

December, 1932

# University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, November to June, by the University of Pennsylvania Law School.  
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VOLUME 81

DECEMBER, 1932

No. 2

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## THE PROBLEM OF THE UNPROVIDED CASE

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Every lawyer is familiar with the problem of the "unprovided case"—the case which does not fall squarely and obviously within the terms of a statute or rule established by precedent.<sup>1</sup> These are the interesting cases, the cases which interrupt the monotony of routine practice, and under our common-law system with its restriction of appeal in most instances to questions of law, they are the cases which reach appellate courts, find their way into the books, and become precedents for the future.

The problem of the unprovided case assumes greater or less importance at different epochs, and at any given epoch in different branches of the law. All lawyers know from experience how immediately after the enactment of an important statute there are countless situations of possible doubt in the law until the statute has been construed by the courts in decisions which can serve as precedents. On the other hand where no new statute has been enacted, but where human enterprise and ingenuity have suddenly become active in a given field of business or social relations, creating new types of transactions, relationships, and interest-conflicts, this spawning of novel situations raises doubts in great numbers as to the proper legal rules applicable.

In our western civilization no period has ever been purely static and immune from change in one or another department of human activity, with the result that no epoch of legal history has been completely free from the problem of the unprovided case. All we can say is that at some periods the problem has presented itself in one field rather than another and that in some ages

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<sup>1</sup> See Géza Kiss, in *SCIENCE OF LEGAL METHOD* (N. Y. 1921, Modern Legal Philosophy Series) 158 (translated from 3 *ARCHIV FÜR RECHTS UND WIRTSCHAFTSPHILOSOPHIE* 536); ZITELMANN, *LUCKEN IM RECHT* (Leipzig, 1903).

it has been insistent in a larger number of fields simultaneously than at other times. With the speeding up of the rate of change and progress which has marked the increase in mechanical inventions and the development of economic organization during the last hundred and fifty years, the problem has tended to become more omnipresent and insistent in a larger number of fields of law than ever before.

## I

The problem of the unprovided case is one of finding grounds for reaching a decision of a case where those grounds are not directly and clearly supplied by existing rules and precedents. How and where are such grounds to be obtained? On what principle of selection are they to be chosen from various possible grounds which might lead to diametrically opposite decisions of the case? These are the questions which confront both the judge who is called on to render a decision and the lawyer who has to advise a client. Both are faced with the same problem, but with this difference, that the lawyer if he is to advise his client soundly must attempt to reach the same result which will be reached by the courts if the case should be litigated, while the judge, at least if he is a judge of a court of last resort, is under no similar necessity for making his conclusion conform to the anticipated conclusion of another mind. Since the lawyer must thus conform his technique so far as possible to that of the courts in order that he may anticipate the result at which they will arrive, it is highly desirable that the technique which the courts employ for finding grounds of decision for unprovided cases should be settled, with reasonable certainty and understood with reasonable precision by the bar.

This necessity for understanding the technique of deciding unprovided cases has become more and more obvious to the profession during the last half century, and has consciously or unconsciously attracted an increasing share of the attention of legal thinkers. It is the fundamental motive underlying the so-called "case-method" of law-teaching, which aims to put before the student not merely the dry bones of established and ready-made legal rules, but the living processes by which cases are decided for which the rules are not already settled. Nevertheless the nature and meaning of the problem has not been fully appreciated until comparatively recent years, and most of the earlier contributions made to its solution were made more or less unconsciously and without direct reference to the issues involved. Ideas have accordingly survived which tend to confuse and obscure the considerations on which a solution of the problem depends.

In the seventeenth and the early part of the eighteenth century, when many of the lines of our present legal processes were laid down, it is fair to say that the problem of the unprovided case was taken for granted and not clearly envisaged as a problem at all. The bulk of litigation of the time lay in the field of real-property law where the rules had already been elaborated

to great fullness and required little more than direct application to the cases. On the other hand a strict formalism in the attitude of lawyers, and a tendency to reduce most questions to questions of procedure, led to a willingness to deny relief in cases which did not fall squarely within the terms of a precedent. Whenever an issue arose which seemed to the judges to call for relief not directly warranted by precedent, the case was apt to be decided on broad and vague grounds of "natural justice" and an unanalyzed sense of right and wrong, and of what was fair and just from a lay point of view. There is astonishingly little close legal reasoning in our modern sense; there are very few instances of an elaborate chain of analysis and deduction anywhere in the old reports. Toward the middle of the eighteenth century the tendency to decide unprovided cases on the basis of so-called natural justice increased, and many of the most famous decisions of Lord Mansfield can be reduced in the last analysis to no other grounds than the opinion of that great Judge that fairness and convenience required the result arrived at. It was this characteristic of Lord Mansfield's decisions which antagonized the latent desire of the bar for more settled and definite grounds of decision, and which justified the reaction under Lord Kenyon toward a more technical and closely reasoned jurisprudence.<sup>2</sup>

The first half of the nineteenth century witnessed a splendid outburst of intellectual effort in the field of the common law which shaped the basic assumptions still current among the legal profession in common-law countries as to the nature of law and the technique of its application. This effort is associated with the names of such jurists as Kent and Story and Parsons in this country and Chitty, Sugden, Williams and Blackburn in England. Carrying forward the thought of the jurists of continental Europe in the preceding century,<sup>3</sup> they conceived law as a system or "science" in the sense of

<sup>2</sup> See for example Lord Justice Scrutton's criticism of Lord Mansfield's liberal use of the action for money had and received, *Holt v. Markham* [1923] 1 K. B. 504 at 513 and Lord Sumner's criticism in *Baylis v. Bishop of London* [1913] 1 Ch. 127. Lord Sumner said: "Whatever may have been the case 146 years ago, we are not now free in the 20th century to administer that vague jurisprudence which is attractively styled 'justice between man and man.'" For an interesting comparison of Lord Mansfield with Lord Holt see 6 HOLDSWORTH, *HISTORY OF ENGLISH LAW* (1st ed., vols. IV-VII, 1924) 521-522. Eighteenth century natural law theorists like Mansfield and the contemporary French jurists regarded considerations of natural justice as themselves forming a system whose precepts could be deduced from other parts of the system by logic. For a popular expression of this assumption, see 1 BL. COMM. (Christian's ed. 1825) 41. This view differs from the nineteenth century view in that it places the logically complete system outside and not inside the body of authoritatively established rules of positive law consisting of statutes and precedents. Positive law consists of those parts of natural law which happen to have been already caught and fixed.

<sup>3</sup> "Since there is nothing more necessary in sciences than to possess the first principles of them . . . that they may serve for a foundation to all the particulars which are to depend upon them; it is of importance to know what are the principles of laws in order to know . . . the rules which depend on them. . . . All the laws which govern society in the condition in which it is at present are no other than consequences of these first principles, or laws. . . . In order to judge therefore of the spirit and use of the laws which maintain society in the condition in which it is at present, it is necessary to draw a plan of society on the foundation of the two primary laws to the intent that we may discover the order of all the other laws, and the connection which they have with these." 1 DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* (Strahan's tr. 1737) xxxiv, xxxvi.

a body of rules all rationally related to and connected with one another in such a way that any given rule can be deduced by a process of logic from other rules already known.<sup>4</sup> The bearing of this conception on the problem of unprovided cases was direct, and its influence enormous. It formed the attitude toward the problem which still prevails, and which has become even more dominant through the influence of the case-method of teaching in the law-schools.

The notion that legal rules are so connected rationally that one can be deduced from others leads to the conclusion that in the last analysis there is no such thing as an unprovided case. If the rules which are already established grow out of one another inevitably by a mere process of reasoning, it seems to follow that rules which have never yet been applied because their application has not chanced to be called for are yet fully implicit in the body of existing rules,<sup>5</sup> and that if a new case arises which calls for a hitherto unapplied rule, this rule can at once be deduced from the body of existing rules in the same way in which those rules themselves are supposed to have been deduced. There was thus consciously affirmed the doctrine of the "logical completeness" of the law, with the corollary that when an unprovided case arises the existing law already contains the proper legal ground of decision in spite of the fact that that ground of decision has never been applied in any preceding case. The theory is thus that it is not necessary to go outside the boundaries of existing law to find the ground of decision of new cases; that the law, being complete, is necessarily self-contained, and that the ground of decision of new cases is to be sought not in something outside the precedents, like natural justice or a common-sense opinion of right or wrong, but within the body of technical law itself as expressed in the precedents. This notion underlies the theory of the case-method of law-teaching as it was conceived by the inventor of the method, Langdell of Harvard. Langdell assumed that the entire body of existing precedents if treated inductively would reveal themselves as a system of particular instances of the application of certain general principles from which there could then be deduced by logic the proper rule to apply to any particular case falling within the scope of a principle.<sup>6</sup> The process thus indicated was sufficiently technical to satisfy

<sup>4</sup> These views resulted from the attempt to treat law as a kind of geometry, possessing mathematical certainty, which was promoted by the great advance of the mathematical sciences in the 17th century and the resulting tendency of other lines of intellectual activity to borrow from mathematics. See DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* (Cambridge, 1927) 115, note 15. Quite comparable was the borrowing by other disciplines of the concept of biological evolution in the later 19th century.

<sup>5</sup> "It is supposed that the law contains within itself the materials for the decision of every case, however novel in its circumstances; and accordingly when the judges have a new case before them, they do not profess to arrive at the law by reasoning, by theory, or by philosophical inquiry, but they profess to discover it by searching among the records of former decisions." Lord Westbury, *Speech on Revision of the Law*, in WAMBAUGH, *THE STUDY OF CASES* (2d ed. 1894) 75.

<sup>6</sup> See Keener, *The Inductive Method in Legal Education* (1894) 28 AM. L. REV. 709, 713; M. Cohen, *The Place of Logic in the Law* (1916) 29 HARV. L. REV. 622, 627.

the demands of lawyers who were discontented with a crude appeal to lay considerations of natural justice and fair dealing, and on the other hand promised sufficient flexibility to make the law adaptable to the new cases which were constantly being presented by a progressive and changing civilization. The essential characteristic of the method, however, was its deliberate and conscious insistence that the law for new cases is to be found inside the law itself and not by resort to considerations and ideas drawn from outside the field of technical law.

It is a striking fact that this conception of law as self-contained, and as making it unnecessary to seek grounds of decision for new cases outside existing technical law, took possession of the jurists of Continental Europe during the same period, although the legal environment in which they were working was as different as possible from that of the American and English legal systems during the nineteenth century. The Continental jurists in a country like France were concerned with applying not a system of unwritten rules based on precedents, but a detailed Code which had been adopted in its entirety at a single moment. Nevertheless they took the view that this Code constituted a complete and scientific system of law precisely as the nineteenth century English and American jurists looked on the common law as constituting such a system, and the resulting attitude toward the problem of unprovided cases was the same. The great French commentators from Duranton to Laurent definitely assumed that from the statutory rules enacted in the Code there could be deduced without looking beyond the four corners of the Code the one and only correct rule which was legally applicable as the ground of decision for an unprovided case.<sup>7</sup>

This assumption was what first attracted conscious attention to the problem of the unprovided case at the end of the nineteenth century. Once again the legal thought of Continental European countries and of common-law countries marched in the same direction at the same time. The rapid changes which were taking place throughout western civilization in prevalent conceptions as to some of the most fundamental human relations and institutions: the position of woman; the institution of marriage and divorce; the relation of parent to child; of employer to employee; of owner to property; the rapid evolution of new types of economic activity and organization; the growth of corporations; the development of banking, and the emergence of new methods of production and transportation, all created an unprecedented mass of novel situations for courts and lawyers to deal with. The attempt to deal with these situations strictly on the basis of rules deduced from pre-established and existing rules created dissatisfaction among

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<sup>7</sup> See JULIEN BONNECASE, *L'ÉCOLE DE L'EXÉGÈSE EN DROIT CIVIL* (1924). The chief German exponent of the theory of the logical completeness of law is BERGBOHM, *JURISPRUDENZ UND RECHTSPHILOSOPHIE* (1892) 371-393.

jurists like Esmein and Raymond Saleilles,<sup>8</sup> who never broke completely with the old assumptions, and concentrated attention on the defectiveness of the theory of the logical completeness and self-contained character of law. In consequence, the problem of the unprovided case became a center of conscious interest, and most of the jurists who devoted their study to it in the years about the turn of the century developed a new outlook and attitude toward law and its technique which register one of the great germinal epochs in the history of legal thought. Of these jurists the one who came most directly to grips with the central problem, and who has devoted the most single-minded and painstaking study to its solution, has been François Gény of the University of Nancy.<sup>9</sup>

What chiefly dissatisfied the newer thinkers was the idea that already existing rules of established positive law contained within themselves, and without resort to outside aids, the proper legal solution of all cases that might arise.<sup>10</sup> In France the technique of the great commentators on the Code was challenged on the ground that it made the law too rigid and did not sufficiently permit its adaptation to meet problems which not only were never heard of by the authors of the Code, but would have been inconceivable to them. In Germany the revolt expressed itself in an extreme form in the movement for so-called free "judicial decision" which recommended leaving the decision of cases substantially to the discretion of the judge on the basis of the merits of each case.<sup>11</sup> In the United States, where the older method was felt by many to have led to manifest injustices in the field of the law of husband and wife, master and servant, and constitutional law, the new tendency emerged in the so-called "sociological jurisprudence" sponsored by Dean Pound.<sup>12</sup> The central idea of "sociological jurisprudence" was that the grounds of decision of unprovided cases should be sought not purely in deductions from existing rules but also in the study of social ends and purposes, of current views as to moral and economic values,

<sup>8</sup>A. Esmein, 1 *REVUE TRIMESTRIELLE DE DROIT CIVIL* (1902) 13-16 quoted in I GÉNY, *SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF* (1922) 29. R. Saleilles, preface to GÉNY, *MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF*, quoted in BONNECASE, *op. cit. supra* note 7, at 48-50.

<sup>9</sup>*MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* (1899) (2d ed. 1919) 2 vols.; *SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF* (1914-24) 4 vols.

<sup>10</sup>See E. JUNG, *VON DER LOGISCHEN GESCHLOSSENHEIT DES RECHTS* (Berlin, 1900); ZITELMANN, *op. cit. supra* note 1; L. BRÜTT, *DIE KUNST DER RECHTSANWENDUNG* (Berlin, 1907).

<sup>11</sup>GNAEUS FLAVIUS (H. U. KANTOROWICZ), *DER KAMPF UM DIE RECHTSWISSENSCHAFT* (1906); H. U. KANTOROWICZ, *RECHTSWISSENSCHAFT UND SOZIOLOGIE* (1911); E. FUCHS, *DIE GEMEINSCHADLICHKEIT DER KONSTRUKTIVEN JURISPRUDENZ* (1909); E. FUCHS, *RECHT UND WAHRHEIT IN UNSERER HEUTIGEN JUSTIZ* (1908). The dangers of the movement are pointed out in BEROLZHEIMER, *DIE GEFAHREN EINER GEFÜHLSJURISPRUDENZ* (Berlin, 1911) parts of which are translated in *SCIENCE OF LEGAL METHOD*, *supra* note 1, at 166 ff. See also OERTMANN, *GESETZESZWANG UND RICHTERFREIHEIT* (Erlangen, 1909). For further bibliographical references on the movement see *SCIENCE OF LEGAL METHOD*, *supra* at 146, 166, 170, footnotes; I GÉNY, *SCIENCE ET TECHNIQUE* 36.

<sup>12</sup>See especially his article *The Courts and Legislation* (1912) 7 *AM. POL. SCI. REV.* 361, reprinted in *SCIENCE OF LEGAL METHOD*, *supra* note 1, at 202.

and in a knowledge of the facts and methods of social and business life which would indicate the appropriate legal devices for attaining the results felt to be socially desirable.

## II

Immensely valuable as have been the total results of the new movement, one unfortunate consequence has been the misconception which it has generated as to the place of logic in the development of law. It has tended to represent logic as an independent agency in legal development to be contrasted unfavorably with other agencies such as recourse to historical, philosophical and sociological materials. For this view the older jurists were themselves chiefly responsible in their assumption that existing legal rules could be extended to new cases with no other assistance than that supplied by logical processes alone.

Philosophers have seen the necessity in recent years of insisting that logic is not an instrument which works in a vacuum. The results of its processes depend always on the materials put before it to work upon. What we get out of a syllogism depends on what is filled into its major and minor premises, and the question of whether or not a minor will fit under a major turns in the last analysis on the extra-logical process of constructing the premises. It is this fact which makes it impossible to speak of logical deduction as a method for developing law coördinate with the historical and sociological methods.<sup>13</sup> These latter relate to the source of the materials to be used as a basis for legal reasoning—in other words, to the accumulation and choice of the data on which legal logic is to do its work. The logical method must be part of the application of any other method—it is concerned with the employment of the data which the other methods put at its disposal. This was not sufficiently realized by all the newer jurists, nor by the older jurists whose work they criticized. The defect of the latter was that the meaning which they filled into their premises was often too meager and inadequate—in their effort to exclude from those premises all considerations except such as seemed to be drawn from existing rules of law alone, they narrowed unduly the meaning and content of such rules. They did not fully grasp that the meaning of a rule of law depends after all on the meaning and ideas embodied in the words which express the rule, and that the meaning of words reaches out from law into life so that no rule of law can be used as the basis of reasoning without some consideration of what lies beyond law. Lacking this understanding, they were not always conscious of the processes which

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<sup>13</sup> "There is ground for criticism when logic is represented as a method in opposition to others. In reality it is a tool that cannot be ignored by any of them. The thing that counts is the nature of the premises." *CARDOZO, THE GROWTH OF THE LAW* (1925) 62, referring to Morris Cohen, *Introduction to TOURTOULON, PHILOSOPHY IN THE DEVELOPMENT OF LAW* (1922) 29-30.

gave content to the premises they employed, and the meaning of those premises was accordingly too often filled in for them unconsciously and accidentally. The progressive jurists grasped the truth that existing legal rules themselves can be understood only in the light of ideas and information drawn from outside law, and that the process of collecting and selecting such ideas and information needs to be performed by lawyers with a full and conscious understanding of what is being done; but they have too much neglected the fact that this material can be properly utilized in the development of law only through the instrumentality of logical reasoning, and in consequence they have tended to belittle improperly the place of logic in legal thinking and to conceive the employment of new materials drawn from history and sociology as somehow a substitute for logic.

The relation between logic as an agency in the development of law and the part played by the selection of the materials to which logical processes are to be applied can be illustrated by two sets of opposing decisions in the law of married women. The first set raises a problem in the interpretation of the earlier type of married women's property acts. These acts provided, first, that a married woman should have the right to own, acquire, and enjoy separate property as if sole; and, secondly, that she should have the right to contract with reference to such separate property. The question arose under such statutes whether a married woman having no separate property and contracting to purchase property could be held on her contract. In different jurisdictions, and at different times in the same jurisdiction, this question was answered in opposite ways. One result was reached by a line of reasoning which started from the proposition that since a married woman could contract only with reference to her separate property, she must already own such property at the time of the contract and that therefore a contract for the acquisition of property was not binding if she owned no other property when the contract was made.<sup>14</sup> Exactly the opposite result was reached by a different chain of reasoning which started from the proposition that by the statute a married woman was given power to acquire property, that a contract of purchase was an appropriate means of exercising this power, and that therefore the statute when limiting the married woman's contractual capacity to contracts made with reference to her separate property included the case of property acquired by the contract itself.<sup>15</sup> As the latter argument was put by Judge Cooley: "The contract is for the acquisition of separate property, and the title to it vests when the contract is made. There is therefore no straining of terms in saying that the contract is in

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<sup>14</sup> *Ames v. Foster*, 42 N. H. 381 (1861); *Jones v. Crossthwaite*, 17 Iowa 393 (1864); *Walker v. Jessup*, 43 Ark. 163 (1884); *Palliser v. Gurney*, 19 Q. B. D. 519 (1887).

<sup>15</sup> See *Tillman v. Shackleton*, 15 Mich. 447, 456 (1867); *Building & Loan Ass'n v. Jones*, 32 S. C. 308, 313 (1889); *cf. Wilder v. Richie*, 117 Mass. 382 (1875); *Sidway v. Nichol*, 62 Ark. 146, 34 S. W. 529 (1896).



relation to her separate property. Nothing in the statute limits her capacity so as to prevent her making the first acquisition any more than any subsequent ones on credit."<sup>16</sup>

The second set of decisions chosen for illustration relate to the question whether a husband who has abandoned his wife without means of subsistence is liable to one who supplies her with money for the purchase of necessities. It is settled law that the husband is liable to one who supplies the necessities themselves. Starting from this established rule, one line of decisions reaches the conclusion that, in equity the husband is also liable to the person supplying the wife with money to buy necessities, while at least one case reaches the opposite result. The decisions allowing recovery result from reasoning that since the persons supplying the necessities could themselves have recovered against the husband, equity will treat one who supplies the money paid to such persons as standing in their shoes and subrogated to their right of action against the husband.<sup>17</sup> The decision reaching the opposite result goes on the argument that since the wife paid for the necessities when bought, no right of action in the persons supplying them ever arose against the husband, and that therefore there was nothing for the person furnishing the money to be subrogated to; while such person is prevented from acquiring any right against the husband because of want of "privity".<sup>18</sup>

It seems clear that in neither of the foregoing instances does the contradiction between the decisions result from logical error. The difference in result is due instead to the different meanings given to the premises of the reasoning, and these differences in meaning are due to the inclusion or exclusion of considerations other than established rules of law. Take for example the case of a contract of purchase made by a woman having no separate property at the time. Which of the two opposing results will be reached depends on the interpretation given to the statutory expression "contracts in reference to such separate property". To take this expression to mean "property already owned at the time of the contract" results from disregarding the additional provision of the statute which permits a married woman to acquire property. Whether or not this provision is to be so disregarded, or is to be employed as justifying a broad interpretation of the provision conferring contractual capacity, cannot be decided on the basis of mere logical deductions from the rule. A decision of the question one way or the other turns upon whether or not the court thinks that the statute should be given a broad or narrow construction; and this in turn depends upon whether or not the court regards the contractual capacity of a married

<sup>16</sup> *Tillman v. Shackleton*, *supra* note 15.

<sup>17</sup> *Walker v. Simpson*, 7 W. & S. 83 (Pa. 1844); *Kenyon v. Farris*, 47 Conn. 510 (1880). This was the long-established doctrine in equity, *Harris v. Lee*, 1 P. Wms. 482 (Ch. 1718); *Jenner v. Morris*, 3 De G. F. & J. 45 (Ch. App. 1861).

<sup>18</sup> *Skinner v. Tirrell*, 159 Mass. 474, 32 N. E. 669 (1894).

woman as something desirable and to be extended, or as undesirable and therefore to be limited. On this point the decision in either direction turns ultimately on the court's view as to issues which can be intelligently faced only on the basis of information and considerations lying outside the four corners of established rules of law. The defect of the older jurists is that they did not fully realize the important and ultimately decisive character of considerations of this kind. They took for granted the views of social policy on which decisions of unprovided cases in the last analysis depend, instead of regarding such issues as worthy of their closest and most deliberate scrutiny. Consequently they unconsciously read into the meaning of established law views of policy which they happened personally to regard as normal, and concluded that the results flowing from such views were logically implicit in the law itself. The great contribution of the modern school of jurists has been to expose this fallacy and to reveal the important part which non-legal considerations always play in the process of deducing new rules from established ones.

The second set of cases considered, those namely which involve the liability of a husband for money furnished to an abandoned wife for necessities, disclose how even when the transition from an established rule to a new one is made nominally by means of an intermediate technical concept like "subrogation" or "privity", the ultimate result once more depends on the non-legal considerations which determine views of policy. In neither instance is the transition from the premise to the conclusion determined conclusively by the intermediate legal concept. For example, while it is clear that there is no "privity" between the husband and the person supplying the wife with money, this does not conclusively require that there should be no right of action against the husband, since it is equally true that there is no privity between the husband and the person supplying the wife with necessities, and yet the husband is liable to the latter. On the other hand, if the concept of subrogation is employed, it is correct enough to point out that subrogation in the usual sense cannot arise since the goods are paid for when bought and no right of action accrues to the seller; but it remains equally possible to argue that the reason upon which subrogation depends is present and that the concept of subrogation should be extended by analogy. In short, the determination to apply or exclude the concept of subrogation or privity depends in great measure if not wholly on whether or not it is regarded as desirable to extend or limit the liability of the husband; and only after this decision has been made does the legal concept intervene decisively to give technical form to the result.<sup>19</sup>

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<sup>19</sup> See CARDOZO, *op. cit. supra* note 13, at 99, discussing *Hynes v. New York Central Railroad Co.*, 231 N. Y. 229, 131 N. E. 898 (1921).

No one has examined more closely or in greater detail how the results of legal reasoning depend on the content which is initially filled into legal concepts, or how legal "constructions" like the concepts of privity and subrogation are employed to give shape and direction to considerations of policy, than Professor Gény.<sup>20</sup> At the same time both Gény and Pound have pointed out the danger of applying such constructions divorced from the ultimate considerations of policy upon which they are founded. Any such construction, applied as if it had an inherent content of its own and in forgetfulness that it is a mere instrument to give effect to policy, leads to the purely formal and often absurd results which Pound has characterized as "mechanical jurisprudence".<sup>21</sup> Perhaps the most extreme illustration of such mechanical jurisprudence has been the application of the concept of "privity" in the law of interpleader, where it has had the effect of preventing in many instances precisely the type of relief which it is the function of interpleader to give.<sup>22</sup> Similarly the mechanical application of the concept of "freedom of contract" in constitutional law, divorced from regard for the particular problems to which the concept was adapted, has often led to denial of the very protection which it was the object of the concept to bring about.<sup>23</sup> It is this extension of a concept to everything which can be brought formally within the possible meaning of the words, and without regard to the substantive purpose of the concept, which is sometimes exclusively thought of as the logical method of the development of law. In fact it is no more logical than the sounder method which begins by interpreting the premises of the reasoning in the light of the problems which it is the aim of the law to solve.<sup>24</sup> To analyze and criticize premises before beginning to reason from them does not deprive the subsequent reasoning of its title to be called logical.

### III

The realization of the part played by considerations not purely legal in supplying grounds of decision for unprovided cases indicates as the next problem for progressive legal thought a more detailed analysis of these non-legal elements, and of the way in which they enter into combination with pre-existing legal materials to form new precedents and rules of decision. To

<sup>20</sup> I GÉNY, *SCIENCE ET TECHNIQUE* at 164; 3 *id.* at 175-257.

<sup>21</sup> Pound, *Mechanical Jurisprudence* (1908) 8 COL. L. REV. 605.

<sup>22</sup> See Chafee, *Interstate Interpleader* (1924) 33 YALE L. J. 685.

<sup>23</sup> See Pound, *Liberty of Contract* (1909) 18 YALE L. J. 454.

<sup>24</sup> "We may take as our premise some pre-established conception and work it up by an effort of pure reason to its ultimate development, the limit of its logic. We may supplement the conception by reference to extrinsic sources, and apply the tool of our logic to the premise as thus modified or corrected. The difference between the function of logic in the one case and in the other is in reality a difference of emphasis. The tool is treated on the one hand as a sufficient instrument of growth, and on the other as an instrument to cooperate with others." CARDOZO, *supra* note 13, at 62.

this fundamental problem Gény has devoted substantial attention and has made pioneer contributions of the greatest value.<sup>25</sup> However, taking the field of current legal thought as a whole, interest has for the moment tended to become diverted from this constructive field of investigation, and the nature of the problem itself has tended for the moment to be obscured, through the failure of many of the most advanced legal thinkers to shake themselves loose from a group of ideas inherited from earlier stages of legal thinking, and which have so far prevented a direct approach to the central issues involved.

We have already seen how the legal thought of the nineteenth century expressly assumed that all the materials which form the grounds of decision of an unprovided case and go into the creation of new law were themselves derived from the law itself—that, in other words, nothing but law went into the formation of new law. Oddly enough the very thinkers who have insisted on enlarging the materials which are to form ingredients of new rules have too often been unable to shake off the conception that all these materials must themselves still be regarded as law—they remain enmeshed in the old assumption that nothing but law must enter into the making of law. This has been particularly true of such thinkers as Professor Duguit and his followers in France, and, indeed, it is true of the sociological school in general. The result has been the emergence in very recent years of a new theory of so-called “natural law”, which forms one of the most significant present phenomena in jurisprudence.<sup>26</sup>

The new school of natural law results from an attempt to treat as law the entire body of those considerations of social value and policy which it is quite properly insisted must enter into the selection of grounds of decision for new cases. To treat these considerations as law implies, of course, that they are marked by two characteristics which have hitherto always been regarded as involved in the concept of law: first, a certain clarity and definiteness which makes possible something approaching codification of their precepts; and secondly, an authoritative character which entitles them to exercise mental compulsion on the mind of the judge to the exclusion of inconsistent and competing precepts. Now it is a very difficult thing to predicate these characteristics of the more or less vague and intuitive considerations of social theory and policy which properly form ingredients in the process of minting new legal rules. Accordingly a great deal of the legal theory of the last few years has been devoted to grappling with this difficulty and two wholly inconsistent lines of approach have been followed alternatively and sometimes even simultaneously by the newer theorists.

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<sup>25</sup> See especially 2 GÉNY, *op. cit. supra* note 11, at 351-422.

<sup>26</sup> For a recent review see HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (4 HARVARD STUDIES IN JURISPRUDENCE, Cambridge, 1930).

On the one hand there has been a strenuous effort to show that considerations of social policy can be formulated into clean-cut and unambiguous precepts carrying compulsive intellectual conviction. This attempt usually takes the form of assuming that there is a "science" of human society and social relations which is scientific in the same full and complete sense as chemistry and physics, and which dictates with truly scientific precision the objectives which law exists to promote and the exact legal rules necessary to promote them.<sup>27</sup> The fallacy of this idea, which for the moment is widely prevalent among American legal thinkers, has nowhere been more successfully combated than by Gény,<sup>28</sup> who has pointed out that the determination of legal rules must always depend on ultimate judgments of value, of better or worse, more preferable or less preferable, with which science has no concern, since science in the proper sense of the word is limited to establishing accurate descriptive connections between cause and effect, and to indicating that if one result is desired one course of action must be pursued, while another course must be pursued to reach a different result. There is no contribution to recent legal literature which should be more worth the while of current American legal scholarship to ponder than the pages of Gény's great work which he devotes to a discussion of this topic.

The hopelessness of the attempt to find in "social science" a new body of authoritative natural law has not, however, dampened the effort of many of the newer jurists to discover ready-made natural law in other directions. This effort has resulted in a definite recurrence by some writers to the frankly mediæval conception of natural law as a body of authoritative precepts deducible from a scheme of values supposed to be inherent in human nature and which can only be transgressed at the cost of outraging the highest and noblest aspirations of humanity. Such a doctrine has all the appeal of clothing the honest convictions of each individual judge with the mantle of eternal verity. As Mr. Justice Holmes has said in expressing his dissent from it, it appeals to the innate human desire of every doughty knight that his lady shall be not merely fair, but the fairest lady in all the world.<sup>29</sup> The difficulty is that the values which different human beings regard as ultimate and absolute are not always the same values, and that, therefore, as Dean Pound has pointed out, all theories of natural law result in making law ultimately personal and subjective.<sup>30</sup> Nowhere is this better illustrated than by the fact that both extreme socialists and extreme advocates of the rights of property vouch natural rights to warranty in support of their mutually inconsistent claims; the ones insisting that there is a natural right in every

<sup>27</sup> See Dickinson, *The Law Behind Law* (1929) 29 COL. L. REV. 285, 288-296.

<sup>28</sup> I GÉNY, *SCIENCE ET TECHNIQUE* 179-181.

<sup>29</sup> Holmes, *Natural Law* (1918) 32 HARV. L. REV. 40. It is interesting to note that this article is stated in a footnote to have been suggested by reading Gény's *SCIENCE ET TECHNIQUE*.

<sup>30</sup> *Common Law and Legislation* (1908) 21 HARV. L. REV. 383, 393.

human being to a livelihood, and the others that every man has a natural right to do what he wills with his own. Such antagonisms are insoluble on the basis of an appeal to supposed natural law, and the recurrence at the present time of natural law theory with its doctrine of absolute rights promises ill for the patient and conciliatory solution of some of the deepest problems of modern civilization.

The recurrence of natural law theory under the influence of the new jurisprudence represents one result of the survival of the idea that all the materials which enter into the construction of a new legal rule for an unprovided case must themselves be law. Natural law theory results from attempting to combine this idea with the notion of precision, certainty, and authoritativeness which inhere in the idea of law. The questionable character of the result, and the apparent necessity to which it leads of reviving discredited natural law theories have caused other recent thinkers to seek a solution in a different direction. These thinkers, however, also remain enmeshed in the idea that the considerations of social policy which enter into the decision of unprovided cases must somehow be "law"; but they are awake to the undesirability of attempting to give them the precise and authoritative character hitherto associated with law. In consequence, the result at which they arrive, and which represents the very latest development of legal thought, is that the idea of law itself must be purged of these characteristics which have always been associated with it—that law must henceforward be understood as something different from a body of more or less definite rules distinguished from other rules by their title to exert an authoritative influence on judicial decisions. This newest school of jurists may be described as the school of legal sceptics, for whom law has melted into a fluid mass of factors of any and every kind which happen to influence the decision of any particular judge in a specific case. Law in this sense does not consist of rules, nor is it vested with any authority.<sup>31</sup> It is said to be simply whatever judges do. The law of every case is peculiar to itself and different from the law of any other case. Law simply means official action.<sup>32</sup> Any attempt to formulate and apply legal rules is said to amount to no more than a futile attempt at self-deception. There is a body of law only insofar as there can be said to be a behavioristic psychology of judges.

This final outcome of the new jurisprudence represents a scepticism which like most other scepticisms is in fact only a kind of inverted absolutism. Whereas under the old absolutism the legal rule was everything, under the new absolutism it is nothing. And yet, on any realistic or pragmatic view of the judicial process, it seems clear that there are factors in that

<sup>31</sup> See the elaboration of this idea in FRANK, *LAW AND THE MODERN MIND* (N. Y. 1930).

<sup>32</sup> See Llewellyn, *A Realistic Jurisprudence—The Next Step* (1930) 30 COL. L. REV. 431, 456.

process which for want of some other name can be called legal rules, and which do in fact exert an influence on the process. A truly objective approach to an understanding of the process cannot afford to shut its eyes to this fact and behave as if the fact did not exist, but must recognize that under a developed legal system the process of deciding cases differs to at least a certain extent from the exercise of arbitrary discretion by an oriental *cadi*. It is this difference which forms a worthwhile subject of study if we are to understand the nature and operation of law as an agency of social control. We cannot get far towards such an understanding by treating law simply as discretionary official action. If we do so, we merely make believe that the problem does not exist, instead of attempting to solve it. No advance toward better understanding of the making of legal decisions is therefore promised along the path of the new scepticism. Rather we need to go forward to further and more detailed analysis of the interaction between legal rules on the one hand and discretion on the other which is presented in the decision of every unprovided case.<sup>33</sup>

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<sup>33</sup> See Dickinson, *Legal Rules: Their Function in the Process of Decision*, and *Legal Rules: Their Application and Elaboration* in (1931) 79 U. OF PA. L. REV. 833, 1052.