THE WEST'S TWO LEGAL SYSTEMS

The Anglo-American adversary system daily subverts truth, fairness, justice, and morality, but self-interest and intellectual torpor inhibit inquiry into what precisely is wrong, how it happened, and the solution.

What's wrong is simple enough. The system does not search for the truth, and trial lawyers, described as serial liars by a Harvard ethicist, control the evidence, and hence the process, and hence the money.

How it happened is also quite simple. Untrained British judges allowed trial lawyers to take control of the civil process in the 17th century, and of the criminal process early in the 19th. Since then, lawyers and judges have invented a series of anti-truth devices which make it relatively easy for trial lawyers to get rich criminals off.

As for the solution, an Australian judge says justice is fairness, fairness is truth, truth is reality, and the search for truth gives a justice system its necessary moral dimension. The European investigative system searches for the truth and trained judges control the process.

In short, the Anglo-American system is largely about money; the European system is largely about truth.

Evan Whitton has been exploring the two systems since 1991, when the adversary system concealed compelling evidence the European system had found against an organised criminal, Sir Terence Lewis.

Cover illustration by Rose Lennon.

ISBN 1-4116-5875-2

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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.

FRED RODELL

Professor of Law, Yale University

Written in 1939

“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

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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.

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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.

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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 scepticism 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 befoozles 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

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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 hig-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 "willfullys" and "maliciouslys," 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 lawbooks 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 tot hat 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 ratiocination's 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

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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 statue 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.

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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."

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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.

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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 home-owner 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

WOE UNTO YOU, LAWYERS!

"*…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

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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.

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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 aesthetic 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.

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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 honouring 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* labelled 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.

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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 tot he 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

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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.

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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 tot he 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 her 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 changes 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"?

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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.

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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 if 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.

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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 ma, 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

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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…."

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(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 therefrom. 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. 6230, 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 situation."

(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."

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(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:"

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(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,

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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. — "