes no sense except in relation to the abstract legal principles which are said to define it. "When a court (whether judge or jury or both or some other kind of deciding body) finds that one person has killed another person and believes that the killer deserves to be electrocuted, the court may order that he be electrocuted" is equally descriptive of the rule and much more accurate. Why not phrase the statute that way, so everyone would know just what it did mean? Then, if we should want the rule to be more precise, the written law could be made more precise – instead of pretending that the words "first degree murder" contribute toward preciseness or toward anything but obscureness and unintelligibility.

For, of course, there would still have to be courts, or judges, or decision-makers, under any orderly system of social control, even though written laws were made intelligible to all. There would have to be decision-makers to determine the true facts behind any dispute, and then to apply to the dispute the terms of any written laws, whether those laws were so precise that their application was almost automatic, or whether they left room for the decision-makers to exercise their own

discretion and their own sense of justice. There would have to be decision-makers, too, to settle any disputes which were not covered by written laws. And it is as decision-makers that men trained in the technicalities of factual problems, rather than in the technicalities of legal language, would come in.

Suppose today a problem in the regulation of utility rates comes before a court of Law. The company will argue that its property is worth a great deal of money because the more money it is worth the higher rates it can charge, since it is allowed to make "a fair return on the reasonable value of its investment." The utility commission, out to defend the rates it ordered the company to charge, will argue that the company's property is worth considerably less than the company's figure. Both the company and the commission will bring in engineers and accountants to testify about the value of the company's property. The company's experts will set a high figure and the commission's experts will set a low figure. And the court, unable to understand or gauge intelligently the basis of either set of figures will, more than likely, split the difference and let it go at that. But why – if the commission, which is a government body just like any court, is not to have the last word in applying a written law entrusted to it for enforcement – should not the dispute at least be brought before a court of engineers or accountants or both who, unpaid by either side, could apply their technical knowledge to an examination of both sets of claims and an intelligent choice between them?

Suppose today a man accused of a crime pleads before a court of Law that he is insane and, therefore, cannot be held responsible. The prosecuting attorney will produce psychiatrists who insist, and explain in medical terms why they insist, that the defendant is sane. The defendant's attorney will produce psychiatrists who insist, and explain in medical terms why they insist, that the defendant is crazy. The court will listen uncomprehendingly to both sets of psychiatrists and will then go into a huddle with itself over the question whether the accused man can "understand the difference between right and wrong." If he can, he is sane according to The Law, and if he can't, he is sane according to The Law, no matter how ridiculous the basis of distinction may seem – and does seem – to any psychiatrist. But why should not the dispute be brought immediately before a court of psychiatrists, or before a single psychiatrist-judge, who, unpaid by either side, could

apply technical knowledge to an examination of the defendant's claim and make an intelligent decision as to its validity.

Suppose today a complicated dispute over the internal management of a corporation comes before a court of Law for solution. Lawyers for both sides will defend their client's actions and interests in elegant legal language. The court, in making its decision, will choose between two proffered sets of legal principles. Why legal language and legal principles? Why not considerations of business efficiency and business ethics? And why should not the dispute be brought before a court of men experienced in corporate management, who could apply their technical knowledge to an examination of the claims of both sides and to an intelligent and practical as well as fair solution of the difficulty?

It is no answer to say that a lawyer-judge understands better than does an engineer or an accountant or a psychiatrist or a business executive the "other issues" involved in these cases, or in any other of a thousand types of cases that might be named. The only real issue ever involved in any case is the intelligent formulation of a fair decision to a factual problem, either within the framework of some relevant written law or, if necessary, without reference to any written law. The only understanding helpful in formulating such a decision, granted that the words of any relevant statute makes sense – and if they don't they should be ignored – is a practical understanding of the problem involved. An engineer or an accountant or a psychiatrist or a business executive, remember, has just as keen and impartial a sense of justice where his own interests are not concerned as has any judge where *his* interests are not concerned. Moreover, if two or more kinds of specialized knowledge are pertinent to the settlement of any problem, why should not two or more kinds of technical experts compose the court which settles the problem? Why, in any case, should the real issues ever be obscured by the fake issues of The Law?

In any common-sense system of social control, or government, the courts – the law-applying and decision-making bodies – would be built of men trained to an understanding of the different fields of human activity with which they were to deal. The exact mechanics of such a scheme could be worked out in any one of several ways. Perhaps permanent courts of experts in different fields of practical knowledge might be set up, each to handle all disputes and problems that centered

around their own fields. Perhaps, instead of taking men permanently away from the work to which they had been trained and making specialized judges out of them, there might be panels of experts on call for part-time court service in the settlement of disputes involving their separate fields of knowledge.

Perhaps – for any such scheme would have to include a central directing bureau to arrange for the hearing of each case before the right court – there might be central courts composed of a dozen different kinds of specialists: -- an ex-business executive and an ex-doctor and an ex-labor leader and an ex-engineer and an ex-banker and an ex-farmer and an ex-public administrator and so forth. And each central court might assign the handling of every case that came along among its own members or among other specialists it had available for service, or among a relevant combination of the two. Perhaps each field of dispute might have its own central court and its own outside part-time judges. Thus a central criminal court might include an ex-penologist and an ex-financial expert and an ex-doctor and an ex-police official and a couple more, with a chemist and a psychiatrist and a ballistics expert, among others, on call to sit in certain cases where their special knowledge would be of help.

Even the Supreme Court, composed of course of non-lawyers (and this, incidentally, would not even require an amendment to the Constitution which says not a word about the judges having to be lawyers) might well make use of outside specialists as part-time judges. And since most of the problems that come before the Supreme Court involve, and would probably continue to involve, practical problems in government, most of its members – as well as the members of any other courts devoted to handling such problems – would be men trained and qualified in the efficient and wise administration of government affairs.

As a matter of fact, abolition of the lawyers and their Law might eventually lead to the virtual disappearance of courts as we know them today. Every written law – written, you remember, in comprehensible language – might be entrusted to a body of technical experts, to administer and apply it and make specific decisions under it. As the Interstate Commerce Commission applies the Interstate Commerce Act, as the Federal Trade Commission applies the Clayton Act, so each state would have, say, a Killing Commission to apply its laws about what are



now called murder and manslaughter. Moreover, the decision of the technical experts who made up each commission would be final. There would be no appeals and super-appeals to other bodies of men who knew and understood less about the real matter in dispute than the original deciders.

There would be a Supreme Court – or a Supreme Commission or such – to settle important inter-governmental or intra-governmental squabbles to which the written laws did not contain the ready answer. But just about all that would be left for courts, or something like our present courts, to handle would be disputes to which no written laws directly applied. And where no written laws directly applied, arbitration of the dispute by picked specialists in that field, or that business, would serve the ends of efficiency, justice, and also economy far better than a formal trial before any kind of court.

If even the remote idea of the eventual disappearance of our courts has a shocking sound, it is only because of our blind faith that the mysterious processes of The Law do somehow work inexorably toward certain justice. Well, for the tenth time, they don't. When the courts happen to produce justice it is as likely to be despite the irrelevant processes of The law as because of them. Nor, for all the legal legend, are judges infallible arbiters of right and wrong, fair and unfair. Judges are men, not gods. Moreover they are government servants, government employees. Why should not another group of men, another group of government employees, be equally able to decide what is fair and what is unfair? Why should not another group of men, given equal responsibility and trained to an understanding of complicated practical problems, be *better* able to decide what is fair and what is unfair, within the limits of an intelligible statute, than those who have been trained mainly in the manipulation of abstract principles? Why should not a commissioner's word be as good as a judge's word?

True, the mechanics of any such system as has been suggested to replace the lawyer-judges would be complicated in the extreme. But no more complicated than the present confusing, overlapping, and wasteful hierarchy of trial courts and appellate courts, state courts and federal courts, courts of law and courts of equity, police courts and magistrate's courts, common pleas courts and special claims courts, and all the rest, all of them manned by exalted lawyers.

And if the whole idea of taking the settlement of our disputes and problems, in one fashion or another, out of the hands of the lawyer-judges sounds too fantastic, too far-fetched and unfeasible, a couple of little points are worth considering. For small steps in that direction have already been made in the field of government and also in the field of business.

In the field of government, the growth of commissions and boards and all sorts of administrative bodies has served to deprive the courts of Law of some of the decision-making business that used to be theirs. Today, most new statutes are put in the charge of special decision-making agencies instead of being entrusted directly to the courts for interpretation and application. It is true that today an appeal to a court can always be taken from any commission's decision. But the commission really stands in the place of a trial court – and appeals are comparatively few. It is true, too, that these commissions are now usually manned in large part by lawyers. But even the lawyer-commissioners are coming, more and more, to be chosen for their familiarity with the practical problems with which the commission has to deal, rather than for their adeptness at The Law. At the least, it is a trend.

In the field of business, the first halting step away from the lawyer-judges has been the growth of arbitration as a means of settling disputes. Arbitration means nothing more than the voluntary turning over of a dispute for fair settlement to a man or group of men, trusted by both sides and equipped by specialized knowledge to understand the question at issue. Lawyers are not necessary, either as arbitrators or as advisers, and experience has proved that their presence is all too likely to hold up and confuse the whole proceedings. They just can't forget their abstract principles – nor their Pleading and Procedure – and get down to business. Most judges, incidentally, disapprove heartily of arbitration, and say so whenever they get a chance in a lawsuit, as when a contract provides for it. They well know in what direction arbitration, as a system, is heading.

As a matter of fact – to go back for a minute to the possible mechanics of setting up substitutes for the present courts of Law – one scheme might be the tremendous extension of the arbitration device. Thus the two sides in what The Law would call a "civil suit" – an ordinary case

not involving the government – might be required to pick their own expert or experts to settle their dispute for them, perhaps from among a qualified list of arbitrators in that field, or perhaps not. Certainly such a requirement would fit in perfectly with the complete abolition of courts as we know them, with the use of commissions or such to decide matters arising under written laws. For all disputes *not* covered by written laws could then be turned over to arbitration.

At any rate, regardless of the exact details or mechanics, the important thing in any common sense system would be to get rid of the abracadabra of The Law as an alleged basis for the settlement of human and social problems. That would mean cleaning all the vague and essentially meaningless legal language out of constitutions and statutes. It would mean taking the settlement of specific disputes out of the hands of the lawyer-judges. And finally – or perhaps first of all – it would mean getting rid of the lawyers, as lawyers.

Getting rid of the lawyers would mean no more legal counsel to talk for you before the courts or commissions or arbitrators or whatever bodies were given the job of handling specific problems in the orderly management of human affairs. People who got involved in disputes or got hauled up for alleged violation of some written law would have to tell their own stories and produce their own proof – in the form of written evidence or witnesses or whatever kind of proof was necessary and available. Companies would have to send to court a responsible company official, to talk facts and not Law. Why not – since the decision-makers would no longer be concerned with balancing abstract principles but only with applying justice, straight, to the problems before them?

Not – despite what the lawyers will immediately howl -- would it be one whit harder to determine the true facts behind any dispute without the "help" of the lawyers and their principles of P. and P. As everybody knows, at least one of the lawyers in every case in which the facts are in dispute is out to hide or distort the truth or part of the truth, not to help the court discover it; and his is always able to use the accepted principles to help him do it. The notion that in a clash between two trained principle-wielders, one of whom is wearing the colors of inaccuracy and falsehood, the truth will always or usually prevail is in essence nothing but a hang-over from the medieval custom of trial by

battle and is in essence equally absurd. Why not let the people really involved in any squabble tell, and try to prove to the satisfaction of the decision-makers, their own lies? Commissions have often found it far easier to discover the true facts behind any dispute by dispensing with the lawyers' rule; arbitrators have found it easier still by dispensing with the lawyers.

Getting rid of the lawyers altogether would also mean no more legal advice, for those who can now afford it, in the making of financial arrangements and the drafting of business documents. People and companies who made financial plans and business agreements would have to word them – or have them worded by non-Legal draftsmen – in intelligible language. Why not? Why should not a man who wants to leave his property to his wife at his death say in his will, "I want everything I own to go to my wife when I die," instead of having to hire a lawyer and go through a long rigmarole of legal language? If the written law about wills says, for instance, that three other people have to sign a person's will, to help prove later that he signed it, then let the written law be not only intelligible but as readily available as a guidebook or an article in an encyclopedia. And why should not two people or two companies or a company and a person, who want to enter into a business agreement, be both entitled and required to state in plain words just what each of them is promising to do or not to do?

If constitutions and statutes were all written in ordinary English and if the lawyer-judges were ousted from their decision-making seats, the practicing lawyers would soon automatically disappear. There would be no more use and no more place for their magic. The practical men in charge of dispensing justice would neither understand nor be interested in the abstract principles of The Law. Legal language, thrown out of the new courtrooms or commission chambers, would serve no possible function in the wording of business documents. Neither as advisers out of court nor as representative in court would the lawyers be able to sell their special brand of verbal skill. Then too, the law schools would be forced to close their doors – or else to turn themselves into schools of practical government or business administration. The breeding of word-jugglers would come to an end.

Yet it might be just as well to get rid of the lawyers directly, along with the lawyer-judges and the legal wording of written laws. At the least,

they would have to be voted out of Congress and the state legislatures before it would be possible to redraft constitutions and statutes and set up a new decision making system. And if the lawyers, as lawyers, were abolished directly and immediately, then the other changes would go into effect more smoothly.

How abolish the lawyers directly? Well, why not make the practice of law for money (or for anything else) a crime? The lawyers would of course insist that anything so unheard-of could only be done by amending the Constitution – but why not amend it? And incidentally, only a lawyer would quibble about what "the practice of law" meant.

Absurd? Preposterous? Think it over for a minute. Suppose the nation were suddenly to wake up to the fact that all its affairs were being supervised and controlled according to the language and principles of astrology, by a smart bunch of astrologers. Would making the practice of astrology a crime seem absurd? Go back and read over again the solemn judgment of the Supreme Court of lawyers in the case of *Senior v. Braden* – or pick some other court opinion at random – and see where the absurdity lies. Or are we just to go quietly and unquestioningly and stupidly on, submitting the management of our entire civilization to the modern medicine men?

The immediate answer is undoubtedly yes, but it need not be a permanent answer. And if any popular movement to get rid of the lawyers and their Law, and to put our system of social control on a common-sense basis, should ever make enough headway for the lawyers to have to face it instead of scoffing at it, their chief arguments against it – other than those already considered – would probably boil down to two.

They would argue, in the first place, that even if the time-tested legal system, with all its principles and its precedents, were scrapped and another sort of system set up in its place, the new system would soon develop its principles and its precedents too, and even its special language. Now if the new system were put in the hands of lawyers, or of men trained and skilled principally in abstract logic, that would unquestionably be so. But it would not be so if the new system were entrusted – as it would be entrusted – to men trained and skilled in coping with practical human problems. And it would particularly not be

so if those in charge of the new system were aware – as they would be aware – that there need be no pretense of preordained certainty and consistency about their decisions, taken in the mass, but rather a direct effort to deal intelligently and justly with each problem or dispute as it came along.

Finally, the lawyers would argue that if The Law were scrapped and it became generally known that fallible men rather than infallible and impersonal abstract principles were dictating decisions which other men had to obey, then all respect for law-and-order would vanish, and revolution or anarchy or both would ensue. But in this argument – a typical magician’s argument in its conjuring up of frightful imaginary hobgoblins – is displayed a strange and contemptuous mistrust of the civilized tendencies of the nation. It implies that the whole structure of our society would automatically go to pieces if it were put on a practical rather than a mystical basis – an unwarranted assumption at best. Moreover, in this argument lies the crux of the whole fraud of The Law.

For the average man’s respect, such as it is, for our *present* system of Law, and his consequent willingness to let his life be run in mysterious fashion by the lawyers, are indeed founded on the carefully nurtured legend that legal principles *are* just about infallible and that they produce, in the judges’ hands, something very close to certain justice. Which – to sum it all up in four words – they aren’t and don’t. It is a blind respect, born not of understanding but of fear. And the fear is built on ignorance.

If only the average man could be led to see and know the cold truth about the lawyers and their Law. With the ignorance would go the fear. With the fear would go the respect. Then indeed – and doubtless in orderly fashion too – it would be: --

*Woe unto you, lawyers!*