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

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

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

A cynic might explain all this on the ground that The Law approves of gifts to churches and does not approve of gifts to chorus girls. The cynic would not be far wrong. Certainly the strange doctrine whereby mutual promises to give money to worthy causes are considered good legal Consideration for each other developed out of nothing more complicated than a desire on the part of the courts to keep people from welching on such promises. The Law, in order to uphold such promises, had to find Consideration somewhere, and found it. Or as the naïve layman would put it, Consideration was what there *was* when the courts wanted to uphold a promise and what there *wasn't* — and *isn't* — when the courts just plain don't care.

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

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

Without piling up examples any further, it is, then, apparent that Consideration can mean the digging of half a ditch, it can mean a cigarette, it can mean a promise by a total stranger to give money to a church, or it can mean a piece of sealing wax on a sheet of paper. Yet it is also apparent that none of these things has the slightest conceivable relation to any of the others. And the list of unrelated things that lawyers may label Consideration or that judges *have* labelled Consideration runs literally into the millions.

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

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

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

Thus, the layman who would have defined Consideration as what there *is* when a court upholds a promise and what there *isn't* when it refuses to uphold a promise is absolutely right. Consideration – and every other so-called concept or principle of The Law – amounts to a vague legal way of stating a result, applied to the result *after* the result is reached, instead of being, as the lawyers and judges stoutly pretend, a reason for reaching the result in the first place.

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

Now a super-intelligent and super-outspoken lawyer or judge may occasionally admit that his legal brethren are either fools or liars when they claim that the words and concepts and principles of The Law are any more than statements of results in legal language. But this same rare member of the profession will probably go on to defend the vast vocabulary of The Law – the Considerations and Malices and

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Domiciles and all the rest – on the theory that it provides at least a sort of legal shorthand, a convenient medium in which lawyers can talk to each other about their trade.

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

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

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

A court will solemnly purport to decide whether Tony is going to be paid for digging a ditch – on the basis of whether there was Consideration to support a Contract, just as though the idea of Consideration contained within itself, like a command from God, the right answer (or *any* answer). A court will solemnly purport to decide that the State of New Jersey may not regulate ticket scalpers – for the reason that the sale of theater tickets is a business Not Affected With a Public Interest. A court will solemnly purport to decide that the federal government may

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not supervise wages in the coal industry – on the ground that those wages have only an Indirect Effect on Interstate Commerce; (and then the same court will solemnly purport to decide that the federal government may force a steel company to deal with a union – on the ground that steel wages have a Direct Effect on Interstate Commerce). As though, in each case, the legal phrase used were anything more than a circumlocutious statement of the result, rather than a reason for arriving at it. As though, in *any* case, any abstract legal phrase could conceivably contain the right key – or any key – to the solution of a concrete social or political or human problem.

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

CHAPTER IV

THE LAW AT ITS SUPREMEST

“We are under a Constitution, but the Constitution is what the judges say it is.” — Charles Evans Hughes

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

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

But if, by any change, the solemn legal incantations of the Supreme Court itself can be shown up as empty, inept, or illogical rationalizations based on nothing more substantial than big words with blurred meanings, then it would not seem too unreasonable for any citizen to suppose that The Law as a whole is a lot of noxious nonsense.

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

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

When the Supreme Court deals with a case of this kind, it tosses around such abstract concepts as “consideration” and “contributory negligence” and the rest

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with the same abandon as does any other court, and it regularly purports to find the specific answer to the problem in some vague but “controlling” general principle. Yet it is perhaps unfair to examine or judge the Court on the score of these cases. In the first place, they are the least important that come before the Court. Furthermore, in most of these cases, the Court is handicapped – although by a rule of its own making – in being bound to follow The Law as laid down by the state courts in previous similar cases. In other words, the Court is merely seeing to it that state Law is fairly applied. It is in the other two kinds of cases that come before it – and these include practically all the significant and publicized decisions – that the Supreme Court is really on its own.

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

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

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

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

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

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

Not at all, said the Supreme Court, in substance, when it was asked to “interpret” and apply the statute. In the first place, we have a general principle to the effect that tax statutes are to be strictly construed in favor of the taxpayer. True, we also have a general principle of statutory construction to the effect that words are to be read in the light of their customary and accepted meaning (presumably the Court did not care to deny that “enjoyment” meant “enjoyment”) but the prior principle seems here to carry more weight. The fact that various state courts have interpreted identical words in their state death tax statutes so as to cover the type of transfer here at issue (the state courts had, almost unanimously) is not controlling upon us (the *Supreme* Court). Finally there is the compelling fact that the decedent (i.e. the dead man) had completely divested himself of title to the property before his death. (Indeed he had, according to The Law, but Congress had said nothing about legal title; it was the taking effect of enjoyment that was supposed to matter.) At any rate, concluded the nine solons, the dodge works; the statute doesn’t cover this case; no tax.

The pay-off came the very day after the decision was handed down. On that day Congress amended the statute so that the estate tax even more specifically applied to transfers of property in which the original owner hung on to the income for

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himself until his death. Of course a couple of tax lawyers hopefully asked the Supreme Court to rule that, under certain circumstances at least, this didn't mean what it said either. But this time the Court upheld the tax; this time the second principle of statutory construction as outlined above outweighed the first principle.

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

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

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

From the practical or non-legal viewpoint, Constitutional Law adds up, simply, to a list of all those instances where the Supreme Court as said to Congress or to a state legislature, "You mayn't enforce that statute," – or where it has said to a federal or state executive officer or administrative board, "You mayn't carry out that ruling." The instances where the Court has said, "You may" don't count – from a practical

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viewpoint. There, the situation would have remained exactly the same if the Supreme Court had never said anything.

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

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

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

Yet, granting that by custom if by nothing more, the last word does belong to the Supreme Court, the question remains – how, and how well, has the Court exercised this powerful privilege, as applied to the laws of the states as well as to those of the nation? Have its constitutional decisions been models of logic, statesmanship, and

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justice? Or have they, perhaps, been cut out of the same old legal cheese-cloth – abstract concepts, ambiguous words, and ambidextrous principles?

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

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

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

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

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

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To help it answer these questions the Supreme Court has evolved – and this will be a big surprise – a batch of general principles. There is the general principle that a regulation which is a proper exercise of the state police power is valid but that a regulation which does not fall within the police power is deprivation of property without due process of law. There is a general principle that businesses affected with a public interest may, by and large, be regulated but that to regulate a business not so affected is a d.o.p.w.d.p.o.l. There is a g. p. that a tax on anything over which the state has jurisdiction is proper, but that a tax on something over which the state has no jurisdiction is a d.o.p., etc. And so on.

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

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

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

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

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

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

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

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

Nor should it be supposed that the silly house-of-cards logic of Constitutional Law works only in what might be called unprogressive ways. True, most of the state statutes the Supreme Court has condemned as “violating” the “due process” clause of the Fourteenth Amendment have been such measures as minimum wage laws, laws protecting labor union activities, laws and rulings setting public utility rates, certain types and uses of income and inheritance taxes, and other restrictions on the

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business of making money and keeping it. But, as mentioned before, the word-magic of legal processes recognizes no socially significant limitations. Constitutional Law can be just as illogical and irrelevant on the liberal side.

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

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

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

Though the bulk of Constitutional Law as applied to the states stems in a mystic manner from the “due process” clause of the Fourteenth Amendment, its parent clause in the Fifth Amendment has not been used or needed so often as an excuse for calling federal laws unconstitutional. Railway workers were doubtless

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interested to learn that the Congressional outlawing of yellow dog contracts – contracts forbidding membership in a labor union – deprived the railroad companies of liberty and property without due process of law. Women who worked in Washington, D.C., were doubtless fascinated to hear that their employers had been similarly deprived, by a Congressional act setting minimum wages for women. Both the railway men and the Washington women were probably especially impressed to be told by the Supreme Court that anti-union discrimination and sweatshop wages were protected against Congressional interference by none other than the American Bill of Rights – of which the Fifth Amendment is, of course, a part.

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

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

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

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strictest strict constructionists. All, of course, in the name of The Law – and the Founding Fathers.

There is, for instance, a clause of the Constitution (the original Constitution, for a change) to the effect that “The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the . . . general welfare of the United States.” Lawyers and law professors and judges have written tracts and treatises and whole books about the meaning of this clause. The strict construction boys say it means that Congress can collect taxes, etc. *in order to* pay the debts and provide for the general welfare of the people. The loose construction boys say it means that Congress can collect taxes *and also* pay debts *and also* – with laws that aren’t necessarily tax laws – provide for the general welfare. You can guess which side the Supreme Court is on. Why? Why, because that’s what the Founding Fathers meant – which, as a matter of historical record, they almost surely didn’t; and because of the Tenth Amendment – which obviously has nothing whatsoever to do with the case.

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

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

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an appropriation in aid of agriculture falls within it.” Then why, in heaven’s name, isn’t the A.A.A. perfectly constitutional as a tax to promote the general welfare, which you grant Congress has the right to enact? Because it uses the tax money to accomplish an unconstitutional purpose, namely, federal regulation of farmers.

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

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

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

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

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

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

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

The basic principle that the Court made up is that Congress may not delegate or hand over any of its lawmaking power to anyone else. Now it is clear that if this principle were really followed there wouldn't be any United States government. All the thousands of rules and regulations and orders, little laws every one of them, that are formulated day after day by every branch of the government – by the commissions, like the Interstate Commerce Commission and the Federal Trade Commission, by the departments, all ten of them, and by the branches and bureaus of the departments, like the Patent Office and the Coast Guard and the rest – all these rules and regulations would have to be passed by Congress itself. It is only because Congress has always delegated the largest part of its lawmaking power, after laying down the broad, general outlines of a law, that the federal government has been able to function at all.

But the Supreme Court, as might be expected, has an answer to all this. It is in the form of sub-principle or exception to the primary principle. It is that Congress may

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

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

It developed, as it always does, that there were sub-principles. The Court discovered one to the effect that the federal government, while it could not tax the "governmental functions" of the state governments, *could* tax the "non-governmental functions" of the state governments – which may sound confusing to a non-lawyer in that it is hard to think of something done by a government being non-governmental, but which was perfectly clear to the Supreme Court. Also, while a "direct" tax levied by a state on something connected with the federal government was all wrong, an "indirect" tax was all right. Now, for some reason wrung from the metaphysical reaches of Constitutional Law, the Court considers an inheritance tax an "indirect" tax. Therefore any state can slap on a tax when a man dies and leaves his federal bonds to his wife. But since an income tax is a "direct" tax, no state can tax the man – or his wife either – on the income he makes from those federal bonds. Presumably – going back to the primary principle – such a tax might destroy the federal government.

The corresponding immunity of state bonds from the federal income tax raises yet another question. Can you necessarily change the Supreme Court's notions about Constitutional Law even by amending the Constitution? Apparently not. For the income tax amendment gave Congress the power to tax incomes "from whatever source derived." The words could scarcely be plainer or stronger, and part of the

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reason for writing them in was to put an end to the immunity rule so far as the federal income tax was concerned. But the Court still says that it is unconstitutional for the federal government to tax the income from state bonds. Thus, the unwritten piece of the Constitution that the Court discovered all by itself carries more weight with the Court than the written words of the document.

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

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

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

Thus it can happen – and has often happened – that one man, one judge, holds the “meaning” of the Constitution in his hands. This possibility was never more

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strikingly illustrated than when, less than a year after the Court called a New York minimum wage law for women unconstitutional, it called a Washington state minimum wage law for women constitutional – all because one man, Justice Roberts, voted on the other side. It seems that the New York statute deprived employers of their property without due process of law and therefore violated the Fourteenth Amendment, whereas the almost identical Washington statute was a proper exercise of the state police power and therefore didn't violate anything. Of course, it was not the principles, the basic Law, that changed with Justice Roberts' mind. It was merely that in one case, one principle was “controlling”; in the other case, it gave way to a different principle.

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

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

CHAPTER V

NO TAX ON MAX

*“If the law supposes that,’ said Mr. Bumble...,
‘the law is a ass, a idiot.’”* — Charles Dickens

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

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of this little experiment in vivisection will be a case known to the lawyers as *Senior v. Braden*. It was decided by the Supreme Court in the spring of 1935.

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

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

In short, *Senior v. Braden* is today an integral and respectable part of *The Law of the Land* as set forth by the top craftsmen of the profession. Here, then, interspersed with an almost literal translation of each paragraph into non-legal language, and with a few pertinent (or maybe impertinent) comments, is the Supreme Court's opinion in *Senior v. Braden*. Hang on to your hats: —

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

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

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

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

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

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

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

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

“The validity of the tax under the federal Constitution is challenged. Accordingly we must ascertain for ourselves upon what it was laid. Our concern is with realities, not nomenclature. *Moffitt v. Kelly*, 218 U.S. 400, 404, 405; *Macallen Co. v. Massachusetts*, 279 U.S. 6230, 625, 626; *Educational Films Corporation v. Ward*, 282 U.S. 379, 387; *Lawrence v. State Tax Commission* 286 U.S. 276, 280. If the thing here sought to be subjected to taxation is really an interest in land, then

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by concession the proposed tax is not permissible. The suggestion that the record discloses no federal question is without merit.”

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

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

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

“The trust certificates severally declare: — That Max Senior has purchased and paid for and is the owner of an undivided 340/1275 interest in the Lincoln Inn Court property; that he is registered on the books of the trustee as the owner of 5/3250 of the equitable ownership and beneficial interest in the Clark Randolph Building Site, Chicago; that he is the owner of 6/1050 of the equitable ownership and beneficial interest in the East Sixth street property, Cleveland. In each declaration the trustee undertakes to hold and manage the property for the use and benefit of all certificate owners; to collect and distribute among them the rents; and in case of sale to make pro rata distribution of the proceeds. While certificates and declarations vary in some details, they represent beneficial interests which, for present purposes, are not substantially unlike. Each trustee holds only one piece of land and is free from control by the beneficiaries. They are not joined with it in management. See *Hecht v. Malley*, 265 U.S. 144, 147.”

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

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

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

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

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

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

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

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

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

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

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

“Apparently no opinion of any court definitely accepts the theory now advanced by appellees, but some writers do give it approval because of supposed consonance with general legal principles. The conflicting views are elaborated in articles by Professor Scott and Dean Stone in 17 Columbia Law Review (1917) at pp. 269 and 467.”

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

“Maguire v. Trefry, 253 U.S. 12, much relied upon by appellees, does not support their position. There the Massachusetts statute undertook to tax incomes; the securities (personality) from which the income arose were held in trust at Philadelphia; income from securities taxable directly to the trustee was not within the statute. The opinion accepted and followed the doctrine of Blackstone v. Miller, 188 U.S. 189, and Fidelity & Columbia Trust Co. v. Louisville, 245 U.S. 54. Those cases were disapproved by Farmers' Loan & Trust Co. v. Minnesota,

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280 U.S. 204. They are not in harmony with *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83, and views now accepted here in respect of double taxation. See *Baldwin v. Missouri*, 281 U.S. 586; *Beidler v. South Carolina Tax Commission*, 282 U.S. 1; *First National Bank v. Maine*, 284 U.S. 312.”

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

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

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

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

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(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.

* * * * *

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?