

## WOE UNTO YOU, LAWYERS!

(If a man with some land that was being held for him by somebody else should transfer part of his stake in the land to a third person, no one would be fool enough to claim that the piece of paper involved in the transfer was a “chose in action” – a “chose in action” being, roughly, a piece of paper that entitles its owners to certain rights, including usually the right to collect money from someone – in the sense that the words “chose to action” are used in one section of the federal statute that tells the federal courts how various kinds of lawsuits should be handled. If, instead of land, it had been goods or cash that was being held, and someone had swiped the goods or the cash, then the man with a stake in them could bring a lawsuit to get the stuff back. At any rate, whoever might have been holding the property for whoever had a stake in it would, in truth, have been holding the property for whoever had a stake in it. – And just *try* to figure out what any of this, whatever it means, has to do with Max Senior and the tax he doesn’t want to pay.)

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

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

“The doctrine of *Brown v. Fletcher* is adequately supported by courts and writers. *Narragansett Mutual Fire Ins. Co. v. Burnham*, 51 R.I. 371, 154 Atl. 909; *Bates v. Decree of Judge of Probate* 131 Me. 176, 160 Atl. 22; *Bogert, Handbook of the Law of Trusts*, 430; 3 *Pomeroy Equity Jurisprudence* Fourth Ed., 1928, sec. 975, p. 2117; 17 *Columbia Law Review*, 269, 289. We find no reason for departing from it.”

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

“The challenge judgment must be Reversed.”

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

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

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

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

The first sub-principle is that a state has no “jurisdiction” to tax land outside its borders. And that – regardless of what relation it has or hasn’t to the Fourteenth Amendment – seems eminently sensible and fair. It also seems eminently pointless. For New Hampshire, for instance, would no more try to slap a property tax on a farm in Iowa than the United States would try to tax a ranch in Argentina. There wouldn’t be any way of collecting the tax and no state would be idiotic enough to try.

But, starting from that fair, if pointless, principle, the Court has gradually built up other principles about what a state has or hasn’t “jurisdiction” to tax. A lot of property today, like stocks and bonds and I.O.U’s and mortgages and trust

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certificates, is not so solid and stationary as land, and so, occasionally, different states try to tax that kind of property at the same time and the owners of the property don't like it. The Supreme Court has obligingly enshrined in The Law various complicated sub-principles telling which states have "jurisdiction" to tax that kind of property and which haven't. And these "jurisdiction" rules have been carried over, with refinements and exceptions, to other kinds of taxes than property taxes – especially to inheritance taxes.

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

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

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

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

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

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

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

The difference, and the only difference, is in the legal wording of the pieces of paper that did give or might have given Max a right to Share in the profits. If he had held shares of stock he would have been nothing but a stockholder. But since he held trust certificates, he was, in legal language, a "cestui que trust." And being

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a “cestui que trust” – which only means someone-who-trusts-someone-else-to-hold-property-for-him – Max Senior claimed he was, in a sense, the owner of some of the land that was being held for him. He claimed he was the owner of land despite the fact that he had no right whatsoever to build a fence on the land or to manage it, but only to collect some of the profits.

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

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

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

In the course of deciding this, the Supreme Court wrote the two long and rather incomprehensible paragraphs that were quoted verbatim in the *Senior v. Braden* opinion. And it was on the basis of those two paragraphs, as expressing a relevant

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general principle, that the Supreme Court of a generation later concluded that Max Senior *did*, in a sense, own land, and so could not be taxed by the state of Ohio.

Thus, the reasoning of the Court in Senior v. Braden boils down to something like this: — The nine judges who held our jobs almost 20 years ago, in deciding a problem of federal court procedure, expressed the general principle that certain pieces of paper, giving their owner certain rights, were not, technically, “choses in action.” Therefore, what Max Senior, whose trust certificates read something like those pieces of paper, *really* owns is land. Some of that land is outside Ohio. Ohio is trying to tax some of the profits Max Senior made out of his stake in that land. The tax, even though it is measured by the profits so that it works like an income tax, is called a property tax in the statute. Therefore it *is* a property tax. Since it is a property tax it is a tax on what Max Senior owns. But what Max Senior really owns is land, some of it outside Ohio. Therefore Ohio is trying to tax land outside Ohio. But we have a principle that no state has “jurisdiction” to tax land outside its own borders. We also have a principle that a state tax on something which the state has no “jurisdiction” to tax deprives the taxpayer of his property without due process of law and so violates the Fourteenth Amendment. Therefore, Ohio’s attempt to collect a tax from Max Senior is forbidden by the Constitution. Therefore, Max can keep his hundred-odd dollars.

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

There isn’t even a legal answer. The Supreme Court’s “jurisdiction” principles under the Fourteenth Amendment allow — as they would obviously have to allow — a state to tax its own land. True, the Ohio land that Max had a stake in had already been taxed once that year under a regular property tax. So, considering the tax in the case as a property tax, that made two property taxes on the same land. But there is nothing in the Constitution that forbids a state to do that if it wants to. There is not even a Supreme Court principle that forbids it, the Court’s rule against double taxation applying only to taxation of the same thing by two states.

The *Ohio* constitution might well have forbidden it. But the job of saying what the Ohio constitution forbids or doesn’t forbid is, in legal tradition, exclusively the job of the Ohio courts. And the Supreme Court of Ohio had said that, so far as it was concerned, the tax on Max Senior was entirely constitutional.

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

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

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

Regardless of the right answer, the Court's solemn consideration of the type of property Max Senior owned or didn't own seems scarcely pertinent to a solution of Ohio's – or Max Senior's – fiscal difficulties. Even if the Court had snapped that Ohio was taxing legitimate investment too heavily and ought to cut down on its spending anyway and that, therefore, the tax under dispute might not be collected, such a decision, though hardly judicial in manner, would at least have made a great

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deal more common sense than any discussion of “choses in action” and interests in land and similar irrelevant ambiguous abstractions.

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

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

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



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

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

## CHAPTER VI

### THE LAW AND THE LADY

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

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

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

In the first place, she would of course be guided, from afar, by a dim and conveniently ambiguous ideal of personal justice. She would be bothered about

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doing the right thing, making the right decision, but since she would be her own Supreme Court, anything she did would be right – after she did it. The difficulty would lie in deciding beforehand what to do and what not to do, in accordance with the inexorable rules of her personal Law.

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

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

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

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

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

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made need not be kept at all are both obviously beside the point here. The Law, finally tracked to earth, seems to decree that the lady must rise.

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

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

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

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

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reconciling a conflict between two apparently irreconcilable principles, the lady has displayed her mastery of the legal process.

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

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

At lunch, the lady is confronted with the problem whether to order or refrain from ordering a rich pastry dessert. Here, the primary principle concerning desirability and the secondary principles concerning what is said to be healthy appear to be both cogent and conflicting. But only on the surface, of course. Reaching into the recesses of her legal system, the lady recalls that there is a pertinent and useful corollary to the sub-principle that the denial of whatever seems desirable may, by imparting a sense of nobility, become desirable and therefore right. The corollary is to the effect that whatever seems desirable but not too desirable may be denied with greater impunity than whatever seems extremely desirable, since the sense of nobility imparted by the denial depends on the denial itself and not on the degree of desirability of that which is desired. Accordingly, the lady passes up the cream-puff.

The lady’s luncheon companion is going shopping. Will the lady come along? Decision, of course, must be dictated not by whim but by Law. It is The Law that to waste time is wrong. It is, further, The Law that to devote oneself to trivial matters when important matters demand attention is to waste time – and various household chores await the lady at home. Yet it is an accepted rule that, outside the home jurisdiction, household chores take on the color of triviality. The exception

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to this rule, that household chores assume extreme importance, especially outside the home jurisdiction, in the face of an unwanted invitation, is clearly inapplicable here. Furthermore, there exists an equitable principle, frequently superseding the more rigid rules of Law, that accommodation to the requests of others may be proper, *per se*. The “*per se*” settles it.

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

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

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

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

Yet, in all fairness, the lady must admit that there is an exception to the desirable-equals-right rule, to the effect that the denial of whatever seems desirable may, by

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imparting a sense of nobility, become desirable in its own right, and therefore proper. There seems to be a deadlock. It will be a close decision.

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

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

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

\* \* \* \* \*

Now, this resume of a lady's day in which all decisions are directed by abstract principles, or rules of Law, may sound absurd in the extreme. It is plain that most of the principles are couched in such vague, general language that they cannot possibly be guides to a specific decision on a specific matter. It is plain that practically every principle can be countered with another principle or exception which contradicts in whole or in part the first principle. It is plain that not one of the lady's decisions necessarily follows from the principle or concept which is said to dictate it. It is plain that in every instance, the "controlling" principle, or

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principles, resembles nothing so much as a loose rationalization of what she is going to do, applied after the actual decision is made.

Furthermore, it is plain that if someone else, say the lady's husband, had been acting as Supreme Court for her, many of the rulings would have gone the other way, even though the same set of guiding principles had been rigidly adhered to. In any conflict between the concepts of smartness and economy, for instance, the decision might have favored economy and yet done the proper obeisance to smartness under the rule that it is smart to be economical. Freedom of contract might well have been interpreted as freedom to refuse to buy a hat, no matter how becoming. Despite its limited scope, the lady's legal system would hardly have needed stretching to do double duty all the way down the line.

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

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

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

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

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

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

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

It is as though a court were to have considered, with complete disinterest, the case of our friend, the lady; were to have balanced against each other the principles put forth by opposing counsel to the effect that what is desirable is right and that what is desirable is wrong; were to have decided, in the abstract, of course, that what-is-desirable-is-wrong was the more compelling of the two; and were then to have informed the lady that *since* it is The Law that what is desirable is wrong, *therefore* the lady must get out of bed. Certainly, time and time again, in

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actual law cases, opposing counsel will put forth as the bases of their arguments legal principles which are respectable and yet are directly contradictory. Equity-will-act-when-there-is-no-adequate-remedy-at-law and equity-need-not-act-even-though-there-is-no-adequate-remedy-at-law. Peaceful-picketing-is-legal and all-picketing-is-illegal. Contributory-negligence-on-the-part-of-the-plaintiff-absolves-the-defendant-of-responsibility and contributory-negligence-on-the-part-of-the-plaintiff-does-not-absolve-the-defendant-of-all-responsibility. And time and time again a court will grab one of the two contradictory principles and, with some slight elaboration, use it as the basis of decision.

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

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

## CHAPTER VII

### FAIRY TALES AND FACTS

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

*‘Nothing,’ said Alice.*

*‘Nothing whatever?’ persisted the King.*

*‘Nothing whatever,’ said Alice.*

*‘That’s very important,’ the King said, turning to the jury.”* — Lewis Carroll

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

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symbols, push the buttons on the big machine that correspond to those symbols, and the right answer automatically pops out at the bottom.

Certainly it is only because of their passionate belief in the machine-like and inexorable quality of The Law that non-lawyers continue to submit their civilization to legal decree. Certainly too, the law boys themselves are anxiously aware that they must keep up the pretense if they would keep their prestige and their power. Even the Supreme Court, from time to time in its opinions, feels it imperative to state that it is The Law, that infallible automatic machine, and not the Court, those nine fallible men, that really dictates decisions. For the lawyers know it would be woe unto the lawyers if the non-lawyers ever got wise to the fact that their lives were run, not by The Law, not by any rigid and impersonal and automatically-applied code of rules, but instead by a comparatively small group of men, smart, smooth, and smug – the lawyers.

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

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

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

The point is, of course, that in every case the real decision is made, The Law of the case is laid down, not after the machine gets to work but before. The crux of the whole matter lies in the choice of which button or buttons to push, which principle

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or principles or concepts to follow. In *Senior v. Braden*, the Supreme Court decided to push the buttons marked “property tax” and “interest in land.” Whereupon the machine whirred smoothly through “no jurisdiction to tax” and “deprivation of property without due process of law,” right up to the answer – unconstitutional. But if the Court had instead laid its venerable finger on the “income tax” button, or had skipped the “interest in land” button, the machine of The Law would have whirred just as smoothly to the exactly opposite conclusion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As would of course be expected, any lawyer will arise to the defense of his trade and hotly dispute all this disparagement of The Law's vaunted dignity, majesty, and preciseness. He will tell you that most legal principles, though abstractly phrased, have acquired, through long usage, a specific content of meaning and application – in lawyers' and judges' minds at least. He will tell you that The Law must have two qualities, continuity and certainty; (he will not put it that The Law must *seem* to have continuity and certainty – in order to survive.) He will tell you that, in order to achieve continuity and certainty, The Law must be based on general or abstract principles which can be carried over from one year to the next and from one decision to the next. And he will tell you, if you press him about the way in which abstract principles can be carried over continuously and certainly, that problems and fact situations, by reason of their similarity or dissimilarity, fall naturally into groups; one group will be governed by one legal principle, another group by another or possibly a contradictory principle. In short, each new case or problem that comes up is enough like some batch of cases and problems that have come up before to be controlled by the same principle that was used to control them. There is your certainty. There is your dignity, majesty, and preciseness.

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

The theory does not explain, either, why a promise by a stranger to give money to the same church is more like a cigarette than it is like a promise by a stranger to give a present to the same girl; for the first two, remember, are valid considerations for a contract, while the third isn't. Nor does the theory explain why the tax

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problem of *Senior v. Braden* fell naturally into the same batch of cases that included the *Brown v. Fletcher* problem in legal procedure, and so was controlled by the same general principle. Still, it makes a pretty theory – in the abstract.

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

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

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

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

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

Maybe the first Cadillac was doing sixty miles an hour and the second one thirty. Or maybe one was doing forty-five and the other one forty. Or maybe both were doing forty-five but it was raining one week and clear the next. Maybe one farmer blew his horn and the other didn't. Maybe one farmer stopped at the crossing and the other didn't. Maybe one farmer had a driver's license and the other didn't. Maybe one farmer was young and the other was old and wore glasses. Maybe they both wore glasses but one was nearsighted and the other farsighted.

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

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

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

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

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The “essential” facts being similar, the judge would put it, the same principles of Law are “controlling.”

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

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

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

Well, don’t you believe a word of it. In the first place, those legal papers of all kinds and descriptions are phrased the way they are, not in order to keep the people whose affairs they deal with *out* of court, but in order to give somebody a better chance of winning if the affair gets *into* court. If the document is an installment-plan contract or a lease or an insurance policy or a mortgage, you can guess who

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that “somebody” is. If it is the result of a really two-sided business dicker, with lawyers working for both sides, then some of the clauses of the contract will be for the benefit of one side and some for the other – in case they go to court over it. At any rate, every legal agreement is drawn up *in contemplation* of a court fight. It is therefore phrased with an eye to the same old ambiguous, abstract principles that the judges use for Law. And no matter how hard the lawyers may try to make their legal language favor one side or the other, they can no more wring certainty out of abstractions than they could wring blood out of a cauliflower.

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

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

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

No, the asserted certainty of The Law is just as much of a hoax out of court as in court. And how could it not be – inasmuch as the whole of The Law, whether it be glorified in the opinion of a Supreme Court justice or darkly reflected in the

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conversation of two attorneys about to draw up a deed of sale, is built of abstract principles, abstract principles and nothing more?

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

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

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

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

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

They must have been lawyers.

## CHAPTER VIII

### MORE ABOUT LEGAL LANGUAGE

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

The Chief Justice of the Supreme Court of the United States, several years ago, was elucidating in the course of the Court’s opinion a little point of Law. “Coming

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to consider the validity of the tax from this point of view," he wrote, "while not questioning at all that in common understanding it was direct merely on income and only indirect on property, it was held that, considering the substance of things it was direct on property in a constitutional sense since to burden an income by a tax was, from the point of substance, to burden the property from which the income was derived and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent. . . .

Moreover in addition the conclusion reached in the Pollock case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it . . . . From this in substance it indisputably arises, . . . that the contention that the Amendment treats the tax on income as a direct tax although it is relieved from apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct, thus destroying the two great classifications which have been recognized and enforced from the beginning, is wholly without foundation since the command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived, forbids the application to such taxes of the rule applied in the Pollock case by which alone such taxes were removed from the great class of excises, duties, and imposts subject to the rule of uniformity, and were placed under the other or direct class."

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

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

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

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

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

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

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As pointed out previously, The Law, regardless of any intellectual pretensions about it, does not at bottom deal with some esoteric or highly specialized field of activity like the artistic valuation of symphonic music or higher calculus or biochemical experimentation. If it did, there would be reason and excuse for the use of language unfamiliar and unintelligible to ninety-nine people out of a hundred. Nor would the ninety-nine have any cause to care. But the fact is that Law deals with the ordinary affairs of ordinary human beings carrying on their ordinary daily lives. Why then should The Law use a language – language being, remember, no more than a means of communicating ideas – which those ordinary human beings cannot hope to understand?

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

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

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

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

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

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

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

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

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

Yet the lawyers, taken as a whole, cannot by any means be accused of *deliberately* hoodwinking the public with their devious dialectic and their precious principles and their longiloquent language. They, too, are blissfully unaware that the sounds they make are essentially empty of meaning. And this is not so strange. For self-deception, especially if it is self-serving, is one of the easiest of arts.

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

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

Strange as it may seem, it is his similar unwillingness to swallow the sacredness of The Law that has turned the lawyers, in a body, viciously against Justice Black today. They do not hate him because he is a New Dealer; so is Justice Reed whom they respect. They do not hate him because he was a Ku Kluxer; Justice McReynolds’ notorious and continuing racial intolerance has brought no squawks from the legal clan. The lawyers hate Black because he, too, without the age or the legal reputation of a Holmes to serve him as armor, has dared to doubt in print that there is universal truth behind accepted legal principles or solid substance behind legal language. “Why,” they say of him, “that Black doesn’t even know The Law.” Which only means that he knows The Law too well – for what it really is.

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

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

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

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

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

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

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

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Moreover, he will go on, the whole ideal and purpose of The Law is to maintain, in human relations and affairs, a well-known popular abstraction called “justice.” Try to define “justice” any more accurately than you can define any legal concept you can think of! As a matter of fact, the chief intent of The Law, as a complicated science, is to make the idea of “justice” *more* precise, to make it more readily and more certainly applicable to any fact situation, any problem, any dispute that may ever arise. And you can’t split an abstract ideal into separate parts – you can’t reduce it to principles and sub-principles – without phrasing them in abstract and therefore somewhat imprecise terms. Hence, legal language.

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

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

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

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

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

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

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

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

### CHAPTER IX

#### INCUBATORS OF THE LAW

*“The legal apprentice he sweats and he strains  
To memorize every principle;  
He’d learn a lot more in the end for his pains  
By studying something sinciple.” — Anon.*

As every good fascist knows, the perpetuation of the fascist fraud depends, in the long run, on the training of fledglings in the faith. The dictators catch their conscripts young and discipline them to think in goose-step. Promises of reward for the faithful and ominous warnings about the dangers of nonconformity play

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their part in making apprentices firmly believe a mass of lies, half-lies, and nonsense. Doubt, even the tiniest wondering doubt, is the cardinal sin. There are few heretics.

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

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

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

In order to teach apprentices how to talk the language and how to reason in the proper abstract circles, the law schools have divided The Law's mass of principles into big chunks. Each chunk represents a "field" of Law and is taught in a separate course, or courses. There are Contracts and Torts and Trusts. There are Constitutional Law and Criminal Law and Labor Law. There are "fields" and courses by the score. Of course, an actual case may fall into several "fields" at the same time. It may involve, for instance, the Constitution, and a crime and a labor dispute. But that will not faze the law schools. So far as they are concerned, it is the principles, not the cases, that really matter. And so the same case will show up in Constitutional Law and in Criminal Law and in Labor Law. It will not, however, show up in the same way. In Constitutional Law, the relevant principles of Constitutional Law will be examined. In Criminal Law, the relevant principles of Criminal Law will be examined. In Labor Law, the relevant principles of Labor Law will be examined. In each one of the courses, the aspects of the case that fall into the other two course-categories will be either glossed over or omitted entirely. A student may thus have to take three courses in order to understand thoroughly,

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even from the legal standpoint, what one decision is all about. But not in order to learn any one "field" of Law. Thus, law school courses, since they are cut out of the pseudo-science of Law, inevitably focus on generalities and abstractions rather than on the solution of specific problems. A student might even study a case in a dozen different courses – and thus learn all about The Law of the case – and still not have the slightest comprehension of, or insight into, the real down-to-earth factual difficulty or controversy that brought the case into court.

Sometimes a "field" of Law is too big to be stuffed into one course. For example, Property Law is commonly divided into Real Property and Personal Property (neither "real" nor "personal," of course, means what it means in everyday conversation) and Wills and Mortgages and Negotiable Instruments and several more. But then, Property Law is for the most part only a big branch of Contract Law. Moreover, Corporation Law, a "field" extensive enough to have various subdivisions of its own, is in essence nothing but a branch of Property Law. It is almost as hard to keep straight the hierarchy of legal "fields" and courses as it is to sort out the abstract principles of which the different courses are constructed. And either process is like trying to cut water with a knife.

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

Pleading and Procedure covers all the principles and rules of Law which govern the way lawyers may make use of other principles and rules of Law. If that sounds complicated, so is Pleading and Procedure. For P. and P. encompasses the code of precepts according to which the legal game is played, once a dispute actually starts

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on its way into court. And when you begin dealing with a lot of abstract principles about the proper manipulation of other abstract principles, you can't help getting somewhat confused.

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

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

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

By contrast, the rest of The Law, the "substantive" principles of Property and Quasi-Contracts (oh yes, there is that, too) and Corporations and all, are pounded into the young legal brain as Ultimate Truths about Life. Even after the apprentice

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graduates from law school, when he comes to take his bar examination, he will find the distinction carefully preserved. One part of his ordeal will test his knowledge of “substantive” Law; the other part will test his knowledge of Pleading and Procedure. One represents wisdom; the other represents skill.

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

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

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

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

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

Of course, the students did not have to fish in the dark. In each “field” of Law, a big bunch of opinions was gathered together by some recognized authority in that branch of legal learning and was then arranged, according to the principles illustrated by the opinions, in a “casebook.” The students then read the right cases in the right order and the principles practically popped out at them from the pages. The facts behind any case did not really matter and were often omitted entirely from the reprint of the judge’s opinion, as were the parts of the opinion that dealt with other “fields” of Law. What was important, still, was to learn the deathless principles, enhanced a bit in impressiveness by the fact that they were now taken right out of the judges’ mouths.

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

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

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

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

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

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confronted with weeping widows may all come into the discussion along with the doctrines of “contributory negligence,” “proximate cause,” and “the last clear chance.”

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

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

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

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

Those comparatively few students of those comparatively few law schools who do learn to recognize the great gap between worldly problems and legal principles – and who do not later fall prey to the propaganda of the trade they are practicing

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

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

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

## CHAPTER X

### A TOUCH OF SOCIAL SIGNIFICANCE

*“Laws grind the poor, and rich men rule the law.”* — Oliver Goldsmith.

In case it should not yet be perfectly apparent, it may be worth stating here and now that the purpose of this inquiry into The Law and its mysterious ways has not been – and is not – what today would be called a “socially significant” purpose. That is, it has not been to prove that The Law, in terms of its results, oppresses the poor and favors the rich and is a tool of the big corporations and is almost always found on the side of wealth, Wall Street, and the Republican Party. Practically every critical book on The Law ever written attempts to prove just that --and there are hundreds of them. The trouble with them all is not by any means that they are

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not, for the most part, quite right. The trouble is that they get just that far and no farther. Their authors, who are usually lawyers, have no basic quarrel with The Law as a method, a science, a technique of running the world. They merely want to see it work for their side. They are not out to tear down The Law. They are out to remodel it slightly so that its results suit them better.

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

Yet no inquiry into The Law could pretend to be complete without at least some slight consideration of The Law’s famous tautological boast about “equal justice for all.” For the boast is a lie. The Law not only can be bought – although usually not in so direct a fashion as it was bought from ex-Judge Manton – but most of the time it *has* to be bought. And since it has to be bought, its results tend to favor those who can afford to buy it.

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

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

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

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

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

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

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True, in a great many legal disputes, there will seem to be more principles of Law or more compelling – in the abstract – principles of Law available to one side than to the other. But the other side will always have some principles left to play with. And just as in the game of bridge, so in the game of Law, an expert player will beat a run-of-the-mill player nine times out of ten despite the fact that he may hold worse cards.

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

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

A several-million-dollar corporation recently complained in print about the terrific cost of carrying to and through the courts a protest against a ruling of the National Labor Relations Board. The point was well taken. Yet it serves quite nicely to emphasize the utter helplessness of the ordinary man with a grievance that he would like to expose to The Law. The corporation at least could and did afford to pay the thousands of dollars necessary to get a legal hearing on the wrong that it thought had been done it. But what chance, for instance, would an employee, or a customer, of the corporation have to air his complaint in court if he thought he had been unfairly and illegally treated by the U.S. Government – or, for that matter, by

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the corporation itself? The disadvantages of the corporation, up against the U.S. Government in a matter involving The Law, are as nothing compared to the advantages the corporation holds over every individual who works for it, buys from it, or invests in it wherever The Law is or might be concerned.

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

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

Yet most people who lose articles out of cars left in parking lots have scarcely a Chinaman's chance of getting a cent out of the lot owners. Most parking lots are owned by people or companies with money enough to buy legal advice beforehand. And so most parking checks are not plain pieces of cardboard with numbers on them. They have numbers on them all right, but on the back of the check or at the bottom is printed in small type "The owner of the car covenants that the bailee will not be held liable or responsible for the loss, theft, and/or damages of articles, etc." – or words to that effect. Courtesy of the legal advice, The Law has been carefully placed on one side of the potential lawsuit – without so much as the knowledge of one of the "parties to the contract" that it has been placed there – just in case.

It is the same – on a much larger and more complicated scale – with leases. It is the same with mortgages. It is the same with insurance policies. It is the same with stock issues and bond issues and all the other legal devices by which business

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

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

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

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

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New York. And financial arrangements and important business deals, even more than actual legal disputes, are what the lawyers thrive on.

Most New York lawyers spend most of their time working out legal advice for the business titans that make their financial headquarters in the city. It may be advice about how to word a series of mortgages or conditional-sale contracts or leases or stock certificates, so that the little fellows on the other side of the deals will have little or no chance for legal redress if they should later feel themselves cheated. It may be advice about an intercorporate transaction, where the sole real usefulness of the advice will be to counter any tricks of legal language that the other side, also advised by high-paid lawyers, might try to pull. It may be advice about how to get around a bothersome government regulation and still keep on good terms with The Law, which of course is more almighty than any government regulation – advice that thousands of smaller companies or less wealthy people would love to have too, if only they could afford it. It may be advice about how to make use of legal language so as to get out of paying taxes – as when J.P. Morgan, for all his yacht and his grouse-shooting, perfectly Legally avoided the federal income tax for a couple of years while hundreds of thousands of \$1500-a-year men had to chip in to the U.S. Treasury.

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

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

Here too is the kernel of another reason why The Law is kinder to the rich than to the poor. Not only are the most promising young hocus-pocus artists immediately lured to the service of those who pay them the highest wages for the magic, but out