CHAPTER 6

The Common Law *

Sec. 6-01. Scope of chapter. A large part of what we ordinarily call law is found not in the statutes, but in the reports of cases decided by our courts. This case law consists of rules, principles, ideas and methods which are used in the decision of cases. The body of decisions runs backward continuously from today through our colonial period and into the earliest history of England. Our colonists began as subjects of the English King and derived their legal notions from English sources. After the Revolution, the American courts simply carried on in their decisions, the notions which had been worked out by the English courts. From the English cases they derived general ideas and legal methods as well as rules and principles to apply. The development of case law, based on this foundation, has gone on without interruption to the present day.

The continuous but rather loosely interrelated mass of case law in England, in this country, and in the British Dominions,

*(I.R.) Suggestions for further reading:
1. Regarding the common law

2. Regarding the judicial process
Frank, Law and the Modern Mind (Brentano's 1930) (reprinted 1948).

3. Regarding sources of case law, see sec. 6-04, note *.
4. Regarding the doctrine of precedent, see sec. 6-12, note *.
5. Regarding the overruling of precedent, see sec. 6-18, note *. 
is sometimes called "the common law" or "the Anglo-American common law." Though more often the mass of case law as a whole is not mentioned, but only certain methods, principles and doctrines common to the systems of law in England, the United States, and the Dominions, these common elements are called the methods, principles and doctrines of "the common law." From these usages of the phrase "common law" must be distinguished two others: First, the case law of England down to about the time of our Revolution, essentially as summarized in Blackstone's Commentaries (1765); this is sometimes referred to as the "English" common law or the "old" common law. Second, it is not unusual to speak of the case law of a particular state, e.g., New York, as the common law of that state. But usages are indefinite and not consistent; often a writer slips from one use of the phrase, the common law, into another within the confines of a single paragraph. Whatever use you may choose to make of this phrase, it is most important that you keep these various kinds of decision-law distinct from one another. The need for clarity of thought and usage in this respect will become sufficiently obvious as we proceed with our discussion of the problems to follow.

A century or more ago, most of the standards provided by our American legal systems were to be found in case reports. The man who wanted to know what the law was went to the reports; he had no other place to go. In the ensuing years the proportions of case law and statute law have changed. Legislation has intruded into more and more fields; the legislatures, federal and state, have added enormously to the bulk of the statutes, so that the predominant part of legal standards is now cast in statutory form. In a few states, such as New York and California, the process of codification has been pushed about as far as it can go. In most states, however, the statutory coverage is far from
complete; statutes cover only certain fields and parts of fields; the intervening spaces are covered by case law. For example, the "law" regarding contracts, torts, property, trusts, etc., remains uncodified in most states. Where codification is relatively complete, the courts still look to "the common law" for definitions, methods and general principles. Indeed, in your work as law students you will find that your time and attention are taken up more with a discussion of case law than statute law. In any event, we would be leaving our picture of the American legal system and its operation quite unfinished if we were to stop without considering the important body of legal standards, principles and methods expounded in the case law.

The present chapter will be devoted to the common or case law. The discussion will fall under two subtopics:

Creation of law by decisions.

"Common law" rules for using, finding, interpreting and changing standards.

**Creation of Law by Decisions**

*Sec. 6–02. Occasions for creation of law.* When a case or controversy is properly presented to an Anglo-American court, the court recognizes an obligation to decide it. What does the court do if it finds no appropriate rule of law to apply to the case or controversy? Conceivably the court might, in such a situation, refuse to proceed to a decision. But this has never been the practice of courts anywhere, so far as I know, and certainly not the practice of any English or American court. It does not refuse to decide a case simply because it cannot find a ready-made rule to apply. It weighs the case, works out the rule that ought to apply, and then applies it. Nor is the Anglo-American court ever content to dispose of a new and precedented case with the simple declaration that the court holds for the plaintiff or for the defendant, without giving reasons. The court always feels obliged
to decide the case that is brought before it, and equally obliged to give reasons for its decisions.\(^1\) These reasons are the rules and principles of law which the court fashions for the occasion; they are the rules or principles according to which the court decides. They are rules or principles which apply to the case in essentially the same sense that statutory provisions, if there were any, would be held to apply to it.

Sec. 6-03. Rules and methods of judicial lawmaking. The lawmaking activity of a court is markedly different from the lawmaking activity of the legislature. Whenever the legislature recognizes the need to regulate the behavior of individuals or officials, it creates new standards for the purpose. Whenever it recognizes that standards need to be changed, it repeals or amends them, or substitutes new standards in their place. The court does not make case law in this broad and unrestricted fashion.\(^1\) Judicial lawmaking is controlled by several restrictive rules of method: First of all, the court must not lay down a new legal rule except in relation to a case which it has to decide. Second, the court must not lay down a rule broader than is necessary to settle the case. In short, the court legislates only incidentally in the decision of a case. As Mr. Justice Holmes said, "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."\(^2\) Third, the judicial lawmaker must stick to hallowed principles in choosing a new rule; he must

\(^1\) In some states they are required by constitution or statute to declare their reasons fully and in writing.

\(^2\) Southern Pacific Co. v. Jensen, 244 U. S. 205 at 221 (1917) (dissenting in regard to other matters). One can say that the reception of the Law Merchant in England and the reception of the English Common Law in this country are two instances in which judicial lawmaking occurred on a wholesale scale. But such instances are not typical of the processes of judicial lawmaking today.
reason by reference to the closest analogies and derive his results as far as possible from doctrines or policies which have been settled by the cases or declared by statute. The judicial lawmaker is not expected to be a daring innovator. He is to look first for a specific rule to apply. If he cannot find one, and if he is forced to declare a new rule for the occasion, he is to set forth a wider principle from which he deduces the rule laid down. He is to bring his decision of a case under a specific rule which can, in its turn, be regarded as a natural deduction from a general principle which is well recognized.

Sec. 6-04. Sources of case law.* The sources of case law are in general the same as the sources of statute law.¹ The judicial lawmaker like the legislature, derives standards from the available knowledge of his time. He discovers standards to adopt primarily in the legal background. If he finds none there, he looks to the general social background.

Ordinarily he starts his quest with the scrutiny of the law of his own state. Even though there is no case law directly covering the case before him, he may be able to make an analogical extension of principles previously accepted by the decisions of his own state. If such extensions are not possible he looks to the case law of other jurisdictions. In fact the

*(I.R.) Throughout the rest of this chapter, I ask the student repeatedly to distinguish between sources of law and law. I also ask him to differentiate the various meanings of the term "common law." Of course, none of these distinctions is necessary. They are controlled by usage and are fluctuating in character. But I find that the effort to make and maintain such distinctions is a useful pedagogical device. The student has a clearer notion of our case law and its character after he has wrestled with these distinctions.

On the general subject of sources of law, see Pound, "Sources and Forms of Law," 21 NOTRE DAME LAWYER 247 (1946), and 22 ibid. 1 (1946). A full bibliography on this subject is contained in POUND, OUTLINE OF LECTURES ON JURISPRUDENCE (5th ed.) 115 et seq. (1943).

¹ As to the sources of statute law see sec. 4-06 and note*. The sources of case law are also essentially the same as the sources of interpretation which we discussed in the last chapter, especially the general and legal contexts of interpretation; see secs. 5-09 to 5-13.
judge who is preparing to lay down a new rule often proceeds in both of the ways mentioned. If he finds nothing suitable in either of these sources he may borrow a standard from the legislation of some other state or from a textbook on legal subjects.

Not infrequently the judicial lawmaker has to look beyond the legal background for a standard to adopt. He gives legal sanction to an existing folkway or custom, or to the standard of an extralegal institution, such as a church or trade association. By judicial recognition, the way, custom, or standard becomes a legal standard. However, it is worth noticing that these prior existing usages are sometimes spoken of by writers on law in a manner which is very misleading. They sometimes speak of these usages as if they were already existing law, not dependent upon judicial adoption for their legal character. By a logical sleight-of-hand, social usages are converted by these writers into law, without adoption by any agency of the state. Their method of statement has caused an enormous amount of confusion regarding the way law arises, by blurring or obliterating the distinction between law and its sources.

Sec. 6-05. Statement of law in cases. In an earlier chapter we dealt with the form in which the legislator’s message is stated.1 We discussed the terms in which it is stated, its completeness, its generality, its organization, and other matters. I believe that a similar examination of the form of the case law will be worth making.

The common law was often called “the unwritten law” by writers of a generation or more ago. It was given this name because it was identified with the customs of the community and these customs were not written down as statutes are. But “unwritten law” is a misnomer. Case law cannot

1 Secs. 4-17 to 4-27.
properly be identified with customs. And while case law is not declared in the same clear-cut form that enactments of the legislature are, the case law is written. The decisions of cases, at least the decisions of appellate courts, are recorded in printed form no less solemn and permanent than enactments of the legislature. As regards written character, case law stands on essentially the same footing as legislation. And, what is most important for our purpose, the application of case law may involve all the problems that the application of any verbal statement does. Propositions of case law, like propositions of statute law, may have to be interpreted. When one applies a proposition of case law, one may have to determine first of all what that proposition means. In fact, I am sure that you will find, after perusing the material which follows, that these interpretive problems are more critical and more difficult to handle in regard to case law than in regard to legislation.

In the first place, such interpretive problems grow out of the fact that case law is not fully stated out. Case law, like legislation, takes much for granted. It deals with individual cases and does not profess to cover fields. An opinion may refer to many decisions in prior cases, but these references extend only to those rules and principles which are relevant to the points to be decided. The result is that anyone who reads case law with understanding, has to fill in a great deal from his knowledge of the legal background.

Most reported decisions employ a great deal of technical legal terminology. Even more than statutes, case reports are intended for the eyes of courts and lawyers. Only exceptionally can a case be read with full understanding by a layman. Usually the report states rules and principles in technical terms; it describes the procedural steps in technical terms; and it even sets forth facts and conclusions of fact in legal jargon which is quite incomprehensible to the person without
legal training. So that it is almost invariably true that "it takes a lawyer" to extract the law from cases. As David Dudley Field remarks about case law in a passage already quoted:

"The law with us is a sealed book to the masses; it is a sealed book to all but the lawyers; and it is but partly open even to them. It is an insult to our understanding to say that the knowledge of the law is open to everybody." ²

But the factor which makes case law most difficult of application, even for the lawyer, is the form in which case law is stated. It is not declared in a clear-cut legal text, as statutes and constitutional provisions are.³ Case law is found in judicial opinions on particular cases. These opinions take the form of a discussion of a legal problem. The discussion may include a great variety of materials. Normally, it includes a statement of the facts in the case before the court; a formulation of the legal problem or issue, which the court has to decide; an exposition of various rules of law which may be relevant to the decision; an analysis of the facts of the particular case in relation to these various rules; the citation of the holdings in other cases and an analysis of their facts (some of which are analogous and some of which are different and distinguishable); and finally, a discussion of general principles on the basis of which the court chooses to adopt one rule rather than another. In other words, the proposition of law for which such a case stands seldom comes ready-made; it is interlarded with a discussion of the facts of the particular case; it is mixed up with a discussion of many other cases; it is put first in one shape and then another, here as a principle, there a rule. The person who approaches such a decision may sometimes find a clearly formulated proposition of law for which the decision stands. More often,

² See the excerpt from his article, quoted at some length in sec. 4-27 above.
³ Statutes are characterized, as Patterson says, by "textual rigidity."
he has to formulate his own proposition. The legal element is "interstitial"; and it is not always easy to dig out of the interstices, as you have doubtless found in the reading of cases that you have done so far.

The mass of case law from which rules and principles have to be extracted would be quite overwhelming for the individual lawyer if he had to do all the extracting himself. He simply could not handle the job alone. The job of integrating and organizing the case law is done for the lawyer in partial fashion.

1. In digests of the cases, of which the most notable is the *American Digest*, which is part of the National Reporter System and covers all American decided cases.

2. In encyclopaedias, e.g., *Corpus Juris Secundum*.

3. In textbooks, e.g., Williston on *Contracts*, Prosser on *Torts*, Tiffany on *Real Property*, and Wigmore on *Evidence*.

4. In case annotations, e.g., *American Law Reports Annotated* (A.L.R.), which are selections of important cases with collections of other decisions relating to the same topics.

The persons who prepare these works attempt to select and extract the significant legal material from the cases, and to sort and arrange it by reference to subject, principle and rule. Their work is most helpful for practitioner, student and scholar. But it is unofficial and unauthoritative; selection, statement and arrangement are extrinsic to the material organized, in the sense that they are imposed from the outside by a person or persons who have no authority to make or formulate the law.

In the last two decades an important enterprise, similar to the preparation of textbooks on law, has been carried out by the American Law Institute. This is an organization of judges, practitioners and law teachers, formed "to promote
the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.” It has restated the law in the following fields: Agency, Conflict of Laws, Contracts, Judgments, Property, Restitution, Security, Torts, and Trusts. The Restatement in each of these fields was undertaken by a reporter, who was a specialist in that field and who had working with him a number of advisers, chiefly law teachers, also interested in the field. Frequent conferences were held, and the drafts as they progressed were submitted for discussion and criticism by the council and the annual meetings of the Institute.* Mr. William Draper Lewis, first director, thus describes the work which the Institute undertook to do and what it has accomplished:

“We started with the belief that out of the mass of case authority and legal literature could be made clear statements of the rules of the common law today operative in the great majority of our states, expressed as simply as the character of our complex civilization admits. The result shows that this belief was justified. The Restatement of each subject expresses as nearly as may be the rules which our courts will today apply. These rules cover not merely situations which

have already arisen in our courts, but by analogy rules applicable to situations likely to arise. The Restatement of a subject is thus more than a picture of what has been decided; it is a picture of present law expressed by foremost members of the profession. As a result of the way in which the work has been done and the persons who have labored on it, the Restatement has acquired an authority far greater than those of us who organized the Institute to do the work anticipated. Though the rules are expressed in the form of a code, except in sporadic instances, there never has been any desire to give them statutory authority. The Restatement is an agency tending to promote the clarification and the unification of the law in a form similar to a code. But it is not a code or statute. It is designed to help preserve, not to change, the common system of expressing law and adapting it to changing conditions in a changing world."

Sec. 6-06. Problems. Consider the following items in terms of judicial lawmaking and the sources therefor:

1. Judge von Moschzisker:

"The judge may discover the solution of the point for decision in the constitution or statutes of the jurisdiction involved, and when either of these sources supplies the guide, he is bound to stop there; if they both fail he must turn to the body of the law as previously laid down by his own court, and be guided by such relevant authorities as he may find there. Should his researches in that field prove fruitless, it is usual for him to look for decisions in other jurisdictions, and if none appears which appeals to him as furnishing the proper rule, then he who is fixed with the responsibility of deciding the case has 'to draw his inspiration from consecrated

4 However, the American Law Institute did prepare three model codes for submission to the state legislatures: 1. a Model Code of Criminal Procedure, which has been adopted, in whole or in part, in about one-half the states; 2. a Model Code of Evidence, which has not so far been adopted anywhere; and 3. a Code of Commercial Law, which has only progressed to the stage of a tentative draft. This last-named code is a joint undertaking of the Law Institute and the National Conference of Commissioners on Uniform State Laws.

principles,—he is not to yield to spasmodic sentiment, to vague and unregulated benevolence (but must) exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." 1

Von Moschzisker gives a hierarchy of sources from which the judge derives the rule which he applies. How far are the various items which he mentions to be regarded as law and how far as sources of law? Suppose for example a judge in Michigan decides to follow a New York decision, there being no Michigan decision on the point. Is he treating the New York decision as law or as a source of law? What do you think von Moschzisker means by the suggestion that the judge must, if no other resources are available, "draw his inspiration from consecrated principles"?

Where would von Moschzisker place a textbook or a Restatement of the law? Is such a work to be regarded as law or a source of law? In what essential respect does a Restatement differ from a code?


"Plaintiff, a minor, brings this action by his guardian to recover $125, paid by him upon the purchase of a certain motorcycle purchased from the defendants.

"The case involves the question of whether or not a minor, who has purchased an article of this kind, and taken and used the same, after paying part or all of the purchase price, can return the article and recover the money paid without making good to the vendors the wear and tear and depreciation of the same while in his hands. . . .

"Bennett, J. The amount involved in this proceeding is not large, but the question of law presented is a very important one, and one which has been much disputed in the courts, and about which there is a great and irreconcilable conflict


2 97 Ore. 464 (1920).
in the authorities, and we have therefore given the matter careful attention.

"The courts, in an attempt to protect the minor upon the one hand, and to prevent wrong or injustice to persons who have dealt fairly and reasonably with such minor upon the other, have indulged in many fine distinctions and recognized various slight shades of difference.

"In dealing with the right of the minor to rescind his contract and the conditions under which he may do so, the decisions of the courts in the different states have not only conflicted upon the main questions involved, but many of the decisions of the same court, in the same state, seem to be inconsistent with each other; and oftentimes one court has made its decision turn upon a distinction or difference not recognized by the courts of other states as a distinguishing feature.

"The result has been that there are not only two general lines of decisions directly upon the question involved, but there are many others, which diverge more or less from the main line, and make particular cases turn upon real or fancied differences and distinctions, depending upon whether the contract was executory or partly or wholly executed, whether it was for necessaries, whether it was beneficial to the minor, whether it was fair and reasonable, whether the minor still had the property purchased in his possession, whether he had received any beneficial use of the same, etc.

"Many courts have held broadly that a minor may so purchase property and keep it for an indefinite time, if he chooses, until it is worn out and destroyed, and then recover the payments made on the purchase price, without allowing the seller anything whatever for the use and depreciation of the property.

"Many other authorities hold that where the transaction is fair and reasonable, and the minor was not overcharged or taken advantage of in any way, and he takes and keeps the property and uses or destroys it, he cannot recover the payments made on the purchase price, without allowing the seller for the wear and tear and depreciation of the article while in his hands.

"The plaintiff contends for the former rule, and supports his contention with citations from the courts of last resort
of Maine, Connecticut, Indiana, Massachusetts, Vermont, Nebraska, Virginia, Iowa, Mississippi, and West Virginia, most of which (although not all) support his contention. On the contrary, the courts of New York, Maryland, Montana, Illinois, Kentucky, New Hampshire, and Minnesota, with some others, support the latter rule, which seems to be also the English rule.

"Some of the cyclopedias and some of the different series of selected cases state the rule contended for by plaintiff, as supported by the strong weight of authority; but we find the decisions rather equally balanced, both in number and respectability. . . .

"Our attention has not been called to any Oregon case bearing upon the question, and as far as our investigation has disclosed, there is none.

"In this condition of the authorities, we feel that we are in a position to pass upon the question as one of first impression, and announce the rule which seems to us to be the better one, upon considerations of principle and public policy.

"We think, where the minor has not been overreached in any way, and there has been no undue influence, and the contract is a fair and reasonable one, and the minor has actually paid money on the purchase price, and taken and used the article, that he ought not to be permitted to recover the amount actually paid, without allowing the vendor of the goods the reasonable compensation for the use and depreciation of the article, while in his hands. . . .

"We think this rule will fully and fairly protect the minor against injustice or imposition, and at the same time it will be fair to the business man who has dealt with such minor in good faith. This rule is best adapted to modern conditions, and especially to the conditions in our far western states.

"Here, minors are permitted to and do in fact transact a great deal of business for themselves, long before they have reached the age of legal majority. Most young men have their own time long before reaching that age. They work and earn money and collect it and spend it oftentimes without any oversight or restriction.

"No business man questions their right to buy, if they have the money to pay for their purchases. They not only buy for themselves, but they often are intrusted with the
making of purchases for their parents and guardians. It would be intolerably burdensome for everyone concerned if merchants and other business men could not deal with them safely, in a fair and reasonable way, in cash transactions of this kind.

"Again, it will not exert any good moral influence upon boys and young men, and will not tend to encourage honesty and integrity, or lead them to a good and useful business future, if they are taught that they can make purchases with their own money, for their own benefit, and after paying for them in this way, and using them until they are worn out and destroyed, go back and compel the business man to return to them what they have paid upon the purchase price. Such a doctrine as it seems to us, can only lead to the corruption of young men's principles and encouraging them in habits of trickery and dishonesty.

"In view of all these considerations, we think that the rule we have indicated, and which is substantially the rule adopted in New York, is the better rule, and we adopt the same in this state."

How far do you regard this decision as creative of law for Oregon? Where did the court find the rules which it adopted?


"The instant appeal raises this question: Have children living in Pennsylvania, a cause of action for damages against a woman living in Illinois who caused their father to leave them, their mother, and their home and go to Chicago and live with her and to refuse to further contribute to their maintenance and support? The District Court answered the question in the negative and dismissed the complaint. . . .

"Is the family relationship and the rights of the different members therein, arising therefrom, sufficient to support a cause of action in each, the father, mother, or children, against one who breaks it up and destroys rights of the said individual members?"

3 152 F.2d 174 (1945).
"Appellee concedes that such a cause of action exists in favor of the father and within certain limits and certain jurisdictions, also in favor of the wife. She denies that such a cause of action, however, exists in favor of the children.

"The history of the development of the family and the family relations and the duties and obligations of the members of the family is a long one, covering centuries. Its development was slow, due to society's acceptance of the relative positions of the parties in the family and its reluctance to change such status. The husband was lord and master, and the rights of all of the members of the family were merged in him. He ruled. He spoke in the first person singular in all matters. He spoke authoritatively for all. Through the centuries, however, there came slowly a change. The father is still the master, it may be said, but the duties of the master have changed. Where it was said to be his duty to rule, he now serves. He recognizes rights of the others and his obligation to meet them.

"Perhaps he is still the titular head of the family. If so, his position merely carries with it greater duties and obligations. The duties of each member of the family are measured (at least in theory and in legal conception) by the position, the role, each takes in the family. Thus we see the wife, the breadwinner, and speaking for the family when the husband becomes incapacitated through sickness or invalidism. And children of tender years take on the family financial burdens when father is incapacitated and mother must attend him or for other reasons is unable to contribute to the financial support of the family. Relativity of rights and duties marks the rights and the obligations of the group and relativity is determined in each case by the situation of the family. But relativity does not eliminate or destroy the rights of any member.

"It is this conception of the family which must constitute our approach to the question at hand. . . .

"Defendant argues that such rights as here asserted have never been, and should not now be, recognized by any court until and unless legislation has been enacted creating such right. She argues that in the past, children's rights have not
been judicially recognized, save after legislative enactment and she points to various specific acts which the Illinois Legislature enacted to give rights which were not previously recognized...

"Plaintiffs, on the other hand, rely upon the maxim, Ubi Jus Ibi Remedium. Also they refer to the bill of rights of the Illinois Constitution (Sec. 19, Art. 2, Smith-Hurd Stats.) where it is provided 'Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation.' They contend that the absence of precedent affords no justification for denial of a common-law remedy where the right of an individual has been invaded by the wrongful act of another.

"Instead of holding that there is no remedy, because there is no precedent, they argue for what they assert to be the better rule, and what Dean Pound calls judicial empiricism. In other words, the common law has been and is sufficiently elastic to meet changing conditions. We quote from Dean Pound's book, 'The Spirit of the Common Law,' page 183:

'Anglo-American law is fortunate indeed in entering upon a new period of growth with a well-established doctrine of lawmaking by judicial decision. . . . Undoubtedly. . . . judicial empiricism was proceeding over-cautiously at the end of the last century. . . . If the last century insisted over-much upon predetermined premises, and a fixed technique, it did not lose to our law the method of applying the judicial experience of the past to the judicial questions of the present.' . . .

"Our conclusion, without going further into the matter, is that a child today has a right enforceable in a court of law, against one who has invaded and taken from said child the support and maintenance of its father, as well as damages for the destruction of other rights which arise out of the family relationship and which have been destroyed or defeated by a wrongdoing third party. Likewise, we are persuaded that because such rights have not heretofore been recognized, is not a conclusive reason for denying them. . . .

"The judgment is reversed with directions to proceed in accordance with the views expressed in this opinion."
What sources are used by Judge Evans in his decision? Does he rely on constitutional sources? On common law sources? On general background?

Does he go beyond the consecrated principles to which Judge von Moschzisker refers? 4

Sec. 6-07. The "discovered law" doctrine. Down until about two generations ago legal writers in this country were quite unwilling to admit that the judge actually creates law by his decisions. This reluctance was due chiefly to the prevailing "separation of powers" doctrine, according to which the legislature is to make laws, the executive to carry them out, and the judge to apply them to controversies. To admit that the judge makes law was to concede that he disregards this fundamental dogma. Adhering to a literal interpretation of the separation doctrine, these writers denied that the judge legislates, and in order to avoid ascribing a legislative role to him, they developed the so-called "discovered law" doctrine. Its purport was that the rules and principles that the judge announces in his opinions are merely discovered by him. They are supposed to have existed since the beginning of time, even though neither the judge himself nor anyone else was aware of their existence before they were judicially announced.

This "discovered law" doctrine involved an automatic or "slot machine" conception of the application of standards to cases. It denied entirely the judge's role in creating new law. It ignored entirely the judge's function of settling doubts and uncertainties regarding the law. By cloaking all these matters in a mystery, it prevented a rational explanation of the creative side of the judge's role.

Today practically all theoretical writers and most judges are ready to recognize the limited creative role of the judge.

4 Compare Russell v. Men of Devon, 2 Term R. 667 (1788) quoted in sec. 6-17, problem 3.
They are ready to admit that the judge does of necessity make law. That he has many legal problems to solve, and in solving them contributes new law for the guidance of future judges. They regard the so-called discovery of pre-existent law as merely a pious fiction, invented to save the face of a doctrine of "separation of powers" stated in absolute form. They realize that interstitial legislation is a necessary consequence of the decision of doubtful cases. The recognition that lawmaking of this character attends the decision of cases, has meant a real advance in realism and in clarity of thinking about law and the judicial process.

One factor which probably contributed to the success and former acceptance of the "discovered law" doctrine, was the fact that the judge's creative work occurs only in small bits, as is pointed out above. His lawmaking is not on a large scale. No doubt his prime function in the mine-run of cases, is to apply standards to acts of individuals and officials, standards which can fairly be said to be already existing; judicial legislation is secondary and incidental. It is easy to overlook the element of judicial lawmaking as it occurs from case to case. This oversight is a good deal like the failure to see that a glacier moves because it moves so slowly. It is only when we look at the imposing structure of the common law as it has grown up and developed through the centuries that we get a real appreciation of the creative work that judges have done and are doing.

Sec. 6-o8. Problems. 1. At one place in his Nature and Sources of Law, Gray asks the question regarding a group of common law rules, "What was the law in the time of Richard Coeur de Lion on the liability of a telegraph company to persons to whom a message was sent?" (Sec. 222.) What is Gray's point?

2. Suppose states X, Y, and Z have respectively three different common law rules regarding the same subject
matter: e.g., different rules regarding "attractive nuisances," or regarding the effects of a mistake in telegraphic transmission of a contractual offer, or regarding the test for insanity as a defense to criminal liability. Why does the existence of such differences create logical difficulties for the "discovered law" doctrine?

Suppose the differing rules are found not in judicial decisions but in statutes. Does this alter the logical difficulty? Why?

3. Does the fact that the legislature of state X passes different statutes at different times make logical difficulties for the "discovered law" doctrine? *

Suppose the Supreme Court of state X changes its view of the law in the course of time; first it adopts rule 1, later it adopts rule 2 on the same subject, still later rule 3, and finally it reverts to rule 1 again. What does this suggest?

"COMMON-LAW" Rules for Using, Finding, Interpreting and Changing Standards

Sec. 6-09. Legal standards and rules for their use. The acts of the judge like the acts of any other official are controlled by standards. Some of these standards—the rules of pleading and procedure—have already been considered in the third chapter of these lectures. To be contrasted with these are the rules of method which govern his handling of

* (I.R.) Those who adhere to a "higher law" theory, are prone to accept the "discovered law" doctrine. There is, however, no necessary connection here. The "discovered law" doctrine is concerned only with judicial lawmaking and purports to describe (and prescribe) a relationship between judicial decisions and an existing body of law. There is no mention of a parallel relationship between legislation and an existing body of law; it is not denied that the legislature can and does lay down law which never existed before. But the "higher law," according to its protagonists, is a body of pre-existing principles which stand apart from human law; these principles serve as sources for legislative lawmaking and limitations on such lawmaking. Of course, this "higher law" can serve likewise as source and limit of judicial lawmaking. My quarrel with the "discovered law" doctrine is that it gives a special, different and unrealistic explanation of judicial lawmaking. See section 7-45 for further discussion of the "higher law" theory.
legal materials. Some of these latter rules have also been given sufficient consideration, such rules as those which tell the judge how to deal with conflicts between constitution and statute, and between statute and statute; and also the rules which govern the processes of interpretation. Besides these many rules of method, we have also referred to the rules which govern the judge's function as lawmaker. All these rules control the judge in handling legal materials. Some of them regulate his handling of statutory material, others his acts of creating case law. There remain a number of other important rules of method which control the judge's choice of legal rules, his use of legal rules, and his interpretation of the materials which he finds in the case law. These are to be the subject of discussion in the remainder of this chapter.

Sec. 6-10. Primary rules of use: follow statutes and follow decisions. First among the rules of judicial method is one which directs the court to apply the mandate of statutes in cases which come before it. This rule is taken for granted by the legislature whenever it enacts a statute. The legislature assumes that the standards which it declares will be used by the courts in the decision of cases. The courts themselves consistently recognize their obligation to follow statutes; no court would ever question that it is bound to carry out the mandates of a statute, provided of course, that the courts regard the statute as constitutional.

Occasionally this rule is explicitly stated; ¹ more often the rule is taken for granted. The fact that the rule is not men-

¹ The rule appears explicitly in the clause of the Federal Constitution which declares that "the laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Art. VI, Cl. 2.) But this clause is apparently intended for the immediate purpose of declaring the obligatory force of federal statutes, etc., on state judges; their obligatory force on federal judges is taken for granted. Again, that clause of the Federal Constitution which provides that "judicial Power shall extend to all Cases in law and equity, arising under this Constitution, the Laws of the United States . . ." rather implies than states the binding
tioned frequently does not mean that it is any the less impor-
tant. It does mean that its role in the operation of the legal
system can be overlooked. The fact that the binding force of
statutes is assumed and not mentioned, has resulted in a fail-
ure to analyze the controlling force of statutes on the court,
and this in turn has resulted in some very obscure thinking
about the binding force of standards. What needs to be noted
is that a simple statute is a mandate to an individual or an
official, and that this statute is supplemented by a very general
superstandard which requires the judiciary to effectuate
statutory provisions. This superstandard is analogous to the
explicit provision of the Federal Constitution that the Pres-
ident "shall take care that the laws be faithfully executed." For
example, a statute which penalizes reckless driving raises
questions of the binding force of two standards. It is needful
to inquire whether the statute furnishes a standard for indi-
vidual action and also whether the court is bound to apply
this standard by virtue of a standard applicable to it. The
statutory provision does not per se bind the court; the court
is rather bound by a general standard which directs it to use
statutes in cases which come before it; in so doing it acts
pursuant to a standard for applying standards, an established
rule of judicial method. 2

A second general rule of judicial method, parallel to the
rule which requires courts to follow statutes, is embodied in
the doctrine of precedent, or as it is sometimes called, the
document of stare decisis. This doctrine requires the courts to
follow previous decisions. It was received by our colonial

2 Even if the statute expressly provides that the court shall take certain
action, a very common type of statutory provision as applied to trial courts,
the situation is not changed. There are still two standards—the standard
applicable to the individual and a second standard requiring the court to
apply the first.
ancestors as part of their English common law heritage. As Salmond has said, "The importance of judicial precedents has always been a distinguishing characteristic of English law. . . . A judicial precedent speaks in England with authority . . . the courts are bound to follow the law that is so established." What Salmond says of the English system holds equally of the American legal systems today.

Sec. 6-11. Problems. 1. Von Moschzisker says, in a passage quoted above:¹

"The judge may discover the solution of the point for decision in the constitution or statutes of the jurisdiction involved, and when either of these sources supplies the guide, he is bound to stop there; if they both fail he must turn to the body of the law as previously laid down by his own court and be guided by such relevant authorities as he may find there. Should his researches in that field prove fruitless, it is usual for him to look for decisions in other jurisdictions, . . . ."

How are this author's remarks related to the points about rules of method which are made in the last preceding section?

2. Consider the "choice of law" problems which the court had to deal with in the following case:

E. A. Stephens & Co. v. Albers.² The plaintiff, who operated a silver fox farm, paid $750 for a fox named, "McKenzie Duncan." Soon afterward this fox slipped through an inner gate inadvertently left unfastened at feeding time, and escaped. Next evening, the fox was shot by a ranchman who lived six miles distant, and who discovered the animal prowling near his chicken house. The ranchman did not know of the nature, value, or ownership of the animal, but removed his pelt and gave it to a trapper to sell

³ JURISPRUDENCE (6th ed.) sec. 61 (1920).
2 81 Colo. 488 (1927).
on commission. The latter sold the pelt to the defendant for $75. The plaintiff later found out what had happened to the fox and located its pelt in the defendant’s possession. Plaintiff brought suit for the value of the pelt, and recovered $75. Defendant appealed.

Burke, J.:

"... Defendant says McKenzie Duncan was a wild animal whose possession was essential to ownership, and that when he escaped and pursuit was abandoned plaintiff lost title which the ranchman obtained by slaughter and passed to defendant by sale. Plaintiff says the fox was domesticated; that his disposition to return to his pen (animum (sic) revertendi) must be presumed; that irrespective of such facts foxes are taxable in this state, hence the common law rule as to domesticated animals applies; and that the common law rule as to wild animals is not applicable here. . . ."

"For the common law we go to Blackstone who says: A qualified property may subsist in wild animals 'by a man's reclaiming and making them tame by art, industry and education; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty. . . . These are no longer the property of a man, than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty, his property instantly ceases; unless they have animus revertendi (the intention of returning) which is only to be known by their usual custom of returning. . . . The deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester: remains still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them.' 3 . . ."

"It should be borne in mind that when this common law rule was formulated the great wild animal menageries of the present day, with their enormous collections and vast investment, were in embryo, and the business of raising fur bearing animals in captivity was practically unknown in England. . . ."

“Counsel for defendant further says this common law rule is in force in this jurisdiction by virtue of an act passed by our territorial legislature in 1861. ‘The common law of England, so far as the same is applicable and of a general nature, . . . shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority.’ Sec. 6516, p. 1698, C. L. 1921.

“Applicability as to past or to future conditions would often be difficult, if not impossible, of ascertainment. That it is to be determined when claimed is clearly indicated by the language of Mr. Justice Beck, who, speaking for the court nineteen years after the passage of the statute, in a case where the common law rule as to damage done by trespassing cattle was involved, said, ‘such a rule of law is wholly unsuited and inapplicable to the present condition of the state and its citizens.’ Morris v. Fraker, 5 Colo. 425, 428.

“For the reason hereinbefore pointed out we think it equally clear that the common law rule now invoked ‘is wholly unsuited and inapplicable to the present condition of the state,’ the transaction in question, and the industry out of which it grew.

“Having then neither statute nor applicable common law rule governing the case we must so apply general principles in the light of custom, existing facts, and common knowledge, that justice will be done. So the courts of England and the United States have acted from time immemorial and so the common law itself came into existence.

“Counsel for defendant concedes he would have no title had the fox been released by a stranger or killed by one informed of its ownership. The thread is too frail to support its burden. McKenzie Duncan was held in captivity, semi-domesticated, escaped by accident, fled against the will of his owner, and pursuit was abandoned by compulsion. This defendant in fact had, or is charged with, knowledge that the pelt purchased was the product of a vast, legitimate, and generally known industry; that it had a considerable and easily ascertainable value; that it bore the indicia of ownership; that it has been taken in an unusual way; that the seller was not the owner; that no right of innocent purchasers had
THE COMMON LAW

intervened; and that it was from an animal taken in a locality where its kind ferae naturae was unknown and in a state where large numbers were kept in captivity.

"We are loath to believe that a man may capture a grizzly bear in the environs of New York or Chicago, or a seal in a mill pond in Massachusetts, or an elephant in a corn field in Iowa, or a silver fox on a ranch in Morgan County, Colorado, and snap his fingers in the face of its former owner whose title had been acquired by a considerable expenditure of time, labor, and money; or that the rule which requires that where one or two persons must suffer the loss falls upon him whose carelessness caused it, has any application here. If the owner was negligent in permitting the escape the dealer was even more reckless in making the purchase.

"Under all the circumstances of this case we feel obliged to hold that the defendant obtained no title which it can maintain against the plaintiff."

"The judgment is accordingly affirmed."

What rule did the defendant contend was applicable here? Why did the court reject it?

How did the court dispose of the statute which adopted the English common law as "the rule of decision" in Colorado? Did this statute make the English law a source of law, or make it law for Colorado?

How do you interpret the paragraph beginning, "Having then neither statute nor applicable common law . . ."?

3. An important field of the law bears the name "conflict of laws." The bulk of the problems which are considered in this field are problems of the "choice of law." Suppose as an example that O, who lives in Michigan, is the owner of land in Ohio which he wishes to convey. What law controls such a transfer, the law of Michigan or the law of Ohio? Story states the answer thus: "All the authorities in England and America . . . recognize the principle in its fullest import, that real estate, or immovable property, is exclusively subject to the laws of the government within
whose territory it is situate." 4 Accordingly, the formal sufficiency of a conveyance is governed by the law of the place where the land lies; that law also determines what constitutes the delivery of a deed, who is a competent grantor, etc. However, statutes in some states have modified the requirement regarding formalities by providing that the conveyance of local land is valid, as regards form, if it complies with the law of the place where the conveyance is executed.

What rules regarding "choice of law" appear in the foregoing statement?

4. In 1789 the first Congress of the United States enacted the Federal Judiciary Act. Section 34 of this act provided:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

This section was intended primarily to specify the law which was to be applied in the federal courts in lawsuits between citizens of different states ("diversity of citizenship" cases). Justice Story, speaking for the Supreme Court in the famous case of Swift v. Tyson 5 held that "laws of the several states" referred only to statute law and that on matters of common law the federal courts were at liberty to follow their own ideas of the general common law. This interpretation was repeatedly criticized, but was adhered to by the Supreme Court until 1937. Thus Black and White Taxicab, etc., Co. v. Brown and Yellow Taxicab, etc., Co. 6 involved a contract between A, a citizen of Tennessee, and B, a citizen of Kentucky, made in Kentucky and to be performed there. There was no question but that the operation of the contract was to be governed by Kentucky law, nor that the contract was

4 Conflict of Laws (8th ed.) sec. 428 (1883).
5 16 Pet. (U. S.) 1 (1842).
6 276 U. S. 518 (1928).
of a type which was invalid under the Kentucky decisions. However, in a suit to enforce this contract the Supreme Court held the contract valid and binding between the parties. The majority opinion declared:

"The cases cited show that the decisions of the Kentucky Court of Appeals, holding such arrangements invalid, are contrary to the common law as generally understood and applied. And we are of opinion that petitioner here has failed to show any valid ground for disregarding this contract, . . ." 7

According to this decision of the Supreme Court, what is the common law of Kentucky applicable to this contract? What determines the content of the common law of Kentucky?

In this last case Holmes, J. (with Brandeis and Stone, JJ.) dissented. He said in part:

"Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeals, from the State Courts, from England and the Colonies of England indiscriminately, and criticise them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendent body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may

7 Ibid. 528.
have been in England or anywhere else. . . . Whether and how far and in what sense a rule shall be adopted whether called common law or Kentucky law is for the State alone to decide. . . . The Supreme Court of a State does something more than make a scientific inquiry into a fact outside of and independent of it. It says, with an authority that no one denies, . . . that thus the law is and shall be. Whether it be said to make or to declare the law, it deals with the law of the State with equal authority however its function may be described."

Under Holmes' view, how is the common law of Kentucky determined? What rule for choosing applicable law is to be recognized by the federal courts?

In *Erie Railroad Co. v. Tompkins*, the Supreme Court speaking through Mr. Justice Brandeis overruled *Swift v. Tyson* and the whole series of cases following it. I need not go into the reasons for the conclusion in the *Erie Railroad Case*, as we are interested only in the views above expressed regarding the determination of common law. It is only important for our purpose that the *Erie Railroad Case* in effect adopted the views propounded by Justice Holmes above.*

**Sec. 6-12. Judicial lawmaking and the following of precedent.** Judicial lawmaking and the following of precedent are correlative acts. They are like proposal and acceptance of marriage. The judges who lay down a precedent offer it as a guide for subsequent decision; the judges who

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8 Ibid. 532-536.
9 304 U. S. 64 (1937).
* (I.R.) The distinction is now definitely made between state created rights and federally created rights, or, as I would prefer to say, between state created law (statute or common law) and federally created law. Regarding developments since *Erie Railroad v. Tompkins* was decided, see Guaranty Trust Co. v. York, 326 U. S. 99 (1945); and Clark, "State Law in the Federal Courts: The Brooding Omnipresence of *Erie v. Tompkins*," 55 YALE L. J. 267 (1946); Gavit, "State Rights and Federal Procedure," 25 IND. L. J. 1 (1949); Keeffe et al., "Weary Erie," 34 CORN. L. Q. 494 (1949); and Blume and George, "Limitations and the Federal Courts," an article to appear in the MICHIGAN LAW REVIEW in 1951.
follow the precedent accept it as a guide. The aims and intentions of these groups of judges are parallel respectively to the intentions of the legislature which enacts a statute and the court which applies it. Just as the legislature passes a statute with implicit confidence that its provisions will be applied by the courts in future cases, the supreme court as it lays down an original decision expects its opinion to serve as a guide for future decisions, and tries to make it a satisfactory and safe guide. On the other hand, judges in subsequent cases uniformly recognize the obligation to follow the precedent already established. This is one of the basic tenets of Anglo-American judicial method, as I have already pointed out. And the following of precedents is reinforced by the conscious judicial recognition that precedents ought to be followed as a matter of policy, and by judicial habits of mind which have become established through long training in our common law modes of thinking.

Acts of legislation and the following of precedents affect others than the judicial participants. Individuals, officials, and judges of lower courts rely upon the decision which has been made and upon its obligatory force on judges in subsequent cases. They rely upon the habits and practices of judges of following cases. They rely upon the authority of precedent. And further than this, they regard the judicial decision which establishes a precedent as an implied promise, and a solemn one, to adhere to the rules laid down therein. From the court's point of view the promise can be likened to a promise made to oneself—a resolution; but from the point of view of the outsider, the supreme court's declaration stands as a public confession of faith. The court says in effect: "This is what we hold now; it is what we are going to hold in like cases in the future." The court does sometimes go back on its resolution; it overrules a precedent. But no one likes to go back on a pious resolution openly announced, least of all
judges who are trained to announce their intentions and to stick to them. The supreme court's assurance of continuity of decision is therefore a considerable bond on which to rely.*

Sec. 6–13. Varying force of precedents. Precedents are not self-effectuating. They do not control later decisions automatically. Precedents only control to the extent that they are accepted as binding by judges in later cases. Varying force is attached by judges to different kinds of prior decisions. The variation in weight or operation of precedents is apparent in several respects:

1. As regards the place and court in which the precedent is cited. A decision of the supreme court of state X has a different weight when cited in an inferior court than when it is cited in the supreme court itself. It also has another weight when it is cited in state Y; in the latter state it is usually regarded merely as persuasive authority, and courts there will follow it only to the extent that its reason commends itself to their judgment.

2. As regards the character of the judicial statement which is relied on. If the opinion is unanimous, it will have one force; if the court is divided in opinion, the weight of its decision is somewhat weakened.

3. As regards the scope of acceptance of the view expressed by the precedent. If, for example, a precedent is supported by an overwhelming weight of general authority, it is entitled to more weight than if it diverges from general views.

4. As regards age and confirmation in later cases. A new precedent, it is often suggested, may be overruled more readily than one which has been long and continuously followed.

5. As regards the subject matter involved in the previous decision. Courts have less hesitation about overruling cases in some fields than in others, e.g., decisions on points of evidence and procedure than decisions on points of property law. Compare von Moschzisker, "Stare Decisis in Courts of Last Resort," 37 Harv. Law Rev., 409 (1924).

Sec. 6-14. Problem.

Salmond:

"Decisions are further divisible into two classes, which may be distinguished as authoritative and persuasive. These two differ in respect of the kind of influence which they exercise upon the future course of the administration of justice. An authoritative precedent is one which judges must follow whether they approve of it or not. It is binding upon them and excludes their judicial discretion for the future. A persuasive precedent is one which the judges are under no obligation to follow, but which they will take into consideration, and to which they will attach such weight as it seems to them to deserve. It depends for its influence upon its own merits, not upon any legal claim which it has to recognition. . . .

"The authoritative precedents recognized by English law are the decisions of the superior courts of justice in England. The chief classes of persuasive precedents are the following: "

"(1) Foreign judgments, and more especially those of American courts.

"(2) The decisions of superior courts in other portions of the British Empire, for example, Irish courts.

"(3) The judgments of the Privy Council when sitting as the final court of appeal from the Colonies.

"(4) Judicial dicta, that is to say, statements of law which go beyond the occasion, and lay down a rule that is irrelevant or unnecessary for the purpose in hand. We shall see later that the authoritative influence of precedents does not extend to such obiter dicta, but they are not equally destitute of persuasive efficacy." ¹

¹ Jurisprudence (6th ed.) sec. 63 (1920).
Does Salmond make a valid distinction here? In what way shall we describe the difference in the binding force of authoritative and persuasive precedents? Do courts ever overrule the former?

Do you accept his distinction between the force of a decision and a dictum? Would it be correct to say that a dictum of a court in state X is persuasive there, in the same way as a decision made in state Y?

Sec. 6-15. Dictum and decision.* Not all statements which one finds in a judicial opinion are regarded as having binding authority. Only those declarations of law which are made by the court upon questions which are necessary to the decision of the case before it, are binding in later cases. An opinion expressed by the court upon some question of law which is not necessary to the decision of the case before it, is dictum and not binding. Dictum may be persuasive, but it has not the force of decision. This all means that one must make the distinction between decision and dictum—a distinction which is not easy to make and which will cause you plenty of trouble as you proceed with your study of cases.

Under the caption, “What Does a Case Decide?” Oliphant points out three types of dictum and suggests the difficulty of distinguishing dictum from decision. He says in part:

“In the first place, a court, in deciding a case, may throw out a statement as to how it would decide some other case. Now if that statement is a statement of another case which is as narrow and specific as the actual case before the court, it is easily recognized as dictum and given its proper weight as such. In the second place, the court may throw out a broader statement, covering a whole group of cases. But, so long as that statement does not cover the case before the

* (I.R.) In addition to the item by Oliphant, cited in the next footnote, see Goodhart, “Determining the Ratio Decidendi of a Case,” 40 YALE L. J. 161 (1930).
court, it is readily recognized as being not a decision, much less the decision of the case. It is dictum, so labeled and appraised. But, in the third place, a court may make a statement broad enough to dispose of the case in hand as well as to cover also a few or many other states of fact. Statements of this third sort may cover a number of fact situations ranging from one other to legion.”

Simply put, dictum is any statement of law by the court which is not necessary to the decision of the case before it. The third of the types of dictum mentioned by Oliphant is the one which makes most difficulty. It is the type in which the court has laid down a proposition in its decision which is more general than it needs to be in order to decide the case. It raises the question, when is a proposition broader than it needs to be? When is it too general? Oliphant supposes a case in which A’s father induces her not to marry B as she has promised to do. If the court holds that A’s father is not liable to B for inducing A to break her contract, what proposition should it base its conclusion on? Oliphant suggests the following possibilities among others:

“1. Fathers are privileged to induce daughters to break promises to marry.
“2. Parents are so privileged.
“3. Parents are so privileged as to both daughters and sons.
“4. All persons are so privileged as to promises to marry.
“5. Parents are so privileged as to all promises made by their children.
“6. All persons are so privileged as to all promises made by anyone.”

And this author then asks:

“Where, on that graduation of propositions, are we to take our stand and say, ‘This proposition is the decision of this case . . .’? Can a proposition of law of this third type ever

become so broad that, as to any of the cases it would cover, it is mere dictum?"

Sec. 6-16. Problems regarding dictum. 1. Now to pursue to the end the line of suppositions which Oliphant makes let us assume that the court which decides the case rested its decision on the sixth of the above possibilities: All persons are so privileged as to all promises made by anyone. Might not the court in a later case, involving a breach of promise of marriage induced by a neighborhood busybody, quite properly say that the previous decision only supported the second possibility, i.e., that parents are privileged to induce the breach of such promises? If the court in this later case determined to hold the busybody liable, it would call the proposition of law laid down in the first case dictum insofar as it went beyond what was necessary to decide the first case.

2. Suppose another later case arises in which Z has induced X to breach his contract to sell and deliver lumber to Y; on what basis might the court distinguish the original case involving A's father, and justify a conclusion that Z is liable for damages to Y?

3. The process by which the judge limits the application of a prior judicial declaration, which he calls dictum, closely resembles the process by which the judge restrictively interprets a legislative declaration in statutory form (secs. 5-23 and 5-24). Elaborate and explain the analogy.

4. What is the relation of dictum to the rules of method which limit judicial lawmaking (see sec. 6-03 above)?

Sec. 6-17. Analogical and extensive interpretation of precedents. Problems. When a novel case arises, one which is not clearly covered by a statute or by a prior decision, the court to which it is presented will develop a principle from its former holdings, and decide the case according to this principle. This method of decision obviously extends the
holdings of the previous cases, although the court usually talks as if it were applying law which it found in them.

1. Let us return for a moment to the breach of promise cases discussed above. Suppose D, a father, induces his daughter to breach her promise to marry P, and P sues D for damages. Suppose, further, that the court which decides the action in D’s favor, rests its conclusion on the proposition that a father is justified in inducing his daughter to breach a promise of this kind. Now, if a later case comes before this court in which a son has been induced by his mother to breach a promise of marriage, what would this court probably hold? How would it state the proposition of law of the second case? How would it state what was decided in the first case?

Can the method of extending the principle of a decision to a new case be reconciled with the traditional doctrine which limits the controlling force of a decision to what is actually decided?

2. *Commonwealth v. Hoxey.* 1 The indictment set forth that the inhabitants of Williamstown, on the 15th of March, 1819, were duly assembled in town meeting, for the choice of town officers for the political year then next ensuing; that a moderator was duly chosen, who called on the electors present to give in their votes for a selectman for the year ensuing; that the defendant, while the moderator was presiding in the meeting, and was receiving the votes for a selectman, with force and arms, intending as much as in him lay to prevent the choice of said selectman according to the will of the electors, and to interrupt the freedom of election, unlawfully and disorderly did openly declare that the old selectmen should not be chosen, and attempted repeatedly to take from the box, which contained the ballots of the electors, the votes of the electors; and so the jurors say, “that the said T. F. Hoxey, on &c., at &c., in the public

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1 16 Mass. 385 (1820).
town meeting aforesaid, in manner and form aforesaid, did behave himself disorderly and indecently, to the disturbance of the peaceable and quiet citizens then and there assembled for the purpose aforesaid, in violation of the rights of private suffrage, against the peace of the commonwealth aforesaid, and contrary to the form of the statute in such case made and provided.'

"The defendant pleaded guilty to the indictment, and moved in arrest of judgment, 'because the said indictment purports to be founded upon a statute of law of the commonwealth; whereas there is no such statute in the state, making the facts set forth in the indictment an offence against the commonwealth; and because the facts set forth in the indictment do not amount to an offence at common law.' . . .

"By the Court. The indictment charges the offence to have been committed contra formam statuti; but no statute is found to describe the offence as alleged. The statute of 1785, c. 75, § 6, imposes a penalty of twenty shillings for disorderly conduct in town meetings, if the offender shall, after notice from the moderator, persist in his disorderly behavior, and shall refuse or neglect to withdraw from the meeting, after being directed to do so by the moderator. The offence laid in the indictment is not within this provision. . . .

"The remaining question is, Do the facts charged amount to an offence at the common law? On this question we entertain no doubts. Here was a violent and rude disturbance of the citizens, lawfully assembled in town meeting, and in the actual exercise of their municipal rights and duties. The tendency of the defendant's conduct was to a breach of the peace, and to the prevention of elections, necessary to the orderly government of the town, and due management of its concerns for the year. It is true that the common law knows nothing perfectly agreeing with our municipal assemblies. But other meetings are well known and often held in England, the disturbance of which is punishable at common law, as a misdemeanor. In this commonwealth, town meetings are recognized in our constitution and laws; and the elections made and the business transacted by the citizens, at those
meetings, lie at the foundation of our whole civil polity. If then there were no statute, prohibiting disorderly conduct at such meetings, an indictment for such conduct might be supported.

"Motion overruled."

Would you regard such a decision as a creative decision? Why?

Is the court ready to extend the existing statutes to cover this new case? Do not the same objections apply to the extension of the principle of prior decisions to cover the new case?²

3. **Russell v. Men of Devon.**³

"This was an action upon the case against the men dwelling in the county of Devon, to recover satisfaction for an injury done to the waggon of the plaintiff's in consequence of a bridge being out of repair, which ought to have been repaired by the county; to which two of the inhabitants, for themselves and the rest of the men dwelling in that county, appeared, and demurred generally. . . .

"**Lord Kenyon, Ch. J.** If this experiment had succeeded, it would have been productive of an infinity of actions. And though the fear of introducing so much litigation ought not to prevent the plaintiff's recovering, if by law he is entitled, yet it ought to have considerable weight in a case where it is admitted that there is no precedent of such an action having been before attempted. Many of the principles laid down by the plaintiff's counsel cannot be controverted; as that an action would lie by an individual for an injury which he has sustained against any other individual who is bound to repair. But the question here is, Whether this body of men, who are sued in the present action, are a corporation, or qua a corporation, against whom such an action can be maintained. If it be reasonable that they should be by law liable to such an action, recourse must be had to the Legislature for that purpose. But it has been said that this action ought to be

³ (1788) 2 Term R. 667.
maintained by borrowing the rules of analogy from the statutes of hue and cry: but I think that those statutes prove the very reverse. The reason of the statute of Winton was this; as the hundred were bound to keep watch and ward, it was supposed that those irregularities which led to robbery must have happened by their neglect. But it was never imagined that the hundred could have been compelled to make satisfaction, till the statute gave that remedy; and most undoubtedly no such action could have been maintained against them before that time. Therefore, when the case called for a remedy, the Legislature interposed; but they only gave the remedy in that particular case, and did not give it in any other case in which the neglect of the hundred had produced any injury to individuals. And when they gave the action, they virtually gave the means of maintaining that action; they converted the hundred into a corporation for that purpose: but it does not follow that, in this case where the Legislature has not given the remedy, this action can be maintained. . . .

"Ashhurst, J. It is a strong presumption that that which never has been done cannot by law be done at all. And it is admitted that no such action as the present has ever been brought, though the occasion must have frequently happened. But it has been said that there is a principle of law on which this action may be maintained, namely, that where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principle of law which is more applicable to this case, that it is better that an individual should sustain an injury than that the public should suffer an inconvenience. Now if this action could be sustained, the public would suffer a great inconvenience; for if damages are recoverable against the county, at all events they must be levied on one or two individuals, who have no means whatever of reimbursing themselves; . . . .

"Buller, J. and Grose, J. assented.

"Judgment for the defendants."

Here the court refused to make an analogical extension of prior decisions and established principles. Why?
What do you think of the "strong presumption" which Justice Ashhurst mentions? If applied, what is its effect? 4

Sec. 6-18. Overruling precedents. Problems. Courts do overrule their prior decisions. Even the clearest precedents are not absolutely binding. Three theories are expressed in the following excerpts as to whether courts should overrule previous decisions and if they are to overrule them, when they should do so.

1. In People v. Tompkins 1 the court said in part:

"The learned district attorney is clearly right in his assertion that the law of this state, as enunciated in the cases of Clough, Stetson and McCord, is at variance with the rule adopted by many other states in the Union. We are also impressed with the weight of the argument that in view of the constantly expanding ingenuity of intelligent criminals, which serves to render the administration of criminal justice more and more difficult, the law must be progressively practical in order to keep pace with the development of new forms of crime. But these arguments, impressive as they are, simply serve to suggest that it is the province of courts to give effect to existing rules of law and not to legislate. The law of this state, as set forth in the McCord Case, has been in existence since 1837. It has become a rule of personal liberty quite as firmly established in this state as the rule of property recently re-affirmed in the case of Peck v. Schenectady Ry. Co., 170 N. Y. 298, 63 N. E. 357. Although it may be admitted that this rule, which exists only in New York and Wisconsin, is at variance with what now appears to be the more reasonable view adopted in at least twelve of our sister states, and although it may be conceded to be too narrow for the practical administration of criminal justice as applied to modern conditions, we are admonished that the remedy is not with the courts, but in the legislature. We

4 Compare Daily v. Parker, quoted in section 6-06, problem 3; Pyle v. Waechter, 202 Iowa 695 (1926); and dissenting opinion of Grose, J., in Pasley v. Freeman, (1789) 3 Term R. 51.

1 186 N. Y. 413 (1906).
cannot change the existing rule without enacting, in effect, an ex post facto law. This cannot be done without ignoring the constitutional rights of many who may legally claim the protection of the rule. Neither can it be done without judicial usurpation of legislative power."

How would you state the theory here announced? Is there a real point in the statement that the court "cannot change the existing rule without enacting, in effect, an ex post facto law"?

2. In Bricker v. Green, Bushnell, J., speaking for the court, said in part:

"We come, then, to the question of imputed negligence. In this case, a wife who, while riding with her husband as a passenger, was killed by a combination of his negligence with that of a third party. Under the authorities as they now stand in this State, she could not have recovered had she survived nor can her administrator now recover. This rule, which exists only in Michigan, has been consistently applied in this State since the decision in Lake Shore & Michigan Southern R. Co. v. Miller, 25 Mich. 274, 277, decided in 1872, and it has been just as consistently criticized both within and without this jurisdiction. . . .

"The amicus curiae brief of the State Bar of Michigan closes with this statement:

"In the typical case, there is presented, on the one hand, the plaintiff-passenger, wholly free of any negligence or wrongdoing. On the other hand, there is the tortfeasor whose negligence has brought harm to such passenger or contributed to such harm. The injured party brings suit. The court must choose between them, the one innocent, the other guilty. Which is to be preferred? Must we continue for all time to drag in this exploded and obsolete legal monstrosity with the sole result of throwing the loss on the innocent party? The "imputed negligence" doctrine prefers the wrongdoer. He is the favored one and he is allowed to go free of responsibility for his wrongdoing. The loss is thrown upon the innocent passenger. As has been pointed out, abolition of the pernicious

2 313 Mich. 218 (1946)."
doctrine would affect only the wrongdoer and that only to the extent of preventing his escape from liability for his own negligence to one free from fault. At rock-bottom, the imputed-negligence doctrine is a denial of justice as between parties litigant. Hence, the rule of *stare decisis* should not be invoked in its behalf to perpetuate it through the many years to come.

"Ever since 1872 we have adhered to the imputed-negligence rule. We have recognized from time to time the changes brought about by the innovations of science and engineering, and we have carefully considered at much length the implications of the rule, its application, and the effect of its abandonment. As a result of our study and observation we are convinced that in the long run the application of the rule is more harmful than helpful and results in more injustice than it prevents; and that we should not continue the invariable application of the so-called imputed-negligence rule merely and solely on the ground that the injured person was a voluntary, gratuitous passenger in an automobile, the driver of which was guilty of negligence which was a contributing proximate cause of an accident and injury to such passenger.

"The rule of imputed negligence as announced and applied in *Lake Shore & Michigan Southern Railroad Co. v. Miller*, 25 Mich. 274, and in subsequent cases of like character, is overruled, so far as pending and future cases are concerned. Notwithstanding the fact that the trial judge applied the law as laid down in our opinions, we must, in view of our present holding, set aside the judgment of no cause of action and order a new trial."
ratified and adopted by the people, knowing the general tendency of governments and especially subordinate taxing divisions thereof and their officials to run into debt and incur liabilities that would affect their faith and credit and impose onerous burdens upon the tax paying public placed these positive and wise limitations upon the powers of the counties, towns, etc., to incur debts or impose liabilities upon themselves beyond the limitations prescribed in the quoted provisions without referring the proposition to the voters for approval (section 157). Knowing also that the electorate through zeal or improvidence is often inclined to assume excessive and burdensome indebtedness, they inserted section 158 of the Constitution as a further safeguard limiting the total amount of indebtedness that might be incurred by a political subdivision in any manner whatsoever, even by a vote of the people. . . .”

The opinion then reviewed several of the court’s prior decisions construing the provisions in question, and the decisions of other courts construing similar provisions; and the opinion continued:

“The rule announced in the domestic cases referred to lets down the barriers to the mischief obviously intended by the framers of the Constitution to be prohibited, and invited an orgy of maladministration waste of public funds and accumulation of indebtedness in counties and municipalities of alarming and in many instances ruinous proportions, which inevitably follow in the wake of judicial pronouncement removing restraint and limitations upon public expenditures and the creation of public indebtedness. The court can only view with regret the mischief already wrought under sanction of its decisions in giving a clearly strained and erroneous interpretation to the involved sections of the Constitution, however, and as will later be pointed out, the court is not by any rule of stare decisis or long continued erroneous construction rendered powerless to remedy the ills arising from its erroneous prior interpretations but may with propriety and so far as is consistent with vested rights acquired or acts done on faith of its decisions subordinate that rule when justice
and public welfare make such a course preferable to perpetuation of error. . . .

"But it is said that the doctrine of stare decisis prevents us from overruling our former opinions and compels us to continue to follow them, howsoever erroneous they may be. . . .

"Of course, all of the authorities say that more hesitation will be indulged against overruling prior opinions establishing property rights than in cases where such rights are not established. But no case that we have been able to find attributes such binding force to the rule as compels courts to continue to follow prior erroneous opinions to the detriment of the public interest, and when prior erroneous opinions are not only without reason to support them, but are in direct conflict with what was intended by a statute, a Constitution, or by the parties to a contract. . . . We, therefore, conclude that if there ever was a case where the doctrine of stare decisis should not prevent us at this time from correcting the glaringly erroneous opinions heretofore prevailing on the question in hand, it is this one, and we unhesitatingly disallow its urged effect in this case.

"But it might be said that property rights have been created in following our prior interpretations of the sections of the Constitution referred to, and which is true. We conceive, however, it to be competent for a court, in overruling a prior adopted principle, to preserve in the overruling opinion all rights accrued under the prior declaration, the same as if they had been created or arose out of a former existing statute which was later repealed by the Legislature. . . .

"Therefore, in overruling our prior opinions and in declaring our disapproval of such erroneous interpretations herein dealt with, we do so with the express reservation that all rights heretofore created and accrued in favor of all persons interested, in any manner whatsoever, shall be preserved and the principles of this opinion will not apply to any transaction begun or in the course of completion, or finished before this opinion becomes final. But the various taxing units of the commonwealth embraced by the two sections of the Constitution, supra (157 and 158) shall, after this opinion
becomes final, observe and be governed by the interpretation herein made, and shall contract no debts beyond the amount of revenue which they themselves provide under authority given to them by the Constitution or Statutes legally enacted thereunder. Therefore, if they wish to incur debts in any fiscal year they must not exceed in the aggregate what they themselves produce under the authority so given to them, and that any indebtedness in excess of what they do so produce, shall be void. As a consequence of the conclusions we have reached the opinions in the cases of *City of Providence v. Providence Electric Light Co.*, *supra*; *Overall v. City of Madisonville*, 125 Ky. 684, 102 S. W. 278, 31 Ky. Law Rep. 278, 12 L. R. A., N. S., 433; *Carter v. Krueger & Son*, 175 Ky. 399, 194 S. W. 553, and all others following the interpretations therein made, are hereby expressly overruled; but with the reservation, *supra*, whereby the rights of all parties are preserved, and this opinion shall have a prospective effect only.

"However, the withholding of any retroactive effect of this opinion requires an affirmance of the judgment, since compliance is shown with the erroneous interpretations here-tofore made. Wherefore, the judgment of the lower court is affirmed.

"The whole court sitting."

How would you formulate the theory here announced? What are its effects as regards the instant case? As regards the decision of future cases?*

*Sec. 6–19. Summary.* In this chapter the chief topics for consideration have been the ways in which case law is made,

* (I.R.) "But an overruling decision may be limited to prospective effect only, and thereby have the same general, future operation as a legislative enactment. In the overruling case, the court may apply the overruled decision to the case before it and announce a new rule which it will apply to jural relations that arise thereafter." Kocourek and Koven, "Renovation of the Common Law Through Stare Decisis," 29 Ill. Law Rev. 971 at 972 (1935). Two jurisdictions, Montana and Kentucky, have adopted this theory and method of overruling precedents. See editorial "Sensible View of Stare Decisis Gains Ground," 23 Am. Jud. Soc. Jour. 32 (1939); Kocourek, "Retrospective Decisions and Stare Decisis and a Proposal," 17 A. B. A. J. 180 (1931); and Green, "Freedom of Litigation," 38 Ill. L. Rev. 117, 248, 355 (1943–1944).
followed, and changed by our judges. We have analyzed the massive body of precedents, built up bit by bit by judicial decisions and known collectively as "the common law"; and have noted the ambiguity of the latter term. We have examined the more important rules that our judges have worked out to guide each judge in the handling of legal materials. These rules are superstandards of judicial method. They tell the judge where to find rules of law to apply, how to choose among possible rules, how and when to lay down a new rule or precedent, how far to follow precedents already established, and when to depart from or overrule such precedents. And the lawyer needs to understand the role of these rules of method no less than the judge. Without this understanding a lawyer cannot read a case intelligently, or write a law brief, or present a legal argument in court.