great part—to bring about the realization of the dream embodied in the burning words of the peasant poet written over a hundred years ago:

"Then let us pray
That come it may
As come it will for a' that,
That mankind a' the world o'er
Shall brithers be for a' that."

When that great day at last arrives, when the supremacy of law is universally recognized, then will our noble mistress, the Law, be able to open the great doomsday book of humanity, containing as it does the names of hundreds of millions of human beings of every creed and color—Christian and pagan, Mohammedan and Hebrew, Buddhist and Confucian; white, black, red, brown and yellow—then indeed I say may she open that great book, and with firm hand, and unfaltering faith in the future of humanity, write therein in letters of celestial radiance—for the blessing of Almighty God will be upon her pen—the glorious words:

"Peace on earth to men of good will."

D. MURPHY.

Vancouver.

THE THEORY OF JUDICIAL DECISION.

III.

A THEORY OF JUDICIAL DECISION FOR TO-DAY.[1]

In a developed legal system when a judge decides a cause he seeks, first, to attain justice in that particular cause, and second, to attain it in accordance with law—that is, on grounds and by a process prescribed in or provided by law. One must admit that the strict theory of the last century denied the first proposition, conceiving the judicial function to begin and end in applying to an ascertained set of facts a rigidly defined legal formula definitely prescribed as such or exactly deduced from authoritatively prescribed premises. Happily, even in the height of the reign of that theory, we did not practise what we preached. Courts could not forget that they were administering justice, and the most that such a theory could do was

[1] The third of three lectures delivered before the Bar Association of the City of New York on January 17th and January 23rd, 1923. It appeared in the Harvard Law Review, vol. 36, p. 940. It is reprinted here with the permission of the author, the Harvard Law Review Assocation, and the Bar Association of the City of New York.

to hamper the judicial instinct to seek a just result. The proceedings of our Bar associations and the memoirs of our judges written by lawyers are full of proofs of the regard accorded by layman and lawyer alike to the strong judge who knew how to use the precepts of the law to advance justice in the concrete cause. Whenever the exigencies of legal theory did not interfere with expression of our real feeling, we honored the magistrate who administered justice according to law.

When justice in the cause in hand has been attained as near as may be and has been attained on grounds and in a manner prescribed by law, the duty of the judge under the civil law has been performed. But the Anglo-American judge must do more. At least if he is an appellate judge, and to some extent in any court of general jurisdiction, he must so decide that his decision will enter into the body of the law as a precedent. He must so decide that his decision or the grounds thereof will serve, first, as a measure or pattern of decision of like cases for the future, and, second, as a basis of analogical reasoning in the future for cases for which no exact precedents are at hand. In a very great proportion of the causes that come before the judge on the crowded judicial calendars of today this additional duty is relatively negligible. Happily, the bulk of these cases repeat or ring insignificant changes upon familiar states of fact. Yet in an appellate court, which has the power and hence the responsibility of laying down a binding precedent by its decision, the fact that each departure, however slight, from the states of fact to which settled legal precepts have attached defined legal consequences calls for consideration not merely of the relation of such departure to the just result in that case, but quite as much of the possible operation of the decision as a precedent or as furnishing an analogy for future cases—this responsibility adds to the burden of the tribunal. Indeed the necessity of weighing not merely the grounds of its decision, but the exact words in which those grounds are expressed with reference to their possible use in other cases and thus of foreseeing within limits the potential analogical applications thereof, is perhaps the gravest of the burdens involved in the crowded dockets of modern American appellate courts. If it were not for the need of scrupulously careful formulation of their decisions with reference to other cases in the future, our appellate courts could despatch the business that comes before them with less than half of the effort which our system of precedents requires. As it is, one or both of the aspects of the court's function must suffer. Having to decide so many cases and to write so many opinions, either considera-

tion of the merits of the actual controversy must yield to the need of detailed formulation of a precedent that will not embarrass future decision, or careful formulation must give way to the demand for study of the merits of the case in hand. In the event, too often both these things happen and the case itself is not as well considered as the court could wish, while much is said in deciding it which must be re-examined as well as may be when cited to the court in other controversies.

In another respect these two sides of the judicial function in Anglo-American law, the function of deciding the controversy and the function of declaring the law for other controversies, have a reciprocal influence. On the one hand, as the saying is, hard cases make bad law. On the other hand, regard for the stability of the legal order inclines courts to be callous toward unfortunate results in particular cases. And if a compromise results, as like as not it neither gives a just decision between the parties nor a practicable instrument of justice for the future.

Our reports are full of illustrations of this reciprocal influence of the deciding and the declaring function. More than one general rule, more than one doctrine has been determined or has been directed into a certain course by the hard circumstances of the particular case that first called upon a common-law court to state it or to fix its limits. To put but two instances of arbitrary doctrines with which our case law has since waged a long struggle, consider *Winterbottom* v. *Wright*,[2] which seemed to establish that the general principle of liability for an active course of conduct, carried on without due care under the circumstances, did not apply to a manufacturer or dealer who negligently put upon the market an article containing an unknown hidden defect, whereby the ultimate purchaser was injured; or *Thorogood* v. *Bryan*,[3] which, for a time, set up an artificial conception of imputed negligence. In each case, when we look narrowly at the cause presented to the court which established the doctrine, we discover that there is an element moving behind the logical scene. In each case we struggled painfully for more than half a century to unshackle the law from these decisions and their consequences, and in more than one jurisdiction the process is far from achieved. On the other hand quite as many cases may be found where strong judges have said, in effect: The result is unfortunate in this particular case, but we must apply the appointed legal precept or the logical consequences of the applicable precedent, be the result

[2] 10 M. & W. 109 (1842).
[3] 8 C. B. 115 (1849).

what it may. When they reason thus often they not merely sacrifice the interests of the parties to the particular litigation, but they extend the potential application of the precept calling for such a result and threaten an ascending series of like sacrifices until the whole has to be overturned.

One cannot understand American case law without bearing in mind the disturbing influence of the facts of particular cases upon the general rule. Nor can he understand American judicial decision without bearing in mind the disturbing effect of the exigencies of our doctrine of precedents upon the disposition of particular cases. At one moment courts are tempted to modify a general rule with reference to appealing circumstances of one case. The next moment fear of impairing a settled rule or of unsettling it by analogy will tempt them to ignore appealing circumstances of another case. If we actually set as much store by single decisions as we purport to do in legal theory, the path of the law would lie in a labyrinth. In truth, our practice has learned to make large allowances for both of these features of decision which are inseparable from a judge-made customary law. The tables of cases distinguished and cases overruled tell a significant story. Out of the struggle to decide the particular cause justly and yet according to law, while at the same time furnishing, or contributing to furnish, a guide for judicial decision hereafter, in time there comes a logically sound and practically workable principle derived from judicial experience of many causes. In the meantime there has been sacrifice of particular litigants and sacrifice of certainty and order in the law, as decision has fluctuated between regard to the one or to the other of the two sides of the judge's duty.

It may be observed in passing that the foregoing considerations explain what American lawyers find so hard to understand, namely, how civil-law tribunals, which decide the particular case without settling or attempting to settle any general point of law, merely determining that controversy for those parties on general legal grounds found for that case, can act on such a theory consistently with the general security. In fact, their decisions are much more consistent and ours are much less consistent than they appear respectively in theory. Probably just about the same degree of certainty is attained in practice in each system, for if our results were as rigid or theirs as loose as the respective theories taken at their face value indicate, neither system would be tolerable under the conditions of today. Permanent judicial tribunals manned by trained lawyers are sure to follow their own decisions and the decisions of other like tribunals to the extent of being guided by experience and

adhering to precepts that have approved themselves in experience. Tribunals set up to administer justice are no less sure to seek and to achieve just results between the parties despite theories that call upon them to subordinate such results to formulation of general rules on the basis of the facts of the cases before them.

Throughout the world and in all departments of intellectual activity there is a demand for individualization. Eighteenth-century natural law of thought of the abstract individual man in a perfect state and of his ideal qualities and ideal conduct in such a state. Nineteenth-century metaphysical individualism thought of the rights of the abstract individual man and the deductions therefrom. It thought of "the individual," not of individuals, and in its desire to uphold the rights of the individual in the abstract, often sacrificed needlessly the claims of concrete individuals. Recognition of the social interest in the individual human life is making for a new attitude in the application of law. But this only goes along with a like movement in morals. The eighteenth century knew of universal natural moral principles for the abstract man. Later we had common sense theories of principles applicable to the statistical average man. Later still, under the influence of Darwin, we had theories of principles applicable to man as a species, with resultant belief that all human beings, without regard to race, sex, condition or age, must conform to some norm or standard. Today we recognize that the moral judgments pronounced on such bases were too often empty and that we have to deal not with "the individual" but with separate and distinct individual human souls.

Treatment of the individual human unit has become the quest in medicine also. At one time the physician treated the abstract disease. Aristotle speaks as if treatment of disease by written formulas prescribed in advance for each malady, and administration of justice by written formulas, laid down in advance for each species of wrong, were essentially like processes. Later the physician began to think in terms of organs—but again as if they were *in vacuo*. "Man seemed to the analytical pathologist of the last century," says Dr. Southard, "a heap of viscera in which systems, such as digestive, muscular, nervous, respiratory and excretory, were to be found." As they had treated rheumatism as an abstract entity, now their treated the heart or the liver or the kidneys "taken as separately subject to disorder." Today in contrast they seek to treat the individual concrete man and recognize that abstract conceptions and analyses are but rationalizings and orderings of knowledge acquired by experience whereby that knowledge may be retained and developed and

applied to the treatment of the concrete human being with all his individual peculiarities. The parallel of legal treatment and medical treatment is not complete because the judge must bear in mind the effect of his treatment of a particular cause upon judicial treatment of other causes, while the physician may treat each case as wholly unique. But there is none the less a significant parallel for our understanding of one side of the judicial function. It is no more possible to treat negligence in the abstract than rheumatism in the abstract. It is no more possible to isolate and standardize types of controversy out of their concrete setting and treat all controversies solely on this basis than it was to treat "the heart" or "the liver" or "the kidneys" apart from the actual man whose heart or liver or kidneys were not operating as they should. Analyses and abstract conceptions that serve us well in the legal securing of interests of substance, where cases are alike and the economic order admits of no individualization, are vain as anything more than organizings and rationalizings of experience when applied to the individual human life.

Insisting, then, that the decision of a case under the Anglo-American legal system involves both a process of achieving a just result between the parties to that case on grounds and by a process provided by law, and also a duty, peculiar to our system, of so deciding that the decision or the grounds on which it proceeds may be a ground of decision in future cases, let us look into the elements of the process and the nature and mode of performance of the duty as they are and as they may be.

Supposing the facts to have been ascertained, decision of a controversy according to law involves (1) selection of the legal material on which to ground the decision, or as we commonly say, finding the law; (2) development of the grounds of decision from the material selected, or interpretation in the stricter sense of that term; (3) application of the abstract grounds of decision to the facts of the case. The first may consist merely in laying hold of a prescribed text of code or statute, or of a definite, prescribed, traditional rule; in which case it remains only to determine the meaning of the legal precept with reference to the state of facts in hand, and to apply it to those facts. It is the strength of judicial administration of justice today that in the general run of causes that have to do with our economic life this is all that is called for, or so nearly all, that the main course of judicial decision may be predicted with substantial accuracy. But it happens frequently that the first process involves choice among competing texts or choice from among competing analogies so that the texts or rules must be interpreted—that is,

must be developed tentatively with reference to the facts before the court—in order that intelligent selection may be made. Often such interpretation shows that no existing rule is adequate to a just decision and it becomes necessary to formulate the ground of decision for the given facts for the first time. The proposition so formulated may, as with us, or may not, as with the civilian, become binding for like cases in the future. In any event this process has gone on and still goes on in all systems of law, no matter what their form, and no matter how completely in their juristic theory they limit the function of adjudication to mechanical application of authoritatively given precepts.

All three of the steps outlined above are commonly confused under the name of interpretation. This is partly because in primitive times, when the law was taken to be god-given and unchangeable, the most that might be permitted to human magistrates was to interpret the sacred text. Partly also it is because the Middle Ages received the Corpus Juris as an authoritative text under the influence of an academic theory that gave it statutory binding force in Western Europe. It followed that jurists could do no more than interpret the text. Partly it is because in our stage of strict law we conceived of an immemorial common custom of England that could only be developed by logical discovery of and deduction from the principles which it presupposed. Chiefly, perhaps, it is due to the dogma of separation of powers, which refers lawmaking exclusively to the legislature and would limit the courts to interpretation and application. The analytical jurists first pointed out that finding a new rule and interpreting an existing rule were distinct processes, and Austin distinguished them as spurious interpretation and genuine interpretation respectively, since his belief in the possibility of a complete body of enacted rules, sufficient for every cause, led him to regard the former as out of place in modern law. Indeed he was quite right in insisting that spurious interpretation *as a fiction* was wholly out of place in legal systems of today. But experience has shown what reason ought to tell us, that this fiction grew up to cover a real need in the judicial administration of justice, and that the providing of a rule by which to decide the cause, or at least the reshaping of one which is inadequate in its given form, is a necessary element in the determination of all but the simplest controversies. More recently the growing insistence upon the importance of reasonable and just solution of the individual controversy has led jurists to distinguish application of legal precepts to particular cases from the more general

problem of interpretation. Application of legal rules is regarded today as one of the chief problems of jurisprudence.

Dividing our process of decision, as apart from the duty of providing a well considered precedent, into the three steps, finding the law, interpreting the legal material selected, and applying the resulting legal precept to the cause, let us look into the first of these, the process of finding or selection, and ask what it involves, as the process actually goes on. It may involve nothing more than a selection from among fixed precepts of determined content calling only for a mechanical ascertainment of whether the facts fit the rule. Such is the case when a tribunal looks to an instrument to see whether it contains the words of negotiability required by the Negotiable Instruments Law or by the law-merchant, or when it looks to a conveyance to see whether it contains the formal covenant of warranty without which at common law one may not hold his grantor. Or it may involve selection from competing analogies, urged by the respective parties as the ground of decision. Here, as it were, there is to be an inductive selection. Or it may involve selection by logical development of conceptions or principles. Here, as it were, there is a deductive selection. If these fail, it calls for selection from outside of the legal system in whole or in part—from custom, from comparative law, from morals, or from economics.

How, in practice, do courts determine when to resort to the one of these and when to another and in what order? It is manifest that the general security requires that they should select the grounds of decision with reference to fixed precepts wherever possible, and that selection from outside of the legal system should be resorted to only when the others fail or at least when they clearly fail to give a just result. As things go it is apparent that courts proceed in the order of (1) selection with reference to fixed precepts, (2) inductive or deductive selection, and (3) selection from outside of the legal system. As between inductive selection and deductive selection the practice of courts and even of individual judges varies. There is no standard method of determining between them, although some judges habitually proceed in the one way and others as habitually proceed in the other. The mental bent of the particular judge or the availability of the result with reference to the particular case seem to be the decisive factors. Likewise there is no standard practice determining when to invoke custom, when comparative law, when current morals and when economics, in case selection must be made from outside of the legal system. In general, custom has been resorted to only in special types of case where a definite custom of popular action

was at hand and was clearly applicable, as in Western mining law and water law and in the old decisions of controversies arising in the whaling industry. Comparative law was drawn upon largely in the formative era of our commercial law, but was drawn on rarely in the latter part of the last century. Current moral ideas are drawn upon continually, although seldom consciously. Usually they play their most important rôle in the process of interpretation. Yet one may see them as the basis of the formulated ground of decision in much recent decision in the law relating to labour, in much recent decision as to interference with advantageous business relations and in not a little decision on due process of law. Economic ideas are used as the ground of decision to-day chiefly in applying the Fourteenth Amendment; but also in labour cases, in cases on restraint of trade, and in connection with attempts to impose restrictions upon chattels binding upon those who acquire with notice. In these cases the economic proposition is sometimes formulated as a principle of natural law and sometimes assumed as a fact of external nature of which courts are required to take notice.

It was chiefly these cases, where courts have had to go outside of the given legal materials and find grounds of decision in economic ideas, that gave rise to so much criticism of judicial decision and excited projects for recall of decisions or recall of judges a decade ago. On the one hand, it was not appreciated that the process of selection of grounds of decision from outside of the strictly given legal materials was a legitimate and necessary one. On the other hand, courts afforded some basis for the agitation by assuming the economics of half a century before as something incontestably applicable to urban industrial America of the twentieth century. There could not but be popular irritation, after legislative committees had investigated a situation elaborately and had formulated a statute in the light of the best economic knowledge of the day, when courts rejected the statute on the basis of judicial notice of economic ideas of a prior generation. It was not the method of falling back upon materials outside of the legal system that was at fault. It was the theory that led to a false picture of what was doing and why, and hence led to a blundering process of selection where, had the process been consciously carried on, the judges would not have been content with anything short of the best economic materials available.

In the second step in decision, namely, development of the grounds of decision from the material selected, the usual process is one of traditional legal reasoning, scholastic down to the seventeenth century, rationalist more and more in the seventeenth and eighteenth

centuries, and tending to be deductive on a metaphysical basis in the nineteenth century. But in new and difficult cases this merges in, and in all cases is influenced by, current moral, political and social ideas, especially fixed pictures of the end of law and of an ideal legal and social order, by reference to which, consciously or subconsciously, the tribunal determines how far possible interpretations will yield a just result in the individual cause and judges of the intrinsic merit of the different developments of the legal materials potentially applicable which are urged by the contending parties. Along with these we must put an intuition of what will achieve justice in action and what will not, expressing the experience of the magistrate both as lawyer and as judge. The traditional legal reasoning represents the experience of generations of judges in the past. It is in some sort a traditionally transmitted judicial intuition founded in experience. But it has been given shape by philosophy. In our stage of strict law it was cast in a mold of scholasticism which gave it permanent shape. Rationalism in the seventeenth and eighteenth centuries and the metaphysical jurisprudence of the nineteenth century affected its substance more than its form. It is at its best as a technique of developing the grounds of judicial decision from materials selected from reported judgments of the past. It is usually at its worst, except in simple cases, in developing the grounds of judicial decision on the basis of materials found in legislation. A theory of "the will of the lawmaker" taken over from the civilian who thought of a text of the Digest as the declared will of Justinian, and a traditional attitude toward legislation discussed in my first lecture, make judicial handling of statutes the least satisfactory part of the work of American tribunals.

Application of the abstract grounds of decision to the facts of the particular case may be purely mechanical. The court may have to do no more than ask, did title pass on a particular sale, was possession given in a particular gift of a chattel, did a particular possession comply with the requisites of acquiring title by adverse possession? Or application may be apparently mechanical but with a greater or less latent margin of something else. For example, consider the cases with respect to acquisition of an easement by adverse user. As one reads these cases he can but see how much beneath the surface depends on the judge's feelings as to what is right between the parties to the particular case and how this is covered up by a margin of choice between competing rules. Where it seems the better solution to hold that an easement was acquired, a court will speak only of adverse user. Where it seems a preferable

solution to hold that an easement was not acquired, the court speaks of permissive user. As like as not in each case there was a known user not objected to or not prevented, which may be construed either way to meet the exigencies of justice between the parties.

But there is a more important form of application which is of a wholly distinct type. Frequently application of the legal precept, as found and interpreted, is intuitive. This is conspicuous when a court of equity judges of the conduct of a fiduciary, or exercises its discretion in enforcing specific performance, or passes upon a hard bargain, or where a court sitting without a jury determines a question of negligence. However repugnant to our nineteenth century notions it may be to think of anything anywhere in the judicial administration of justice as proceeding otherwise than on rule and logic, we cannot conceal from ourselves that in at least three respects the trained intuition of the judge does play an important rôle in the judicial process. One is in the selection of grounds of decision—in finding the legal materials that may be made both to furnish a legal ground of decision and to achieve justice in the concrete case. It is an everyday experience of those who study judicial decisions that the results are usually sound, whether the reasoning from which the results purport to flow is sound or not. The trained intuition of the judge continually leads him to right results for which he is puzzled to give unimpeachable legal reasons. Another place where the judge's intuition comes into play is in development of the grounds of decision, or interpretation. This is especially marked when it becomes necessary to apply the criterion of the intrinsic merit of the possible interpretations. A third is in application of the developed grounds of decision to the facts.

Nor need we be ashamed to confess that much that goes on in the administration of justice is intuitive. Bergson tells us that intelligence, which frames and applies rules, is more adapted to the inorganic, while intuition is more adapted to life. In the same way rules of law and legal conceptions which are applied mechanically are more adapted to property and to business transactions; standards where application proceeds upon intuition are more adapted to human conduct and to the conduct of enterprises. Bergson tells us that what characterizes intelligence as opposed to instinct is "its power of grasping the general element in a situation and relating it to past situations." But, he points out, this power is acquired by loss of "that perfect mastery of a special situation in which instinct rules." Standards, applied intuitively by court or jury or administrative officer, are devised for situations in which we are compelled to take

circumstances into account; for classes of cases in which each case is to a large degree unique. For such cases we must rely on the common sense of the common man as to common things and the trained common sense of the expert as to uncommon things. Nor may this common sense be put in the form of a syllogism. To make use once more of Bergson's discussion of intelligence and instinct, the machine works by repetition; " its use is mechanical and because it works by repetition there is no individuality in its products." The method of intelligence is admirably adapted to the law of property and to commercial law, where one fee simple is like every other and no individuality of judicial product is called for as between one promissory note and another. On the other hand, in the hand-wrought product the specialized skill of the workman, depending upon familiar acquaintance with particular objects, gives us something infinitely more subtle than can be expressed in rules. In the administration of justice some situations call for the product of hands, not of machines. Where the call is for individuality in the product of the legal mill— i.e., where we are applying law to human conduct and to the conduct of enterprises—we resort to standards and to intuitive application. And the sacrifice of certainty in so doing is more theoretical than actual. The instinct of the experienced workman operates with assurance. Innumerable details and minute discriminations have entered into it, and it has been gained by long experience which has made the proper inclusions and exclusions by trial and error until the effective line of action has become a habit.

Turning now to the second phase of the office of the judge in Anglo-American law—the duty of so deciding the particular case that the grounds of decision will serve both for deciding other cases involving the same facts and for the basis of analogical reasoning in analogous cases in the future—it should be noted at the outset that this part of the judge's duty has a collateral importance as a check upon the deciding function, and, *vice versa,* the deciding function has no less collateral importance as a check upon the law-declaring function. For it is no mean advantage of our doctrine of precedents and judicial finding or making of law that the common law is always found and made with reference to actual controversies. It is not declared in the abstract except in relatively rare cases by legislation. For the greater part it is made under the pressure of actual human claims asserted in a pending litigation and to meet the needs of a satisfactory adjustment of these concrete claims. Thus, no matter how abstract and mechanical our legal theory for the time being, it can never develop that serene indifference to the facts of life that

has sometimes marked the juristic speculation of the civilian. In the classical Roman law the juristic speculation of the jurisconsult was carried on in the same way with reference to the needs of opinions on actual controversies, so that Roman juristic writing was in truth a body of case law quite analogous to the law contained in our reports. But in the modern Roman-law world, the jurist is an academic writer, developing legal principles as such in a world of legal reasoning and as abstractions. Hence, if his reason is free to make notable theoretical forward steps, as it has done so often to the benefit of law throughout the world, it is also out of touch with the life which law is to govern and hence too often gives us mechanical constructions of a beautifully logical operation in which the a-logical circumstances of real life are ignored.

Our chief agency of lawmaking is judicial empiricism—the judicial search for the workable legal precept, for the principle which is fruitful of good results in giving satisfactory grounds of decision of actual causes, for the legal conception into which the facts of actual controversies may be fitted with results that accord with justice between the parties to concrete litigation. It is a process of trial and error with all the advantages and disadvantages of such a process.

But what is to govern this judicial search for the law through trial and error? What is to hold down this judicial experimenting with tentative legal propositions in the endeavor to find the practicable precept and to define it by inclusion and exclusion through experience? What is to confine the process within limits compatible with the general security? In the past it has been governed and its path has been defined by ideals of the end of law and of the legal and social order, and it is submitted that such ideals must be our reliance today and tomorrow. Only we must be conscious that these ideals are invoked, of the purpose for which they are invoked, and of the paramount importance of them as maintaining the general security against rash experimentation and wilful giving rein to personal inclinations. First of all our theory of judicial decision must recognize what actually takes place and why, and must endeavor to give a rational account of it. Next it must give a rational account of the check upon the process, upon which we must rely for safeguarding the general security, and enable us to make that check the most effective for that purpose and yet the least obstructive of legal growth and of individualization of decision that may be. To do this it must give us a picture of the end of law and of the legal and social order adequate to these demands.

On many other occasions I have urged that for the purposes of today our picture should be one, not of a god-given order laid down once for all on the lines of a society of the past, not of a reflection of the divine reason governing the whole universe and photographed once for all in the last century, not of a body of unchallengeable deductions from ultimate metaphysically-given data at which men arrived a century ago in seeking to rationalize the social phenomena of that time—that our picture should be none of these things but rather a picture of a process of social engineering. What we seek is a picture which will best enable us to understand what we are doing and to do it most effectively. Such a picture, I venture to think, would represent the social order as an organized human endeavor to satisfy a maximum of human wants with a minimum of sacrifice of other wants. It would represent the legal order as that part of the whole process which is or may be achieved by the force of politically organized society. It would picture elimination of friction and waste, economizing of social effort, conservation of social assets, and adjustment of the struggle of individual human beings to satisfy their overlapping individual claims in life in civilized society, so that if each may not get all that he demands, he may at least obtain all that is reasonably practicable in a wise social engineering.

For it is not difficult to show that the legal order has always been and is a system of compromises between conflicting and overlapping human claims or wants or desires in which the continual pressure of these claims and of the claims involved in civilized social life has compelled lawmakers and judges and administrators to seek to satisfy the most they might with the least sacrifice.

How may we generalize and rationalize the details of this process for the use of judge and jurist? Such a generalization and rationalization must hold fast to what actually takes place. It must seek to put what takes place as a rational process. It must endeavor to put it in an ideal form representing it at its best and thus enabling those who employ it to realize its highest possibilities. And we may actually see such a rationalization latent in judicial decision. For I submit that what courts do subconsciously, when they are at their best, is to generalize the claims of the parties as individual human claims, to subsume the claims so generalized under generalized claims involved in life in civilized society in the time and place, and endeavour to frame a precept or state a principle that will secure the most of these social interests that we may with the least sacrifice. As carried on by judges and jurists this process has suffered from a conception of the generalized individual claims as natural rights,

as deductions from an idea of individual liberty, each to be given a complete logical development within its logically defined scope. It has suffered from a notion that if these natural rights were logically defined with exactness neither the rights nor their logical consequences could come into conflict. It has suffered from a setting off of the claims involved in life in civilized society in a distinct category as policies with a resulting suspicion of those claims, thus branded as on an inferior plane, and tendency to give too much effect to certain longer-recognized claims as against others newly pressing for recognition. For this nomenclature made it easy to argue that rights were sacrificing to expediency when the rights and the so-called considerations of expediency were each but claims, to be compromised and reconciled by some general principle that would give the greatest possible security to both.

In such a conception of judicial decision as part of a larger process of social engineering, in a sense legislation and judicial decision are put on the same basis. Each is or may be creative. Each is and should be governed by principles of social utility. Each should be guided by a picture of the completest satisfaction of human claims or wants or desires that is compatible with the least sacrifice of the totality of such claims or wants or desires. But one of the chiefest of human claims in civilized society is the general security, and this paramount interest requires a distinction between judicial lawmaking through decisions in their capacity of precedents and legislative lawmaking. For legislative lawmaking, at least in its ideal form, prescribes a rule for the future to apply to the situations and transactions of the future. Judicial declaration of law, on the other hand, prescribes a rule with reference to and as a measure for a situation or transaction of the past and, as a precedent, is to be applied to past and future alike. Hence, if but his precept is otherwise good social engineering, it is quite immaterial what are the premises of the legislative lawmaker or how he develops them or whether he has any premises at all. On the other hand, no matter how wise the judicially-found and declared precept, as a precept for the future, it is usually consonant with the general security only in case it rests upon traditional premises and is developed therefrom by the traditional technique. We must urge upon judges that in their law-declaring function they are indeed lawmakers with the responsibilities for wise social engineering that rests upon all lawmakers. But we must urge upon them no less that their lawmaking function is subject to limitations that do not bind the legislative lawmaker, and that a compromise between the general security and social progress is likely to be involved in every important step that they take.

In such a picture as I have sketched an important item is partition of the field of the legal order between legislation and common law and also between judicial justice and administrative justice. Social engineering may not expect to meet all its problems with the same machinery. Its tasks are as varied as life and the complicated problems of a complex social order call for a complicated mechanism and a variety of legal implements. This is too large a subject for discussion in the present connection. Suffice it to say that conveyance of land, inheritance and succession, and commercial law have always proved susceptible of legislative statement, while no codification of the law of torts and no juristic or judicial defining of fraud or of fiduciary duties has ever maintained itself. In other words, the social interests in security of acquisitions and security of transactions —the economic side of human activity in civilized society—call for rule or conception authoritatively prescribed in advance and mechanically applied. These interests also call peculiarly for judicial justice. Titles to land and the effects of promissory notes or commercial contracts cannot be suffered to depend in any degree on the unique circumstances of the controversies in which they come in question. It is one of the grave faults of our present theory of judicial decision that, covering up all individualization, it sometimes allows individualized application to creep into those situations where it is anything but a wise social engineering. On the other hand, where we have to do with the social interest in the individual human life and with individual claims to free self-assertion subsumed thereunder, free judicial finding of the grounds of decision for the case in hand is the most effective way of bringing about a practicable compromise and has always gone on in fact no matter how rigidly in theory the tribunals have been tied down by the texts of codes or statutes. Likewise it is in these cases involving individual self-assertion, especially in affirmative courses of conduct and the conduct of enterprises, where there is never exact repetition of any former situation and each case is more or less unique, that administrative justice is tolerable and that judicial justice must always involve a large administrative element.

Our theories of decision have not recognized this partition of the field of the legal order. They have insisted upon one machine, set up with reference to the work to be done in one field, for all the work to be done in all fields. Our current theory of decision as a simple process of mechanical manipulation had its origin in the strict law which was a system of remedies only, before the system of rights, elaborated in the nineteenth century, had been conceived. Thus our ideas of judicial technique, our theory of that technique, are behind

our actual practice, which although hampered by the theory, has yet been obliged to improve itself under the pressure of new claims and demands for recognition and better securing of new interests. Our theory of judicial technique belongs to a stage of legal development that antedates the weapons of the judicial armoury of today. On the whole, the judges have done their part better than the jurists and the teachers. They have pushed forward cautiously but on the whole with reasonable speed along paths worked out by judicial empiricism, while those who should have rationalized the forward movement and furnished ideal plans of the forward path have urged pseudo-scientific reasons why they should stand fast, and have preached that progress would spontaneously achieve itself.

I repeat, on the whole the judges have been doing their part well. The real responsibility is upon our jurists and teachers to rationalize the process of judicial decision for the purposes of today and not rest content with the rationalizings for the purposes of the past that have come down to them; to substitute a larger and more varied picture of the end of law and a better and more critically drawn idealization of the legal and social order of the present for the simple picture of the past with its broad lines and impressionistic details. In this newer picture which jurists must draw for the courts, the important items will be: (1) to paint a process of legal social engineering as a part of the whole process of social control; (2) to set off the part of the field of the legal order appropriate to intelligence, involving repetition, calling for rule or for logical development of principle, from the part appropriate to intuition, involving unique situations, calling for standards and for individualized application; (3) to portray a balance between decision of the actual cause and elaboration of a precedent, in which, subsuming the claims of the parties under generalized social claims, as much of the latter will be given effect as is possible; and (4) to induce a consciousness of the rôle of ideal pictures of the social and legal order both in decision and in declaring the law. Indeed the last is the item of most importance. For we shall have done much if we induce on the part of judges a searching examination of how far these pictures that enter into their work so largely are personal pictures and how far they are general pictures; if we induce judges to inquire of themselves whence come the pictures with reference whereto they decide causes and whence their details are derived; if we induce the self-examination that will for the most part show them how far they may act upon these ideal pictures with assurance.

Socrates was not all wrong in holding that much which seems

wrongdoing is but ignorant doing. Much will be gained when courts have perceived what it is that they are doing, and are thus enabled to address themselves consciously to doing it the best that they may.

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THE NOTARIAL PROFESSION IN THE PROVINCE OF QUEBEC.

II.

Quebec Province is a province by itself, and in particular this is true as regards its laws. The civil law of Quebec is based on the law of France as it existed at the time of the conquest, which law substantially corresponds with the laws which existed in France previous to the French Revolution. The civil law was definitely established in Quebec by the "Quebec Act," of 1774. The notarial profession was then definitely established in the Province. The legal profession in Quebec is divided into two branches. One is represented by the Bar and the other by the Board of Notaries.

Article 4575 of the Revised Statutes of Quebec reads as follows:—

"Notaries are public officers, whose chief duty is to draw up and execute deeds and contracts, to which the parties are bound or desire to give the character of authenticity attached to acts entered into under public authority, to assure the date thereof, to have and preserve the same in safe keeping, and to deliver copies or extracts therefrom.

"Notaries are appointed for life, with concurrent jurisdiction throughout the Province."

Let us examine some of the phrases of the above definition:—

(*a*) "A public officer." This may be illustrated by the fact that after his death all original documents in the possession of a notary eventually are deposited among the archives of a Court of the Province where they will be carefully and perpetually kept in numerical order and with a proper index.

(*b*) What is meant by giving the "character of authenticity" to a deed or contract?

An instrument is said to be authentic when it is received as genuine without question or without the necessity of proving its execution. An example will perhaps serve best to illustrate the difference between an authentic *acte* and an *acte* under private signature.