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THIS THING MEN CALL LAW

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HOBBS is authority for it that "In the right definition of names lies the first use of speech, and in wrong or no definition lies the first abuse," while Joseph Kohler declares "The moderns do not generally give definitions in the old pedagogic way. Definitions are now characterizations."¹ We have it on the authority of some that to define law is an impossible task. Others say "Not so, for definition is sufficiently accomplished when we make the new we are trying to learn understood in terms of the old we know, and this can be done of law." At any rate, I shall not try to define it. It is sufficient for my purpose to assume that it has been defined, and to ascribe to it characteristics within the assumption. Its apparent self-sufficiency by now, its cast of authority, have made it a favorite word with those who like to speak in absolutes, but it is not as an absolute that I shall deal with it; quite the contrary. I shall deal with it as it has manifested itself in the unending struggle between rule and discretion, the absolute and the relative, the fixed and the changing, the predictable and the unpredictable, as they affect or are affected by judging. In short, I shall deal with this iridescent thing called law in its most elusive and entrancing phases, its everchanging content under the steady pressure of the changing life it serves and rules. I shall take the position, as some do, that the apparent confusion and inconsistency manifested by the law we have on different social planes, in different social set-ups, under different decisions within those set-ups, is not, speaking fundamentally, an inconsistency at all, but a living consistency, the result of the pressure of formal law for a material law with an ideal content, a law ever more truly representing the life always evolving around us. I shall take the position that the civilian and the common lawyer, the strict constitutionalist and the believer in legislative freedom, the precedent men and those for free decision, are always struggling for the same thing as each sees it. This is to have the actual content of the law in its pronounce-

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¹ Kohler, *Mission and Objects of the Philosophy of Law*, 5 Ill. L. Rev. 423, 426 (1911).

ments and in its workings, in its compensations and in its reparations, in its punishments and in its remissions, be ever taking more ideal form. I shall take the position that though everyone is his own interpreter, just law speaks and should speak with one still, small voice; not varying and discordant, but uniform and harmonious. I shall take the position that if attention is centered on law as control, it will be found that law the binder, the controller, presents always a single face to man; that the seeming variances appear only in the means and results of control under varying views and circumstances, in varying times and places. I shall take the position that viewed abstractly and ideally as control, as binding force, abstracted from the institutions it sanctions, the results it brings about, the things on and the means by which the force is exerted, viewed in short, as form, law is timeless and universal. That it is only partial, local, temporary, when it is viewed in its content as means employed to bring about results which have from time to time been deemed desirable. Such law, law in the concrete, is not, it cannot be, an ultimate end; it is, it can only be, means.²

Of justice it has been said that its seat is in the bosom of God. Finite justice, as it is administered under human law, has its seat in the enlightened conscience of mankind. It aims at achieving just results under law. I believe, and I shall roughly state, that just law has been nearest attained and best administered when the actual law has struck the best balance the times admit of, between sympathy and a strong and enlightened common sense. When, in short, the pure claim of the demandant is examined and adjudicated in the light not merely of its own appeal, but of those social considerations out of which wisdom and prudence, and a strong common sense, from time to time extract principles for the guidance of human affairs. Because this is so, it is the boast, it is the strength of the law we live under that it is flexible, and that it changes not so much in principle as in application under changing conditions. Long ago one of the greatest figures in the history of the common law, seeing indeed, more clearly than we do now, the existence of those "principles of natural rights" of which he spoke, said "The principles of natural rights are perfect and immutable; the condition of the law is ever changing and there is nothing in it which can stand forever. Our laws are born and die."³ It is

² "Whoever maintains and defends a specific legal rule with definite content as absolute, simply because it is legal, is guilty of an objectively unjust act of will." Stammler, *The Theory of Justice* (1925), 26.

³ "No rule is just for all times. Every form of justice, like all formulated law, is the outcome of historical development. We have already pointed out that lawyers' law, the child of free de-

this infinite capacity for change exhibited by our law, which makes some of us think of our actual law as but a becoming, which hardly is when it ceases to be. It is this everchanging content which makes necessary and explains judicial systems everywhere.⁴

In every discussion of law, in every reflection on it, a question arises whose solution largely determines the conclusion we reach as to what law is, and how we get it. This question is, whether judges are moved by, and must conform to, a force outside of them which though they may in part direct it, deflecting it sometimes, staying it at other times, yet always furnishes the driving power for the statement of the law, and in the end prevails; or whether they themselves are the force. Some think of law as though it were a great wind blowing, its force caught and used by legal craft by the set and trimming of their sails. Some think of it as a series of little gusts the judges raise in each case, as they launch their decisions, soon blowing themselves out unless fanned by subsequent judges who give the same direction to the barks they launch.

Now every one knows that before any specific decision was rendered or legislation enacted, there must have been existing some body of opinion, dominated by some received ideal, to be shaped into legal form. Everyone knows that in the biblical sense of creation, the making of something out of nothing, no law was ever made. All agree that in the qualified sense of the creation of form, by the assembling of words to give effect as law to the ideas and results already determined upon, all law making is creative, and that judges in that sense do create law.

There is, however, still a real controversy,⁵ a real lack of understanding. It is between those who take the view that law consists only of the countless, the almost infinite combinations of facts, and the legal results which

cision, is composed of rules derived from the nature of social relations and changing as these change. The great mass of rules of decision are determined, at any given time, by the changing social conditions to which they are applied." Ehrlich, *Freedom of Decision in Science of Legal Method* (1917), 72.

⁴ In his great address before the American Bar Association in 1890, on "The Ideal and the Actual in the Law," 13 *Rep. of Am. Bar Assn.* 217, 225, 226 (1890), James Coolidge Carter declared:

"The first step in the administration of justice has been to elect a judge. The creation of judges everywhere antedates the existence of formal law, but though formal law does not at first exist, the law itself exists, or there would be no occasion to appoint a judge to administer it. . . . The social standard of justice exists in the habits, customs, and thoughts of the people, and all that is needed to apply it to the simple affairs of such a person is the selection of a person for a judge who best comprehends these habits, customs, and thoughts. . . . As society advances, the need arises of a special class of men, whose sole function is to apply the social standard to justice and to qualify themselves for the office by a study of those rules; hence the origin of the judicial establishment and of our profession as lawyers."

have been attributed to them and those who think of law as a dynamic force. The first group thinks these combinations set patterns authoritative for other cases, and that in deciding cases judges must, as children do in solving picture puzzles, mechanically arrange and re-arrange facts and law until they fit the pattern. The second group believes that the feeling for just law is a dynamic force; that it has its seat in the bosom of every just judge, and that it drives him to decide the cause before him as nearly in accord with the "ought to be" as established method will at all permit; that there is judgment, intuition in the decision,⁵ not merely mechanics. Those who take the first view look on law as always already present in substance in the form of code, statute or prior decision. They think that the judge merely gives form to the particular case by shaping and fitting its facts into the pattern. They think this act of shaping and applying is mechanical in the sense that when it takes its best and most effective form it is the work of a skilled mechanic versed in the art. The others believe that this description of the judicial process is not truly drawn. They think there has always been in it an element of invention. They declare that judging is best done by a restless, eager mind searching always for justice to give it application through law; a mind searching always in streams of tendency the true stream of the "ought to be," to find and release it where, nearly choked by false precedent, it has almost ceased to run.⁶ That lawyers and judges who serve the law must build its habitations surely and strongly all informed ones admit, but it is no longer greatly debatable that they must be ever building new mansions for its abode. That those who serve it must be ever alert to adapt it to new needs, shaping, blending and conforming the old to the new, no informed person now contests. All of the discussions and all of the troubles are concerned with matters of degree; they really arise out of the feeling and fear of some that precedent holds too stout a sway, and the feeling and fear that others have, that it holds one not stout enough.

⁵ U.S. v. Vineyard, 71 F.(2d) 624, 626 (C.C.A. 5th 1934).

⁶ "That above all things every jurist must become as clear as possible in his own mind on the problem of what constitutes his peculiar function in the life of society. . . . Now it cannot be repeated too often that legal science is essentially a science of action, having no possible purpose except that of finding the necessary rules for the government of certain human relations by external social sanctions. It is based on facts of social life which it aims to order and arrange in such a way that the consequences flowing from them are those which are socially desirable." . . .

"We need also a process of reasoning which starts from an intuition supplemented by the feeling for what is just; and arrives at exact conclusions by a series of deductions under the constant guidance and control of practical common sense." Geny, *Freedom of Decision in Science of Legal Method* (1917), 16-17.

I myself am like Corin, one of the simple ones, a natural philosopher. These have long held the opinion that the whole matter of the controversy could be simply stated in terms which would command the assent of every lawman by admitting once for all that the common law is neither altogether fluid nor altogether fixed. That it neither is nor ought to be altogether based on precedent, nor should it altogether disregard it. That lawyers and judges do, and should, recognize law as essentially a science of action, exhibiting and requiring both a reasonable coherence and a reasonable capacity for change. These think law should be reasonably consistent and coherent, and have as one of its prime characteristics a reasonable predictability. But they think, too, that this coherence and certainty, this capacity for predictability, is reasonable, logical and sound only in respect to broadest principles. These think there should be the fullest admission that we should be ever seeking the real meaning of words and the propositions they make in the consequences attached to the acceptance of particular meanings; that is, in the results this acceptance brings about in the affairs and the conduct of men. These insist, therefore, that it is the duty of the judge, the administrator of justice according to law, to be forever examining the propositions and postulates of the law, to be forever searching the meaning of meanings. These demand that these postulates be not allowed to become set and fixed. These point out that otherwise, statements, which did adequately explain the reasons at the time, in the place, and under the circumstances then apparent for laying down this or that guiding rule for human affairs, become changed into fixed formulas and over-generalized principles. They point out how, transcending the limitations of time, place and circumstance which caused their formulation, they are now conceived of as furnishing the same directive force and attaching the same consequences to conduct under circumstances having no real, no just relation to those which caused the rules to be first laid down. Of course every decision, not least an overruling one, theoretically seeks to conform to a pre-existing standard, and through the use of fictions, analogies and other devices, it does at least on its face, so conform.⁷ In theory, neither judge nor jury decides a case in pure capri-

⁷ "The very peculiarity of the judicial office is the assumption that the judge's utterance represents not his personal opinion, but the law, and this law is found primarily in the legal records of the past, in statutes, in decisions of courts, in legal literature. No Roman justice ever deviated farther from the traditional rules than he was compelled to do by necessity. Blackstone, in a famous passage in his Commentaries, speaking of the English common law, represents the English judge as only declaring not as making the rules of law. Free decision is conservative, as every kind of freedom is, for freedom means responsibility, while restraint shifts responsibility upon other shoulders." Ehrlich, *supra* note 3, 71-72.

ciousness, nor, as we understand deciding, does either decide it upon considerations of conciliation or compromise. In theory every case is decided according to the right of that case. However correct it may be, whatever weight it is to have in future cases, for the very case decided, the decision, that is, the judgment in it, determines what the law is, not what it ought to have been, nor what it would be well for it to be or to have been, at the time for the cause decided. For whether they call it fiction, or whether they call it fact; whether they think it pretense or reality, all know what purports to be done when a cause is decided. That is, generally speaking, to say of the plaintiff and of the defendant that the conduct of the one was in conformity with what the law expected of him at the time and under the circumstances disclosed by the suit, and the conduct of the other was not. There is of course also the trial rule of burden which defeats the plaintiff when there is equilibrium in the proof. There are cases, too, in which the conduct of both is found to be out of accord with the reasonable expectation of the law; the result, no liability.

Now it is not debatable that in theory always, and usually in fact, our courts do not prophesy, they adjudge, and as such give effect as law not to what they think the law ought to be or become, but to what they think it is for the controversy in hand. "For it is of more importance for a judicial determination to ascertain what the law is, than to speculate upon what it ought to be."⁸ It cannot be gainsaid therefore, that it is highly important for judges and students of the law to know what the decisions are, and to what extent judges are bound by the streams of tendency which decisions set up. They must know, too, to what extent decisions are generative⁹ and to what extent they are merely the record of what courts have done under particular circumstances.

Many have written of the *ratio decidendi*, a vague and baffling term, a term which everyone feels at liberty to use to suit himself and on which few have been found in complete agreement.¹⁰ They have written of *stare decisis*, and *stare dictis*. Some claim that for the purpose of precedent each case contributes only the decision of its own precise facts. It is authoritative, they say, only when the precise facts premised by the judge appear again. With these, the real problem in searching for the *ratio decidendi* is to ascertain and isolate the material terms of the minor premise.

Such a definition of precedent, I submit, strips the doctrine of precedent of a great part of its useful force. This lies not in controlling, but in direct-

⁸ *Wiscart v. D'Auchy*, 3 Dall. (U.S.) 310, 328 (1796).

⁹ *Carrollton v. New Orleans*, 69 F.(2d) 691, 693 (C.C.A. 5th 1934).

¹⁰ *Hutcheson*, Book Review, 31 Col. L. Rev. 1209-1215 (1931).

ing decision, and particularly in directing it along the lines of a general principle, the recognition of which has power in accordance with the narrow or broad application given to it, to dispose of numberless other cases whose facts are not only not identical with, but indeed in many particulars are different from, those in the cited case. Lastly, since it is, generally speaking, impossible that the facts of one case should be exactly like those of another, it is quite plain that only by taking the most free view of the identity of facts can the rule thus stated be worked at all.

Some inveigh against *stare decisis* as mere *stare dictis*. These seek, as the others do, to deprive the general reasoning of the opinion, the grounds it purports to base on, of authoritative cast. Unlike the others, however, these will not even permit the decider to put a value on the facts and fix their place in defining what was decided. They insist on doing their own valuing. They say that not only the entire record, but the pertinent history of the case and of the times which produced it, must be examined. Their search is not primarily, if at all, for the facts set down by the judge in his opinion as important to his conclusion. They are looking for the facts which, in their opinion, the critic and the investigator must weigh in determining for himself what really produced the decision. They say that in that way only may "the secret roots from which the law draws all the juices of its life" be found.

I must confess that this method of approach to an understanding and appraisal of decisions is to my mind, certainly as concerns the busy judge, lawyer and law student, even less satisfactory than the first method. The method of letting the decider value his own facts does at least have the merit of giving us, in a definite way, if we can find it set down there, what the judge deciding the case wanted understood to be the fact situation which produced his conclusion. The other method of searching the entire record for facts not disclosed by the judge in the opinion, and more, searching the history of the times itself, will only be a very tedious task and one well-nigh impossible of accomplishment. It will, too, if accomplished, put us in the hopeless and most often useless position of trying to figure out what part of the history of the case and of the times, and what of the conflicting facts not set out in the opinion, really influenced the judge to his conclusion for, in using this method, we must always keep clearly in mind that we are not looking for what ought to have produced the decision, but for what did. To do this, one must have a kind of legalistic clairvoyance which is denied to most. It seems to me that this fact-limiting disregards too much what may not be denied, that "facts are nothing except in relation to desire." That the meaning which facts have varies

for different minds, not only in accordance with their ideals, but in accordance with their capacities. That in short, in matters of the kind we are discussing, facts have little independent objective existence and no dynamic effect apart from the mind which examines and appraises them, and particularly apart from the ideals, the preconceptions, which such minds bring to the task.

Searching the grounds of decisions, then, by pursuing through the marsh of the record and the history of the times the will-o-the-wisp of facts is, I think, generally a sorry business for predictors, prophets of the judicial process. In fact, except where the opinion does not set the facts out or purports to set them out but meagerly, it is in the main no business at all.

I am one of those who believe that the facts of the case, merely as facts, whether they are to be appraised according to the first rule, by the writer of the opinion, or according to the second rule, by the critic of it, may not justly be given such great weight. I am one of those who think the important thing to know is not the facts as facts, but the significance attributed to them by the writer of the opinion, the ligature by which they are tied together, the rule under which it is said they fall, or which they give rise to, and back of that, if we can find it, the ideal to which the decision conforms.

Everyone knows, indeed, it is self-evident, that speaking precisely, every case and every fact is different from every other case and fact. If this were not so it would not be a different, but the same, case and fact. To discriminate truly between fact and fact, case and case, is the main business not only of legal, but of all thinking. To learn to do so is the main purpose of education. We analyze to synthesize; we classify to separate. All then that we should justly mean by the doctrine of precedent is that not the same facts identically, but the same facts substantially, should have the same rule applied to them. All we should contend for it is that it is right that, when substantially the same set of facts transpiring under substantially the same conditions, has already been ruled upon by a tribunal having authority and wisdom adequate to the task, the same rule should usually be again applied. Now it is just here in regard to substantiality that the play comes into the rule of precedent. What is from time to time considered substantial enough conformity so as to require the same rule and what not, determines the whole body and growth of a living law. Thus we return to our starting point to begin again.

In all the discussion and contention over the nature and course of law, whether it is made by judges or is discovered by them; whether it pre-

exists enunciation, or is created thereby, two dominant, inescapable considerations stand out. So dominant, so inescapable are they that their complete recognition almost, if not quite, ends the discussion. These considerations are that the discussion is meaningless unless the terms are used and understood in reasonably the same sense by all the disputants, and that when they are, there is little left to discuss. For the truth of the matter is that in the sense of packaging the countless fact instances which go to make up actual law's stock in trade, judges really do create, by giving content to, law. The continuous process in which judges are engaged of dividing, subdividing, redividing, extending and rearranging these packages in their proper places on their shelves in the warehouse of the law is, in a real sense, creation. Further, judges really do from time to time, in the sense of enunciating, create, and they will continue to create, the germinating principles from which all this great stock springs.

We are not without authority for the proposition that the enunciation of a fact or a principle is almost to create it entirely. But we do not need authority. It is self-evident that this is true, for in the last analysis all enunciation, except an inarticulate cry, is a form of synthesis. But it is not in this sense that those who wage the great argument over whether courts create, or merely declare, the law, use creation. They use it in the Old Testament sense; when they say "creation" they mean something more ultimate, more complete. They speak of creation in the sense of evolving law which had no prior existence, in fact, starting it on its career. Those who argue for creation say law cannot exist in the abstract; it only comes into being in the form of a sovereign mandate, either legislative or judicial. They say it is sheer folly to say of the common law that the judges discover it. They say that just as, in the Old Testament sense, when God said "Let there be light" he created it, so the judge declares the law, and in declaring it creates it into being.

On the other side, it is contended that compounded of experience and desire, law is merely the expression of starting or establishing customs which have come so far along in acceptance as to have gotten articulated as law. In some the argument arouses a fury of contention; in others, an apologetic defense; in others still, a bold "What of it." These realize that the whole argument is much ado about nothing. They try to state the matter in other terms, the meaning of which will be clear and non-controversial. They state it thus: Law exists both in an abstract and in a concrete sense, as the ideal and as the actual, as form and as material. There is pure law and there is applied law. Pure law, they say, lies back of all these general principles and ideals which have from time to time made up

our stock of ethical concepts and influences, our selection and use of those concepts for the control of everyday life. These say concrete law is from time to time formed out of the then prevailing conception of the nature of things and of our relation to them under the constant influence of our attitude toward this conception. If our attitude is approving or there is force to maintain a particular conception, then actual, concrete law tends to be static. If it is disapproving or merely questioning, and there is no force applied to solidify it, actual law tends to be changing. These say that since, speaking of this country and in the large, there has latterly been no long period of time, when our attitude toward the nature of things has not been critical, our actual law has always been undergoing change. These say that our own notions of pure law determine for us from time to time the choice of that body of principles and assumptions, which explains and justifies for us, for the time being, the nature of things and our relation to them in the light of our inquiring outlook on them, and out of which the content of our actual law is formed. These say that this conception of the nature of things and our attitude toward that conception being always in a state more or less of change, so our law must always be.

They say, too, that law in the concrete, law applied, consists of the multitudinous declarations contained in the numberless little packets of instances in which the rights of men have been settled under declared rules and principles, together with the streams of tendency which these various declarations have set up. These say that if students will accept this general view of law as pure and applied, there ought to be no difficulty at all in reconciling and finding harmonious, instead of diverse, all the views which have ever been announced or held about law and its declaring. They say that no case can be imagined which cannot be disposed of in accordance with this view, no difficulties conjured up which cannot be exorcized with it. It but recognizes of law what is true of any branch of knowledge, that it consists of an experimental or observational branch, which collects instances for analysis and classification, and a rational or classificational branch, which in accordance with principles of arrangement establishes categories, and constantly rearranges, extends and expands them, both operating under controlling principles of adequate generality. These say that in accomplishing this the human mind, a machine-like contrivance incapable of thinking except in accordance with the laws of identity and non-contradiction, ranges and ever explores the unknown to state it in terms of the known, using words solely as symbols to make the new that we are constantly receiving plain to us in terms of the old that we know. It is this absolute necessity of satisfying the mind that though

new in form, ideas advanced from time to time are in fact old in principle, a thing which the human mind seems vastly to desire, and it is this alone, I think, which causes all of the discussion in the books between those who incline to hold to freedom of decision, and those who condemn it. It is the refusal to accept that both are striving for, and both tend to obtain, the same thing, the right and just result, which points their discussion so and makes such an apparently serious breach between them.

Those who deny the right of judges to create precedents insist that there is a natural law, the knowledge of which all judges should and undoubtedly do have, and to which all decision must conform. That if judges are to be allowed, by creating precedent, to set up rules for decision, taking the place of resort to natural law, this will result in depriving persons going to law of that assurance they are entitled to that they will have just law dealt them. These seek certainty—but of what? Merely that to each cause the free and unrestrained judgment of the tribunal deciding it shall apply the natural law. These deny the right of judges to set up precedents, not because they want uncertainty, but because they want that certainty of justice which they believe is found only in the uncontrolled right of the judge, without being influenced by what other judges have said, to give justice as he sees it in that cause.¹¹ Some codes contain prohibitions against deciding causes in accordance with precedent, or by laying down general principles. It is considered that the just law has already been laid down in the Code, and that in theory it will fit every case justly and alike. These oppose precedent making, because they fear it will make law uncertain, by taking from the litigant the right to have an individualized just judgment in his particular cause.

How strange it is to find at the other end of the argument the precedent man, demanding also, in the name of equal justice and certainty, that precedents be observed. How clearly Cranch, in the preface to his first

¹¹ "But, because there is no judge subordinate nor sovereign but may err in a judgment of equity, if afterward in another case he finds it more consonant to equity to give a contrary sentence, he is obliged to do it. No man's error becomes his own law, nor obliges him to persist in it. Neither for the same reason becomes it a law to other judges, though sworn to follow it. . . ."

"In laws immutable, such as are the laws of Nature, they are no laws to the same or other judges in the like cases forever after. . . . One judge passeth, another cometh; nay, heaven and earth shall pass; but not one tittle of the law of Nature shall pass, for it is the eternal law of God. Therefore all the sentences of precedent judges that have ever been cannot make a law contrary to natural equity, nor any example of former judges can warrant an unreasonable sentence or discharge the present judge of the trouble of studying what is equity in the case he is to judge from the principles of his own natural reason." Hobbes, *Leviathan* (*Everyman's* ed. 1928), 147.

volume of United States Reports, expresses the view of his day, that want of knowledge of decisions causes injustice and uncertainty in the law. That published decisions will make law certain. "Much of that uncertainty of the law which is so frequently and perhaps so justly the subject of complaint, may be attributed to the want of American reports." More than a century later we find Stone, in "Some Aspects of Law Simplification," saying that because of the flood of published precedents the law is becoming uncertain and overborne.

Now what is the student and the teacher, the lawyer and the judge, to do? Is he to say "A plague o' both your houses"? Is he to hold parley with neither the certainers nor the uncertainers? Is he, despairing of reconciling them, to leave them to go their separate ways, knowing that out of their conflict law is always emerging? Should he not rather try to set down the middle course between them, showing how free decision and precedent following, natural law and declared law, all are sources from which the dynamic law draws its power, and that their very apparent contradictions furnish the frictional pull necessary to turn the dynamo, to generate the electricity a living law requires?

I think that there begins to stand out more clearly, since the philosopher and the logician have come riding into our midst, that there is a false and a real certainty in the law. The false certainty comes as much from over-individualization as from over-generalization. The real certainty lies between. In times when the false certainty of over-generalization, which is in reality not certainty, but its opposite, because it denies effect to differentiating facts, has the upper hand the law becomes rigid and unjust.¹² Then words become things to conjure with. Then judicial and legal predilections for the established view of the nature of things and of our relation to them are strong and fixed, as is also the established view of the function and method of judging. Then it is felt that judging may not start new streams of tendency in the back waters old precedents have set up. Then legislative and judicial efforts to break out new channels to make the law again a living water meet determined opposition. Men do not then, in accordance with the circumstances of their cases, get their just deserts at law. Many a luckless suitor finds himself maimed by lopping off, or disintegrated by racking and stretching to fit its rigid bed. On the other hand, when each case stands alone, when there are no rules, no guides, no standard, no directing, restraining precedents and practices,

¹² "In the first place, the granite fixity of an exact precedent is unduly respected, there is a fetish of immutability. And, in the second place, the infinite variety of justice is forgotten. A precedent is built up narrowly by them out of a few elements; the really new and special elements of the present case are not allowed to have any effect. Wigmore, Evidence (2d ed. 1923), 117.

there is not only no certainty of justice, but great danger from caprice.¹³ This is the real certainty, then, that each litigant get his just deserts in accordance with the facts of his case, including the real conditions under which they occurred, under general principles fairly applied in accordance with the conditions of just law. When this is the accepted theory, it is floodtime in the law. In theory, of course, for those who believe in it, the natural law men have the best of it. In theory, for the believer, the wager of battle is God's good way. Practically no such absolute certainty of justice is possible in our time of little faith. We are all too skeptical. Words are the only instruments we know with which to ascertain and declare the rights of men, and words are willful things.

And so those of us who press for that certainty which consists merely in the repetition and form of words, that magic which springs from a particular arrangement, are bound to find ourselves dealing in the uncertain, just as are those of us who want no rules. Ideal law, just law, exists always to give to man through the means of actual law, what under all the attending circumstances is esteemed to be just, taking into consideration the individual claim and the social need. Actual law exists as a fair compromise between sympathy and common sense. It is impossible, therefore, to formulate law so that without administration it will automatically fit each coming case. It is impossible, without guiding rule, to fairly and justly administer. Those of us, then, who insist only upon that certainty which squares the individual claim as near as may be with the social good, that certainty which, allowing for human error, is always self-searching, will find ourselves more apt to give and get it. We can hope, then, that by drawing on previous decisions, legislation and other juristic material, and by considering the streams of tendency which they have set up, to give justice to each litigant. To give him, that is, what regarding his individual claim in the light of the social need, and giving due consideration to each, he ought justly and fairly to expect as the consequences of his conduct under a system of just law. He is entitled to this much. He ought not to have more.

¹³ "Law is primarily concerned with those who are subject to it. Its aim is to effect a certain mode of conduct and of social life on the part of those persons. Its propositions are evidently intended in the first place as a guidance for the members of the community, and the law's important concern is the right doing and forbearing of the members of the social group and nothing else. . . . The court must justify its opinion in as convincing a manner as possible. The judgment must be objectively right and not 'subjective and free.' It must be a verdict, and not a personal decision. It would be a very unbecoming state of affairs if we could apply to the opinion of the judge the statement in the "Two Gentlemen of Verona"

I have no other but a woman's reason;
I think him so, because I think him so.'

The judgment of the court must be derived logically." Stammler, *supra* note 2, 123, 124.