"SUBSTANCE" AND "PROCEDURE" IN THE CONFLICT OF LAWS

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"One by one we have seen how categories, which at first seem sharply defined, merge one into another, and how every classification when analyzed shows that some imaginary line has been arbitrarily taken as a boundary."¹

ALTHOUGH the foregoing passage was written by a distinguished worker in the field of physical science, it is the thesis of the present paper that it applies with equal truth in the field of legal study. For the lawyer's purpose every situation which confronts him is dealt with as falling into one or the other of two categories which are apparently supposed to be mutually exclusive and separated by a sharp boundary. Either this is a battery or not a battery, a trespass or not a trespass, *etc., etc.*² But such is the complexity of the universe as it presents itself to us that continually new combinations of elements appear; new, that is, in the sense that when we made our classification we did not have them in mind, and now that they present themselves we are in doubt into which class to put

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1. GILBERT N. LEWIS, *THE ANATOMY OF SCIENCE* (1926) 178.

2. "In our approach towards exactness we constantly tend to work out definite lines or equators to mark distinctions which we first notice as a difference of poles. It is evident in the beginning that there must be differences in the legal position of infants and adults. In the end we establish twenty-one as the dividing point. There is a difference manifest at the outset between night and day. The statutes of Massachusetts fix the dividing points at one hour after sunset and one hour before sunrise, ascertained according to mean time. When he has discovered that a difference is a difference of degree, that distinguished extremes have between them a penumbra in which one gradually shades into the other, a tyro thinks to puzzle you by asking where you are going to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other. But the theory of the law is that such lines exist, because the theory of the law as to any possible conduct is that it is either lawful or unlawful. As that difference has no gradation about it, when applied to shades of conduct that are very near each other it has an arbitrary look. We like to disguise the arbitrariness, we like to save ourselves the trouble of nice and doubtful discriminations." O. W. HOLMES, *COLLECTED LEGAL PAPERS* (1921) 232.

them. The difficulty involved may perhaps be made more clear if we imagine that we are looking at a soft focus photograph of some person, and that our problem is to assign all the points to one or the other of the two classes, (1) "face" and (2) "background". At first, as our eyes are focussed upon the center, the photograph appears quite clear, but as we try to locate the outlines of the "face" we discover that it is not possible to say definitely where the "face" ends and the "background" begins. Even if the focus be "sharp", we find ultimately the same difficulty, except that the zone of doubt is narrower. And if we use a microscope we find of course that the supposedly sharp line outlining the face has no real existence. Apparently all concepts which we use in our attempts to classify objects, events, or situations turn out to be surrounded by a "twilight zone" or penumbra, so that continually as our experience widens we are left in doubt, and in consequence are unable to make a purely mechanical or "logical" application of the concept to the ever-varying phenomena of life.³ The purpose of the present paper is to examine into this difficulty as it is exemplified in one problem in the Conflict of Laws, and if possible to point out what has to be done if this difficulty is to be handled in a satisfactory way.

We can perhaps best present our problem by quoting a typical statement of the problem as found in a recently published text-book on the Conflict of Laws.

"When a plaintiff sues in one jurisdiction upon a claim which he says accrued to him under the laws of another, an important distinction arises between what are called matters of right and matters of remedy, or matters of substance and matters of procedure."⁴ After pointing out the difficulties which might arise if the court of the forum were to try to follow the "procedural law" of the foreign state, the author concludes: "Matters of remedy, or procedure, then, are determined by the law of the forum.

3. That is, we are not able to dispose of the "new" situation by treating it as nothing more than another example of an already completely defined class, to be disposed of adequately by the supposedly logical application of a rule or principle. The word "concept" is used in the text for want of a better way of stating the matter. Its use must not be regarded as committing the writer to the so-called "conceptualistic" position in philosophy and logic. Compare the treatment by F. C. S. Schiller, in SCHILLER, *FORMAL LOGIC* (1912) 78 *et seq.* The difficulty in expressing one's meaning accurately is perhaps partly due to the fact that the structure of our language is largely an inheritance from a more primitive period of thought, so that we have nouns, such as "a thought", "an idea", "an emotion", etc., etc., for processes. See C. K. OGDEN, *THE MEANING OF PSYCHOLOGY* (1926) 158; OGDEN AND RICHARDS, *THE MEANING OF MEANING* (2d ed. 1927) 99 *et seq.*; and the passages in Schiller above referred to.

4. GOODRICH, *CONFLICT OF LAWS* (1927) 157.

The general statement is not disputed; the difficulty comes in determining, on a concrete set of facts, into which class the case involved falls."⁵

Then as we read the following sections of the text, dealing with the "application" of the distinction to various situations, we find a veritable chaos of conflicting decisions, as well as a great diversity of opinion on the part of the text writers. Consider the following typical illustration, taken from a recent paper by Professor Lorenzen, in which he tells us that Anson and Browne take the view that the Statute of Frauds lays down a rule of evidence [and so, presumably, a procedural rule], and that in this country Mr. Justice Loring and Professor Williston take the view that that statute lays down a rule of remedial procedure, but that Professor Corbin has reached the conclusion that it affects the substance of the contract—in which conclusion Professor Lorenzen concurs.⁶ Why this difference of opinion? Obviously the matter deserves careful consideration.

As the present writer sees it, much of the difficulty arises from the failure on the part of both judges and text writers to state the problem accurately. Nearly every discussion seems to proceed on the tacit assumption that the supposed "line" between the two categories has some kind of objective existence, so to speak, and that the object is to find out, as one writer puts it, "on which side of the line a set of facts falls."⁷ This way of stating the problem, if taken literally, seems to the present writer to start us off on the wrong scent, and so to divert our attention from the fact that we are thinking about the case precisely because there is no "line" already in "existence" which can be "discovered" by analysis alone. Obviously in the case of the photographs referred to above, there is no such "line", but rather a "no-man's land", the points of which can be assigned by the one making the classification either to the "face" or to the "background" without doing violence to "logic" or "reason".

This brings us to a second part of the reason for the confusion which reigns in the discussion of the problem, *viz.*, that since our

5. *Id.* at 159.

6. Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 311, 324. The references to Anson, Browne, Loring, and Williston are given in Professor Lorenzen's paper.

7. GOODRICH, *op. cit. supra* note 4, at 160. It is of course quite possible to use language of this kind and yet not make the assumption under discussion, just as we continue to say that the sun rises or sets without assuming the Ptolemaic Astronomy. Loose statements of this kind are, however, dangerous if taken at their face value, as many if not most judges and writers seem to do.

problem turns out to be not to discover the location of a pre-existing "line" but to decide where to draw a line,⁸ we can make up our minds about the matter only by asking and answering the question, what difference does it make where we draw it? In the case of the photographs, clearly one never could come to an intelligent conclusion until he had asked and answered the question: For what purpose are we classifying these points?⁹

In the case of the alleged distinction between "substantive law" and "procedural law", it needs first of all to be noted that for some purposes the basis for any such classification disappears entirely and all can be treated or regarded as "substantive". For example, if I wish to show the importance of studying "pleading" and "practice" in law schools, I may point out that just as the occurrence of certain events called offer, acceptance, and the giving of consideration give rise to a "substantive legal obligation" to perform a contract, so the occurrence of all the events of a properly conducted law suit—service of process, pleadings, proof, instructions of the judge to the jury, verdict of the jury, and judgment—gives rise to a new "substantive obligation", a "debt of record", on which suit can be brought. From this point of view, if I define as "substantive" the law which determines what facts give rise to legal obligations, all rules of law may be classified as "substantive". Shall I therefore conclude with Chamberlayne¹⁰ that the distinction between

8. Of course we can never "draw a line", i. e. something that has no width or thickness but merely length. All we do is to assign certain "points" to one or the other of our categories; there will always remain unassigned "points" between.

9. Compare the following remarks by William James in *Some Problems of Philosophy*, reprinted in *THE PHILOSOPHY OF WILLIAM JAMES* (Kallen ed. *Modern Library*, 1925) 82. "The pragmatic rule is that the meaning of a concept may always be found, if not in some sensible particular which it directly designates, then in some particular difference in the course of human experience which its being true will make. Test every concept by the question 'What sensible difference to anybody will its truth make?' and you are in the best possible position for understanding what it means and for discussing its importance. If, questioning whether a certain concept be true or false, you can think of absolutely nothing that would practically differ in the two cases, you may assume that the alternative is meaningless and that your concept is no distinct idea. If two concepts lead you to infer the same particular consequence, then you may assume that they embody the same meaning under different names."

10. "The distinction between substantive and procedural law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to use it, are, legally speaking, part of the right itself. A right without a remedy for its violation is a command without a sanction, a *brutum fulmen*; i. e., no law at all." 1 CHAMBERLAYNE, *EVIDENCE* (1911) § 171.

procedural and substantive law is "illusory and artificial"? Not so, unless I qualify my statement by adding, "for the purpose in hand." For other purposes it may become vital and important, and so "real" and "natural".

This brings us to a third part of the reason for the confusion in nearly all discussions, *viz.*, the tacit assumption that the precise point at which the line between the two is to be drawn is the same for all purposes. This assumption is of course connected with the other assumptions already mentioned, namely, that the "line" is to be "discovered" rather than "drawn" and that it can be located without keeping in mind the purpose of the classification. If once we recognize that the "line" can be drawn only in the light of the purpose in view, it can not be assumed without discussion that as our purposes change the line can be drawn at precisely the same point. To do this is to forget that a word is the "skin of a living thought,"¹¹ and that "words [and the concepts for which the words stand] are flexible,"¹² and should be defined so as best to meet our needs.

The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against. We find examples of it wherever we turn. Contract and tort; contract and quasi-contract; action in rem, in personam, and quasi in rem; title; general and special property—all these and a hundred others furnish examples of words which more often than not are supposed to have some one meaning, good for all purposes, when even a small amount of observation and analysis of the phenomena of legal decision as they occur will show the falsity of the assumption. For example, even an apparently simple word, or idea, such as "vessel", as the admiralty decisions show, turns out to be of varying scope as it is used first in one situation and then in another. Thus a craft launched but not yet completed has been held a "vessel" when the purpose is to give admiralty jurisdiction over deserting seamen,¹³ but not a "vessel" in order to give admiralty jurisdiction over a construction

11. "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Mr. Justice Holmes, in *Towne v. Eisner*, 245 U. S. 418, 425 (1918).

12. Mr. Justice Holmes, in *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 52 (1926).

13. *Tucker v. Alexandroff*, 183 U. S. 424 (1902).

contract.¹⁴ A raft of logs has been held a "vessel" for the purpose of giving a maritime lien for collision,¹⁵ but not for a libel *in rem* for wages.¹⁶ A barge or scow, even when anchored and used as a derrick boat, has been held a "vessel" under the Limited Liability Statute,¹⁷ but a similar structure held not a "ship" for which a possessory action in admiralty would lie under the Admiralty Rule then in force.¹⁸ In the last mentioned case Pardee, J., recognized that the barges in question would probably be held "vessels" for salvage, towage, or collision purposes.¹⁹ A sunken barge was held a "vessel" for maritime repair liens,²⁰ but not for the purpose of limiting liability.²¹ We need not endorse all these decisions as "sound" in order to recognize that the particular purpose of the classification in each case is actually playing a part in bringing about what at first sight seems a great conflict of decision.²²

The tendency to forget the purpose of a classification and to assume without adequate discussion that a given word, here "vessel", has the same meaning in a number of different rules is strikingly illustrated by the decision in *Reinhardt v. Newport Flying Service*.²³ In that case an employee was struck by the propeller of a "hydroaeroplane" while it was drifting on navigable waters. It was held that since the plane was a vessel "while afloat upon waters capable of navigation" and so "subject to the admiralty" jurisdiction, the State Workmen's Compensation Act did not apply. In his opinion Cardozo, J., apparently assumes that there is a single definition of

14. *Thames Towboat Co. v. The Schooner "Francis McDonald"*, 254 U. S. 242 (1920).

15. *Seabrook v. Raft of Railroad Cross Ties*, 40 Fed. 596 (D. S. C. 1889).

16. *Raft of Cypress Logs*, Fed. Cas. No. 11527 (D. Tenn. 1876).

17. *The Sunbeam*, 195 Fed. 468 (C. C. A. 2d, 1912).

18. *Wood v. Two Barges*, 46 Fed. 204 (C. C. La. 1891).

19. *Ibid.*

20. *The Geo. W. Elder*, 196 Fed. 137 (D. Ore. 1912).

21. *Petition of Diamond Coal Co.*, 297 Fed. 238 (W. D. Pa. 1921). *Contra*: *Eastern S. S. Corp. v. Great Lakes Dredge Co.*, 256 Fed. 497 (C. C. A. 1st, 1919).

22. In *Thames Towboat Co. v. The Schooner "Francis McDonald"*, 254 U. S. 242 (1920), relief *in rem* was refused to one who had contributed labor in completing a ship that had come to his yard after a considerable journey in tow. Commenting on this in (1924) 37 HARV. L. REV. 529, 534, Charles Merrill Hough says: "She was enough of a ship for that [towing], and doubtless could have incurred a maritime lien for collision *en route*, but was not sufficiently a vessel to be liable for her own finishing. The case suggests the query whether she could have been held *in rem* for repairing collision damage, if any."

23. 232 N. Y. 115, 133 N. E. 371 (1921).

"vessel" for all purposes of the admiralty law,²⁴ and thus by a process of what may fairly be called "mechanical jurisprudence" reaches his conclusion. Should we not ask, is a hydroaeroplane even when on a navigable water the kind of structure covered by the policy of the rule laid down in *Knickerbocker Ice Co. v. Stewart*?^{24a} Surely we do not need to conclude that because in a collision case the hydroaeroplane on the water ought perhaps to be held to be a "vessel" within the meaning of a marine insurance policy or to give a lien, it is therefore a vessel in the sense that one of the "crew" who "navigate" it while temporarily on the water can maintain a libel *in rem*? This would indeed be a "jurisprudence of conceptions."²⁵

Let us hasten to add that in saying this we are not denying that very often, perhaps usually, words used in more than one legal rule have, so to speak, a common core of meaning, so that many objects, events, or situations would at once be recognized as covered by them no matter what the purpose of the rule. For example, we may assume that the Europa while on a navigable water would be held to be a "vessel" within the meaning of the word as used in any of the admiralty rules; at least it is difficult to imagine an admiralty lawyer arguing to the contrary. This does not, however, take us far in dealing with cases which offer any difficulty, for these latter are those in which the meaning of the word (or scope of the concept) is in doubt. Were it not so there would be no problem for solution. It is the raft of logs, the floating derrick, the hydroaeroplane, which set us to thinking and arguing.²⁶

24. The opinion cites a large number of cases indiscriminately, i. e., without noting whether they involved salvage, towage, collision liens, repair liens, limitation of liability, or what not. Of course practically all the judges in deciding these cases did the same thing.

24a. 253 U. S. 149 (1920).

25. The note on the case in (1922) 31 YALE L. J. 437 fails to notice this relativity in the use of words. Note that while it is "in the air" the hydroaeroplane is not a "vessel", and, presumably, the State Workmen's Compensation Act applies. We thus have the somewhat curious result that the "crew" are entitled to compensation under the State Compensation law for injuries received when the plane is "in the air", but not for those which occur while the plane is "on the water".

26. "Thinking actually occurs only when an intelligent being capable of thought finds that he has to think; that is, finds himself in a situation where his habits and impulses no longer seem to suffice to guide his actions. He has then to *stop to think*. Thought arises, therefore, in a quandary, when he no longer seems to himself to know what to do, or is in doubt as to what he had *better* do. The primary purpose of his thinking is thus determined by its origin. It is, to get over his difficulty, to solve his problem, to learn what to do." F. C. S. SCHILLER, LOGIC FOR USE (1929) 3.

It may be well to add another word of caution before we proceed with our main discussion. This we may do by quoting once more from the physical scientist whose words stand at the opening of this paper. A little farther on in the book from which the former quotation is taken he adds:

" . . . I once more express the hope that in attacking the infallibility of categories I have not seemed to intimate that they are the less to be respected because they are not absolute."²⁷

This word of caution needs to be uttered because the present writer has more than once found that the point of view here expressed is at times seriously misinterpreted by some who do not share it. For example, when some years ago the present writer at the meeting of The American Law Institute ventured to suggest that very possibly the word "domicile", as used in the Conflict of Laws cases, may not have precisely the same scope in different rules having different purposes,²⁸ he was interpreted by one speaker as having taken the view that "you cannot draw any generalizations."²⁹ Now of course any such statement would be obvious logical and philosophical nonsense. The moment one puts two objects, two events, two situations, into a single category, he is "generalizing".³⁰ The question is, how do we generalize? How are the concepts used in our generalizations formed? How are they actually used in our thinking? If, as the present writer said on the occasion referred to, concepts are tools which we use to aid us in determining what ought to be done in concrete situations, it is clear that we are not denying that we do generalize. But we need first of all, before making up our minds as to the exact scope to be given to the concept, to get clearly in mind and to keep in mind the purposes for which we are using the tool.

It is an unfortunate fact that not only lawyers but also scientists tend to fail to realize fully this relativity in the use of words and of concepts, and that it is connected with the ambiguity, so to speak, of the universe as we experience it. Thus many biologists still

27. LEWIS, *op. cit. supra* note 1, at 184.

28. AMERICAN LAW INSTITUTE, PROCEEDINGS (1925) 226.

29. *Id.* at 230.

30. Even the use of a proper name, such as Peter, involves in a certain sense "abstraction" or "generalization". There are "fleeting particular occurrences which make up the several appearances of Peter;" no one of these fleeting particular occurrences is precisely like any other. They are sufficiently "similar" so that I put them all into a single category, "Peter". See BERTRAND RUSSELL, *PHILOSOPHY* (1927) 53; and compare A. N. WHITEHEAD, *SYMBOLISM: ITS MEANING AND EFFECT* (1927) 27, as to three possible meanings of a proper name, such as Julius Caesar.

exhibit a tendency to believe that a concept such as "species" in their science is a single, unitary concept, the same for all purposes, having, so to speak, a sort of objective existence. The endless quarrels of biologists over the correct or proper definition of a "species" ought to show them that they are on a fruitless quest. Much time and labor would doubtless be saved if they were to heed the wise words of Professor T. H. Morgan:

"Is it not possible that the kind of classification [into species] the taxonomist needs for purposes of identification may be very different from the classification that the evolutionist needs to indicate lines of descent or relationship? Is it not possible that the geneticist may need still another classification to indicate how many genes certain types have in common and in how many they differ? Each of us might, if he wished, erect a species definition of his own, and each would be within his rights in forming such a definition."³¹

If now in the light of the foregoing we examine into the distinction between "substantive law" and "remedial and procedural law" as that distinction is involved in legal problems, we find that this distinction is drawn for a number of different purposes, each involving its own social, economic, or political problems. In this discussion we shall enumerate only enough of them to bring out clearly the significance of the present approach for the solution of the problem of where the line is to be drawn in the field of the Conflict of Laws.

1. One group of cases deals with a question of constitutional law, *viz.*, how far may legislative bodies go in making statutes retroactive, when the constitution contains, as do some of our state constitutions, provisions forbidding retrospective legislation? Thus we find it stated in 12 Corpus Juris, 1088:

"Constitutional prohibitions against retrospective laws are generally held not to apply to acts which affect procedure only."

An example of the cases there cited in support of the statement is *Gibson v. Chicago Great Western Ry. Co.*,³² in which the statute in question was upheld on the ground that it "related solely to the remedy" and that "this court has repeatedly held that acts of the Legislature which relate only to the remedy of existing causes of action" do not violate the "retrospective" clause of the state constitution.

31. T. H. Morgan, *The Bearing of Mendelism on the Origin of Species* (1923) 16 THE SCIENTIFIC MONTHLY 237, 238.

32. 225 Mo. 473, 480, 125 S. W. 453, 455 (1910).

2. A second group, similar to the first, has to do with the *ex post facto* clause of the Constitution.

3. A third group, again more or less similar to the foregoing, has to do with laws "impairing the obligation of contracts."³³

4. A fourth group has to do with the question whether a statute general in terms and not professing to be retroactive shall be construed as retrospective in operation. A leading example of this use of the distinction is *Jacobus v. Colgate*,³⁴ in which the court refused to apply a statute allowing actions for trespass to foreign land to acts of trespass committed before the passage of the law.³⁵

5. Another group of cases consists of situations presented to State courts for decision, in which the State court is to apply federal statutory law but follow its own "procedural law". An example is *Barnet v. New York Central and Hudson River Rr. Co.*³⁶ discussed below.

6. Still another group has to do with the interpretation of the federal statute directing the federal courts, in civil cases other than equity or admiralty cases, to follow state procedure.³⁷

7. Closely connected with the preceding group are the cases in which the federal court of equity, professedly following the "procedure" established by the federal equity rules, is asked to take action to enforce what is described as a new "substantive equitable right" created by a state statute.³⁸

8. As our final group we have the cases in the Conflict of Laws, in which the "substantive law" of some foreign state is to be "applied" to determine the "substantive rights" of the parties, but the

33. Note that in this group and in some others the distinction we have under consideration is not the only criterion used in reaching a conclusion. In all, however, the distinction plays an important part.

34. 217 N. Y. 235, 111 N. E. 837 (1916).

35. See the present writer's discussion of this case in (1924) 33 YALE L. J. 457, 481.

36. 222 N. Y. 195, 118 N. E. 625 (1918); Note (1918) 18 COL. L. REV. 354.

37. Here the federal courts may, it seems, still refuse to follow a rule even though it be one of procedure if it has to do with "minor details" or if to follow it would "hamper the administration of justice." See Note (1922) 35 HARV. L. REV. 602. The result of the statute and of *Swift v. Tyson*, 16 Pet. 1 (1842) and similar cases is that in "diversity of citizenship" cases the federal court follows its own ideas of the "substantive common law", but the state "procedure" with the exceptions noted.

38. See *The Effect of State Statutes on Equity Jurisdiction in the Federal Courts*, Comment (1923) 33 YALE L. J. 193, and cases collected in 1 COOK, CASES ON EQUITY (1st ed. 1923) 380 *et seq.*, especially *Pusey and Jones Co. v. Hanssen*, 261 U. S. 491 (1923).

"remedy" and "procedure" to enforce these "rights" are to be determined by the law of the forum.³⁹

If we glance back over this list of purposes for which the distinction we are discussing is drawn, we see at once that a person asking where the line *ought* to be drawn might well conclude that this ought to be at one place for one purpose and at a somewhat different place for another purpose.⁴⁰ For example, in group one, dealing with the constitutionality of retroactive laws, it seems clear that the idea underlying the use of the distinction is, that while it would not be fair to individuals to alter their so-called "vested substantive rights" by subsequent legislative enactment, it is not to be expected that the "machinery for the enforcement" of those rights will remain unaltered. The precise meaning to be given to "substance" and to "procedure" ought, therefore, to be determined in the light of this underlying purpose to be fair to the individuals concerned.⁴¹

If we turn to group 8, *i.e.* the Conflict of Laws cases, we find a very different purpose. In determining the legal consequences of certain conduct or events it has seemed reasonable to apply "foreign substantive law" because of some factual connection of the situation with the foreign state; but on the other hand it would obviously be quite inconvenient for the court of the forum, though not unfair to the litigants concerned, to take over all the machinery of the foreign court for the "enforcement", as we say, of the "substantive rights." If we admit that the "substantive" shades off by imperceptible degrees into the "procedural", and that the "line" between them does not "exist", to be discovered merely by logic and analysis, but is rather to be drawn so as best to carry out our purpose, we

39. Under Article V, Sec. 1 of the Covenant of the League of Nations "except as where otherwise especially provided by this Covenant, or by provisions of the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting," and by Sec. 2. of the same article "*all matters of procedure* at meetings of the Assembly and of the Council . . . may be decided by a majority of the Members of the League represented at the meeting." (The italics are the present writer's.) As would be expected, the "application" of these provisions has already led to much difference of opinion as to the scope of "procedure". For example, the question of allowing the representative of the United States to sit with the Council in the discussion of the Manchurian question was declared to be one of "procedure" only. See (1932) 26 THE AMERICAN POLITICAL SCIENCE REVIEW 508.

40. See the present writer's discussion of "ought" and of "value judgments" in social science, including legal science, in Cook, *The Possibilities of Social Study as a Science* (1931) ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES 27.

41. Similar considerations are of course involved in the cases in groups 2, 3, and 4.

see that our problem resolves itself substantially into this: How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?

Against the inconvenience involved in learning the foreign rule is the fact that so closely are "procedure" and "substance" connected that in many cases a refusal to accept the foreign rule as to a matter falling into the doubtful class will defeat the policy involved in following the foreign substantive law. Clearly a decision on this basis might place the line at a somewhat different point from where it might be drawn when the purpose is that involved in the consideration of the cases in the first four groups. Only after the most careful consideration ought it to be concluded that decisions relating to one of these problems are to be followed as "precedents" for the decision of cases in another group. This is not to say that they ought to have no weight at all; far from it. It is merely to point out that at most they make out a *prima facie* case, and even that is perhaps to overstate the case for their use as precedents in really doubtful cases involving different purposes. Let it be once more emphasized that in a vast number of cases, nearly all of which never get into court, the distinction is so clear that a given situation if presented to a court would in all probability be treated without discussion as falling into one of the two classes, no matter which of these groups of cases might be under consideration.

Dean Pound has written much about "mechanical jurisprudence", a "jurisprudence of conceptions". Of course in a very real sense all jurisprudence is one of "conceptions". What frequently is happening in the cases Dean Pound refers to is, it is believed, that a court will unthinkingly assume that the definition given to a word in one legal rule is to be followed blindly when the same word appears in a different rule having a different social, economic, or political purpose. To do this is not, as one might at first sight conclude, "the extension of a maxim or a definition with relentless disregard of consequences to a 'dryly logical extreme'."⁴² Only after one has made the indefensible assumption that the definition of the word (or concept) given in one rule is applicable without further thought in connection with a different rule, can there be

42. Cardozo, J., in *Hynes v. New York Central Rr. Co.*, 231 N. Y. 229, 235, 131 N. E. 898, 900 (1921): "This case is a striking instance of the dangers of 'a jurisprudence of conceptions' (Pound, *Mechanical Jurisprudence*, 8 COL. L. REV. 605, 608, 610), the extension of a maxim or a definition with relentless disregard of consequences to a 'dryly logical extreme'."

even an appearance of "logic".⁴³ Once the relativity in the use of words and of the concepts for which the words stand is recognized, it is seen that "logic" alone does not and can not settle the matter.

In the light of this analysis, we shall not be surprised on examination of the decisions of the courts to find that what is held "procedural" in one rule is treated as "substantive" in another, and as a matter of fact this is precisely what we do find. For example, where the problem is whether a statute shifting the burden of proving contributory negligence from the plaintiff to the defendant is to be given a retroactive effect, and whether to do so will be constitutional, the answer of the courts usually is that since the statute affects procedure only and not substantive law, it is to be given a retroactive effect and to do so is constitutional.⁴⁴

But where the problem involved falls into group 5, *i. e.* cases where a state court is applying federal substantive law but its own procedure, it is held that the question of the location of the burden of proof in a negligence case is one of substantive law. An example is *Barnet v. N. Y. Central & H. Rr. Co.*,⁴⁵ in which the New York Court of Appeals held that, in a suit by a shipper against a common carrier for loss of interstate freight, the state courts were bound to treat the rule as to the burden of proving negligence as a question of substantive law, since the United States Supreme Court had so held.⁴⁶

43. See the discussion by the present writer in *Law and the Modern Mind: A Symposium* (1931) 31 COL. L. REV. 82, 114.

44. See, for example, *Southern Indiana Ry. Co. v. Peyton*, 157 Ind. 690, 61 N. E. 722 (1901); *Sackheim v. Pigueron*, 215 N. Y. 62, 109 N. E. 109 (1915). Compare the use of these cases by GOODRICH, *op. cit. supra* note 4, at 167 n. 35.

45. *Supra* note 36, discussed in (1918) 18 COL. L. REV. 354 as if it were a case in the Conflict of Laws.

46. In its opinion the court said at 198 *et seq.*, 118 N. E. at 626 *et seq.*: "In both the state and the United States courts where proof is given that goods are damaged in the hands of the carrier, the burden is upon him to show that the damage arose from some cause for which he was not liable. They differ, however, in this: In the United States courts where the carrier shows that the loss was occasioned by the act of God he has done all that is required. If the shipper then claims that the carrier's negligence also directly contributed to the injury, he must show that fact. In New York, on the other hand, the burden is upon the carrier to show both the act of God and his own freedom from contributing negligence . . . As to the question of proximate cause, when we have to do with interstate shipments we must follow the United States courts. If, however, the rule as to the burden of proof is simply a rule as to procedure and evidence we should be guided by our own precedents. For some purposes it has been so held by us. (*Sackheim v. Pigueron*, 215 N. Y. 62). But in determining the boundary between state and federal jurisdiction the Supreme Court has held it to be a rule of substance. (*Southern*

Is this latter result "inconsistent" with the decisions involving retroactive laws? It seems not. In one group fairness to the litigants is the test; in the other, Congress has laid down a uniform policy with reference to interstate carriers, and to make sure that that policy is fairly carried out may require that state rules as to burden of proof shall be ignored. The result in neither of these groups of cases is decisive for the Conflict of Laws cases, where the inconvenience to the court of the forum is the only reason for refusing to apply the rules of the "place of wrong" as to burden of proof. In view of the fact that to-day it is generally no more difficult to know the foreign rule as to burden of proof than it is to know the foreign "substantive law", much can be said for holding the question, at least in the negligence cases, to be "substantive" in the Conflict of Laws cases, for often the location of the burden in these cases is really decisive as to which side will emerge victorious.

On the other hand—to take a fairly clear case—there would obviously be no reason why in a forum having one system of pleading facts the court should follow the style of alleging facts prescribed by the law of the foreign state whose "substantive law" is being applied. The change from one style of alleging facts to the other would not as a rule substantially affect the probable outcome of the suit, as does the shifting of the burden of proof, and there would therefore be no advantage to offset the great inconvenience to the court of the forum if it were to try to follow the intricacies of a foreign system of pleading. Indeed, one may hazard the statement

Ry. Co. v. Prescott, 240 U. S. 632; *Central Vt. Ry. Co. v. White*, 238 U. S. 507.) We are bound by the federal decisions as the shipment was interstate."

Note the interesting suggestion of Learned Hand, J., in *Pariso v. Towse*, 45 F. (2d) 962, 964 (C. C. A. 2d, 1930) that *Central Vermont Ry. v. White*, *supra*, held that "the procedure was a part of the [federal] statute, and that the state courts must conform," conform, that is, to federal procedure as well as substantive law; and that similarly the federal court in applying a state statute must follow as "authoritative" the "procedure adopted by the state court in its administration." But surely the federal court is not bound to follow *all* the procedure of the state court. If not, our problem remains essentially unaltered, viz., how many of the state "rules" are to be followed? Apparently enough to be sure that the state's policy in enacting the statute is fairly carried out. The note in (1931) 31 COL. L. REV. 885 treats the case as an example of a tendency to depart from the rule that the "law of the forum governs procedure," and to apply the "procedural devices" of the "lex loci". It should be noted that *Pariso v. Towse* is the reverse of the *Central Vermont Ry. v. White* case, the question being whether state decisions as to the effect of a "rebuttable presumption" are "binding upon" the federal court equally with the state court's ruling on the "substantive law" of the state statute.

that this question of the precise form of allegations of fact would, if presented for decision, turn out to be "procedure" in all the eight groups of cases.

In the light of the foregoing, may we not fairly conclude that so long as we assume that the distinction between "substance" and "procedure" has a more or less "real" or "objective" existence, and is to be found at the same point for all purposes, the phenomena of judicial decision appear hopelessly inconsistent and chaotic, but that much of this disappears when we classify the decisions according to the type of problem presented? ⁴⁷

Additional light will perhaps be thrown upon the matter if, before we examine the decisions further, we attempt to clarify our minds upon certain other fundamental matters involved in our discussion. Down to the present we have more or less tacitly assumed that we know, and that the reader will know, what we mean when we use such a word as "right", in the sense, of course, of a legal and not merely of a moral or some other kind of right. This is perhaps an unwarranted assumption, at least if we mean by it that students of law or of "jurisprudence" are in agreement upon the matter. In the present paper all that can be done is to state the meaning which, it seems to the author, is most useful in the solution of the problem which confronts us. That meaning is the one so well expressed by Mr. Justice Holmes in his illuminating paper on "Natural Law":

"For legal purposes a right is only a hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it—just

47. Of course not all conflict of decision is thus accounted for. All that is meant is that a classification of the cases in terms of the purposes involved discloses that the "chaos" is not nearly so great as is usually supposed. In the proposed book of which this paper is a part there will appear a more detailed examination of the various rules and of the cases than is possible within the limitations of the present paper.

In his excellent paper on *The Statute of Frauds and the Conflict of Laws*, *op. cit. supra* note 6, Professor Lorenzen, while at some points recognizing rather clearly the relativity in the use of terms here insisted upon (see especially the argument on pages 330-331), at other points shows a tendency to adopt a more traditional point of view. For example, on page 327 he speaks of the "need of restricting the term 'procedure' to its *proper* signification" (the italics are the present writer's); on page 322 he seems to argue that decisions that "the statute of frauds does not affect contracts made prior to its enactment", i.e., is "substantive", show that it ought to be so regarded in the Conflict of Laws cases; and on page 329 he refers to the doctrine of *Lecroux v. Brown*, 12 C. B. 801 (C. P. 1852), to the effect that the statute affects procedure, as "erroneous", and the contrary doctrine as "correct".

as we talk of the force of gravitation accounting for the conduct of bodies in space."⁴⁸

If we follow this definition of "right", when we say that one person has a certain "right" against another, we are making a prophecy, to the effect that if the other person, usually stated to be under a "correlative duty", acts (or fails to act) in a certain way or ways, and if the one having the "right" appeals in the proper way to the proper officials of the state, these officials will take appropriate official action to bring the public force to bear upon the defendant.⁴⁹

Writers and at times judges distinguish between "primary" rights and "secondary" rights.⁵⁰ In the case of "trespass to land", for example, it is frequently said that the owner of the land has a primary right *in rem* "against all the world" that they keep off the land, *etc.*, except under certain specified circumstances;⁵¹ and that after some one has "trespassed" unlawfully, the owner has a "secondary" right to damages as against that person. If we adhere to our definition of right, we are compelled to say that the assertion that *A* has a primary right against *B* that he refrain from trespassing is a bit of shorthand, a conventional way of stating our prediction that if *B* acts in a certain way and *A* calls upon the state officials in the proper way, they will take certain specified action against *B*,⁵² and that the assertion that when *B* trespasses unlawfully a "secondary" right "comes into existence" is merely another bit of shorthand, a conventional way of stating that now we can make the prophecy omitting the "if" so far as the conduct of the trespasser is concerned, for that has happened.⁵³

Now obviously we do not make either of these prophecies unless we feel that there is a sufficient degree of certainty that the specified official conduct will happen if the "injured party" takes the appro-

48. O. W. Holmes, *Natural Law* (1918) 32 HARV. L. REV. 40, 42, reprinted in COLLECTED LEGAL PAPERS (1921) 310, 313.

49. See *supra* note 35, at 476. Of course all statements as short as this oversimplify and tend to ignore the fact that if the case is contested one can never be sure, for example, what verdict the jury may bring in, *etc.* For the purposes of the present paper, this always present uncertainty is not of importance.

50. See the opinion of Cardozo, J., in *Jacobus v. Colgate*, 217 N. Y. 235, 111 N. E. 837 (1916). We might call the primary rights "antecedent" and the secondary rights "remedial". See HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923) 150. But "remedial" is so often used to mean "procedural" that this usage has obvious dangers. Hohfeld suggests "tertiary or procedural" for the third class having to do with the mode of enforcing the secondary right.

51. See the present writer's discussion in (1931) 31 COL. L. REV. 368, 378.

52. Recall the limitations on this prophecy, *supra* note 49.

53. See the present writer's analysis, *supra* note 35, at 481.

priate steps to set the officials into action. We thus find ourselves beginning to consider what these appropriate steps are, and so find ourselves in the field of "remedies" and "procedural law". At first sight these distinctions seem clear enough, but let us not overlook that our "substantive right" prophecy is no more than a prophecy that these steps if taken will probably result in the specified official action. In a sense, therefore, we may say that the "substantive right" is, so to speak, a shadow which these (hypothetical) coming events cast before them.

In the light of this analysis, let us consider the question of which "form of action" is available to the injured party. Are we confronted with a question of "substantive law" (primary and secondary rights), or is it one of "remedial" or "procedural" law? If we look at the decisions in the Conflict of Laws we find that the orthodox view stated in the opinions and in texts is that the

"matters pertaining to the form in which the action is brought" are "clear instances of what relates to the remedy, to be settled by the *lex fori*. This includes whether . . . it is at law or in equity, whether it should be *assumpsit*, *covenant*, or *debt*."⁵⁴

The word "remedy" is of course highly ambiguous and needs definition before we can make up our minds whether or not we can agree with the writer from whom we have just quoted. Sometimes what we have above called the "secondary right" is described as "remedial", *i.e.*, the "remedy" for "breach" of the "primary right". Now clearly this kind of "remedial right" is as much "substantive" as the primary right itself, as indeed the author himself recognizes when he distinguishes between the substantive "primary" and "secondary" rights on the one hand and on the other the procedural "remedial right" (*i.e.*, the "means given for enforcing the claim").⁵⁵

Consider now the rule that at common law replevin would not lie for the mere unlawful detention of a chattel (by a bailee, for example), a "trespassory taking" being necessary. Was this a rule relating merely to the "remedy", *i.e.*, "procedural law", or was it "substantive"? Note that in the case of the bailment, where the bailor could bring only detinue, the judgment was in the alternative, that the plaintiff recover either the chattel or its value; a judgment which could be satisfied by the defendant by paying the value and keeping the chattel. Nominally an action to recover possession of a chattel, detinue thus turns out to be substantially an action

54. GOODRICH, *op. cit. supra* note 4, at 159.

55. *Id.* at 158.

for damages for the value of the chattel.⁵⁶ Replevin, on the other hand, was an action in which the common law court made a real attempt to restore the chattel to the plaintiff.⁵⁷ Suppose now by judicial legislation or statute replevin is extended to cover cases of unlawful detention: have we merely changed procedure, or have we at the same time altered substantive rights? Note that now the bailor can be said to have a right to specific restoration of the chattel, whereas before his right might fairly be described as no more than a right to either restoration or damages.⁵⁸

Or consider the rule that the doctrine of "undisclosed principal" in agency does not apply to contracts made by the agent in his own name, but under seal—obviously, one is tempted to say, a rule of "substantive law". Assume now that a contract is made and to be performed in State X, under the law of which a mere "scroll" made with ink is not regarded as a "seal", and that an action by the third party against the undisclosed principal is brought in State Y, in which a written agreement of this kind executed in the State is regarded as a sealed agreement. Assume, also, for the sake of simplicity in our argument, that both states still have common law pleading, including forms of action. If the form of action is determined by the law of the forum,⁵⁹ the action will have to be "covenant" because of the "seal", and as a result the action will not lie, for only the parties named in a sealed instrument can sue and be sued on it.⁶⁰ If, on the other hand, the form of action were to be determined by the law of the place of contracting (and of performance),⁶¹ the form would be "assumpsit", as the agreement is "unsealed", and so the action would lie. Clearly "substantive rights" are here so intertwined with "form of remedy" or form of action that it is "obvious" that we are not dealing merely with the "means of enforcing the substantive rights". We are, if not clearly

56. "This action [of detinue] is as nearly an action of the nature of debt as can well be; for in detinue the plaintiff can only recover the value of the article, and can not, by any means, obtain possession of the chattel itself." Maule, J., in *Walker v. Needham*, 3 M. & G. 557, 563 (C. P. 1841). This led to the development of "equitable replevin" where the chattel was "unique".

57. Not always with success, of course.

58. That is, in a court of common law. In equity, if the chattel were "unique", he had an equitable right to specific restoration.

59. That is, if the court of the forum applies to this "conflict of laws case" the same rule that it applies to similar agreements executed in the state.

60. *Green v. Horne*, 1 Salk. 197 (K. B. 1694); and see 1 WILLISTON, CONTRACTS (1920) § 296.

61. That is, if the court of the forum applies to this "conflict of laws case" the same rule that the foreign state would apply to a similar agreement executed in that state.

in the field of substantive law, at least in the "no-man's land" of our classification, and in deciding what to do need as always to consider the reasons for which that classification has been and is being made. That, it will be recalled, in the Conflict of Laws cases, is the inconvenience to which the court of the forum would be put if it were to try to follow not only the "substantive law" of a foreign state but also its pleading, practice, *etc.* One might well argue that that inconvenience is not so great in the case put as to lead to applying the *lex fori* to the determination of the form of action.⁶²

In other cases, however, the effect of a decision between two possible forms of action may have a less obvious, but none the less very real, effect upon "substantive rights". Take the case of a negligent but otherwise "direct" injury, *e.g.* an automobile accident in which *D*, the defendant, it is alleged, has negligently injured *P*, the plaintiff. At common law the plaintiff could bring either trespass or trespass on the case, *i.e.*, either allege that the defendant ran the automobile against the plaintiff's person or automobile, as the case may be, or that he so negligently, *etc.* drove the automobile that "in consequence of" the negligence the automobile was driven against the plaintiff, *etc.* This shift from one form of action to the other ought not, perhaps, to make any difference in the outcome of the litigation. Nevertheless under the common law system there is some evidence that it perhaps did. In trespass *vi et armis*, it was not necessary to allege that the defendant's act of trespass was unlawful or wrongful, and so we find it stated that in trespass for colliding with plaintiff's carriage contributory negligence was a plea in excuse, *i.e.* had to be alleged by the defendant.⁶³ On the other hand, in an action on the case the declaration had to allege facts showing a "wrongful act", and so, we are told, "a plea in excuse in this action is on principle impossible."⁶⁴ From this it follows that

"if the plaintiff is guilty of negligence [contributing to] causing the injury, then the defendant's act, which the plaintiff has helped to make effective, is not wrongful . . . Evidence of contributory negligence tends to support a denial . . . "⁶⁵

The plaintiff's choice of the form of action thus might have an important effect upon his chances of succeeding in the action. By choosing trespass he could apparently place upon the defendant the

62. *Cf.* Lundblad v. New Amsterdam Casualty Co., 265 Mass. 158, 163 N. E. 874 (1928); Note (1929) 42 HARV. L. REV. 701, noted in LORENZEN, CASES ON THE CONFLICT OF LAWS (3d ed., 1932) 337, n. 5.

63. MARTIN, CIVIL PROCEDURE AT COMMON LAW (1905) § 298.

64. *Id.* § 302.

65. *Ibid.*

burden of alleging and perhaps, logically, of establishing the plaintiff's contributory negligence, but if he chose "case" the defendant's plea of not guilty would apparently leave the plaintiff with the burden of establishing his own due care as well as the defendant's negligence.⁶⁶ Thus the shift from one to the other might make all the difference in the world as to the outcome of the suit. The connection with "substantive rights", though less obvious at first sight, is nevertheless clearly present.

May one whose chattel has been converted, with a resulting enrichment of the wrongdoer, sue in assumpsit for goods sold and delivered? Some states say yes, others no.⁶⁷ Suppose the conversion occurs in State X, which normally allows assumpsit, and the suit is in Y, which normally does not. Apparently we are dealing with "procedure", "the means for enforcing the right", but note that apparently in the absence of a statute the trover action would die with the death of the tortfeasor,⁶⁸ but the assumpsit action would survive against the estate. Assume that the suit in Y is assumpsit against the executor or administrator of the deceased tortfeasor; if we apply the *lex fori*, on the ground that "the form of the action is a question of remedy or procedure", a recovery against the estate is denied⁶⁹ — an obvious effect upon "substantive rights".

Enough has perhaps been said to show that many of these problems of the form of action fall at least within the "twilight zone" of our distinction between "substance" and "procedure", and must therefore be solved by keeping in mind the purpose in view in drawing the distinction. May it not turn out that in some cases the question of the "form of action" has so little relation to "substance" that the *lex fori* ought to govern,⁷⁰ but that in others the real problem has so much to do with whether the plaintiff shall be given an effective right that the views of the "place of wrong" or of

66. Our discussion is confined to the English common law cases. It is possible also that a shift from trespass to case might affect questions of the measure of damages.

67. WOODWARD, *THE LAW OF QUASI CONTRACTS* (1913) § 273.

68. *Hambly v. Trott*, Cowper 371 (K. B. 1776). In this case apparently the court might have refused to apply the maxim *actio personalis moritur cum persona* to the trover action had they not believed a quasi-contractual action in assumpsit could be brought.

69. Possibly the forum might take the view suggested by the dictum in *Jones v. Hoar*, 5 Pick. 285 (Mass. 1827) that assumpsit would lie against the executor even though not against the converter while alive.

70. As might be the case in the "waiver of tort" problem put in the text if by the law of both State X and State Y the tort action would survive against the converter's estate, and the measure of damages in both forms of action proved to be the same.

the "place of contracting", *etc.*, with reference to the "form of action" ought to be the decisive ones? The matter at least deserves more careful consideration than it has thus far received.

If we ask how it comes that these cases dealing with the form of action have so easily been relegated to the field of procedure, perhaps we may say that in addition to, or rather under the influence of, the tacit assumptions discussed at the opening of this paper, it has been unthinkingly assumed that because Chitty on Pleading and all other books on that subject very properly devote a large part of their space to the scope of the forms of action—for their purposes the rules governing them may well be regarded as procedural—they must be procedural for all purposes and so for the decision of cases in the Conflict of Laws. Surely this is a conclusion that will not stand examination.

Consider, as another example of the type of problem under consideration, the nature of "presumptions". We are told by the latest text on the Conflict of Laws that

"the ordinary [i.e. so-called rebuttable as distinguished from conclusive] presumption is not a rule of substance but procedure."⁷¹ The reasons given are as follows: "It 'attaches to one evidentiary fact certain consequences as to the duty of production of other evidence by the opponent'; in other words, determines, under certain circumstances, which party has the burden of going ahead with further evidence. It relates, therefore, to the manner in which facts are to be proved, rather than to the facts themselves, and it would be expected that it should be called a matter of procedure, governed by the law of the forum."⁷²

It is believed the matter is not quite so simple. Consider a concrete example. There is a well known presumption which in substance is that a person who has been absent seven years without being heard from by those who normally would hear from him is presumed to be dead.⁷³ This is not a "conclusive presumption" but is "rebuttable". If we examine into the way the presumption actually works at a trial, we shall make an interesting discovery. Assume that by the declaration or complaint certain facts, call them *A*, *B*, *C*, are alleged, *C* being the death of the person concerned; and that *A* and *B* are admitted, *C* being the only fact in issue. At the trial the one alleging *C* offers evidence sufficient to go to the jury tending to establish that the person alleged to be deceased has

71. GOODRICH, *op. cit. supra* note 4, at 166.

72. *Ibid.*

73. See 22 AM. & ENGL. ENCYCLOPEDIA OF LAW (2d ed. 1902) 1244 for a typical statement of the rule and its operation. 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2531, deals with the presumption in detail.

been absent seven years, *etc.* Let us for convenience designate this set of facts—absence for seven years, not heard from, *etc.*—by *X*. Assume there is no other evidence tending to prove or disprove *C*. Is not the proper instruction to the jury—assuming a general verdict is to be brought in—that (since *A* and *B* are admitted) if they find *X* established, the “presumption of death arises,” and they are to find for the plaintiff?⁷⁴ Or, if a special verdict is to be brought in, the truth or falsity of *X*, not *C*, is actually the issue passed upon by the jury. Apparently this fact is somewhat obscured by the technical rules applicable to special verdicts, for the following reasons. The general rule is that a special verdict must conform to the pleadings; by the pleadings the issue is *C*, not *X*;⁷⁵ hence (it seems) the verdict in this case must on its face find *C*, and not merely *X*. This technical rule, however, must not be allowed to deceive us, for what actually happens in such cases is that the jury is peremptorily directed by the court to find *C* if they find *X*, *i.e.*, they actually pass only upon the truth or falsity of *X*, and not of *C*, in spite of the appearance to the contrary produced by the (directed) recital of *C* in the verdict.

If the foregoing analysis is sound, a presumption of this kind, so long as it operates, changes the issue which the triers of fact must pass upon from *C* to *X*, and is a rule of law which directs the legal tribunal to attach under specified circumstances the same legal consequences to *A*, *B* and *X* that normally would attach to *A*, *B*, and *C*.⁷⁶ May we not argue, therefore, that from this point of view we have a rule which for some purposes at least may be regarded as a rule of “substantive law”, *i.e.*, a rule which determines what facts have certain specified legal consequences? It is perhaps unnecessary to emphasize that the purpose of this argument is not to show that this rule of law is always and everywhere to

74. See, for example, *Biegler v. Supreme Council of American Legion of Honor*, 57 Mo. App. 419 (1894). Presumably the instruction to the jury would take the form of a peremptory direction that if they find *X*, they are to find *C*, and so for the plaintiff.

75. As a matter of pleading, if the operative facts are *A*, *B*, and *C*, it is not sufficient to allege *A*, *B*, and *X*, even though *X* would raise the (rebuttable) presumption of *C*. See *Prudential Insurance Co. of America v. Moore*, 197 Ind. 50, 149 N. E. 718 (1925). I am indebted to Professor E. W. Hinton for this reference as well as for aid in stating the procedure in the case of special verdicts.

76. To be sure, if other evidence is offered by the opponent, not controverting *X*, but tending sufficiently to show that the person in question is actually alive, even though *X* may be true, the “presumption” can no more be relied upon, and the triers of fact must pass upon the truth of *C*. See *Directors of the Prudential Assurance Co. v. Edmonds*, L. R. 2 App. Cas. 487 (H. L. 1877).

be treated as "substantive"; far from it. For the purposes connected with a number of our groups of cases enumerated above it may well be that the underlying purpose in drawing the distinction will best be carried out by assigning this particular rule to the "procedural" category. For example, this might well be true in the first four groups of cases. On the other hand, obviously it was considerations of the underlying policy involved which in *Barnet v. New York Central & Hudson River Rr. Co.* discussed above⁷⁷ led to a somewhat similar rule being classed as substantive for the purpose in hand, *viz.*, to carry out effectively the policy of the federal law in establishing a uniform rule to govern interstate shipments.

A similar analysis may be made in the case of other "rebuttable presumptions". Space permits no more than a brief statement of one of these, which, however, is usually regarded as "substantive". In equity it is held by the English and many American courts that where land is conveyed to *A*, but the purchase price is paid by *B*, there is, in the absence of all other evidence, a "resulting trust" for *B*, not within the Statute of Frauds. This rule is, it is believed, usually treated as a part of the "substantive law", and taught in the course on Trusts in law schools; yet it operates very much as does the presumption of death just discussed. Given facts *X* (conveyance to *A*) and *Y* (payment of purchase price by *B*) and nothing more, there is a "resulting trust" in favor of *B*.⁷⁸ A rule of substantive law? Note that if there is added fact *Z*, that *A* is a child or the wife of *B*, the "resulting trust" is "rebutted", and there is a "presumption of an advancement" to the child or wife. This, however, is again not "conclusive", for evidence is admissible tending to establish fact *W*, that although *A* is a child or the wife of *B*, the latter has taken possession of the land. If this fact *W* is established, there is a rebuttal of the "presumption of advancement" and *A* holds in trust for *B*,⁷⁹ or, apparently, if by oral proof it is established that no advancement was intended, the "presumption of advancement" is rebutted and *A* holds in trust for *B*.⁸⁰

Apparently we have here a series of rules comparable in many ways to the "presumption of death" rule, and yet they are thought of as "substantive" by teachers and writers on the law of Trusts, and very properly so from their point of view.

The gist of our argument is, then, that all such cases fall into the no-man's land, the twilight zone of our classification, where a

77. *Supra* note 36.

78. BOGERT, LAW OF TRUSTS (1921) 109.

79. *Id.* at 110.

80. *Dyer v. Dyer*, 2 Cox, 92 (Ch. 1788).

decision one way or the other is in the abstract equally possible or "logical", and that therefore no intelligent conclusion can be reached in any particular case until the fundamental purpose for which the classification is being made is taken into consideration.

Before we close, it should be noted that in the final analysis the choice of what we may figuratively call the "border line" is in any of these groups of cases bound to appear to some extent arbitrary. This is what Mr. Lewis had in mind when in the paragraph quoted at the opening of this paper he said that "some imaginary line has *arbitrarily* been taken as a boundary." Once again, however, all this does not diminish the usefulness or the good sense of the classification; it merely suggests its nature and its limitations. Because the child grows by imperceptible degrees into the adult, so that no real "line" of division between the two is discernible, but must at last be drawn somewhat arbitrarily, it does not follow that the distinction between child and adult is not a useful one. Quite the contrary. Whether we will or no, we are compelled to distinguish between the capacity of the child and the adult to make contracts and convey property, to commit torts, to commit crimes, to marry, to consent to sexual intercourse, *etc., etc.* In these cases we do not hesitate to recognize the arbitrariness with which the precise point of division is selected, and that it is placed at one point for one purpose, at a second for another purpose, and at a third for a still different purpose.⁸¹ There is, then, no reason to be disturbed when we find a similar arbitrariness at the border line and a similar relativity of decision in such a field as that under consideration. It is just what we ought to expect if we keep in mind certain rather obvious but often overlooked truths about the nature of classification.⁸²

81. Note how as the purpose varies the age at which the child has "capacity" varies. Twenty-one for ordinary contracts; something less for entering into a valid marriage; a different age for "capacity to commit crime"; another in the "age of consent" cases; and so on.

82. "I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it. But the line which is drawn must be justified by the fact that it is a little nearer than the nearest opposing case to one pole of an admitted antithesis. When a crime is made burglary by the fact that it was committed thirty seconds after one hour after sunset, ascertained according to mean time in the place of the act, to take an example from Massachusetts (R. L. c. 219, § 10), the act is a little nearer to midnight than if it had been committed one minute earlier, and no one denies that there is a difference between night and day. The fixing of a point when day ends is made inevitable by the admission of that difference." Holmes, J., dissenting, *Haddock v. Haddock*, 201 U. S. 562, 631 (1906).

At the present moment there is going on in the pages of the legal periodicals an animated discussion as to whether certain writers on legal science are or are not "nominalists" in the philosophical sense.⁸³ In view of this it may be well to file a *caveat*. Very possibly there are chance expressions in the foregoing discussion which, wrested from their context, may seem to some to suggest that the "nominalist" position in philosophy is here assumed. Nothing in this paper is to be so interpreted. Fortunately in the conduct of science, including legal science, it is not necessary to choose between the "schools" on this point.⁸⁴ Nor, it may be added, is any denial of the utility of "logic" intended. Like the character in Moliere's play who suddenly discovered that all his life without knowing it he had been talking prose, those who in their reaction against the excesses of the formal logicians seem to deny any usefulness at all to "logic" will some day discover that they have been using it all the time.⁸⁵ The real point is to discover how to use it best; what

83. See, for example, the discussion between Professor Yntema in (1931) 31 COL. L. REV. 925, and Professor Cohen in (1932) 32 COL. L. REV. 1103.

84. Compare A. E. Blumberg and Herbert Feigl, *Logical Positivism* (1931) 28 THE JOURNAL OF PHILOSOPHY 281, 295. The statement in the text does not mean that scientific work is carried on entirely without the making of "metaphysical" assumptions, i.e. unproved assumptions about the "nature of things" which are taken as starting points. An example of such an assumption in scientific work is that in considering a small portion of the universe all the rest can be neglected. Note that any such assumption is held tentatively, as a methodological postulate, subject to revision in the light of results. The important thing is that any theory about the "nature of things in general" is held purely tentatively and no longer than is found convenient. The reference is of course not to the attitude of all scientists, but to the temper of "science" in general. See A. D. RITCHIE, *SCIENTIFIC METHOD* (1923) 7; and note his discussion of the possibility of using the distinction between "universals" and "particulars" and of speaking of "classes" and "relations" without "pronouncing judgment for or against any of the rival theories of Nominalism, Conceptualism and Realism." *Id.* at 39, 195. It may be noted in passing that it is quite possible that one might adopt "nominalism" as a tentative working hypothesis, a methodological postulate, and see how far he could get with it, without adopting it as an ultimate metaphysical "truth" about the nature of the universe. But that is another story.

85. As Professor Cohen has so often pointed out, among other things logic enables us to explore the consequences of rival hypotheses, and so may guide our observation and experimentation into more fruitful channels. It is difficult therefore to understand Bertrand Russell's attitude in *RUSSELL, PHILOSOPHY* (1927) 78, or the statement of a distinguished teacher and writer on law that "many considerations enter into the development of law; but formal logic is the least of them, if it is one at all," that "in restating the law one does not use formal or deductive logic," and that "modern American legal scholars do not use it [i.e. deduction]". See (1928) 51 NEW YORK STATE BAR ASSOCIATION REPORTS 180, 181.

its uses and what its abuses are. The same is true as to principles, rules, generalizations of all kinds, including the philosopher's "universals". What needs emphasizing at the present time is, it seems to the present writer, that while one must have rules and principles to go on, life is continually developing and presenting new and unexpected situations, and that these can not just off-hand be treated as "nothing but particular instances of defined classes,"⁸⁶ as so much of our legal writing and judging seems to assume. What is to be noted is that whatever else they may be generalizations are not

"fixed rules for deciding doubtful cases, but instrumentalities for their investigation, methods by which the net value of past experience is rendered available for present scrutiny of new perplexities. . . . they are hypotheses to be tested and revised by their further working. . . . In denying that the meaning of any genuine case of deliberation can be exhausted by treating it as a mere case of an established classification the value of classification is not denied. It is shown where its value lies, namely, in directing attention to resemblances and differences in the new case, in economizing effort in foresight. To call a generalization a tool is not to say it is useless; the contrary is patently the case. A tool is something to use. Hence it is also something to be improved by noting how it works. The need of such noting and improving is indispensable if, as is the case with moral [or legal] principles, the tool has to be used in unwonted circumstances. Continuity of growth not atomism is thus the alternative to fixity of principles and aims."⁸⁷

86. Adler, *Law and the Modern Mind: A Symposium* (1931) 31 COL. L. REV. 82, 106. If all that is meant by this is that many of the cases which present themselves to a trial judge are so much like other cases already passed upon that they are disposed of in a more or less routine way without much thought, the present writer has no disposition to disagree. But cases of this kind do not require reflective thinking; they are disposed of by habit. And of course by far the larger proportion of situations to which the answer seems clear never go to court at all unless the "facts" are in dispute.

87. JOHN DEWEY, *The Nature of Principles*, HUMAN NATURE AND CONDUCT (1922) 240, 245.