

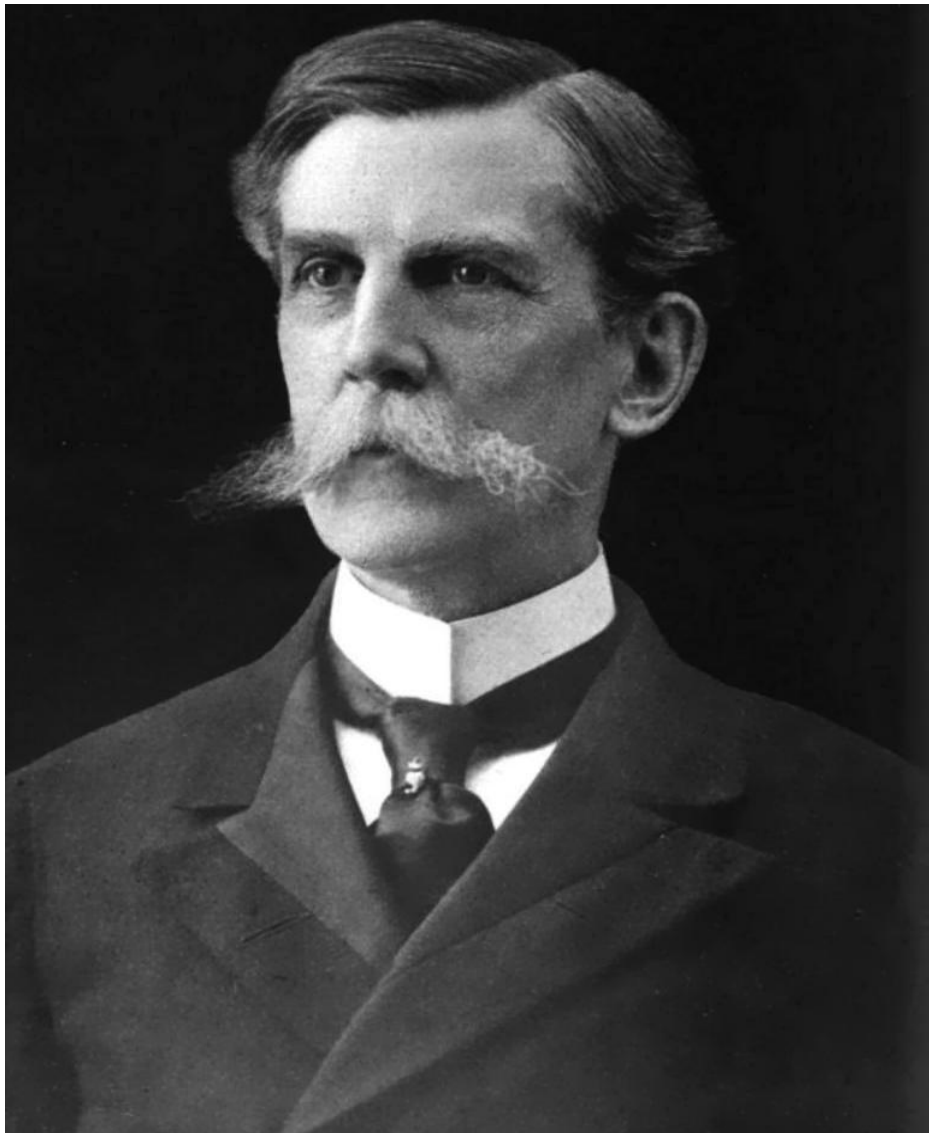
LAW IN SCIENCE AND SCIENCE IN LAW

BY

Oliver Wendell Holmes

Associate Justice

Massachusetts Supreme Judicial Court



On January 17, 1899, Oliver Wendell Holmes, Jr., Associate Justice of the Supreme Judicial Court of Massachusetts, delivered an address to the New York State Bar Association. His subject was “Law in Science and Science in Law.” It was his last major extra-judicial writing.

He struck at old targets: the willingness of lawyers and judges to repeat old common law rules, “catch phrases” and generalizations. He saw an element of mental laziness in the frequent application of outdated doctrines, just “empty words” that have survived. Ever the skeptic, he noted “the blind imitateness” and “the paucity of original ideas in man.” As usual, there are memorable epigrams: “[C]ontinuity with the past is only a necessity and not a duty.” “[T]he generalizing principle will prevail, as generalization so often prevails, even in advance of evidence, because of the ease of mind and comfort which it brings.” “Any solution in general terms seems to me to mark a want of analytic power.” He was tough on the bench:

Judges commonly are elderly men, and are more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties. Every living sentence which shows a mind at work for itself is to be welcomed. It is not the first use but the tiresome repetition of inadequate catch words upon which I am observing,—phrases which originally were contributions, but which, by their very felicity, delay further analysis for fifty years. That comes from the same source as dislike of novelty,—intellectual indolence or weakness,—a slackening in the eternal pursuit of the more exact.

It is imperative that judges, lawyers and scholars “scrutinize” the reasons for a common law doctrine to see if it still makes sense, whether it fits conditions of the present day. Here historical

inquiry is important: “History sets us free and enables us to make up our minds dispassionately whether the survival [of a rule of law] which we are enforcing answers any new purpose when it has ceased to answer the old.” And he is clear that judges make policy choices in close cases, a candor that attracted Legal Realists a generation later:

We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true. . . . But inasmuch as the real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire, it is no less necessary that those who make and develop the law should have those ends articulately in their minds. I do not expect or think it desirable that the judges should undertake to renovate the law. That is not their province. . . . But I think it most important to remember whenever a doubtful case arises, with certain analogies on one side and other analogies on the other, that what really is before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way. The social question is which desire is strongest at the point of conflict. The judicial one may be narrower, because one or the other desire may have been expressed in previous decisions to such an extent that logic requires us to assume it to preponderate in the one before us. But if that be clearly so, the case is not a doubtful one. Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious the judges are called on to exercise the sovereign prerogative of choice.

The influence of Darwin on Holmes, noted by his biographers and intellectual legal historians, is apparent in his belief that there is a “struggle for life among competing ideas, and of the ultimate

victory and survival of the strongest.” And in close cases, where there is a “conflict between two social desires,” the question becomes which is “strongest at the point of conflict.” It is here that the “science” can benefit the law by liberating it from an over reliance on tradition:

[T]he practical study of the law ought also to be scientific. The true science of the law does not consist mainly in a theological working out of dogma or a logical development as in mathematics, or only in a study of it as an anthropological document from the outside; an even more important part consists in the establishment of its postulates from within upon accurately measured social desires instead of tradition.

He concluded:

Gentlemen, I have tried to show by examples something of the interest of science as applied to the law, and to point out some possible improvement in our way of approaching practical questions in the same sphere. To the latter attempt, no doubt, many will hardly be ready to yield me their assent. But in that field, as in the other, I have had in mind an ultimate dependence upon science because it is finally for science to determine, so far as it can, the relative worth of our different social ends, and, as I have tried to hint, it is our estimate of the proportion between these, now often blind and unconscious, that leads us to insist upon and to enlarge the sphere of one principle and to allow another gradually to dwindle into atrophy. Very likely it may be that with all the help that statistics and every modern appliance can bring us there never will be a commonwealth in

which science is everywhere supreme. But it is an ideal, and without ideals what is life worth?

To the question of whether others in the legal profession shared his belief in using “science” to guide developments in the law, we may look at him years later, when he sits on the United States Supreme Court. The cases that come before him challenge laws on child labor and working hours for women, reform legislation that displaces hoary common law doctrines, licensing and regulations of businesses, among others, and in each there is a fierce clash of values, interests, ideals, and the worthiness of these means to socially desired ends. Sitting in the library in his home on I Street in Washington, Holmes reads the briefs in these cases. Besides precedents and treatises, a few also cite studies of labor economists, articles by psychologists, books by sociologists, and some contain tables of statistics. The time of judges and lawyers who recognize, as he did, the importance of science in the law – that is, social science – has arrived.

Holmes’ address was published in the *Harvard Law Review* a month later. It has been reformatted, footnotes renumbered and page breaks added. Otherwise it is complete.

HARVARD LAW REVIEW

Vol. XII

FEBRUARY 25, 1899.

NO. 7

LAW IN SCIENCE AND SCIENCE IN LAW. ¹

BY OLIVER WENDELL HOLMES.

THE law of fashion is a law of life. The crest of the wave of human interest is always moving, and it is enough to know that the depth was greatest in respect of a certain feature or style in literature or music or painting a hundred years ago to be sure that at that point it no longer is so profound. I should draw the conclusion that artists and poets, instead of troubling themselves about the eternal, had better be satisfied if they can stir the feelings of a generation, but that is not my theme. It is more to my point to mention that what I have said about art is true within the limits of the possible in matters of the intellect. What do we mean when we talk about explaining a thing? A hundred years ago men explained any part of the universe by showing its fitness for certain ends, and demonstrating what they conceived to be its final cause according to a providential scheme. In our less theological and more scientific day, we explain an object by tracing the order and process of its growth and development from a starting point assumed as given.

1. An Address delivered by Mr. Justice Holmes before the New York State Bar Association on January 17, 1899.—Ed.

This process of historical explanation has been applied to the matter of our profession, especially of recent years, with great success, and with so much eagerness, and with such a feeling that when [444] you had the true historic dogma you had the last word not only in the present but for the immediate future, that I have felt warranted heretofore in throwing out the caution that continuity with the past is only a necessity and not a duty. As soon as a legislature is able to imagine abolishing the requirement of a consideration for a simple contract, it is at perfect liberty to abolish it, if it thinks it wise to do so, without the slightest regard to continuity with the past. That continuity simply limits the possibilities of our imagination, and settles the terms in which we shall be compelled to think.

Historical explanation has two directions or aspects, one practical and the other abstractly scientific. I by no means share that morality which finds in a remoter practice the justification of philosophy and science. I do not believe that we must justify our pursuits by the motive of social well-being. If we have satisfied ourselves that our pursuits are good for society, or at least not bad for it, I think that science, like art, may be pursued for the pleasure of the pursuit and of its fruits, as an end in itself. I somewhat sympathize with the Cambridge mathematician's praise of his theorem, "The best of it all is that it can never by any possibility be made of the slightest use to anybody for anything." I think it one of the glories of man that he does not sow seed, and weave cloth, and produce all the other economic means simply to sustain and multiply other sowers and weavers that they in their turn may multiply, and so *ad infinitum*, but that on the contrary he devotes a certain part of his economic means to uneconomic ends — ends, too, which he finds in himself and not elsewhere. After the production of food and cloth has gone on a certain time, he stops producing and goes to the play, or he paints a picture, or asks unanswerable questions about the universe, and thus delightfully consumes a part of the world's food and clothing while he idles away the only hours that fully account for themselves.

Thinking in this way, you readily will understand that I do not consider the student of the history of legal doctrine bound to have a practical end in view. It is perfectly proper to regard and study the law simply as a great anthropological document. It is proper to resort to it to discover what ideals of society have been strong enough to reach that final form of expression, or what have been the changes in dominant ideals from century to century. It is proper to study it as an exercise in the morphology and transformation of human ideas. The study pursued for such ends becomes science [445] in the strictest sense. Who could fail to be interested in the transition through the priest's test of truth,² the miracle of the ordeal, and the soldier's, the battle of the duel, to the democratic verdict of the jury! Perhaps I might add, in view of the great increase of jury-waived cases, a later transition yet — to the commercial and rational test of the judgment of a man trained to decide.

It is still only the minority who recognize how the change of emphasis which I have called the law of fashion has prevailed even in the realm of morals. The other day I was looking over Bradford's history — the book which Mr. Bayard brought as a gift from Lambeth to the Massachusetts State House — and I was struck to see recounted the execution of a man with horrible solemnities for an offence which still, to be sure, stands on the statute book as a serious crime, but which no longer is often heard of in court, which many would regard as best punished simply by the disgust of normal men, and which a few would think of only as a physiological aberration, of interest mainly to the pathologist. I found in the same volume the ministers consulted as the final expounders of the law, and learnedly demonstrating that what now we should consider as needing no other repression than a doctor's advice, was a crime punishable with death and to be ferreted out by searching the conscience of the accused, although after discussion it was thought that torture should be reserved for state occasions.

2. I do not forget that the church abolished the ordeal.

To take a less odious as well as less violent contrast, when we read in the old books that it is the duty of one exercising a common calling to do his work upon demand and do it with reasonable skill, we see that the gentleman is in the saddle, and means to have the common people kept up to the mark for his convenience. We recognize the imperative tone which in our day has changed sides, and is oftener to be heard from the hotel clerk than from the guest.

I spoke of the scientific study of the morphology and transformation of human ideas in the law, and perhaps the notion did not strike all of you as familiar. I am not aware that the study ever has been systematically pursued, but I have given some examples as I have come upon them in my work, and perhaps I may mention some now by way of illustration, which, so far as I know, have not been followed out by other writers. In the *Lex Salica*³— the law of the Salian Franks — you find going back to the fifth century a very mysterious person, later ⁴ named the *salmannus*—the *saleman*—a [446] third person who was called in to aid in completing the transfer of property in certain cases. The donor handed to him a symbolic staff which he in due season handed over in solemn form to the donee. If we may trust M. Dareste, and take our information at second hand, a copious source of error, it would look as if a similar use of a third person was known to the Egyptians and other early peoples. But what is certain is that we see the same form used down to modern times in England for the transfer of copyhold. I dare say that many of you were puzzled, as I was when I was a law student, at the strange handing over of a staff to the lord or steward of the manor as a first step toward conveying copyhold land to somebody else. It really is nothing but a survival of the old form of the Salic law, as M. Vinogradoff at last has noticed, in his work on

3. Merkel, c. 46.

4. A. D. 1108, Beseler, 263, n.

Villainage in England. There you have the Salic device in its original shape. But it is the transformations which it has undergone to which I wish to call your attention. The surrender to the steward is expressed to be to the use of the purchaser or donee. Now, although Mr. Kenelm Digby in his History of the Law of Real Property warns us that this has nothing to do with the doctrine of uses, I venture to think that, helped by the work of learned Germans as to the development of the saleman on the continent, I have shown heretofore that the saleman became in England the better known feoffee to uses, and thus that the connection between him and the steward of the manor when he receives the surrender of a copyhold is clear. But the executor originally was nothing but a feoffee to uses. The heir was the man who paid his ancestor's debts and took his property. The executor did not step into the heir's shoes, and come fully to represent the person of the testator as to personal property and liabilities until after Bracton wrote his great treatise on the laws of England. Surely a flower is not more unlike a leaf, or a segment of a skull more unlike a vertebra, than the executor as we know him is remote from his prototype, the saleman of the Salic law. I confess that such a development as that fills me with interest, not only for itself, but as an illustration of what you see all through the law — the paucity of original ideas in man, and the slow, coasting way in which he works along from rudimentary beginnings to the complex and artificial conceptions of civilized life. It is like the niggardly uninventiveness of nature in its other manifestations, with its few smells or colors or types, its short list of elements, working along in the same slow way from compound to compound until the dramatic impressiveness of the most intricate [447] compositions, which we call organic life, makes them seem different in kind from the elements out of which they are made, when set opposite to them in direct contrast.

In a book which I printed a good many years ago I tried to establish another example of the development and transformation of ideas. The early law embodied hatred for any immediate source of hurt, which comes from the association of ideas and

imperfect analysis, in the form of proceedings against animals and inanimate objects, and of the *noxæ deditio* by which the owner of the offending thing surrendered it and was free from any further liability. I tried to show that from this primitive source came, in part at least, our modern responsibility of an owner for his animals and of a master for his servants acting within the scope of their employment, the limited liability of shipowners under the law which allows them to surrender their vessel and free themselves, and that curious law of deodand, under which a steam engine was declared forfeited by the Court of Exchequer in 1842.⁵ I shall have to suggest later that it played a part also in the development of contract.

Examples like these lead us beyond the transformations of an idea to the broader field of the development of our more general legal conceptions. We have evolution in this sphere of conscious thought and action no less than in lower organic stages, but an evolution which must be studied in its own field. I venture to think that the study is not yet finished. Take for instance the origin of contract. A single view has prevailed with slight modifications since Sohm published "*Das Recht der Eheschliessung*" in 1875. But fashion is potent in science as well as elsewhere, and it does not follow because Sohm smashed his predecessor that there may not arise a later champion who will make some impact upon him. Sohm, following a thought first suggested, I believe, by Savigny, and made familiar by Maine in his "*Ancient Law*," sees the beginning of contract in an interrupted sale. This is expressed in later law by our common law Debt, founded upon a *quid pro quo* received by the debtor to the creditor. Out of this, by a process differently conceived by different writers, arises the formal contract, the *fides facta* of the Salic law, the covenant familiar to us. And this dichotomy exhausts the matter. I do not say that this may not be proved to be the final and correct [448] account, but there are some considerations which I should like to suggest in a summary way. We are not bound to assume with Sohm that his Frankish

5. *Regina v. Eastern Counties Railway Co.*, 10 M. & W. 59.

ancestors had a theory in their heads which, even if a trifle inarticulate, was the majestic peer of all that was done at Rome. The result of that assumption is to lead to the further one, tacitly made, but felt to be there, that there must have been some theory of contract from the beginning, if only you can find what it was. It seems to me well to remember that men begin with no theory at all, and with no such generalization as contract. They begin with particular cases, and even when they have generalized they are often a long way from the final generalizations of a later time. Down into this century consideration was described by enumeration, as you may see in Tidd's "Practice," or Blackstone,⁶ and only of late years has it been reduced to the universal expression of detriment to the promisee. So, bailment was Bailment and nothing further until modern times. It was not contract. And so warranty was Warranty, a duty imposed by law upon the vendor, and nothing more.⁷ A trust still is only a Trust, although according to the orthodox it creates merely a personal obligation.

Well, I have called attention elsewhere to the fact that giving hostages may be followed back to the beginning of our legal history, as far back as sales, that is, and that out of the hostage grew the surety, quite independently of the development of debt or formal contract. If the obligation of the surety, who, by a paradox explained by his origin, appears often in early law without a principal contractor, as the only party bound, had furnished the analogy for other undertakings, we never should have had the doctrine of consideration. If other undertakings were to be governed by the analogy of the law developed out of sales, sureties must either have received a *quid pro quo* or have made a covenant. There was a clash between the competing ideas, and just as commerce was prevailing over war the

6. 1 Tidd, ch. 1; 2 Bl. Comm. 444, 445.

7. Glanv. x, ch. 15; Bracton, 151; I Löning, Vertragsbruch, § 14, p. 103; cf. Sohm, Inst. Rom. Law, § 46, § 11, n. 7.

children of the sale drove the child of the hostage from the field. In the time of Edward III, it was decided that a surety was not bound without a covenant, except in certain cities where local custom maintained the ancient law. Warranty of land came to require, and thus to be, a covenant in the same way, although the warranty of title upon a sale of chattels still [449] retains its old characteristics, except that it now is thought of as a contract.⁸

But the hostage was not the only competitor for domination. The oath also goes back as far as the history of our race.⁹ It started from a different point, and, leaving the possible difference of sanction on one side, it might have been made to cover the whole field of promises. The breach of their promissory oath by witnesses still is punished as perjury, and formerly there were severe penalties for the jury if convicted of a similar offence by attain. ¹⁰ The solemnity was used for many other purposes, and, if the church had had its way, the oath, helped by its cousin the plighting of troth, would have been very likely to succeed. In the time of Henry III., faith, oath, and writing, that is, the covenant, were the popular familiar forms of promise. The plighting of a man's faith or troth, still known to us in the marriage ceremony, was in common use, and the courts of the church claimed jurisdiction over it as well as over the oath. I have called attention elsewhere to a hint of inclination on the part of the early clerical chancellors to continue the clerical jurisdiction in another court, and to enforce the ancient form of obligation. Professor Ames has controverted my suggestion, but I cannot but think it of significance that down to later times we still find the

8. Y. B., 13 & 14 Ed. III. 80.

9. Cæsar, B. G., iv, 11; Ammianus Marcellinus, xvii, I, 13, *jurantes conceptis ritu patrio* verbis.

10. Bracton, 292 b.

ecclesiastical tribunals punishing breach of faith or of promissory oaths with spiritual penalties. When we know that a certain form of undertaking was in general use, and that it was enforced by the clergy in their own courts, a very little evidence is enough to make us believe that in a new court, also presided over by a clergyman and with no substantive law of its own, the idea of enforcing it well might have been entertained, especially in view of the restrictions which the civil power put upon the church. But oath and plighting of troth did not survive in the secular forum except as an occasional solemnity, and I have mentioned them only to show a lively example of the struggle for life among competing ideas, and of the ultimate victory and survival of the strongest. After victory the law of covenant and debt went on, and consolidated and developed their empire in a way that is familiar to you all, until they in their turn lost something of their power and prestige in consequence of the rise of a new rival, Assumpsit. [450]

There were other seeds which dropped by the wayside in early law, and which were germs of relations that now might be termed contractual, such as the blood covenant, by which people bound themselves together or made themselves of one substance by drinking the blood or eating the flesh of a newly killed animal. Such was the fiction of family relationship, by which, for instance, the Aedui symbolized their alliance with the Romans.¹¹ I may notice in this connection that I suspect that the *mundium* or early German guardianship was the origin of our modern bail, while, as I have said, the surety came from a different source. I mention these only to bring still closer home the struggle for existence between competing ideas and forms to which I have referred. In some instances the vanquished competitor has perished. In some it has put on the livery of its

11. Strabo, iv, 32.

conqueror, and has become in form and external appearance merely a case of covenant or assumpsit.

Another important matter is the way in which the various obligations were made binding after they were recognized. A breach of oath of course brought with it the displeasure of the gods. In other cases, as might be expected, we find hints that liabilities of a more primitive sort were extended to the new candidates for legal recognition. In the Roman law a failure to pay the price of a purchase seems to have suggested the analogy of theft. All over the world slavery for debt is found, and this seems not to have stood on the purely practical considerations which first would occur to us, but upon a notion akin to the noxal surrender of the offending body for a tort. There is a mass of evidence that various early contracts in the systems of law from which our own is descended carried with them the notion of pledging the person of the contracting party, — a notion which we see in its extreme form in the seizure or division of the dead body of the debtor,¹² and which seems to come out in the maxim *Debita inhaerent ossibus debitoris*.

I am not going to trace the development of every branch of our law in succession, but if we turn to the law of torts we find there, perhaps even more noticeably than in the law of contracts, another evolutionary process which Mr. Herbert Spencer has made familiar to us by the name of Integration. The first stage of torts embraces little if anything beyond those simple acts of violence [451] where the appeals of death, of wounding or maiming, of arson and the like had taken the place of self-help, to be succeeded by the modification known as the action of trespass. But when the action on the case let libel and slander

12. See, e. g., *Three Metrical Romances*, Camden Soc. 1842, introd. page xxvi and cantos xii & xxii; Boccaccio, Bohn's tr. page 444 n., referring to an old English ballad.

and all the other wrongs which are known to the modern law into the civil courts, for centuries each of the recognized torts had its special history, its own precedents, and no one dreamed, so far as I know, that the different cases of liability were, or ought to be, governed by the same principles throughout. As is said in the preface to Mr. Jaggard's book, "the use of a book on Torts, as a distinct subject, was a few years ago a matter of ridicule." You may see the change which has taken place by comparing Hilliard on Torts, which proceeds by enumeration in successive chapters through assault and battery, libel and slander, nuisance, trespass, conversion, etc., with Sir Frederick Pollock's Introduction, in which he says that the purpose of his book "is to show that there really is a Law of Torts, not merely a number of rules of law about various kinds of torts—that this is a true living branch of the Common Law, not a collection of heterogeneous instances." It would be bold, perhaps, to say that the integration was complete, that it did not rest partly in tendency. The recent much discussed case of *Allen v. Flood*, in the House of Lords, seems to me to indicate that, in the view of the older generation even of able and learned men, the foundation of liability still is somewhat in the air, and that tradition and enumeration are the best guides to this day. But I have no doubt that the generalizing principle will prevail, as generalization so often prevails, even in advance of evidence, because of the ease of mind and comfort which it brings.

Any one who thinks about the world as I do does not need proof that the scientific study of any part of it has an interest which is the same in kind as that of any other part. If the examples which I have given fail to make the interest plain, there is no use in my adding to them, and so I shall pass to another part of my subject. But first let me add a word. The man of science in the law is not merely a bookworm. To a microscopic eye for detail he must unite an insight which tells him what details are significant. Not every maker of exact investigation counts, but only he who directs his investigation to a crucial point. But I doubt if there is any more exalted form of life than that of a great abstract

thinker, wrapt in the successful study of problems to which he devotes himself, for an end which is neither unselfish nor selfish in the com-[542]-mon sense of those words, but is simply to feed the deepest hunger and to use the greatest gifts of his soul.

But after all the place for a man who is complete in all his powers is in the fight. The professor, the man of letters, gives up one-half of life that his protected talent may grow and flower in peace. But to make up your mind at your peril upon a living question, for purposes of action, calls upon your whole nature. I trust that I have shown that I appreciate what I thus far have spoken of as if it were the only form of the scientific study of law, but of course I think, as other people do, that the main ends of the subject are practical, and from a practical point of view, history with which I have been dealing thus far, is only a means, and one of the least of the means, of mastering a tool. From a practical point of view, as I have illustrated upon another occasion, its use is mainly negative and skeptical. It may help us to know the true limit of a doctrine, but its chief good is to burst inflated explanations. Every one instinctively recognizes that in these days the justification of a law for us cannot be found in the fact that our fathers always have followed it. It must be found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants. And when a lawyer sees a rule of law in force he is very apt to invent, if he does not find, some ground of policy for its base. But in fact some rules are mere survivals. Many might as well be different, and history is the means by which we measure the power which the past has had to govern the present in spite of ourselves, so to speak, by imposing traditions which no longer meet their original end. History sets us free and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old. Notwithstanding the contrasts which I have been making, the practical study of the law ought also to be scientific. The true science of the law does not consist mainly in a theological working out of dogma or a logical

development as in mathematics, or only in a study of it as an anthropological document from the outside; an even more important part consists in the establishment of its postulates from within upon accurately measured social desires instead of tradition. It is this latter part to which I now am turning, and I begin with one or two instances of the help of history in clearing away rubbish, — instances of detail from my own experience. [453]

Last autumn our court had to consider the grounds upon which evidence of fresh complaint by a ravished woman is admitted as part of the government's case in an indictment for rape. All agree that it is an exception to the ordinary rules of evidence to allow a witness to be corroborated by proof that he has said the same thing elsewhere when not under oath, except possibly by way of rebuttal under extraordinary circumstances. But there is the exception, almost as well settled as the rule, and courts and lawyers finding the law to be established proceed to account for it by consulting their wits. We are told that the outrage is so great that there is a natural presumption that a virtuous woman would disclose it at the first suitable opportunity. I confess that I should think this was about the last crime in which such a presumption could be made, and that it was far more likely that a man who had had his pocket picked or who had been the victim of an attempt to murder would speak of it, than that a sensitive woman would disclose such a horror. If we look into history no further than Hale's "Pleas of the Crown," where we first find the doctrine, we get the real reason and the simple truth. In an appeal of rape the first step was for the woman to raise hue and cry. Lord Hale, after stating that fact, goes on to say that upon an indictment for the same offence the woman can testify, and that her testimony will be corroborated if she made fresh complaint and pursued the offender. That is the hue and cry over again. At that time there were few rules of evidence. Later our laws of evidence were systematized and developed. But the authority of Lord Hale has caused his dictum to survive as law in the particular case, while the principle upon which it would have

to be justified has been destroyed. The exception in other words is a pure survival, having nothing or very little to back it except that the practice is established.¹³

In a somewhat earlier case¹⁴ I tried to show that the doctrine of trespass *ab initio* in like manner was the survival in a particular class of cases of a primitive rule of evidence, which established intent by a presumption of law from subsequent conduct, after the rule had gone to pieces and had been forgotten as a whole. Since that decision Professor Ames has made some suggestions which may or may not modify or enlarge the view which I took, but [454] which equally leave the doctrine a survival, the reasons for which long have disappeared.

In *Brower v. Fisher*,¹⁵ the defendant, a deaf and dumb person, had conveyed to the plaintiff real and personal property, and had got a judgment against the plaintiff for the price. The plaintiff brought a bill to find out whether the conveyance was legal, and got an injunction *pendente lite* to stay execution on the judgment. On the plaintiff's petition a commission of lunacy was issued to inquire whether the defendant was *compos mentis*. It was found that he was so unless the fact that he was born deaf and dumb made him otherwise. Thereupon Chancellor Kent dismissed the bill but held the inquiry so reasonable that he imposed no costs. The old books of England fully justified his view; and why? History again gives us the true reason. The Roman law held very properly that the dumb, and by extension the deaf, could not make the contract called *stipulatio* because the essence of that contract was a formal question and answer which the dumb could not utter and the deaf could not hear.

13. *Commonwealth v. Cleary*, 172 Mass. 172.

14. *Commonwealth v. Rubin*, 165 Mass. 453.

15. 4 Johns. Ch. 441.

Bracton copies the Roman law and repeats the true reason, that they could not express assent, *consentire*; but shows that he had missed the meaning of *stipulari* by suggesting that perhaps it might be done by gestures or writing. Fleta copied Bracton, but seemed to think that the trouble was inability to bring the consenting mind, and whereas the Roman law explained that the rule did not apply to one who was only hard of hearing—*qui tardius exaudit* — Fleta seems to have supposed that this pointed to a difference between a man born deaf and dumb and one who became so later in life.¹⁶ In Perkins's "Profitable Book," this is improved upon by requiring that the man should be born blind, deaf, and dumb, and then the reason is developed that "a man that is born blind, deaf, and dumb can have no understanding, so that he cannot make a gift or a grant."¹⁷ In a case before Vice-Chancellor Wood¹⁸ good sense prevailed, and it was laid down that there is no exception to the presumption of sanity in the case of a deaf and dumb person.

Other cases of what I have called inflated and unreal explanations, which collapse at the touch of history, are the liability of a master for the torts of his servant in the course of his employment, to which I have referred earlier, and which thus far never, in my [455] opinion, has been put upon a rational footing; and the liability of a common carrier, which, as I conceive, is another distorted survival from the absolute responsibility of bailees in early law, crossed with the liability of those exercising a common calling to which I have referred. These examples are sufficient, I hope, to illustrate my meaning,

16. But see C. 6, 22, 10.

17. Pl. 25; Co. Lit. 42*b*.

18. Harrod v. Harrod, 1 K. & J. 4, 9.

and to point out the danger of inventing reasons offhand for whatever we find established in the law. They lead me to some other general considerations in which history plays no part, or a minor part, but in which my object is to show the true process of law-making, and the real meaning of a decision upon a doubtful case and thus, as in what I have said before, to help in substituting a scientific foundation for empty words.

I pass from unreal explanations to unreal formulas and inadequate generalizations, and I will take up one or two with especial reference to the problems with which we have to deal at the present time. The first illustration which occurs to me, especially in view of what I have been saying, is suggested by another example of the power of fashion. I am immensely struck with the blind imitateness of man when I see how a doctrine, a discrimination, even a phrase, will run in a year or two over the whole English-speaking world. Lately have we not all been bored to death with *volenti non fit injuria*, and with Lord Justice Bowen's remark that it is *volenti* and not *scienti*? I congratulate any State in whose reports you do not see the maxim and its qualification repeated. I blush to say that I have been as guilty as the rest. Do we not hear every day of taking the risk — an expression which we never heard used as it now is until within a very few years? Do we not hear constantly of invitation and trap — which came into vogue within the memory of many, if not most of those who are here? Heaven forbid that I should find fault with an expression because it is new, or with the last mentioned expressions on any ground! Judges commonly are elderly men, and are more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties. Every living sentence which shows a mind at work for itself is to be welcomed. It is not the first use but the tiresome repetition of inadequate catch words upon which I am observing, — phrases which originally were contributions, but which, by their very felicity, delay further analysis for fifty years. That comes from the same source as dislike of

novelty, — intellectual indolence or weakness, — a slackening in the eternal pursuit of the more exact. [456]

The growth of education is an increase in the knowledge of measure. To use words familiar to logic and to science, it is a substitution of quantitative for qualitative judgments. The difference between the criticism of a work of art by a man of perception without technical training and that by a critic of the studio will illustrate what I mean. The first, on seeing a statue, will say, "It is grotesque," a judgment of quality merely; the second will say, "That statue is so many heads high, instead of the normal so many heads." His judgment is one of quantity. On hearing a passage of Beethoven's Ninth Symphony the first will say, "What a gorgeous sudden outburst of sunshine!"—the second, "Yes, great idea to bring in his major third just there, wasn't it?" Well, in the law we only occasionally can reach an absolutely final and quantitative determination, because the worth of the competing social ends which respectively solicit a judgment for the plaintiff or the defendant cannot be reduced to number and accurately fixed. The worth, that is, the intensity of the competing desires, varies with the varying ideals of the time, and, if the desires were constant, we could not get beyond a relative decision that one was greater and one was less. But it is of the essence of improvement that we should be as accurate as we can. Now to recur to such expressions as taking the risk and *volenti non fit injuria*, which are very well for once in the sprightly mouth which first applies them, the objection to the repetition of them as accepted legal formulas is that they do not represent a final analysis, but dodge difficulty and responsibility with a rhetorical phrase. When we say that a workman takes a certain risk as incident to his employment, we mean that on some general grounds of policy blindly felt or articulately present to our mind, we read into his contract a term of which he never thought; and the real question in every case is, What are the grounds, and how far do they extend? The question put in that form becomes at once and plainly a question for scientific determination, that is, for quantitative comparison by means of

whatever measure we command. When we speak of taking the risk apart from contract, I believe that we merely are expressing what the law means by negligence, when for some reason or other we wish to express it in a conciliatory form.

In our approach towards exactness we constantly tend to work out definite lines or equators to mark distinctions which we first notice as a difference of poles. It is evident in the beginning that there must be differences in the legal position of infants and adults. [457] In the end we establish twenty-one as the dividing point. There is a difference manifest at the outset between night and day. The statutes of Massachusetts fix the dividing points at one hour after sunset and one hour before sunrise, ascertained according to mean time. When he has discovered that a difference is a difference of degree, that distinguished extremes have between them a penumbra in which one gradually shades into the other, a tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other. But the theory of the law is that such lines exist, because the theory of the law as to any possible conduct is that it is either lawful or unlawful. As that difference has no gradation about it, when applied to shades of conduct that are very near each other it has an arbitrary look. We like to disguise the arbitrariness, we like to save ourselves the trouble of nice and doubtful discriminations. In some regions of conduct of a special sort we have to be informed of facts which we do not know before we can draw our lines intelligently, and so, as we get near the dividing point, we call in the jury. From saying that we will leave a question to the jury to saying that it is a question of fact is but a step, and the result is that at this day it has come to be a widespread doctrine that negligence not only is a question for the jury but is a question of fact. I have heard it urged with great vehemence by counsel, and calmly maintained by professors that, in addition to their wrongs to labor, courts were encroaching upon the province of the jury when they

directed a verdict in a negligence case; even in the unobtrusive form of a ruling that there was no evidence of neglect.

I venture to think, on the other hand, now, as I thought twenty years ago, before I went upon the bench, that every time that a judge declines to rule whether certain conduct is negligent or not he avows his inability to state the law, and that the meaning of leaving nice questions to the jury is that while if a question of law is pretty clear we can decide it, as it is our duty to do, if it is difficult it can be decided better by twelve men taken at random from the street. If a man fires a gun over a prairie that looks empty to the horizon, or crosses a railroad which he can see is clear for a thousand yards each way, he is not negligent, that is, he is free from legal liability in the first case, he has not prevented his recovery by his own conduct, if he is run over, in the second, as matter of law. If he fires a gun into a crowded street, or tries to cross [458] a track ten feet in front of an express train in full sight running sixty miles an hour, he is liable, or he cannot recover, again as matter of law, supposing these to be all the facts in the case. What new question of fact is introduced if the place of firing is something half way between a prairie and a crowded street, or if the express train is two hundred, one hundred, or fifty yards away? I do not wish to repeat arguments which I published long ago, and which have been more or less quoted in leading text-books. I only wish to insist that false reasons and false analogies shall not be relied upon for daily practice. It is so easy to accept the phrase "there is no evidence of negligence," and thence to infer, as the English House of Lords has inferred, as Professor Thayer infers in his admirable Preliminary Treatise on Evidence which has appeared since these words were written, that the question is the same in kind as any other question whether there is evidence of a fact.

When we rule on evidence of negligence we are ruling on a standard of conduct, a standard which we hold the parties bound to know beforehand, and which in theory is always the same upon the same facts and not a matter dependent upon the whim

of the particular jury or the eloquence of the particular advocate. And I may be permitted to observe that, referring once more to history, similar questions originally were, and to some extent still are, dealt with as questions of law. It was and is so on the question of probable cause in malicious prosecution.¹⁹ It was so on the question of necessities for an infant.²⁰ It was so in questions of what is reasonable,²¹ as — a reasonable fine,²² convenient time,²³ seasonable time,²⁴ reasonable time,²⁵ reasonable notice of dishonor.²⁶ It is so in regard to the remoteness of damage in an action of contract.²⁷ Originally in malicious prosecution, probable cause, instead of being negatived in the declaration, was pleaded by the defendant, and the court passed upon the sufficiency of the cause alleged. In the famous case of *Weaver v. [459] Ward*,²⁸ the same course was suggested as proper for negligence. I quote: "as if the defendant had said that

19. *Knight v. Jermin*, Cro. Eliz. 134; S. C. *nom. Knight v. German*, Cro. Eliz. 70; *Paine v. Rochester*, Cro. Eliz. 871; *Chambers v. Taylor*, Cro. Eliz. 900.

20. *Mackarell v. Bachelor*, Cro. Eliz. 583. As to married women see *Manby v. Scott*, 1 Siderfin, 109, 2 Sm. L. C.

21. *Caterall v. Marshall*, 1 Mod. 70.

22. *Hobart v. Hammond*, 4 Co. Rep. 27 b.

23. *Stodder v. Harvey*, Cro. Jac. 204

24. *Bell v. Wardell*, Willes, 202, A. D. 1740.

25. *Butler v. Play*, 1 Mod. 27.

26. *Tindal v. Brown*, 1 T. R. 167, A. D. 1786. In this case an exact line has been worked out for commercial paper, and an arbitrary rule established.

27. *Hobbs v. London & Southwestern Railway*, L. R. 10 Q. B. 111, 122; *Hammond & Co. v. Bussey*, 20 Q. B. D. 79, 89; *Johnson v. Faxon*, Mass. Jan. 9, 1899.

28. *Hobart*, 134.

the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances, so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt." But about the middle of the last century, when the rule of conduct was complicated with practical details the court began to leave some of these questions to the jury. Nevertheless, Mr. Starkie, a man of intellect, who was not imposed upon by phrases, very nearly saw the ground upon which it was done, and puts it on the purely practical distinction that when the circumstances are too special and complicated for a general rule to be laid down the jury may be called in. But it is obvious that a standard of conduct does not cease to be a law because the facts to which that standard applies are not likely often to be repeated.

I do not believe that the jury have any historic or *a priori* right to decide any standard of conduct. I think that the logic of the contrary view would be that every decision upon such a question by the court is an invasion of their province, and that all the law properly is in their breasts. I refer to the subject, however, merely as another matter in which phrases have taken the place of real reasons, and to do my part toward asserting a certain freedom of approach in dealing with negligence cases, not because I wish to quarrel with the existing and settled practice. I think that practice may be a good one, as it certainly is convenient, for Mr. Starkie's reason. There are many cases where no one could lay down a standard of conduct intelligently without hearing evidence upon that, as well as concerning what the conduct was. And although it does not follow that such evidence is for the jury, any more than the question of fact whether a legislature passed a certain statute, still they are a convenient tribunal, and if the evidence to establish a rule of law is to be left to them, it seems natural to leave the conclusion from the evidence to them as well. I confess that in my experience I have not found juries specially inspired for the discovery of truth. I have not noticed that they could see further into things or form a saner judgment than a sensible and well

trained judge. I have not found them freer from prejudice than an ordinary judge would be. Indeed one reason why I believe in our practice of leaving questions of negligence to them is what is precisely [460] one of their gravest defects from the point of view of their theoretical function: that they will introduce into their verdict a certain amount — a very large amount, so far as I have observed — of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community. Possibly such a justification is a little like that which an eminent English barrister gave me many years ago for the distinction between barristers and solicitors. It was in substance that if law was to be practised somebody had to be damned, and he preferred that it should be somebody else.

My object is not so much to point out what seems to me to be fallacies in particular cases as to enforce by various examples and in various applications the need of scrutinizing the reasons for the rules which we follow, and of not being contented with hollow forms of words merely because they have been used very often and have been repeated from one end of the union to the other. We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true. I sometimes tell students that the law schools pursue an inspirational combined with a logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results. It is a necessary method for the purpose of teaching dogma. But inasmuch as the real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire, it is no less necessary that those who make and develop the law should have those ends articulately in their minds. I do not expect or think it desirable that the judges should undertake to renovate the law. That is not their province. Indeed precisely because I believe that the world would be just as well off if it lived under laws that differed from ours in many ways, and because I believe that the claim of our especial code to respect

is simply that it exists, that it is the one to which we have become accustomed, and not that it represents an eternal principle, I am slow to consent to overruling a precedent, and think that our most important duty is to see that the judicial duel shall be fought out in the accustomed way. But I think it most important to remember whenever a doubtful case arises, with certain analogies on one side and other analogies on the other, that what really is before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way. [461] The social question is which desire is strongest at the point of conflict. The judicial one may be narrower, because one or the other desire may have been expressed in previous decisions to such an extent that logic requires us to assume it to preponderate in the one before us. But if that be clearly so, the case is not a doubtful one. Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious the judges are called on to exercise the sovereign prerogative of choice.

I have given an example of what seems to me the uninformative and indolent use of phrases to save the trouble of thinking closely, in the expression "taking the risk," and of what I think a misleading use in calling every question left to the jury a question of fact. Let me give one of over-generalization, or rather of the danger of reasoning from generalizations unless you have the particulars which they embrace in mind. A generalization is empty so far as it is general. Its value depends on the number of particulars which it calls up to the speaker and the hearer. Hence the futility of arguments on economic questions by any one whose memory is not stored with economic facts. *Allen v. Flood* was decided lately by the English House of Lords upon a case of maliciously inducing workmen to leave the plaintiff's employ. It is made harder to say what the precise issue before the House was, by the fact that except in fragmentary quotations it does not appear what the jury were told would amount to a malicious interference. I infer that they were instructed as in

Temperton v. Russell,²⁹ in such a way that their finding meant little more than that the defendant had acted with knowledge and understanding of the harm which he would inflict if successful. Or if I should add an intent to harm the plaintiff without reference to any immediate advantage to the defendant, still I do not understand that finding meant that the defendant's act was done from disinterestedly malevolent motives, and not from a wish to better the defendant's union in a battle of the market. Taking the point decided to be what I suppose it to be, this case confirms opinions which I have had occasion to express judicially, and commands my hearty assent. But in the elaborate, although to my notion inadequate, discussion which took place, eminent judges intimated that anything which a man has a right to do he has a right to do whatever his motives, and this has been hailed as a triumph of the principle of external [462] standards in the law, a principle which I have done my best to advocate as well as to name. Now here the reasoning starts from the vague generalization Right, and one asks himself at once whether it is definite enough to stand the strain. If the scope of the right is already determined as absolute and irrespective of motive, *cadit quæstio*, there is nothing to argue about. So if all rights have that scope. But if different rights are of different extent, if they stand on different grounds of policy and have different histories, it does not follow that because one right is absolute another is, — and if you simply say all rights shall be so, that is only a pontifical or imperial way of forbidding discussion. The right to sell property is about as absolute as any I can think of, although, under statutes at least, even that may be affected by motive, as in the case of an intent to prefer creditors. But the privilege of a master to state his servant's character to one who is thinking of employing him is also a right within its limits. Is it equally extensive? I suppose it would extend to mistaken statements volunteered in good faith out of love for the possible employer. Would it extend to such statements

29. [1893] 1 Q. B. 715.

volunteered simply out of hate for the man? To my mind here, again, generalities are worse than useless, and the only way to solve the problem presented is to weigh the reasons for the particular right claimed and those for the competing right to be free from slander as well as one can, and to decide which set preponderates. Any solution in general terms seems to me to mark a want of analytic power.

Gentlemen, I have tried to show by examples something of the interest of science as applied to the law, and to point out some possible improvement in our way of approaching practical questions in the same sphere. To the latter attempt, no doubt, many will hardly be ready to yield me their assent. But in that field, as in the other, I have had in mind an ultimate dependence upon science because it is finally for science to determine, so far as it can, the relative worth of our different social ends, and, as I have tried to hint, it is our estimate of the proportion between these, now often blind and unconscious, that leads us to insist upon and to enlarge the sphere of one principle and to allow another gradually to dwindle into atrophy. Very likely it may be that with all the help that statistics and every modern appliance can bring us there never will be a commonwealth in which science is everywhere supreme. But it is an ideal, and without ideals what is life worth? They furnish us our perspectives and open glimpses of [463] the infinite. It often is a merit of an ideal to be unattainable. Its being so keeps forever before us something more to be done, and saves us from the ennui of a monotonous perfection. At the least it glorifies dull details, and uplifts and sustains weary years of toil with George Herbert's often quoted but ever inspiring verse:

**"Who sweeps a room as in Thy cause,
Makes that and the action fine."**

◀=>

Posted MLHP: July 25, 2014.