MECHANICAL JURISDPRUDENCE

BY

ROSCOE POUND

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FOREWORD

BY

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In the early 1900s, Roscoe Pound published numerous critiques of contemporary legal thinking and judicial behavior that would become famous and influential. Among them were "The Need of a Sociological Jurisprudence," which appeared in 1907, "Mechanical Jurisprudence" in 1908, and "Liberty of Contract" in 1909.

In "Mechanical Jurisprudence," he argued that American common law or judge-made law had become sterile, unable to adapt to changing social and economic conditions; it had become a closed system of many archaic rules that judges and lawyers deducted from general "conceptions" and applied mechanically to the actual situations before them.

He urged judges to understand the effects of their decisions, how their rules on business, labor relations, trial procedure, evidence and other matters operated in practice; that they reexamine whether the original reasons for a rule still exist, and reformulate them when necessary to "respond to the vital needs of present-day life"—that is, they must make "rules fit cases instead of making cases fit rules." If it did not adapt, "case law" would be disregarded

and supplanted by legislation. A new approach — a pragmatic jurisprudence — was needed:

> **The development of the common law in America was a period of growth because the doctrine that the common law was received only so far as applicable led the courts, in adapting English case-law to American conditions, to study the conditions of application as well as the conceptions and their logical consequences. Whenever such a period has come to an end, when its work has been done and its legal theories have come to maturity, the jurisprudence of conceptions tends to decay. Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules. This is the condition against which sociologists now protest, and protest rightly.**
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> **The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.**

"Mechanical Jurisprudence" appeared in volume 8 *Columbia Law Review* 605-623 (December, 1908). Pound was Dean of the University of Nebraska School of Law at the time. Though appearing in an academic journal, it is a work of advocacy supported not only by numerous citations and quotations from foreign scholars and treatises, several in Latin, but also by examples of the inadequacies and failures of many case law rules.

One citation is to Nassau William Senior's *Conversations with Distinguished Persons* (1880), which included his talks in the summer of 1861 with Lord Chief Justice William Erle (1773-1880). It can be read in a few minutes and is posted in the Appendix. ◊

MECHANICAL JURISPRUDENCE. [1]

"There is no way," says Sir Frederick Pollock, "by which modern law can escape from the scientific and artificial character imposed on it by the demand of modern societies for full, equal, and exact justice." [2] An Australian judge has stated the same proposition in these words: "The public is more interested than it knows in maintaining the highest scientific standard in the administration of justice." [3] Every lawyer feels this, and every thoughtful student of institutions must admit it. But what do we mean by the word "scientific" in this connection? What is scientific law? What constitutes science in the administration of justice? Sir Frederick Pollock gives us the clew when he defines the reasons that compel law to take on this scientific character as three: the demand for full justice, that is for solutions that go to the root of controversies; the demand for equal justice, that is a like adjustment of like relations under like conditions; and the demand for exact justice, that is for a justice whose operations, within reasonable limits, may be predicted in advance of action. In other words, the marks of a scientific law are, conformity to reason, uniformity, and certainty. Scientific law is a reasoned body of principles for the administration of justice, and its antithesis is a system of enforcing magisterial caprice, however honest, and however much disguised under the name of justice or equity or natural law. But this scientific character of law is a means,— a means toward the end of law, which is the administration of justice. Law is forced to take on this character in order to accomplish its end fully, equally, and exactly; and in so far as it fails to perform its function fully, equally and exactly, it fails in the end for which it exists. Law is scientific in order to eliminate so far as may be the personal equation in judicial administration, to preclude corruption and to limit the dangerous possibilities of magisterial ignorance. Law is not scientific for the sake of science. Being scientific as a means toward an

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[1] The substance of this paper was presented before the Bar Association of North Dakota, at its annual meeting, at Valley City, N. D., Sept. 25, 1908.

[2] A First Book of Jurisprudence, 56.

[3] Richmond, J., quoted in Clark, Australian Constitutional Law, 348.

end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.

Two dangers have to be guarded against in a scientific legal system, one of them in the direction of the effect of its scientific and artificial character upon the public, the other in the direction of its effect upon the courts and the legal profession. With respect to the first danger, it is well to remember that law must not become too scientific for the people to appreciate its workings.[4] Law has the practical function of adjusting every-day relations so as to meet current ideas of fair play. It must not become so completely artificial that the public is led to regard it as wholly arbitrary. No institution can stand upon such a basis to-day. Reverence for institutions of the past will not preserve, of itself, an institution that touches every-day life as profoundly as does the law. Legal theory can no more stand as a sacred tradition in the modern world than can political theory. It has been one of the great merits of English law that its votaries have always borne this in mind. When Lord Esher said, "the law of England is not a science," he meant to protest against a pseudo-science of technical rules existing for their own sake and subserving supposed ends of science, while defeating justice.[5] And it is the importance of the role of jurors in tempering the administration of justice with common-sense and preserving a due connection of the rules governing every-day relations with every-day needs of ordinary men that has atoned for the manifold and conspicuous defects of trial by jury and is keeping it alive. In Germany to-day one of the problems of law reform is how to achieve a similar tempering of the justice administered by highly trained specialists.[6]

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[4] Cf. Lord Herschell's remark to Sir George Jessel: "Important as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it." Atlay, Victorian Chancellors, II., 460.

[5] See Manson, The Builders of our Law, 398.

[6] Sternberg, Kirchmann und seine Kritik der Rechtswissenschaft, xi.

In the other direction, the effect of a scientific legal system upon the courts and upon the legal profession is more subtle and far-reaching. The effect of all system is apt to be petrifaction of the subject systematized. Perfection of scientific system and exposition tends to cut off individual initiative in the future, to stifle independent consideration of new problems and of new phases of old problems, and to impose the ideas of one generation upon another. This is so in all departments of learning. One of the obstacles to advance in every science is the domination of the ghosts of departed masters. Their sound methods are forgotten, while their unsound conclusions are held for gospel.[7] Legal science is not exempt from this tendency. Legal systems have their periods in which science degenerates, in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence.

Roman law in its decadence furnishes a striking example. The Valentinian "law of citations" made a selection of jurisconsults of the past and allowed their writings only to be cited. It declared them, with the exception of Papinian, equal in authority. It confined the judge, when questions of law were in issue, to the purely mechanical task of counting and of determining the numerical preponderance of authority.[8] Principles were no longer resorted to in order to make rules to fit cases. The rules were at hand in a fixed and final form, and cases were to be fitted to the rules.[9] The classical jurisprudence of principles had developed, by the very weight of its authority, a jurisprudence of rules; and it is in the nature of rules to operate mechanically.

Undoubtedly one cause of the tendency of scientific law to become mechanical is to be found in the average man's admiration for the ingenious in any direction, his love of technicality as a manifestation of cleverness, his feeling that law, as a developed institution, ought to have a certain ballast of

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[7] The reasons for this and the laws by which the process takes place are well set forth in Ross, Social Psychology, chaps. 12, 13, 14.

[8] Cod. Theod. I, 4, 3. Karlowa, Römische Rechtsgeschichte, I, 933.

[9] This is said to be the period at which the notion that application of law is a purely mechanical process arose. Gnaeus Flavius (Kantorowicz), Der Kampf urn die Rechtswissenschaft, 7.

mysterious technicality. "Philosophy's queerest arguments," says James, "tickle agreeably our sense of subtlety and ingenuity."[10] Every practitioner has encountered the lay obsession as to invalidity of a signing with a lead pencil. Every law-teacher has had to combat the student obsession that notice, however cogent, may be disregarded unless it is "official." Lay hair-splitting over rules and regulations goes far beyond anything of which lawyers are capable. Experienced advocates have insisted that in argument to a jury, along with a just, common-sense theory of the merits, one ought to have a specious technicality for good measure. But apart from this general human tendency, there is the special tendency of the lawyer to regard artificiality in law as an end, to hold science something to be pursued for its own sake, to forget in this pursuit the purpose of law and hence of scientific law, and to judge rules and doctrines by their conformity to a supposed science and not by the results to which they lead. In periods of growth and expansion, this tendency is repressed. In periods of maturity and stability, when the opportunity for constructive work is largely eliminated, it becomes very marked.

"I have known judges," said Chief Justice Erle, "bred in the world of legal studies, who delighted in nothing so much as in a strong decision. Now a strong decision is a decision opposed to common-sense and to common convenience. * * * A great part of the law made by judges consists of strong decisions, and as one strong decision is a precedent for another a little stronger, the law at last, on some matters, becomes such a nuisance that equity intervenes, or an Act of Parliament must be passed to sweep the whole away." [11]

The instance suggested in the conversation from which the foregoing extract is taken illustrates very well the development of a mechanical legal doctrine. Successive decisions upon the construction of wills had passed upon the meaning of particular

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[10] Pragmatism, 5. Dernburg refers to this as an "innate sense for formalism." Pandekten, I, § 97.

[11] Senior, Conversations with Distinguished Persons (Ed. of 1880) 314-321 [posted in the Appendix, at 24-31 below.

words and phrases in particular wills. These decisions were used as guides in the construction of other wills. Presently rules grew up whereby it was settled that particular words and phrases had prescribed hard and fast meanings, and the construction of wills became so artificial, so scientific, that it defeated the very end of construction and compelled a series of sections in the Wills Act of 1836.

I have referred to mechanical jurisprudence as scientific because those who administer it believe it such. But in truth it is not science at all. We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from *a priori* conceptions. In the philosophy of to-day, theories are "instruments, not answers to enigmas, in which we can rest." [12] The idea of science as a system of deductions has become obsolete, and the revolution which has taken place in other sciences in this regard must take place and is taking place in jurisprudence also. This revolution in science at large was achieved in the middle of the nineteenth century. In the first half of that century, scientific method in every department of learning was dominated by the classical German philosophy. Men conceived that by dialectics and deduction from controlling conceptions they could construe the whole content of knowledge. Even in the natural sciences this belief prevailed and had long dictated theories of nature and of natural phenomena. Linnaeus, for instance, lays down a proposition, *omne vivum ex ovo*, and from this fundamental conception deduces a theory of homologies between animal and vegetable organs.[13] He deemed no study of the organisms and the organs themselves necessary to reach or to sustain these conclusions. Yet, to-day, study of the organisms themselves has overthrown his fundamental proposition. The substitution of efficient for final causes as explanations of natural phenomena has been paralleled by a revolution in political thought. We do not base institutions upon deduction from assumed principles of human nature; we require them to exhibit practical utility, and we rest them upon a foundation of policy and established adaptation to human needs. It has been

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[12] James, Pragmatism, 53.

[13] Philosophia Botanica, aphorisms 134, et seq.

asserted that to no small extent the old mode of procedure was borrowed from the law. We are told that it involved a "fundamentally juristic conception of the world in which all kinds of action and every sort of judgment was expressed in legal phraseology."[14] We are told that "in the Middle Ages human welfare and even religion was conceived under the form of legality, and in the modern world this has given place to utility."[15] We have, then, the same task in jurisprudence that has been achieved in philosophy, in the natural sciences and in politics. We have to rid ourselves of this sort of legality and to attain a pragmatic, a sociological legal science.

"What is needed nowadays," it has been said, "is that as against an abstract and unreal theory of State omnipotence on the one hand, and an atomistic and artificial view of individual independence on the other, the facts of the world with its innumerable bonds of association and the naturalness of social authority should be generally recognized, and become the basis of our laws, as it is of our life." [16]

Herein is the task of the sociological jurist. Professor Small defines the sociological movements "a frank endeavor to secure for the human factor in experience the central place which belongs to it in our whole scheme of thought and action." [17] The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.

Jurisprudence is last in the march of the sciences away from the method of deduction from predetermined conceptions. On the continent of Europe, both the historical school of jurists and the philosophical school, which were dominant until at least the last

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[14] Figgis, From Gerson to Grotius, 152.

[15] Ibid.,14.

[16] Ibid., 206.

[17] The Meaning of Sociology, 14 Am. Journ. Sociol. 13.

quarter of the nineteenth century, proceeded in this way. The difference between them lay in the manner in which they arrived at their fundamental conceptions. The former derived them from the history of juristic speculation and the historical development of the Roman sources. The latter, through metaphysical inquiries, arrived at certain propositions as to human nature, and deduced a system from them. This was the philosophical theory behind the eighteenth-century movement for codification.[18] Ihering [19] was the pioneer in the work of superseding this jurisprudence of conceptions (*Begriffsjuris-prudenz*) by a jurisprudence of results (*Wirklichkeitsjurisprudenz*). [20] He insisted that we should begin at the other end; that the first question should be, how will a rule or a decision operate in practice? For instance, if a rule of commercial law were in question, the search should be for the rule that best accords with and gives effect to sound business practice. In the Civil Law, the doctrine as to mistake in the formation of a contract affords an example of the working of the two methods. Savigny treated the subject according to the jurisprudence of conceptions. He worked out historically and analytically the conception of a contract and deduced therefrom the rules to govern cases of mistake. It followed, from his conception, that if *A* telegraphed *B* to *buy* shares and the telegram as delivered to *B* read *sell*, there was no contract between *A* and *B*, and hence no liability of *A* to *B*; and for a time it was so held. But this and some of the other resulting rules were so far from just in their practical operation that, following the lead of Ihering, they have been abandoned and the ordinary understanding of business men has been given effect.[21]

And, in this same connection, the new German code has introduced, as a criterion of error in the content of an expression of the will, the question, what would be regarded as essential in

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[18] See Code of Frederick the Great, part I, Book I, tit. 2, §§ 3, 4.

[19] Der Zweck im Recht (1878); Scherz und Ernst in der Jurisprudenz (1884) espec-ially the two essays "Im juristischen Begriffshimmel" and Wieder auf Erden."

[20] Sternberg, Allegemeine Rechtslehre, I, 188. Sec Brütt. Die Kunst der Rechtsanwendung, § 5.

[21] Bernhöft, Bürgerliches Recht (in Birkmeyer, Encyklopädie der Rechtswis-senschaft) §46. Cosack, Lehrbuch des Deutschen bürgerlichen Rechts, I, § 64 (3 Ed. pp. 213-214), BGB, §§ 120, 122.

the ordinary understanding of business.[22] Even better examples of the workings of a jurisprudence of conceptions, for our purposes, may be found in the manner in which common-law courts have dealt with points of mercantile law. For instance, the law of partnership is made difficult and often unjust by the insistence of the courts upon deducing its rules from a conception of joint ownership and joint obligation, instead of ascertaining and giving effect to the actual situation as understood and practiced by merchants. The legal theory does not affect the actual course of business an iota. But it leads to unfortunate results when that course of business, for some reason, comes before the courts.[23] Again, the refusal of Lord Holt to recognize the negotiability of promissory notes[24] proceeded upon a deduction from the conception of a chose in action. A jurisprudence of ends would have avoided each of these errors.

In periods of legal development through juristic speculation and judicial decision, we have a jurisprudence of ends in fact, even if in form it is a jurisprudence of conceptions.[25] The Roman *jus gentium* was worked out for concrete causes and the conceptions were later generalizations from its results. The *jus naturale* was a system of reaching reasonable ends by bringing philosophical theory into the scale against the hard and fast rules of antiquity. The development of equity in England was attained by a method of seeking results in concrete causes. The liberalizing of English law through the law merchant was brought about by substituting business practice for juridical conceptions. The development of the common law in America was a period of growth because the doctrine that the common

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[22] BGB, §119, Saleillcs, De la declaration de la volonté §2, Leonhard, Der Irrtum als Ursache nichtiger Verträge (2 Ed.), ll, 178.

[23] Lindley, Partnership (7 Ed.) 4.

[24] Buller *v.* Crips (1703) 6 Mod. 29. Compare modern decisions as to presentment of checks through a clearing house. Holmes *v.* Roe (1886) 62 Mich. 199; Edmiston *v.* Herpolsheimer (1901) 66 Neb. 94. In the former case we are told gravely that "the clearing house and the method of doing business through it had no bearing" on the case!

[25] See, for instance, Modestinus in Dig. I, 3, 25. As Stammler says: "It is notoriously a fundamental property of the classical Roman law to have shown itself exceedingly elastic in its substance, without thereby materially injuring the sharpness and certainty of its conceptions and rules." Wirthschaft und Recht (2 Ed.) 175.

law was received only so far as applicable led the courts, in adapting English case-law to American conditions, to study the conditions of application as well as the conceptions and their logical consequences. Whenever such a period has come to an end, when its work has been done and its legal theories have come to maturity, the jurisprudence of conceptions tends to decay. Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules. This is the condition against which sociologists now protest, and protest rightly.[26]

A period of legislative activity supervenes to supply, first new rules, then new premises, and finally a systematic body of principles as a fresh start for juristic development. But such periods hitherto have not been periods of growth. Usually legislative activity has not gone beyond the introduction of new rules or of new premises, and the chief result has been a summing up of the juristic accomplishment of the past in improved form. The further step, which is beginning to be taken in our present era of legal development through legislation, is in reality an awakening of juristic activity, as jurists perceive that they may effect results through the legislator as well as through the judge or the doctrinal writer. This step has yet to be taken outside of Germany. And in the first and second stages of a period of legislation the mechanical character of legal science is aggravated by the imperative theory, which is a concomitant of legislative activity. Austin's proposition that law is command so complete that even the unwritten law must be given this character, since whatever the sovereign permits he commands, was simply rediscovered during the legislative ferment of the reform-movement in English law. In the flowering-time of Papal legislation the canon law had already asserted it.[27] Moreover, a period of legislation and codification has brought German jurists to a like conclusion.[28] At such times, when law is felt to be positive, to be the command of the law-maker, a tendency to

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[26] See Professor Henderson, 11 Am. Journ. Sociol. 847.

[27] c. I in Vito de Constitutionibus (I, 2).

[28] Czyhlarz, Institutionen, § 4.

enact rules as such becomes manifest. Roman law, in its period of legislation, can furnish more than one example of the sort of law-making of which we complain to-day.[29]

Before the analytical school, which revived the imperative theory to meet the facts of an age of legislation, had become established, historical jurists led a revolt. But their jurisprudence is a jurisprudence of conceptions. Moreover, they have had little effect upon the actual course of Anglo-American law. The philosophical jurists have protested also and have appealed from purely legal considerations to considerations of reason and of natural law. But theirs, too, is a jurisprudence of conceptions, and their method, of itself, offers no relief. Their service has been in connection with the general sociological movement, in giving natural law a new and a modern aspect, and in promoting a general agreement among jurists on a sociological basis. In Europe, it is obvious that the different schools are coming together in a new sociological school that is to dominate juristic thought. Instead of seeking for an ideal universal law by metaphysical methods, the idea of all schools is to turn "the community of fact of mankind into a community of law in accord with the reasonable ordering of active life." [30] Hence they hold that "the less arbitrary the character of a rule and the more clearly it conforms to the nature of things, the more nearly does it approach to the norm of a perfect law." [31]

The utilitarian theory of Bentham was a theory of legislation.[32] The sociological theory of the present is a theory of legal science. Probably the chief merit of the new German code lies in

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[29] e. g. The legislation of Claudius, permitting marriage with a brother's daughter, Gaius, I, 61; imperial legislation as to testaments, Dig. XXIX, I, 1, pr., Code VI, 23; the *beneficium diuisionis* in suretyship, Dig. XLVI, I, 26-27, which has given so much trouble in modern law and is being rejected in recent codes. Dernburg, Lehrbuch des Preussischen Privatrechts, II, § 2466; Dernburg, Das bürgerliche Recht, III, §162; Baudry-Lacantinerie, Traité de droit civil (2 Ed.), XXI, § 1053, *et seq*. Compare also the imperial legislation as to the making and revocation of gifts and Justinian's legislation as to revocation for ingratitude of the donee. Inst. II, 7, §2; Cod. Theod. VIII, 12, 3, 5, and VIII, 12, 5; Code V, 12, 31; Code VIII, 54, 34; Code VIII, 56, 10.

[30] Jitta, La substance des obligations dans le droit international privé, I, 18.

[31] Baty, A Modern *Jus Gentium*, 20 Juridical Review, 109.

[32] This is pointed out very clearly by Maine, Early History of Institutions, Lect. xii.

its conformity in so large a degree to this theory.[33] It lays down principles from which to deduce, not rules, but decisions; and decisions will indicate a rule only so long as the conditions to which they are applied cause them to express the principle. This, and not lax methods of equitable application,[34] into which American courts are falling so generally, is the true way to make rules fit cases instead of making cases fit rules.[35]

An efficient cause of the failure of much American legislation is that it is founded on an assumption that it is enough for the State to command. Legislation has not been the product of preliminary study of the conditions to which if was to apply. It has not expressed social standards accurately. It has not responded accurately to social needs. Hence a large proportion has been nugatory in practice. But the difficulty is not, as some have assumed, that matters of private law are not within the legitimate I scope of legislation.[36] It is rather that legislation has approached them upon a false theory. Judicial law-making also has acted upon an erroneous theory; and its results are often quite as much disregarded in practice as are statutes.[37] Judicial law-making, however, cannot escape, except within very narrow limits, until it is given a new starting point from without. Legislative law-making, on the contrary, may do so and is beginning to do so.

That our case law at its maturity has acquired the sterility of a fully developed system, may be shown by abundant examples of its failure to respond to vital needs of present-day life. Its

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[33] e. g. BGB, §242.

[34] See my address, "Enforcement of Law." 20 Green Bag, 401.

[35] Lord Westbury had this idea. Atlay, Victorian Chancellors, II, 25 Q.

[36] Carter, Law, Its Origin, Growth and Function, 3.

[37] See my paper, "Common Law and Legislation," 21 Harv. Law Rev. 383, 406, note. The recent reversal by the House of Lords of a Scotch case (Toal *v*. North British R. Co. [1908] 16 Scot, L. T. 69) in which the Court of Session spoke "*ex cathedra* as to the right management of a railway train," assuming "an exhaustive knowledge of the whole art of train and railway-platform management," calls attention to a type of judicial law-making which endeavors to dictate rules for practical affairs by deduction from juristic conceptions. Legislation intended to turn questions of negligence over to juries for all purposes, now becoming somewhat common, is a crude attempt to counteract the same judicial tendency in our American law of torts.

inadequacy to deal with employers' liability;[38] the failure of the theory of "general jurisprudence" of the Supreme Court of the United States to give us a uniform commercial law; the failure of American courts, with centuries of discussion before them, to work out a reasonable or certain law of future interests in land; the breakdown of the common law in the matter of discrimination by public service companies because of inability to make procedure or enforce its doctrines and rules; its breakdown in the attempt to adjust water rights in our newer states, where there was opportunity for free development; [39] its inability to hold promoters to their duty and to protect the interests of those who invest in corporate enterprises against mismanagement and breach of trust; [40] its failure to work out a scheme of responsibility that will hold legal entities, or those who hide behind their skirts, to their duty to the public — all these failures, and many more might be adduced, speak for themselves. But compare these failures with the great achievements of the youth of our case-law, with Lord Mansfield's development of a law of quasi-contracts from the fictions of the common counts, with Lord Mansfield's development of mercantile law by judicial decision, with Kent's working out of equity for America from a handful of English decisions, with Marshall's work in giving us a living constitution by judicial interpretation. Now and then, at present, we see vigorous life in remote corners of our case law, as, for instance, in the newer decisions as to surface and underground waters. But judicial revolt from mechanical methods to-day is more likely to take the form of "officious kindness" and flabby equitable application of law.[41] Our judge-

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[38] See a layman's view in the two articles of Mr. Hard, in "Everybody's" for September and October, 1908.

[39] See Long, Irrigation, § 99.

[40] For instance, compare Old Dominion Copper Mining and Smelting Co. *v.* Lewisohn (1908) 28 Sup. Ct. Rep. 634 with Old Dominion Copper Mining & Smelting Co. *v.* Bigelow (1005) 188 Mass. 315. In this connection note also the reactionary course of the courts in the matter of payment for shares. After starting out to deal with the matter on the ground of public policy, they came finally to treat it wholly from the standpoint of estoppel, and put the assets of a corporation in the same position as those of a natural person. Hospes *v.* Northwestern Mfg. Co. (1892) 48 Minn. 174; Clark v. Beaver (1890) 139 U. S. 96; Handley *v.* Stutz (1891) 139 U. S. 417; Fogg *v.* Blair (1890) 139 U. S. 118.

[41] See my address, "Enforcement of Law," 20 Green Bag, 401.

made law is losing its vitality, and it is a normal phenomenon that it should do so.

I have suggested some examples of the failure of our case law to rise to social and legal emergencies. Let me point to some phases of its active operation which lead to the same conclusion.[42]

The manner in which the Fourteenth Amendment is applied affords a striking instance of the workings today of a jurisprudence of conceptions. Starting with the conception that it was intended to incorporate Spencer's Social Statics in the fundamental law of the United States,[43] rules have been deduced that obstruct the way of social progress.[44] The conception of liberty of contract, in particular, has given rise to rules and decisions which, tested by their practical operation, defeat

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[42] Numerous examples from our private substantive law might easily be adduced, e. g., to take those that are first at hand, the curious inability of courts to reach a common-sense result, demanded also by principles of law, in cases of contributory negligence of one of several beneficiaries under Lord Campbell's Act, because of hard and fast procedural conceptions (see Wigmore, Contributory Negligence of the Beneficiary as a Bar to an Administrator's Action for Death, 2 Illinois Law Rev. 487); the narrow and unjust application of Lord Campbell's Act, in many of our State courts, where aliens are beneficiaries (Dent *v.* Pennsylvania R. Co. [1897] 181 Pa. St. 525; Brannigan *v.* Union Gold Mining Co. [1899] 93 Fed. Rep. 164; McMillan *v.* Spider Lake Saw Mill & Lumber Co. [1902] 115 Wis. 332; Roberts *v.* Great Northern R. Co. [1908] 161 Fed. Rep. 239), due for the most part to mechanical deduction from a conception of the universality of common-law doctrines and the necessity of strict construction of everything in derogation thereof, and the mechanical doctrine in New York as to jurisdiction over transitory actions between non-residents which accrued abroad (Collard *v.* Beach [1904] 81 App. Div. 582, 93 App. Div. 389) as compared with the just and flexible rule adopted in England (Logan *v.* Bank of Scotland [1906] 1 K. B. 141. 150).

Criminal procedure is full of instances that will occur to everyone. Not the least striking is our application of the rule as to double jeopardy in the form in which it arose when no appeal was allowed in criminal causes, so as to cut off appeal by the State after appeal by the accused had been allowed. In criminal law, an interesting example may be seen in the judicial demand that medical experts furnish "a definite account of the course of symptoms collectively constituting the disease" of insanity. Mercier, Criminal Responsibility, 88.

[43] Holmes, J., in Lochner *v.* New York (1905) 198 U. S. 45, 75.

[44] See Professor Henderson in 11 Am. Journ. Sociol. 847.

liberty.[45] As Mr. Olney says of the *Adair* Case,[46] "it is archaic, it is a long step into the past, to conceive of and deal with the relations between the employer in such industries and the employee, as if the parties were individuals." [47] The conception of freedom of contract is made the basis of a logical deduction. The court does not inquire what the effect of such a deduction will be, when applied to the actual situation. It does not observe that the result will be to produce a condition precisely the reverse of that which the conception originally contemplated.[48] Again, the Commerce Clause of the Federal Constitution has been taken by one judge, at least, to be a constitutional enactment of a conception of free trade among the states.[49] Deductions from this and like conceptions, assumed to express the meaning and the sole meaning of the clause, have given us rules which, when applied to the existing commercial and industrial situation, are wholly inadequate.[50]

Procedure, with respect to which every thoughtful lawyer must feel that we are inexcusably behind the rest of the English-speaking world, suffers especially from mechanical juris-prudence. The conception of a theory of the case, developed by

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[45] I have cited some of these in my paper, "Do we Need a Philosophy of Law?" 5 Columbia Law Rev. 339, 345. Cf, the dissenting opinion of Holmes, J., in Adair *v*. United States (1908) 208 U. S. 161.

[46] (1908) 208 U. S. 161.

[47] 42 Am. Law Rev. 164.

[48] One might cite in this connection the classical remarks of Maule, J., to the prisoner whom he was sentencing for bigamy. When he had explained to the prisoner how, after years of litigation and the expenditure of hundreds of pounds, he might have obtained a divorce (under the then law), he proceeded: "and if you ask me where you were to get all this money and tell me you never in your life had so many pennies at one time, I must remind you that it hath ever been the glory of the law of England not to have one law for the rich and another for the poor." See James, Curiosities of Law and Lawyers, 317.

[49] This conception appears very clearly in the opinions of the present Chief Justice from Leisy *v*. Hardin (1889) 135 U. S. 100, 109, down to the concurring opinion of Peckham, J., in which the Chief Justice joined, in Howard *v*. Illinois C. R. Co. (1008) 207 U. S. 463. In the latter, an opinion is indicated that Congress can not legislate upon the relation of master and servant involved in interstate traffic. Of course, this is a necessary deduction from the free-trade conception of the Commerce Clause.

[50] Compare the abstract and impracticable distinction between interstate and intrastate activities of employees of railways engaged in both species of commerce indiscriminately, upon which the court proceeds in Howard *v*. Illinois C. R. Co., *supra*, with the pragmatic view taken by Judge Amidon in his paper, "The Nation and the Constitution", Proc. Am. Bar Assn. xxi, 463. 474-5

the common-law forms of action, has, in nearly half of our code jurisdictions, nullified the legislative intent and made the practice more rigid than at common law.[51] But this conception is regarded by many as fundamental. In deductions from this conception they lose sight of the end of procedure, they make scientific procedure an end of itself, and thus, in the result, make adjective law an agency for defeating or delaying substantive law and justice instead of one for enforcing and speeding them. Aristotle discusses a project of a Greek reformer for enabling tribunals to render what he called a divided judgment. At that time, the judgment had to be absolute one way or the other. If a plaintiff claimed twenty *minæ* when but eighteen were proved to be due him, there was no course but to find for the defendant. The proposal to correct this and to allow a finding for the eighteen *minæ* due did not meet with Aristotle's approval. He said:

"A juror who votes acquittal decides, not that the defendant owes nothing, but that he does not owe the twenty *minæ* claimed." [52]

We smile now at Aristotle's hard and fast deduction, in the face of a manifestly absurd result, from his conception of the trial of an issue. But at least half our jurisdictions do the same thing essentially in this matter of the theory of a plaintiff's case. That his pleadings and proofs disclose a case and a good case is not

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[51] Mescall *v.* Tully (1883) 91 Ind. 96; Carbondale Inv. Co. *v.* Burdick (1903) 67 Kan. 329; Maguire *v.* Vice (1855) 20 Mo. 429; Rust *v.* Brown (1800) 101 Mo. 586; Supervisors of Kewaunee County *v.* Decker (1872) 30 Wis. 624; Dessert Lumber Co. *v.* Wadleigh (1899) 103 Wis. 318. See Barnes *v.* Quigley (1874) 59 N. Y. 265; Goelet *v.* Asseler (1860) 22 N. Y. 225; Anderson *v.* Chilson (1895) 8 S. D. 64; Casey *v.* Mason (1899) 8 Okl. 665.

In Mescall *v.* Tully, the Court says: "It is an established rule of pleading that a plaintiff must proceed upon some definite theory, *and on that theory the plaintiff must succeed or not succeed at all*. * * * The theory upon which the complaint is constructed is that the parol agreement transformed the deed from an absolute conveyance into an instrument creating a trust, and as this theory is overthrown by the authorities, the entire complaint is foundationless. This theory is the foundation of the complaint, and, as that falls away, the whole pleading must go down." The plaintiff must now begin over again on another theory of the same facts.

As a consequence of such decisions, "the distinction between trover and assumpsit is to-day even more rigidly observed than under the common law practice." W. B. Hornblower, quoted in 2 Andrews, American Law (2 Ed.) § 635, n. 29.

[52] Politics, ii, 8.

enough. The courts say they are not foreclosing that case; they are merely deciding upon the theory he has chosen to advance.

Again, in the practice as to parties, the common-law conception that there must be a joint interest or a joint liability, because there must be one controversy and joint parties are as one party, has seriously interfered with the liberal plan of the framers of the original Code of Civil Procedure. I can only cite some of the cases.[53] But let me compare with our American cases a recent English decision.[54] In that case two plaintiffs sued for an injunction against infringement of copyright and for an accounting of profits. Only one was owner of the copyright; the other was a mere licensee. But which one was owner was not clear. The court did not deem it necessary to take up this question and determine whether one only was owner and if so which, although a money recovery was to be had. So long as the plaintiffs were agreed among themselves and the defendant had wronged and owed money to one or the other of them, it affirmed a decree for an injunction and accounting. Although in strictness it might be that only one was entitled to judgment and so it would be necessary to determine which one, the court wasted no time on that question so long as nothing turned on it.[55] Here the court was conscious that procedure was a mere

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[53] Voorhis *v*. Childs (1858) 17 N. Y. 354; Union Bank *v*. Mott (1863) 27 N. Y. 633; Borden *v*. Gilbert (1861) 13 Wis. 750; Phillips *v*. Flynn (1880) 71 Mo. 424; Setton *v*. Casseleggi (1883) 77 Mo. 397; Trowbridge *v*. Forepaugh (1869) 14 Minn. 133.

[54] Macmillan & Co. *v*. Dent [1907] 1 Ch. 107, 113.

[55] A like sensible conclusion was reached in Louisville N. A. & C. R. Co. *v*. Lange (1895) 13 Ind. App. 337. But see the usual treatment of this matter in America illustrated in Prestwood *v*. McGowin (1900) 128 Ala. 267; Glore *v*. Scroggins (1905) 124 Ga. 922; State *v*. Beasley (1894) 57 Mo. App. 570; Goodnight *v*. Goar (1868) 30 Ind. 418; McIntosh *v*. Zaring (1898) 150 Ind. 301; Blewett *v*. Hoyt (N. Y. 1907) 118 App. Div. 227. In the last case cited the court says the defect is fatal, "though somewhat technical." Even where a more liberal view is taken, the court must find out *which* is entitled, render judgment for him, and dismiss as to the other. Cf. Gillespie *v*. Gouley (Cal. 1908) 93 Pac. 856. Hence, in a case like Macmillan & Co. *v*. Dent, *supra*, if the trial court hit on the wrong one, a reversal would follow, though no harm was done.

Perhaps the acme of technicality was reached in Wisconsin. There a statute gave permission to courts, in their discretion, to render judgment against one or more defendants and allow the cause to proceed as to others. The court said: "The judgment appealed from is not against but in favor of, certain defendants, and therefore does not come within the statutory permission to vary from the general rule." Egaard *v*. Dahlke (1901) 109 Wis. 366, 369. Although there may be no case against these parties and the plaintiff may not be harmed in any way by terminating the cause as to them, the etiquette

means. It strove to vindicate the substantive law. It was not set upon adhering with scrupulous exactness to logical deductions from a conception of adjective law at the expense of the merits the latter exists to give effect to.

Trial procedure is full of mechanical jurisprudence born of deductions from conceptions. The decisions as to the effect of a view of the *locus* by a jury, in which judgments are reversed unless jurors are told, in the face of common-sense, not to use what they see as evidence, in order to vindicate a conception of the duty of a court of review; [56] the wilderness of decisions as to the province of court and jury, in which, carrying a conception of distinction between law and fact to extreme logical results, the courts at one moment assume that jurors are perfect and will absolutely follow an abstract instruction to its logical consequences, in the face of common-sense and the evidence, and at the next assume that they are fools and will be misled by anything not relevant that drops from the court;[57] and the practice of instructions, one way or the other, when doubtful points of law arise, a general verdict, and a new trial, if the court of review takes another view of the point, when the verdict could have been taken quite as well subject to the point of law reserved, and a new trial obviated,[58] illustrate forcibly the extent

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of justice requires them for the final judgment, and the plaintiff may reverse the judgment in their favor.

[56] Chute *v*. State (1872) 19 Minn. 271; Close *v*. Samm (1869) 27 Ia. 503; Sasse *v*. State (1887) 68 Wis. 530; Machader *v*. Williams (1896) 54 Ohio St. 344; Neff *v*. Reed (1884) 98 Ind. 341. There is a strong tendency to get away from this rule at present. Compare Wright *v*. Carpenter (1875) 49 Cal. 607, with People *v*. Milner (1898) 122 Cal. 171.

[57] See Judge Thompson's observations in the Preface to his Law of Trials, xi.

[58] In the discussion of this matter at the meeting of the American Bar Association meeting at Seattle (August, 1908), many thought reservation of the point and judgment thereon, if required, in the court of review, involved subversion of trial by jury. Mr. Johnston seems also to have this idea. Law Notes, xii, 130. He can conceive no middle ground, where a question of the measure of damages arises, between requiring the trial judge to choose one of two theories and charge the jury accordingly, sending the cause back for a complete new trial, if the court of review chooses the other, and allowing the court of review to determine the *quantum* of damages for itself. To require the trial court to take a finding on each theory and choose in the final judgment seems to infringe upon the necessity of a decisive finding *in form* by the jury. This is mechanical jurisprudence indeed. But when one may solemnly argue that reversing the presumption of prejudice from errors of procedure will require assessment of damages by a court of review, and assume that a statute making such change must be applied in a mechanical fashion to

to which procedural conceptions, pursued for their own sake, may defeat the end of procedure and defeat the substance of the law. For delay of justice is denial of justice. Every time a party goes out of court on a mere point of practice, substantive law suffers an injury. The life of the law is in its enforcement.

Evidence also has been a prolific field for the unchecked jurisprudence of conceptions. But one example must suffice. The decisions by which in a majority of jurisdictions jurors are not permitted to learn directly the views of standard texts upon scientific and technical subjects, but must pass upon the conflicting opinions of experts without the aid of the impartial sources of information to which any common-sense man would resort in practice, carry out a conception of the competency of evidence at the expense of the end of evidence.[59] In one case,[60] the question was whether death had taken place from strangulation. The trial was held in a rural community, and the medical experts accessible had had no actual experience of cases of strangulation of the sort involved. But standard medical works did relate cases precisely in point, and, after proof that they were standard authorities, a physician was allowed to testify with respect to the symptoms disclosed in the light of the recorded experience of mankind. For this, the judgment was reversed.[61] To vindicate a juridical conception, the court shut out the best possible means of information, in the circumstances of the case in hand, and allowed an accused person to escape because of the inevitable limits of experience of a rural physician.

How far the mechanical jurisprudence, of which the example just given is an extreme case, forgets the end in the means, is made manifest by the stock objection to attempts at introducing a common-sense and business-like procedure. We are told that

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defeat its end, it is evident that a deep-rooted professional obsession that mechanical procedure is fundamentally inherent in law has to be reckoned with.

[59] See the excellent critical discussion in 3 Wigmore, Evidence, §§ 1690-1700.

[60] Boyle *v.* State (1883) 57 Wis. 472.

[61] This decision has received the approval of the United States Circuit Court of Appeals, Union P. R. Co. *v.* Yates (1897) 79 Fed. Rep. 584.

formal and technical procedure "makes better lawyers." [62] One might ask whether the making of good lawyers is the end of law. But what is a good lawyer? Let Ulpian answer:

"*Ius est ars boni et æqui. Cuius merito quis nos sacerdotes appellet; iustitiam namque colimus et boni et æqui, notitiam profitemur, cæquum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu pcænarum, verum etiam præmiorum quoque exhortatione efficere cupientes veram, nisi fallor, philosophiam, non simulatam affectantes.*" [63]

The nadir of mechanical, jurisprudence is reached when conceptions are used, not as premises from which to reason, but as ultimate solutions. So used they cease to be conceptions and become empty words. James has called attention to a like vice in philosophical thought:

"Metaphysics has usually followed a very primitive kind of quest. You know how men have always hankered after unlawful magic, and you know what a great part in magic *words* have always played. If you have his name, or the formula of incantation that binds him, you can control the spirit, genie, afrite, or whatever the power may be. * * * So the universe has always appeared to the natural mind as a kind of enigma of which the key must be sought in the shape of some illuminating or powerbringing word or name. That word names the universe's principle, and to possess it is after a fashion to possess the universe itself. 'God,' 'Matter,' 'Reason,' 'the Absolute,' 'Energy,' are so many solving names. You can rest when you have them. You are at the end of your metaphysical quest." [64]

Current decisions and discussions are full of such solving words: estoppel, malice, privity, implied, intention of the testator, vested and contingent,—when we arrive at these we are assumed to be at the end of our juristic search. Like Habib in the

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[62] Cf. also the remarks of Lord Halsbury in Clydesdale Bank *v.* Patton [1896] A. C. 381.

[63] Dig. I, 1, 1.

[64] Pragmatism, 52.

Arabian Nights, we wave aloft our scimitar and pronounce the talismanic word.

With legislative law-making in the grip of the imperative theory and its arbitrary results, and judicial decision in the grip of a jurisprudence of conceptions and its equally arbitrary results, whither are we to turn? Judicial law-making cannot serve us. As things are, the cure would be worse than the disease.[65] No court could hold such hearings as those had by legislative committees upon measures for the protection of operatives, described by Mrs. Kelley,[66] or that recently had before the Interstate Commerce Commission as to uniform bills of lading.[67] We must soon have a new starting-point that only legislation can afford. That we may put the sociological, the pragmatic theory behind legislation, is demonstrating every day. Legislative reference bureaus, the Comparative Law Bureau, the Conferences of Commissioners on Uniform State Laws, such hearings as the one before the Interstate Commerce Commission already referred to, hearings before legislative committees, such conferences as the one held recently with respect to the Sherman Anti-trust Law, bar-association discussions of reforms in procedure,—all these are furnishing abundant material for legislation of the best type. No such resources are open to the courts. Hence common-law lawyers will some day abandon their traditional attitude toward legislation; will welcome legislation and will make it what it should be. The part played by jurists in the best days of Roman legislation,[68] and the part they have taken in modern Continental legislation, should convince us, if need be, that juristic principles may be recognized and juristic speculation may be put into effect quite as well by legislation as by judicial decision.

Herein is a noble task for the legal scholars of America. To test the conception worked out in the common law by the require-

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[65] Fortunately, even the layman recognizes this. Ross, Social Psychology, 333.

[66] Some Ethical Gains Through Legislation, 156.

[67] See Appendix to Report of Committee on Commercial Law at the Eighteenth Conference of Commissioners on Uniform State Laws.

[68] Hofmann, Kritische Studien im römischen Rechte, Essay I.

ments of the new juristic theory,[69] to lay sure foundations for the ultimate legislative restatement of the law, from which judicial decision shall start afresh,—this is as great an opportunity as has fallen to the jurists of any age.[70] The end of a period of development by judicial decision is marked by the prevalence of two types of judges; those who think it a great display of learning and of judicial independence to render what Chief Justice Erle called "strong decisions," and those who fix their gaze upon the raw equities of a cause and forage in the books for cases to sustain the desired result. But the task of a judge is to make a principle living, not by deducing from it rules, to be, like the Freshman's hero, "immortal for a great many years," but by achieving thoroughly the less ambitious but more useful labor of giving a fresh illustration of the intelligent application of the principle to a concrete cause, producing a workable and a just result. The real genius of our common law is in this, not in an eternal case-law.

Let the principles be formulated by whom or derived from whence you will. The Common Law will look to courts to develop and expound them, the Civil Law to doctrinal treatises. It is only a lip service to our common law that would condemn it to a perpetuity of mechanical jurisprudence through distrust of legislation.

ROSCOE POUND.

CHICAGO.

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[69] One of the cardinal points of the doctrine of sociological jurists is that it is enough to work out such rules as may clearly govern particular facts or relations without being over-ambitious to lay down universal propositions. Jitta, op. cit. I, 20. Doubtless courts have been led into excess of zeal to lay down universal propositions by having to do in the past so much of the rightful work of legislatures. But at an earlier period, when conceptions were not so thoroughly worked out and rules were not so numerous, there was always before them the practical problem of devising new theories for a concrete cause. To-day the principles are hidden by the mass of rules deduced from them, and, as these rules are laid down as and taken to be universal, not mere expressions for the time being of the principles, we have an administration of justice by rules rather than by principles. Legislative superseding of this mass of rules by well-chosen and carefully formulated principles seems to offer the surest relief.

[70] The restating and rationalizing of our law of partnership upon which Professor Ames is engaged for the Commissioners on Uniform State Laws is a striking example.

APPENDIX

From Nassau William Senior, Volume 1, *Conversations with Distinguished Persons During the Second Empire from 1860 to 1863* (1880):

Chief Justice [71] and Lady Erle arrived this morning, and drank tea with us in the evening.

August 31st [1861].—The hot weather of the last week has knocked up Lady Erle. Sir William drank tea with us.

September 1st.—I will throw together my conversations of the last two days with Sir W. Erle. [72]

I mentioned that in all the Swiss constitutions trial by jury in criminal matters was required.

***Erle.*—And very wisely.**

***Senior.*—Wisely for the purpose of keeping power in the hands of the people?**

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[71] Sir William Erle was appointed, in 1844, one of the Judges of the Court of Common Pleas; in 1846 he was transferred to the Court of Queen's Bench; in 1859 he was promoted to the Chief Justiceship of the Court of Common Pleas, on the elevation of Lord Campbell to the Woolsack. He retired into private life, taking his farewell of the Bench on November 26th, 1866.—Ed.

[MLHP: this exchange appeared on pages 317-322 of Senior's book. The painting of the Justice is from his entry on Wikipedia].

[72] These conversations have been corrected by Sir W. Erle.— N. W. Senior.

***Erle.*—Wisely for *all* purposes.**

***Senior.*—Including the discovery of truth?**

***Erle.*—Including the discovery of truth. I believe that a jury is in general far more likely to come to a right decision than a judge.**

***Senior.*—That seems to me strange. The judge has everything in his favour,—intelligence, education, experience, and responsibility.**

***Erle.*—With respect to intelligence, a judge is certainly superior to an ordinary juryman; but among the twelve there will generally be found one, often two men, of considerable intelligence, and they lead the rest. As to education, the jury have decidedly the advantage. The education of a judge, as far as relates to deciding fact, is the education of a practising barrister who is immersed in the world of words, and removed from acting in the commercial, agricultural, and manufacturing facts which form the staple of contest. He is so accustomed to deny what he believes to be true, to defend what he feels to be wrong, to look for premisses, not for conclusions, that he loses the sense of true and false — i. e. real and unreal. Then he is essentially a London gentleman; he knows nothing of the habits of thought, or of feeling, or of action in the middle and lower classes who supply our litigants, witnesses, and prisoners. And it is from barristers thus educated that judges are taken.**

When tried by a jury, the prisoner is tried by his peers, or by those who are a little above his peers, who are practically accustomed to the facts adduced as probantia, and can truly appreciate their value. I have often been astonished by the sagacity with which they enter into his feelings, suppose his motives, and from the scattered indicia

afforded by the evidence conjecture a whole series of events. For, after all, the verdict, if it be a conviction, must always be a conjecture. Experience the judge certainly has. As counsel or as judge he has taken part in many hundreds of trials. The juryman may never have served before. But this long experience often gives the judge prejudices which warp his judgment. The counsel who are accustomed to plead before him find them out and practise on them.

I was counsel in a case of assault. My client had had three ribs broken by a drunken bargeman. The opposite counsel cross-examined as to whether since the accident he had not been a field preacher, whether he had not actually preached from a tub. He admitted that he had. I did not see the drift of this, for though a man could not easily preach directly after his ribs had been broken, he might when they had reunited. The judge summed up strongly against me, and my client got nothing. I afterwards found that the judge had an almost insane hatred of field preachers. It is true that each juryman may have prejudices equally absurd, but they are neutralised by his fellows, and, above all, they are not known. They cannot be turned to account by counsel.

As for responsibility, a judge being a permanent officer, especially a judge sitting alone, is more responsible to public opinion than any individual juryman, who is one of a body assembled only once and immediately dissolved. But I believe that the feeling of moral responsibility is much stronger in the case of the juryman, to whom the situation is new, whose attention is excited, who for the first time in his life is called upon to exercise public important functions in the face of all his neighbours, than in that of a judge who is doing to-day what he has been doing perhaps every day for ten years before. I have seen dreadful carelessness in judges. Again, a judge is often under the influence of particular counsel; some he hates, some he likes, some he

relies on, and some he fears. It is easy for a judge to be impartial between plaintiff and defendant, indeed, he is almost always so; it is difficult to be impartial between counsel and counsel.

***Senior.*—I have felt that myself, but in general the feeling of dislike was stronger than that of liking. There were men on whose side I could decide only by an effort; they were so false, so sophistical, so anxious to dress up a cause which was sufficiently good if merely clearly and simply stated, that I was almost ashamed to decide for them lest I should be supposed to have been deceived. But I do not recollect having had favourites.**

***Erle.*—Perhaps you had them without knowing it, and attributed solely to the argument a force which was partly due to your good opinion of the speaker.**

***Senior.*—Just as a juryman who had been in court during the whole sitting at Liverpool congratulated Scarlett on having been always employed by the side that was in the right. What class give you the best jurymen?**

***Erle.*—The respectable farmers and the higher shopkeepers in the country towns. The men from the great cities, accustomed to excess in trade speculations, are inferior to them, especially in an honest sense of duty. The worst juries that I have known came from such places. Their adventurous gambling trade seems to make them reckless. At one time they appeared to have a pleasure in deciding against what they supposed to be my opinion, which I counteracted by seeming to give more emphasis to the reasons in favour of the decision to which I was opposed. One of the things which used at first to surprise me, is**

the very small motive which is enough to lead men to commit atrocious crimes. Smethurst's[73] motive, for instance, was a small one.
***Senior.*—You hold Smethurst guilty?**

***Erle.*—Certainly I do. If the evidence against him was insufficient, almost all circumstantial evidence must be insufficient, for it scarcely ever is stronger.**

***Senior.*—Sir George Lewis was partly influenced by the want of motive.**

***Erle.*—Do you recollect the Buckinghamshire groom, who murdered his fellow-servant because she would not give him a glass of beer?**

***Senior.*—You would have convicted Vidil [74] of the attempt to murder?**

***Erle.*—I have no doubt that he did attempt to murder, and I think that I should have convicted him.**

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[73] Dr. Smethurst was accused of marrying Miss Bankes during the lifetime of his wife. He caused her to make a will in his favour, and she died soon afterwards of slow poison. He was convicted and sentenced to execution, but Sir George Lewis, who was Home Secretary at that time, did not consider the evidence sufficient, and granted him a free pardon. Smethurst was afterwards tried, convicted, and imprisoned for bigamy.—Ed.

[74] The Baron de Vidil made an attack upon his son with a loaded whip while they were riding together in a lane near Orleans House, Twickenham. The Baron alleged that his son's injuries were caused by an accident on the road. In his deposition the boy said that his father had struck him twice on the head; at the police examination, however, he refused to give any information tending to criminate his father. Immediately after the occurrence, the Baron fled to Paris, where he was apprehended and tried. As the son still refused to give any evidence against his father, the jury could find the prisoner guilty only of unlawfully wounding. The Baron was sentenced to twelve months' imprisonment with hard labour.—Ed.

***Senior.*—Would he have been hanged?**

***Erle.*—I think not. I recollect no case of an execution for a mere attempt. He would have been sentenced to penal servitude for twenty-five years, which means twelve and a half years if the prisoner conducts himself well. His present sentence of one year's hard labour is severer while it lasts. The men in penal servitude live apart, each in his cell, and employed in trades. Great importance is attached to keeping up their weight. As their work does not promote the development of muscle, their weight is retained by fattening them. I saw a set of convicts at Dartmoor. Every one of them had thrown out a bow window. Nothing could look more absurd than a line of sixty or seventy men, each adorned by this prominence. Its reformatory effects, however, will be great. They will be guilty of none of the thefts which require agility.**

***Senior.*—I am not sure of that; Falstaff was a highwayman.**

***Erle.*—Yes; but he admitted that he could not rob a-foot, and no one can rob now on horseback.**

***Senior.*—And how will Vidil's punishment differ from penal servitude?**

***Erle.*—It will not be separate, he will be mixed with common felons. He will probably have to sleep on an inclined plane fifty or sixty feet long, and six feet broad, running along the side of the room, among twenty or thirty other convicts, those on each side of him separated from him by only an imaginary line. He will have to work with them and live with them. To a man of any refinement, and he must have some, it is a horrible sentence. And think what will be his position when he is released. I had much rather be hanged.**

***Senior.*—Do you believe that many innocent men are tried?**

***Erle.*—I believe that many men are tried, and that some are convicted, who are innocent of the crime of which they are accused. But I also believe that almost all those who are wrongfully accused, and that all those who are wrongfully convicted, belong to the criminal class. An honest man always proves an alibi, but a professional thief is constantly employed in some breach of the law. If, from a mistake of identity, the great cause of erroneous prosecutions, he is accused of some crime of which he is not guilty, he too can prove an alibi; but that very alibi would show his participation in some other crime. He prefers the risk of a false conviction to the certainty of a true one. He will not defend himself against the charge of having stolen A.'s sheep, by showing that at that very time he was breaking into B.'s house.**

***Senior.*—You have pleaded the cause of juries in criminal cases. What do you say to them in civil causes?**

***Erle.*—Even in civil causes I prefer juries to judges. The indifference to real and unreal, and so to right and wrong, which besets a barrister bred in the world of words rather than of facts, often follows him to the bench. Besides this, I have known judges, bred in the world of legal studies, who delighted in nothing so much as in a strong decision. Now a strong decision is a decision opposed to common sense and to common convenience.**

***Senior.*—Such, for instance, as Lord Eldon's; that if a book be mischievous you have a right to pirate it.**

***Erle.*—A great part of the law made by judges consists of strong decisions, and as one strong decision is a precedent for another a little stronger, the law at last on some matters becomes such a**

nuisance, that equity intervenes, or an Act of Parliament must be passed to sweep the whole away.

***Senior.*—As was done as to the construction of wills. I am told that Cockburn regrets that he has changed the bar for the bench.**

***Erle.*—So do not I. Both are laborious, and both are anxious; but the labour of the bar to a man in great practice is overwhelming. My great delight is my farm at Liphook. I cannot explain to you the soothing influence of agricultural occupation. As soon as I get there, I run to look at my colts and my calves, and my other stock, even my pigs. I care much more about my turnips, which are of no real value, than about my salary. When I am going away I get up an hour earlier to go round the farm once more.**

***Senior.*—I have no doubt that farming is an agreeable and interesting amusement; but is it not an expensive one?**

***Erle.*—I do not think that my farm costs me more than two hundred pounds a year. It is the money which I spend most profitably. ■**

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Posted MLHP: April 8, 2014.