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## The Method of Law

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**THE METHOD OF LAW**

MAX RADIN†

The 1950 Tyrrell Williams Memorial Lectures were delivered by the late Max Radin. The first is printed below. The text of the second address will appear in the next issue of this Quarterly.

It is one of the merits or demerits of "The Law" that it is possible to speak of its method without being required to tell precisely what "The Law" is. It is a demerit, I suppose, in the eyes of philosophers and sociologists, but it is a fortunate thing for those of us who are engaged in the study of the law, because definitions of law are many and all of them are unsatisfactory, while in our particular kind of society, we can always recognize a lawyer and we can examine what a lawyer does, if not what the awesome abstract entity, called The Law, does. To the tendency to create abstract entities and endow them with the properties and qualities of persons, I shall pay my respects somewhat later. For the present, we may treat what the law does and what lawyers do as the same thing.

We must, however, take lawyers in an enlarged sense, to include all persons whose special business is the law, i. e., judges as well as lawyers proper, and, I am bold enough to add, teachers of law. But I should like also to add to this group legislators, who at a given time and as part of a larger task are consciously concerned with the law, and administrators of all sorts from the President of the United States—or his counterpart elsewhere—to the policeman on the beat. There are finally a number of persons whose connection with the law is temporary and who do not

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† Late professor at the Princeton Institute for Advanced Study.

form a definite group at all. These are members of juries whose judgments, although called judgments of facts, are frequently judgments of law in the proper sense of the term.

This is a motley gathering and if we can learn the method of law only by examining what all these people do, we have an extremely difficult task before us. But it seems nonetheless unavoidable.

I think it important to say this much by way of preface since legal method or, to give it its more dignified name, methodology, has most frequently been discussed in only one of its aspects—to be sure, one of its most important aspects—and that is the method or methods that can be inferred from the study of the published opinions of judges in the appellate courts—especially in the highest appellate court. And we meet here a double difficulty. For we must soon distinguish between what we infer was the method the judges actually followed and what they said they followed, in arriving at their conclusions.

But at best we are dealing with a sharply limited part of the law. Decided cases loom large in the study of the law in common law countries. Many of us recall the day when it was not quite good form to refer to any inferior source of law—such as statutes—when a legal proposition was set forth. In this we faithfully followed Sir Edward Coke as transmitted chiefly by the Harvard Law School. Coke was of the opinion that statutes were impertinent intrusions in the sacred enclosure of the common law.

We spoke of this material as “cases,” but what it really was, in the nineteenth century, was a series of short essays on miscellaneous points of law, in which the case proper, i. e., the decision, was little more than the occasion, and while the courts themselves, as well as our instructors, constantly admonished us to consider the decision as alone authoritative, and the opinion as relatively unimportant, law-students commonly treated the opinion as they would treat a text-book in other fields of study—and they still do. The graphic testimony to that is to be found in any copy of the sort of book called “Cases on Contracts,” or “Cases on Torts,” or “Cases” on any other subject, after the book has been in the hands of a succession of students. We need merely note how passages and sentences and phrases are underlined, often in red ink, and the fragmentary generalities of law—

frequently without recognizable relation to the issue of the case—which these underlined sentences express, are marked out for retention in memory on their own, and not as steps in the reasoning which led to the decision.

But, however these cases are, or were used, there is no doubt that the opinions of appellate courts in decided cases form the bulk of what law-students learn in law-schools, and what practicing lawyers read. The examination of the technique used in these opinions has often been undertaken, most recently and acutely by Professor Edward Levi of Chicago in an article published in the *University of Chicago Law Review* and later reprinted in a small book called "Introduction to Legal Reasoning."

If we consider the actual legal process—by which I mean what lawyers, in the extended sense, do, it is clear that the judges of appellate courts constitute only a small group in the legal community. The judges of the first instance and the judges of inferior courts of limited jurisdiction, generally write no opinions, or, if they do, their opinions are not reported officially or otherwise. Lawyers advising clients do so orally, as a rule, so that the legal reasoning on which their advice is based, is not available for study in the same way as the reasoning of appellate courts. Legislators who nowadays make the law to an extent conceded more than insignificant, do occasionally tell us in the *Congressional Record* why they acted as they did, but after all, only a few do so, and those who do, do not always convince us of their complete candor in giving the reasons that animated them. As for jurors, they are generally not permitted to state how they reached their decision, even if they were disposed to tell us. For many types of the men whose method we are examining, we must "infer" that method from the announced result, without much help from the chain of reasoning by which the result was reached.

And we may as well come to grips at once with the notion already alluded to, that of "inference." This has a painfully academic sound, in that it suggests logic and syllogisms, although, of course, it is an ordinary word in common use and its general sense is quite correctly apprehended by most educated people who use it.

But it is a fact that the word "infer" suggests what in our youth we were taught to call a syllogism, which begins with a

major premise couched in general or class terms and is followed by a particular "minor premise" which is the statement of a fact, and from the combination of the two premises we "infer" or arrive at a conclusion. If we must give some fairly crude examples of this, we may offer the following:

"All severed timber is personal property.  
This is a piece of severed timber.  
Therefore, this is actionable per se."

Or

"All unprivileged false written statements are actionable per se.  
This is an unprivileged false written statement.  
Therefore, this is actionable per se."

Ordinarily we do not put our legal reasoning in this particularly stilted and wooden form, and there is no reason why we should. But there is an apparently ineradicable notion, held not only as a matter of fact but as a cherished and highly prized principle, that all legal reasoning is, or should be, capable of being put in this form i. e., with a general broad major premise, under which is placed the minor premise which consists of the facts in any case, from which collocation there inevitably follows, or is "inferred," the conclusion or the decision of the case.

You must have noticed that when I spoke of "inferring" from the decisions of trial courts, or the advice of practicing lawyers or the verdicts of petty juries, the reasons which led to these various results, I was not taking "inference" in this sense at all. There, we begin with something finished or concluded. We know or think we know what the facts were. And what we are looking for is just the major premise. When we speak of "inferring" this from the conclusion and the minor premise, we are using the word in a perfectly correct sense as a matter of ordinary English speech, but in technical logic, we have turned the notion of inference upside down.

So far as the decisions of trial courts are concerned, we quite clearly and admittedly have before us the task of finding a major premise, and it is a wholly practical task, if we happen to be counsel for the litigant in whose favor the court has already decided and if the losing party appeals. But we have more to do than that. We must not only find a major premise, whether or not it is the one the court would have announced, if it had the

duty of doing so, but we must be prepared to show that it is a "good" major premise. I shall ask you to permit me to postpone a consideration of what constitutes "goodness" in such things.

On the other hand, if you are, the defeated litigant or are representing him and if you choose to appeal, you will either assert that no major premise whatever could have led to the conclusion of the court, or if you can imagine or infer one, you will seek to show that it is a bad premise, and you are likely to use the word "untenable" as a synonym for "bad."

I do not have precise statistics on the point, but I think it is a reasonable conjecture to say that much fewer than half the cases which trial courts decide, are appealed. The decision remains therefore as the trial court made it and it results in a judgment, which is itself a most important legal act and has as its sequel a whole series of other important legal acts. And if we ever have to take note of any unappealed judgment or of a series of them, we can only by a conjecture which there is no means of verifying, determine the method of the law in this extremely large group of instances in which some method was surely involved.

In those other examples which I have listed of persons making legal judgments, we find the same thing. Where the verdict of the jury is final we must rely on conjecture to determine how they reached it. And if there is any occasion to argue about it, lawyers will assert that there was or was not a major premise which would lead to the conclusion. There is, however, a somewhat special situation presented here. It is not a single—simple or complicated—minor premise which must be used, but a great many of them, all in the record as the evidence in the case. In most instances they contradict each other, but if they are not trivial or open and palpable lies, any one may be used. In all instances they are acts of one of both of the litigants—in criminal cases, of the accused. The conclusion is "guilty" or "not guilty" in the latter cases, or that the plaintiff should get what he asks, or he should not in the non-penal cases. The major premise, if it were worded at all, would run somewhat like this:

"Persons who act as this particular piece of evidence indicated this person has acted, have or have not brought themselves into the category of punishable persons, or have or have not rendered themselves liable for damages or other redress."

The jury is supposed to have a major premise like this in mind, and it is aided by what is called the instructions delivered orally—rarely in writing—by the judge. Strictly speaking, the jury is legally required to select their major premise from one of those presented to them by the judge. But there is no way of knowing whether they have in fact done so, and no way of compelling them if they have not, except indirectly in the rare instance of ordering a judgment *non obstante veredicto*.

Again, in the case of legislators, we can only conjecture what the reasoning was that resulted in a statute. We cannot rely on what a certain small number of legislators said in debate. I am of the opinion that what they said is quite irrelevant, even if it really expressed their reasons. But, in the legislative kind of conjecture, we have a special situation. The statute is expressed in general terms. That is to say, it is a collection of what may become a number of major premises, indeed it is set forth as a group of major premises which courts and administrators are commanded to use in arriving at their decisions. But the legislature clearly did not begin with them. They are in fact for all their general character, conclusions, and the major premises under which they are placed are the purposes which they hope will be accomplished if courts and administrators obey the legislative command. The minor premise is a typified group of instances which have occasioned the passing of the statute.

If we may take an old example free from present day controversies, we may take the passing of the Statute of Frauds in England in 1677. We may put the conjectured reasoning as follows: "Fraud and perjury cause losses to innocent persons. Oral contracts for certain transactions encourage fraud and perjury. Therefore, those transactions should be evidenced in writing and not merely orally."

The minor premise which is the occasion of the statute is based on a generalization from what is declared to be observed fact. In a few instances these facts are set forth in the preamble, if it has one, which is not always the case. When there is no preamble—or when we do not believe that the preamble states the facts correctly,—we must try to find a minor premise in the complicated way which Edmund Plowden outlined for us in the sixteenth century and which Coke restated after him,—Coke who, you remember, did not like statutes. First, he said, you

determine what the common law was before the statute was passed. Then, you try to conjecture what the mischief was which those who framed the statute thought was left unredressed by existing law. After that, you investigated how the statute-makers thought the mischief should be cured.

This is obviously inference piled upon inference, what Plowden and Coke called the "mischief" is the generalized type-situation which called forth the legislative activity. We often have far more complete knowledge than was possible in the sixteenth and seventeenth centuries about it, and we can therefore speak with something less than a guess when we assert the set of facts which make our minor premises. But even today we are often reduced to inference about it, especially in regard to whether or not the type is as broad as we are assuming.

What, accordingly, the legislature does is to take an explicitly formulated or inferrable conclusion, and with a typified—but actual—situation in mind, reach out for a major premise, or a group of them, which will cover the conclusion.

The legislature is, to be sure, aware that if the statute is considered by a court, it will be subjected to a process which is called "interpretation" or "construction." By this process the class indicated in any of the major premises of which the statute is composed will be narrowed or enlarged. Sometimes, the legislature attempts to forestall this activity by peremptorily limiting the extent to which this enlarging or narrowing shall go. In most instances, this effort to forestall interpretation in either direction is ineffective.

In all cases, it seems to me, we have largely the same process, with the difference noted. The legislature has preceded us in the act of "inferring" premises from specific acts or, groups of acts, for declared or implied purposes. When we examine the statute, as lawyers or as judges, we may, if we know the purpose or can conjecture it, seek out still larger generalities—or somewhat different generalities—for our major premises.

You will have observed that although I characterized the formal syllogism with its major and minor premises, as "wooden" and "stilted," I have nevertheless continued to use the term "major premise" which is meaningless except as a part of a formal syllogism. There is no doubt that there is nothing which



sounds more artificial and, therefore repellent, than the requirement that our ordinary reasoning be placed in a series of syllogisms such as are found in the old-fashioned—not the modern—text-books of logic. Nor are we likely to find the term “major premise” much used in legal writing, either in text-books, in articles in legal periodicals, or in opinions of judges. What we are likely to see are words like “rules,” “principles,” “theories,” “doctrines.” In French legal literature, a common synonym for many of these words is the word *système*.

As a matter of fact all these words, “rule,” “principle,” “doctrine,” “theory,” “*système*” are nothing more or less than major premises. I have deliberately used the wooden and technical equivalent for these emotionally more satisfying terms, for the following reason. The terms “rule” and “principles,” and still more, “doctrine” and “theory,” are fine and lofty words. We use them occasionally to cover a large group of cases which we vaguely hope will include the conclusion we have reached or are ready to reach. Because the terms “principle,” and so on, are so large, we do not put ourselves to much trouble to make sure of the coverage. Whenever a statement is made sufficiently broad, it will cover almost everything. But a major premise is a less imposing and, at the time, a more exacting matter. If we were in fact required to place the conclusion from which we usually start, into one of these ugly and pedantic syllogisms, it would of course be a dull and dry thing to do. But it would be salutary. We should have to face—not a lofty and soul-stirring “rule” or “principle”—but a generality that covers much less ground and in many cases is anything but pleasant in its connotations. And we may discover that nothing except this undesirable major premise really will fit the conclusion.

Let me give a concrete example. An attendant in a wayside restaurant picks up a bottle of Coca-Cola to serve to a customer and it explodes in her hand, injuring her severely. She sues the Coca-Cola Company, although it is not demonstrable that there has been the slightest fault in the manufacture of the beverage or of the bottle. It is a sheer unexplained accident. Now, the court in the case I have in mind found the Company liable and the Supreme Court of the state affirmed the decision. As a major premise, it offered a “rule” frequently cited by lawyers, called “*res ipsa loquitur*,” i. e. “The thing speaks for itself.”

This is in the law, whatever the phrase means in ordinary speech, a large and general rule. It might cover this case but it might cover thousands of other cases as well. If the court were required to put this in the form of a syllogism, they would have to select some major premise of a more precise character. Perhaps it would say: "All manufacturers of advertised articles are responsible to people who use them, for any defect, whether they could have known of the defect or not." That would fit the case. If they had said, as I have heard urged in discussion of the case, that as between the waitress who was in a poor financial position and the Company which was in a better one, the latter, and not the former should bear the burden. This would allow the conclusion that the Company was liable, provided we used as a major premise, the "rule" that in all conflicts the loss should fall on the person in the financially better position. But this would also fit the proprietor of the restaurant, the manufacturer of the bottle, the jobber or other intermediate dealer who sold it, the municipality that licensed the restaurant, and even perhaps, the United States whose administrative agency had passed Coca-Cola as a non-deleterious beverage.

This method of discovering a major premise—and "discover" in its etymological sense is, in many instances, literally true—has been suggested often enough with a sort of arch facetiousness, as though it were an exceptional way in which lawyers proceed, when they are hard put to it and cannot reason grandly from rule or principle or doctrine, to a conclusion which is both new and, being based on a principle, is as sound and firm and true as the principle itself.

As I have said before, lawyers—indeed all people—like the notion that they are proceeding from principles—firm and true principles—and are arriving at a conclusion to which, except for this principle, they never would have got. The phrase "arriving at" is to be bracketed with the word "follow," which is a technical term in logic, especially in its negative form, *non-sequitur*, a Latin phrase which has become nothing less than an English noun. We say, for example of a statement we reject that it is a *non-sequitur*. Since these words "arrive at" and "follow" are matters of English speech, we cannot help using them, and we must be on our guard against being deceived by their apparent

meaning, especially since, as I have sought to point out, there is an emotional incentive to be so deceived.

As a matter of fact they do not at all describe what takes place, even though the assumption that they do is as old as Aristotle. In that respect Plato, although I wholly reject his metaphysics, was more nearly right than Aristotle. We do not "arrive" at a conclusion. We were always there, since we usually began with it. The conclusion similarly does not "follow" the major premise. It either precedes it or is quite contemporaneous with it.

Let me illustrate;—and since major premises, to be worth anything, are long and intricate, I shall take one from mathematics, extremely simple mathematics, I assure you. We may say that in Euclidean geometry the angles of a plane triangle are equal to two right angles. Here is a plane triangle. Therefore, it "follows" that its angles are equal to two right angles. It is, of course apparent that it does not "follow." When we said that the angles of a plane triangle are equal to two right angles, we have already said that it was true of this one. The conclusion does not add a thing to what was said.

All this is part of what logicians call the "paradox of inference" i. e., the curious fact that logical inference adds nothing to what has already been stated. And this paradox is one that we should note when dealing with legal method or legal reasoning. If the conclusion is not already stated when we have stated the major premise, we shall never get to it at all, and if we leap to it disregarding the major premise, we shall be guilty of a *non-sequitur* which could be called in old common-law language, *non est inventus*.

Besides the fact that inference from a major premise tells us nothing that we did not know—or only what we ought to have known—we have to be on our guard against another difficulty in dealing with major premises, a difficulty which is associated with philosophy and even with theology. Major premises, let us remember, are general statements, rules, principles, doctrines, theories. In metaphysics and theology, there are schools of thinking which regard abstract or general ideas as real—indeed as the only real things. This is also true of certain groups of mathematicians. If things are real, they are always there, outside of us, and they can be found there without the aid of any particular experience.

This is not the case in the law. The generalities which we use as major premises are abstract in the sense that they have been abstracted. They state what is common to a great many particular situations in our experience, and the desire to abstract them is due to a value-judgment of "good" and "bad," made some time before and transmitted to us in our legal or social tradition. But we can in most cases give the history of that transmission and can give a fairly adequate account of the special situations out of which it was generalized. Certainly, except with one of those special situations in mind, we could not find the principle, i. e., the major premise, existing by itself "outside" of us. That we do not begin with major premises in the legal process, so far as it is exemplified in the acts of lawyers, of trial courts, of juries, of administrators, and of legislators, I hope is evident. If we try to analyze what these persons do, it seems to me clear that they begin with a particular. They look for a major premise, and, for a good one rather than a poor one, since these premises vary in quality. If they do not find major premises, where Platonic metaphysicians say they find their "ideas" or "archetypes"—as permanent essences outside of us—where do they find them?

The answer is simple. Most of them find them in what, in the preparation of their business, they have learned. Often, they have read them. Less commonly nowadays—but at one time, quite commonly—they have received them orally from their older fellow-craftsmen. Some—and indeed the largest of their major premises—they receive from their social training in the family, the school, the church, the ordinary social groupings to which they belong. And this social transmission overlaps, to a great extent but not completely, their legal transmission. This transmission, let us remember, in a civilized society, is expressed in words, so that the major premise is ready to be placed, just as it is remembered or recalled, at the head of the syllogism, as soon as it has been selected.

But there is a function that these major premises have which is of great practical importance. When they are fully stated, they act as correctives for the hasty assumption that a usable major premise has been found, when in fact none has.

Being human, we like to economize mental processes: As a rule, we do not have in mind, committed to memory like the words of a poem, the complete formulation of all the major

premises which constitute part of our stock in trade. We have chiefly symbolic verbal tags which we could expand in full, if it becomes necessary. Those tags are words like "fraud," "murder," "estoppel," "contract," "limitation." When a particular situation is presented to a lawyer, it often has a striking element which suggests one of these tags. If John comes to us and tells us that he has bought some goods from Richard and that Richard said they were of prime quality, whereas they were not, both John and his lawyer almost instinctively cry out, "Fraud." But we know the "rule" about fraud and if it is stated in full, as it must be to be used as a major premise, it may turn out that there is something lacking in the situation, which prevents it from fitting into our syllogism. But there are other major premises. What about "breach of warranty"? Again we must set it out in full and again we may find something absent. And in some jurisdictions, we are not quite through. We may bring in the rule symbolized by the case of *Derry vs. Peck*, which aroused in Justice Holmes such an intense and protracted antipathy. An ingenious lawyer baffled in all these attempts to find a major premise may come upon others in the miscellaneous storehouse of his learning and memory, and if they are not all quite as good as he would like to have them, they will nonetheless be offered, and they may after all do.

In the examples of the legal process I have hitherto used, it has seemed to me clear that the operation is obviously what we should call "backward"—though there is really no reason for calling it "backward" and not "forward"—from the particular to some general statement in which the particular is inevitably contained because the general statement has been abstracted from particulars like it. But can we say the same thing for that highly important example of the legal process, the action of appellate courts which constitutes by far the largest part of what law-students learn in preparation for their professional activity? Certainly in form, and with some solemnity and insistence, the opinions of appellate courts announce principles first and declare that their decisions are the inevitable result of these principles.

In order to be clear about what appellate courts do, we must keep in mind the details of appellate procedure. The question presented to them does not come to them raw, like a problem

set by an examiner. It has been manipulated in the court below and suffers a further handling and processing on the part of appellant and respondent. Certain statements of fact are posited and ordinarily they can only be reexamined to a limited degree. The appellant basing himself on these statements devises a syllogism that culminates in a major premise different from that which he assumes was used by the trial court. And under that syllogism he finds as a conclusion that an obligation does or does not exist, or, in a criminal case, that the penalty imposed ought not to be exacted. In our system, of course, in penal cases, the prosecution cannot appeal if the accused is acquitted, although it is otherwise in the Continent of Europe.

The respondent, on the other hand, using the same statement of facts and beginning with the judgment as a conclusion, either proposes the same major premise that the trial court used, if he knows it, or suggests a new one. The appellate court, therefore, in the simplest situation has merely to choose between two premises, under one of which the existing judgment could be placed as a conclusion without being a *non-sequitur*, and under the other of which, no such conclusion would fit.

Let us assume that the conclusion is completely neutral morally, which is the common situation in civil actions. The court normally does not care whether Richard should be required to pay a sum of money to John or not. This neutrality will, however, depend not upon Richard and John as individual persons, but upon the type of situation into which the particular conflict between the two can be fitted. To take a specific instance, a bus stops at night at a regular bus-stop, but because of bad weather, the darkness and bad road repair, John slips while alighting and is hurt. To say that in such cases, the bus company should pay seems reasonable, as a method of regulating transport, and to say that it should not is equally reasonable as a method of regulating transport. That is to say, either rule would work without excessive hardship on the public or on the company. The injury could no doubt have been avoided with greater care on either part, but neither has really been careelss.

John is the appellant. He proposes as a major premise that it is the company's duty to provide a safe place to alight in every specific case. The Company's major premise is that if the place is the usual stopping place, it has performed its full duty. What

the court will in the first instance examine, as a matter of technique, is where both sides find their contradictory major premises. If there has been a statute on the subject—as a rule, there has not been—the question would be whether the general words of the statute include, by “liberal” or “strict” construction, the rule implied in the major premise. If there has been no statute, but merely a number of previous decisions, the question would be, whether by generalizing them, you could get one sufficiently general so that either major premise—itsself, of course, a generality—could be included within it.

Now, as a matter of fact, it usually is possible to do this for either premise, both in the case of the statute and of precedents. And both sides vehemently argue, orally and in written briefs, that this can be done.

What is the basis of the court’s choice between them? It may be a matter of technique. John’s counsel or the Company’s may have been more skillful in framing the necessary syllogism, may have used more persuasive words, may have shown other superiorities purely as a matter of argument. We like to believe—and it is often true—that this kind of forensic skill is not as effective as it once apparently was, let us say, under the domination of the rhetorical schools of the fourth century B.C. in Athens or of the first century B.C. in Rome.

If it is not forensic superiority, what is the basis of choice? The court may go to the source which either side used. If it is a statute, one of the two premises proffered may come within the normal and simple wording of the statute. The other can, to be sure, also be placed there, but only by suggesting unusual meanings to the words of the statute or by referring it to an unusual background as a frame of reference. The court may prefer simplicity—almost as an aesthetic preference. In the case of precedents, the court might weigh the cases cited. It asserts it never merely counts them, although numbers have an undoubted influence. If the precedents come from other jurisdictions, the reputation of courts and judges may determine the choice.

So far, we have been in the field of technique. We have been dealing with the situation as if John, the plaintiff, were not a creature of flesh and blood, a member of the community of which we ourselves are parts, but a sort of fungible man, an abstract *homo legalis* or *iridicialis*, and, as if the Company’s vehicle

were a sort of phantom omnibus driving along the insubstantial roads of Cloud-Cuckoo-Land. If the choice is made in the way I have described, it is a pure exercise in logic or rhetoric. It could be made that way by a judge of a high-school or college debate, as well as by that potent public official clothed with majesty of power and authority whom we find sitting on the bench and, whom at our imminent peril we had better treat with at least outward deference and respect. But I think it can be said with safety that the judge on the bench does not normally make his choice of premises this way, although he not infrequently says he does. He does not as a matter of fact forget that John is a real person who has suffered painful injuries, and that the bus is a solidly real vehicle on which he may himself have to depend in order to get from place to place.

The court evaluates the premise and the conclusion, and, I think, evaluates the conclusion first, on the basis either of rightness or utility and often of a fusion of both, in which we cannot be sure whether the utility is determined by the sense of right or the reverse.

Is the conclusion appealed from a "good conclusion"? Does it make travelling unsafe for the Johns and Richards? Or if we take the other conclusion, does that impose an excessive burden on a company responsible for speedy traffic? If the court, in its own mind, answers both questions in the negative, the rival premises with the conclusion on which they were built, will seem equally "good" and the judgment will probably be affirmed.

But there is still another element in the evaluation. In order to reach either conclusion, a major premise has been sought and found. But the court might find that this premise would do equally for the conclusion described and for other conclusions as well, and these other conclusions may seem highly objectionable. If the court cannot narrow the premise so as to fit this conclusion and exclude the objectionable ones, the value of the premise may be so impaired as to be rejected and the contradicting one preferred—since by hypothesis, either conclusion on its own social or moral or practical value, will do well enough.

I fear you have all perceived the clover leaf of my contention, jutting out below the cloak with which I have sought decently to cover it. The method of the law in the opinions of appellate courts is "backward"—if we must cling to this incorrect desig-



nation—i. e., we go in this method from conclusion to premise, quite as much as in other examples of legal method. This is rarely openly stated in the opinions themselves, although some courts are candid enough to indicate the fact either explicitly or implicitly. The common layman's notion of the court, repeated often enough in the formal legal discussion, makes it appear that in the spacious minds of the judges there are a mass of rules or principles, i. e., major premises, all arranged in neat and effective subordination and coordination. Upon these impinge sets of facts—minor premises—each striking its appropriate target with mathematical accuracy. The major premise and the minor premise being brought together, the conclusion which is the judgment, inevitably follows. I am afraid that students whose sole study is directed to the opinions of appellate courts must derive some such feeling about the way law works.

We know why the appellant and respondent begin with their respective conclusions. They have a strong and very practical interest in them. It means property or status, perhaps liberty to them. If they had no such strong practical interest, there would have been no litigation in the first place. The great advantage that the court has is that its interest in the conclusion is of a wholly different character. There have been corrupt courts, of course, in our history, both recent and older history. But I think we can say that the number of corrupt judges has been negligible. What makes one conclusion rather than another seem desirable to the court is not any personal interest. It is based in the sentiments, cultural background, individual training and, in the literal and inoffensive sense, the prejudices, which the judges possess and which they share with a greater or smaller group of their fellow-countrymen.

Evidently the court, both the trial court and the appellate court, the lawyer advising his client, the legislator considering a proposed enactment, the administrator pondering a regulatory determination, all these persons will sometimes reach their goal quite rapidly. They will be ready with a valuation of a conclusion the moment the facts are presented and will be able almost to dart to an effective major premise that includes or excludes the conclusion. If a client brings his lawyer a promissory note made to him, of which the due date is more than ten years ago, the lawyer—or the court, if the question gets there—will have flash-

ing through his mind verbal tags of the kind already mentioned, like "limitations," "bar," "outlawry," and will know *prima facie* that if nothing more appears, there would be judgment for the defendant. If the client goes on, and it appears that a payment on account was recently made or a letter written acknowledging the debt, the tag "tolling the statute" will occur to him and determine his answer, as it would determine the court's judgment. And all this would be almost instantaneous.

But suppose it appears that although there is no acknowledgement or payment on account, the debtor has all sorts of pleadings, assurances and petitions, continually begged for more and more delay and loudly announced that he would never use the statute of limitation as a defense. And, having thus persuaded the kindly creditor to wait beyond the statutory period, he now refuses to pay. Obviously the answer is not so easy. The tag-word "estoppel" will doubtless occur to a lawyer. But he will need more than a little reflection and research before he will think he can construct a syllogism which will cover the obviously desirable conclusion that the debtor is liable. And if it comes to court the debtor's counsel will surely say something of the beauty, rightness, social utility and importance of the limitation rule as a "statute of repose"—or perhaps something about the indefensibility of adding unexpressed exceptions to any statute. These last premises will require a conclusion desirable but the debtors premises preferable for reasons already illustrated.

I should like to repeat something already mentioned. That the law proceeds occasionally from conclusion to premise has often been admitted, generally as a more or less facetious paradox, with a knowing wink from lawyers and laymen and a tacit admission that this ought not to be the case and that there is something surreptitious and reprehensible about it. If I here contend that it is not merely an occasional divagation from the proper course, but the inevitable and right course, it is in no sense from any fondness for paradox itself. What, above all, I should like to point out is that it is not merely the method of the law, but it is the inevitable method of human communication in civilized communities for practically everything that can be communicated.

We have had rubbed into us—not merely in connection with law but in all situations—that words are inferior to things, to

acts and particularly inferior to thoughts and ideas. Now, certainly words for many purposes are inferior to things and acts, but, in regard to acts, it should be remembered that this is true only of good or right acts. Most words are immeasurably superior to wrong acts, and the common impatient urging of headstrong—usually also young people,—to do something right or wrong rather than merely talk about it, is a grave and dangerous error. Good talk, indifferent talk, even foolish talk, is immeasurably superior to wrong or bad action. Harmful talk, is an act and should be classed with harmful acts as one of their forms.

But it is the relation of talking to thinking with which we are concerned. And to lawyers as a group it becomes an almost personal matter. That many persons, and lawyers particularly, talk too much is regrettably true. It is often said of lawyers that their talk is false, that they do not tell the truth, which so far as we are at present concerned is equivalent to saying that they do not say what—to use the ordinary phrase—is really “in their minds.” We can almost say that one of the main charges of laymen against lawyers is that this kind of falsehood is one of the characteristic methods of the law. And we are here speaking about method.

The modern lawyer is in part descended from the Greek *rhetor* of the fourth century B.C. who in turn was a “sophist” or a pupil of “sophist,” a word that has descended to us with an obloquy which it does not deserve. For that, one of the greatest of writers and thinkers is responsible, no less a person than Plato himself. The favorite attack upon these persons was that for pay they were prepared to make “the worse appear the better reason,” and it is perhaps poetic justice that when Romans first heard with horror of what was described as an attempt to apply this technique, it was in a speech of Carneades who claimed to be a follower of Plato.

That this is just what lawyers are engaged in now, is an almost ineradicable belief of laymen. And it is triumphantly demonstrated in their minds by the fact that lawyers can be engaged on either side of litigation. It is no part of my present purpose to discuss the ethics of the bar in defending what is in popular language called the “wrong” side. I ought, however, even though it is an irrelevant digression, remind you that the right of everybody, even of a murderer caught in the act and ready to

plead guilty, to be represented by counsel, is a fundamental constitutional right, and that on a strict interpretation of a famous oath required of all advocates, an attorney is under a duty to appear, when asked, although no such duty of serving is now seriously insisted on.

But to go back to the question of making the "worse appear the better reason." What caused the Roman Senate in 155 B.C., at the instigation of Cato, to demand the expulsion of Carneades from Rome, was the fact that on two successive days he made speeches, one defending an act complained of on the part of a Greek state, and the other attacking it. I think many modern Catos would at least profess to be equally shocked.

The error underlying all this, is the assumption that on every proposed policy or other form of human action, there are only two alternatives, one right and the other wrong, and that one cannot honestly say anything for the wrong alternative. It is further assumed that one alternative is right because it "follows" from a principle which is right and that it has been reached by beginning with the principle as a major premise.

But that is not at all what happens when a course of conduct is before us for decision. We begin with a strong preference for one decision rather than the other, and the act of persuasion or dissuasion consists in finding a principle or major premise that will cover it or in asserting either that none will cover it, or only one that is markedly inferior in quality.

Evidently such major premises can be found, and Carneades may have done no more—although he may have taken a malicious pleasure in shocking the solemn old barbarians in the Curia—than to set forth the reasons for and against the action proposed. We may say with complete assurance that thoughtful men have never entered on a course of action of major or even minor importance without weighing the reasons for and against it—and the figure of speech of "weighing" is quite significant. Indeed, the situations in which no weighing is necessary, are those which we do almost as a reflex action.

This weighing of reason is nothing more than seeking major premises under which either contradictory alternative may be subsumed. The fact that it is done at all implies that various major premises can be found.

I have referred before, somewhat casually, to the fact that

some major premises are better than others. They are assessed by a standard of one sort or another. And it is this standard which I should like briefly to examine. It is not the same standard that is used in assessing the value to be placed on a conclusion. In selecting a conclusion the preference exhibited by most judges is based on a complex of motives. The standard may be social, or moral; it may be personal or economic, without implying anything corrupt or improper. It may be emotional without involving irrational and subjective caprice. It is usually arrived at fairly promptly.

Suppose, once more, we take an example. In the case of Riggs vs. Palmer, which occurred some years ago in the State of New York, a man named Riggs murdered his grandfather. It turned out that by his grandfather's will, the murderer was the principal heir. There is no doubt what the conclusion is which the judge or any other normal person would prefer. It is that the murderer shall not inherit. What will occur to the judge as symbolic word-tags will be such words as "will," "injustice," "forfeiture," or perhaps some case in which something like this has already been decided.

Now, it so happens that no case like it had occurred in New York, which is somewhat strange, since, while parricide is not exactly a common crime, we have learned from mystery-story writers that the person who inherits under the will of a murdered man is the first person to be suspected. This doctrine is in fact what is meant by the famous and much misquoted, phrase, *cui bono*, first used about 150 B.C. by a Roman lawyer named Cassius. It means "Who gains by it?" not "What's the use?" or "What's the good?"

At any rate, in New York, the situation was apparently new. No precedents existed on which they could rely. What major premises could be found would be the expanded or articulate form of one of the tags I have mentioned or others. There is a rule that a will must be taken as it is written and that the motive for selecting an heir is immaterial. This would give the estate to Riggs, the murderer. Another quite general rule is that a man shall not profit by his own wrongdoing. This would rule Riggs out. Again, another rule would occur to a lawyer, although probably not to a layman. The idea that a person shall get property under the will of a man he murdered shocks us, but our

desire to take it from him is based more on a desire to punish him than on an interest in abstract justice. Are we permitted to punish him that way, since punishment is a matter that is fairly rigidly controlled by statute? From that point of view, Riggs would get the estate. Not only is the statutory punishment for murder, death or imprisonment, exclusive, but the Constitution expressly forbids forfeiture as a punishment, and if the will was properly made—as it was—he has an expectant interest in it, even before his grandfather's death.

The only premise that will give us what we want is the one I have referred to—"No man shall profit by his own wrongdoing." Why won't that do? For one thing, it has rarely been used in law except in a more or less supplementary way. In the form here given, it is somewhat too broad. Gambling is wrongdoing and people are quite commonly permitted to keep the stakes they have gambled for. Taking advantage of another's inexperience, incompetence or carelessness without technical fraud is wrong, but generally those who do so can literally get away with it. To limit the rule to felonies, means to make a new rule, because, as is has been handed down, it is not so limited.

The Court of Appeals used the rule despite its excessive breadth, its rare employment in the law and despite the fact that to do so, they had to make exceptions. Tested by standards which lawyers use in such matters, their major premise which gave the result they wanted—and nearly everybody wanted—was not as good as the rules which would not do so.

Professor Ames of Harvard was very much annoyed at the decision of the Court of Appeals. Not that he wanted a different conclusion. On the contrary, he very much wanted that particular one. He said that the thing to do was to permit the estate to go to Riggs, but to require him to hold it in trust for the other heirs of Riggs Senior, who would not be identical with the heirs of the murderer. This made recourse to the rule about not letting a man profit by his own wrong unnecessary, but it did not really save the disregard of the other rules since it was taking away with one hand what was given with the other, so far as the will goes, and it is just as much a forfeiture to take away an equitable interest as a legal one. It further adds an element in the law of trusts that had not been there previously. The method

of creating a class of beneficiaries by excluding one who belongs to that class, was a hitherto unused method.

If the Court of Appeals had looked for precedents they might have found them outside of New York. In several states, when a wife had killed her husband, the question of dower was raised. In most of the few instances, she was permitted to retain her dower rights. Dower rights are not the same thing as rights under a will, but a precedent could be made out of these cases by broadening the generalization. But, as I have indicated, this would not have given the result desired—or, shall we say,—the result needed.

I think we can get some idea from the foregoing of what is meant by a “good” major premise as distinguished, not from a “bad” one, but from one not so good. A good major premise must not be too broad lest it cover many more things than is either necessary for this case, or more than is generally desirable. It should be one frequently used in the law, not rarely and hesitantly. It should, in other words, be among the more familiar of those in the memory-stock of a lawyer. In *Riggs vs. Palmer*, the Court used a major premise not as good in these respects as the one it rejected because only the former secured an obviously desirable result, desirable, in this as in other instances in which the word is used, not because of any subjective preference but because it accords with a standard of social or moral values which the judge shares with the community of which he is a part.

I have characterized some premises as good and others not so good. But there are premises which are distinctly bad. We may say that if one can only reach a desired result by a bad premise, there is an obvious—indeed an imperative need—of reconsidering the result, and if nothing but bad premises can be found which will give us this result, the latter should be rejected out of hand. It is and must be quite as bad as the premise under which it is rationalized.

What is a bad premise? Very simply one that is untrue. Premises are generalizations. False premises, bad premises, are also generalizations. They are statements that do not state the facts correctly. To take one striking example of a bad premise, we have that which seeks to justify one of the most seriously harmful of our social policies, symbolized in the phrase “guilt by

association." The commonest premise devised for that is picturesquely expressed in popular proverbs such as "birds of a feather flock together." Well, that happens to be only partly true of birds, a little less true of other animals moving about in groups, and very rarely true of human beings, in most of whose associations there is great diversity among those who form the association. What about the other proverb: "A man is known by the company he keeps"? That was once applied, some of us may recall, to those who, some nineteen hundred years ago, were often found in the company of publicans and sinners. It is curious that modern Christians have so often forgotten this striking demonstration that this particular proverb is hardly a safe generalization.

We may examine the statement a little more closely. There are circumstances in which it is a more nearly correct statement of a social fact than in others. If a man is found in no other company than that of publicans and sinners, the inference that he shares their characteristics is legitimate, if not conclusive. But those who most frequently depend on it to justify a judgment of guilt by association use it in the demonstrably false and unqualified sense and not in the partially true and qualified one.

False premises are among the commonest parts of our social furniture, and they find their way into the law, since our lawyers are inevitably members of our society. Unfortunately some of these false premises are among those most cherished by large sections of our community. An illustration is to be found in the unjust and harsh treatment, too often enforced in law, of our racial minorities. Avowedly or unavowedly the premise is the wholly false one of racial superiority. Or we might recall the frequently-heard and sullen protest of our least socially minded fellow-citizen: "A man may do what he likes with his own." That is simply not true morally or legally today and has not been true for more than two thousand years anywhere in our Western civilization. And yet—evidently because nothing better was available—those guilty of abusive dealings with property have sought refuge in this false premise, and thereby demonstrated the undesirability of their conclusions.

I spoke of good premises and premises not so good, and then of bad premises, quite bad because they are untrue. But I should have spoken with even more fullness of premises—untrue and



therefore bad—because they are stated as absolutely true when they are only partially true, anywhere from ten percent to ninety-five percent. The difficulty with the syllogism into which impliedly our legal method must be fitted in order to have people understand us, is not its mechanical and pedantic character, but the great temptation to make the major premise absolute, to say “all” or “always” or “none” or “never.” Aristotle seems to have thought that only premises which could be so stated, were properly parts of syllogism.

But these words “all” or “always,” or “none” or “never” are supremely difficult words to substantiate. And the words we should use in their place, words like “most,” “often,” “nearly always,” “few,” “extremely few” are also difficult, because they are subject to the question “how many” and “how often,” a question we rarely can answer with precision. You notice I did not say “never.” We can as a matter of fact answer it in many cases with the kind of assurance which experience and reflection give. We cannot say *all* promises, to be legally binding, must be supported by consideration, because we know that is not true in that form. If we said “some promises” or “many promises,” we should be saying less than we mean and give a wrong impression of the quality and character of that legal generalization. Even “most promises” is a little less than what we mean. We are trying to convey the thought that one may normally go on the assumption that if there is no consideration, the promise is not legally enforceable. We should like to use the word “all.” It makes discourse easier, but we should like to use it with the caveat that we do not quite mean “all,” and that we do not propose at every given moment to enumerate statistically how many promises or how many kinds of promises are included.

In those instances where we say “all,” while we clearly should not say “all,”—the judgment of a man by his company is an example—we merely say it because we are in too much of a hurry or too passionately intense or too indifferent to truth, to consider how far or how near our statement is from “all,” even with a caveat. In those many cases, we do a great deal of harm to legal method because we justify those who assert that the law is merely a device for camouflaging selfish or partisan purposes by solemnly intoning a platitude before gratifying them.

We have still to answer a question glanced at before but de-

liberately avoided. The reason presented for a legal judgment, which can, if it must, be put in the form of a syllogism with its triumphant "*ergo*" at the end, is properly speaking, less a reason than a rationalization. But why rationalize at all? Why not render the judgment and let it go at that? This, T. H. Huxley warned us long ago, was the method of Nature. If we make a mistake about the laws of nature, we suffer for it, and Nature does not take the trouble to explain why it was a mistake. Trial courts render judgments without giving reasons, but we usually have material out of which to construct some sort of reason or several competing reasons. But the question is, why do we do it at all, why do we think we must do so in order to make sense or be understood.

There are schools of thought which hold that it is not at all necessary, that we can communicate with others by a sort of immediate contact like the method by which we ourselves receive ideas or, it could be said, by which we think. This method, it is held by these "non-rational" persons is not reason at all. It is variously called "intuition" or "immediacy" or some such name, and the discussion of it involves an ancient and continuous philosophic controversy.

We need not enter this controversy. It may well be that we apprehend the universe, and derive our knowledge of such profound things as "being" and "existence" and "time" and "change," not by thinking about them but in some other and more direct way. And it is equally true that we have quite unconsciously derived a vast number of notions of all sorts from a social experience that began when we were born and according to one school of psychologists—I do not share their views—began even before birth. Certainly we did not by reason select this experience.

But while the contents of our minds may have come to us irrationally, when we try to communicate them, it is quite a different story. The Sibylls and the Pythia at Delphi spoke in broken and disjointed words and syllables that had no meaning, till the priests arranged and interpreted them. But lawyers had better not act like Sibylls and oracles but do their own arranging and interpreting. Communication must make sense, which is another way of saying that its parts must be placed in an order that under compulsion could take the wooden or pedantic

sylogistic form. What we get by intuition, inspiration or unconscious absorption, we can not communicate that way. Except, to be sure, to those who take our words as oracles. And of these there seems to-day to be an extremely small number.

Many of those who declare that logic is a poorer guide than intuition, do so, I fear, because it is easier to assert a belief as an intuition than to put its basis into a rational form. An Englishman imitating the Latin poet Martial (of the second century A.D.), wrote:

"I do not love thee, Dr. Fell.  
The reason why I cannot tell.  
But this I know and know full well.  
I do not love thee, Dr. Fell."

He was simply not telling the truth. The chances are that he knew very well why he did not like Dr. Fell and was ashamed to admit that he based his dislike on so insubstantial a ground.

But the fact that what is in our minds is, in its original and in its relation to whatever else is there, irrational and is made rational only for purposes of communication is a vital matter in that aspect of one method of law. This is the method of the lawyer as advocate, I hope we have not forgotten that all that we say about the "method of the law" is merely a generalization from the methods of lawyers. And the advocate is not merely a lawyer but in the imagination of the general public, *the* lawyer.

Advocacy as a technique is a relatively recent development of the common law so far as it is exhibited in actual trials in court. Defendants in cases of treason were permitted to have their cases presented to juries by lawyers only since about 1700 and in other felonies only since 1835. Forensic eloquence in England accordingly did not exist before that time. But when it did come into existence it burst immediately into resplendent bloom because it had an ancient and much admired forerunner. This was the forensic eloquence of Greece and Rome, especially such glorious names as Demosthenes and Cicero, with whom every English lawyer was thoroughly acquainted. The highest tribute that could be paid to a speech in defense or a person accused of a crime was that it minded me of Attic and Roman masterpieces of that kind.

I have spoken before of the difficulties the orator-advocate created for the public relations of the law when he quite prop-

erly and legitimately called attention to the fact that for any proposed decision, reasons could be assigned for or against it. Much as people assert their love of freedom of choice and the right to make up their own minds, they often speak as if they preferred to have some incontrovertible reason make their minds up for them, and resent, as the Roman senators resented the suggestion of Carneades, that they really could make it up in either way.

But advocacy involves another method which cannot be justified quite so satisfactorily. Not only did the rhetor, ancient and modern, often consciously use false premises which he vehemently asserted to be true, but he frequently bade defiance to reason altogether and urged his hearers to accept their impulses, whatever their origin, as final and unassailable intuitions which need not seek a reason to justify them.

We have seen on a monstrous scale what a part this type of advocacy has played in bedevilling the recent history of Europe. We can unfortunately not deny that it is to some extent one of the methods of the law, since the technique of jury-trials presents too frequent and continued illustrations of it. Whether any remedy can be found short of completely reorganizing our trial system altogether, is more than doubtful. And we cannot close our eyes to the fact that the same methods which make our jury-trials anything but dispassionate devices for reaching just solutions, are not unknown or ineffective before judges as well as jurors.

Even here, of course, the most conscienceless rhetorician, if he is challenged, will make a more or less feeble effort to clothe his appeal to passion and prejudice in some kind of rational form. And, whatever may be the case in public matters, in the law he almost surely will be challenged. If lawyers are trained to understand what this rationalization is, that it has no value in itself, but merely requires us to examine and evaluate the major premises which it selects, we may find that the method of the law may continue to be logic without denying experience or losing contact with humanity.