ON OUR CASE-LAW OF CONTRACT: OFFER AND ACCEPTANCE, I.*

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THE thesis of this paper is that the cases, and indeed most that has been written *when the cases were immediately before the case-trained writer's eye*, contain a rather coherent and workable and moderately simple body of case-principle and even often of clean case-law about the formation of business agreements, at least in the matter of Offer and Acceptance. And the chief reason why this phase of the law of business agreement continues unnecessarily obscure, and troublesome, and more often unpredictable than Reason would allow, is that the sustained illumination of point after point after point has been presented with a certain almost desperate regularity as a series of minor qualifications of basic theories and of a basic analysis which have not for a century or so rested on either case-law or on sense, and yet have not been re-examined in the light of their incessant and effective partial challenges. When the qualifications needed to make a supposedly simple basic structure of theory give accurate results in practice reach the point where the simplicity is overwhelmed by its own qualifications, and when the qualifications are not made to cohere in theory, though they do in meaning, then a fresh start becomes over-due. The work has been done. The knowledge has been gathered. The insights have been expressed. It is all in careful print. It needs but to gather together and give voice to its common meaning. This paper proposes to discuss some of the voicings in the light of themselves and their brethren, rather than to hide each of them away from all of the others under a cloak of theory which perhaps never should have been. In union lies here clarity as well as strength.

CASE LAW AND COMMON LAW

But certainly no man can write or think upon Our Case-Law of Contract as in any sense a unit without doing violence to some cases or some of the received categories, or both. And any disregard of decided cases or of accepted categories as being unsound or misleading or to be slighted

*This paper, like its predecessor, *The Rule of Law in Our Case-Law of Contract* (1938) 47 YALE L. J. 1243, is inscribed to Arthur Linton Corbin, my father in the law.

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in favor of others forces attention to what it may be which we are discussing under the head of Our Case-Law of Contract.¹

The cases divide; what then is the "case-law" of Contract? Again, five decisions in three States go one way, but in forty-five States there has been no decision and a powerful dissent occurred in the most recent case; what then is "our" case-law of Contract? Or again, if offer of a reward by a government calls for no knowledge or intention to accept, is that part of our case-law "of Contract"?

Holmes minted gold when he taught that the Common Law was no brooding omnipresence in the skies; but, save so far as may specifically concern one slender question of political and administrative wisdom—namely whether federal courts which concede Massachusetts law to be applicable are to dispute with the courts of Massachusetts what Massachusetts law is—the minted gold would risk transmutation into counterfeit if one were to add: "There is *only* the common law of New York or Massachusetts." A "general common law of the United States" there may not be; but a materially general common law *in* the United States there is. It is not easy to lay hold of; partial insight has sometimes exaggerated it into the Platonic omnipresence denied by Holmes; other partial insight has acidly ignored our common law, asking for its authority, or for "its" effect or nature in the case of conflict.² The sometimes ectoplasmic formlessness of our common law lends it over-easily to either treatment. Present, however, the common law is; and in ways of its own which are not mysterious, but only too familiar to be noticed accurately, it moves, and moves effectively. It deserves attempts at further description. For as with the relation of rules to cases, our habit has been to

1. The best and most rounded discussion I have seen in print on what "our" common law is today is Pound's *What is the Common Law?* in the Harvard Tercentennial THE FUTURE OF THE COMMON LAW (1937). As will appear, there are some differences in emphasis and even of substance between us. But the care and balance with which the paper has distinguished superstition about detailed things which "the common law" has been supposed to consist in from the less tangible but for all that real and vital things which do make up the essence of our common law are as welcome as they have been rare.

2. The lines of the argument are familiar. At the one brute end, judges "cannot" make law, and "principles" pervade the common law world of space and time. At the other brute end, no man knows the law of any case until the final court for that case has refused rehearing. There is patently no joinder of issue; two such positions are held in different worlds lacking even a rainbow bridge. Mediating positions move from the one end through such patent truths as that logical premises for new decision are always capable of development out of our materials or the expansion of sources to include changing mores or from the other end through perception of the psychological effects of a held ideology or an established practice of movement close to patterns or the importance of held norms even during departure from them. To be noted is that any attempt to state the fact, to approach success, must get one foot in the world of ethical norm, one in that of logic, one in that of judicial psychology, and one in the world of how our society does practically go round.

notice consciously only some one phase of the common law at any given moment, and at that moment to over-notice it and overstate it; to ignore the inconsistencies among our conscious noticings; and to leave the working reconciliation to our fingers rather than our pens.³ The *working* reconciliation is indeed there. We make out in practice rather comfortably with the decisions of our own State *and* those of other States, with national texts and encyclopedias and digests and services and law schools *and* with local judges, local jurisdiction, local rules.

Suppose we make a few of our accepted working practices articulate, not one by one, but all together.

It seems now unlikely to challenge, even by the federal courts, that the case-law of any jurisdiction so far as covered by decision in that jurisdiction is to be accepted as authoritative for that jurisdiction.⁴ As to decision on any uncovered point which can be foreseen with any clarity, one would argue the same; and many would so argue if some form of words had come to be recited as "now well settled in this State." Whenever the course of decision in any State departs from the general or otherwise common course, however unique or wrongheaded the departure may appear, we have non-community of legal results within the nation; so much is clear. So if there be family-wise departure (one or more minority lines) to that extent "common law," whatever else it does mean, does not mean like outcome of like cases. Wherever there is "confusion," one must suspect the same.⁵

But it is no less fundamental that even the stock of legal concepts and categories within the country which we use for ordering our thought and for diagnosis of the legal nature of a situation is far from homogeneous. Some examples of peculiarities are familiar: community property, the Louisiana "privilege", New England's strict foreclosure, the Western miner's partnership, the original Pennsylvania bailment-lease, the Massachusetts trust. Equally familiar is the power of statute over non-constitutional case-law, both in the single jurisdiction and where departure is cumulative by jurisdictions rather than scattered. There is a marked tendency for statutes to run in families, from codes of civil procedure or Field codes through recording acts and New York statutory trusts and the statute of frauds; more recently from workmen's compensation acts and "uniform" commercial acts⁶ and bulk sales acts on into fair

3. Compare the prior paper, (1938) 47 YALE L. J. 1244 ff.

4. Compare the opening of the literary floodgates by *Erie R. R. v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817 (1938); Shulman, *The Demise of Swift v. Tyson* (1938) 47 YALE L. J. 1336; Corbin, *The Common Law of the United States* (1938) 47 YALE L. J. 1351.

5. But see *infra*, p. 17, ff.

6. Even the Negotiable Instruments Law is splashed with amendatory change and addition, sometimes clerical in character, more often important. See BEUTEL'S BRANNAN'S NEGOTIABLE INSTRUMENTS LAW (6th ed. 1938) 1-97 (amendments by section); 1127 (by State). Such statutes prepared and urged by particular interested groups as

trade acts, little Wagner acts, and the recent mass of relatively uniform state legislation under federal initiative. Any statute which effectively innovates produces a departure not only from community of result but from community of base-line. Families of statutes do initiate a new semi-common base-line, and a new and partial case-law community of "construction", gap-filling, new building of law upon the new statutory base; statutes elaborate enough, or old enough to have been litigated into elaboration, even shape new legal institutions in their own image: *e.g.*, limitations, recording, attachment, survival of tort, remodelling of the seal and its effects; but this new community is at the same time a disruption of any *general* community of legal result unless and until both statute and its construction become uniform for the country or, as with the federal tax system, can control the country.

It will not do to fool ourselves about this situation. What we have in these forty-eight states is, in the main, neither common outcome of cases, nor common detailed rules, nor even too great a stock of truly common concepts and institutions, if we make the concepts and institutions precise enough to have direct decisive or even direct persuasive bearing on the outcome of a case.⁷ It is not merely that discrepancies in procedure mean discrepancies in the substantive effect of "substantive" law. It is that for the lawyer's case the position and relation of twig and leaf are more vital than the general concepts "tree", or "apple-tree", or "Baldwin". Hence, even while national books and the reports from across the line are open on our desks, we find it wise to get the opinion of homegrown counsel on the point of law—this though it be a point of purest case-law.⁸ Indeed the divergencies reach materially further. Though we are likely to assume that at least our law language and our general body of legal information are one, and that our techniques of legal thinking and of work with legal tools are com-

those on "Bulk Sales" and "Fair Trade" have run in families within the family, and require discussion according both to their "type" and to their individual shape of nose in section 3. See MONTGOMERY, *LAWS AND DECISIONS APPLYING TO SALES IN BULK* (2d ed. 1926).

7. I do not overlook the fact that a legal institution, like any other, can have a flavor and a strain for development along some given line. But my observation is that such flavor and strain are rarely strong enough, so to speak, to *force* a case-law result. Given the right facts, and the right counsel, then yes. Otherwise, one must more often wait through a period of groping and confusion and perhaps be thrown entirely off line by mischance. Perhaps the answer is that where flavor and strain have come to almost force a result, we look ahead, and see the result as already achieved.

8. This despite due attention to the counter-phenomenon: that of specialized business counsel in a specialized field who can and often must give local counsel the theory and material for a brief on some tricky point: compare the history of trust receipt litigation. And despite due attention to the fact that local counsel may be needed for other purposes than advice on the law. For neither of these things disturbs the basic importance of the point of the text, but only gives it a non-exclusive importance.

mon among lawyers and among States, closer observation affords some not unreasonable grounds for checking up in detail before such an assumption be merely indulged. For instance, in actual use and work, what will a law review citation be worth as against an encyclopedia? If there are separate chancellors and non-code pleading, does that not affect the thinking techniques of the local bar and bench? Is there a local preference for "foreign" citations from some particular jurisdiction? Has the bar at large grown up with Bispham's Equity, or Pomeroy's, or Ames'? Is the merchant, the manufacturer or the farmer the center of thinking about and sizing up transactions? Is the nicer type of legal reasoning and the finer type of distinction a practice or an irritant? As between individual lawyers, individual judges, so between benches of judges and whole bars, and so between jurisdictions, there are divergencies along such lines as these, and as between areas where the same names of institutions or even the same institutions and similar wording of rules may happen to be accepted. A few years of work with such a body as the Conference on Uniform State Laws turns up a degree of cross-purposing in communication and a diversity in legal techniques between lawyers from different jurisdictions which no man would suspect from reading our nationally sold texts. It is a cross-purposing different in kind from that one meets between country and metropolitan lawyer, or between good, mediocre and bad lawyer within a single jurisdiction; it is a cross-purposing which lacks any single authoritative source—of rule, definition or method—from which to argue with and toward agreement. And something is gained in clarity by the sharpening shift in terms when, in thinking about how far we have in the United States a *common* law, *common* concepts, *common* techniques, one turns first for his data to the *case-law*, the *case-law* concepts, the *case-law* techniques of the several jurisdictions.

Yet when all this has been said, it but opens the picture of the common law in these United States. That common law is in first instance ideological. It exists in good part and persists in greater part because we *think* we have it.⁹ Meantime the texts aforementioned, the encyclopedias, the services, the Restatements, the law school case-books and the schools themselves bear witness to the power of an idea to realize itself—in part. To the *taught* tradition eloquently described in Pound's pages can be added the *learned* tradition, the mere contagion of the assumption of a common law.¹⁰ And decisions and writings pour from the various juris-

9. Insofar it somewhat resembles the orthodox doctrines of Offer and Acceptance. But "the common law" differs from this particular part of it in that the more necessary lines of escape from its ideology (the home-grown precedent, the local statute) have become conscious and articulate, and their operation therefore more certain and predictable.

10. Together, of course, with the *learning* of much detail of "precept" and practice—of "habits of thought", points of view, accepted values—which can go on at need even

dictions into a common reservoir from which any jurisdiction can pump to meet a need its own decisions or dicta have not supplied; which, too, provides power for the mill of scholarship.

This would be difficult if the idea of common law were not implemented or had not implemented itself with some reasonable degree of common vocabulary and common case-technique.¹¹ Difficulties in communication of legal thought between the gentlemen from Mississippi, Washington, Minnesota and Massachusetts there are; but they iron out with a tithe of the effort needed to iron out similar difficulties between any of them and the gentlemen from France, Germany, Sweden—or even England.¹² German case-law, for instance, reminds an American of some kind of platypus: it exists, and its race perpetuates itself, but it is queer enough to make us feel "There can't be no such animal"; it has not only fur but bill; it does suckle its young as ours does; but with a different milk—and it lays them in a code-shell like an egg. Whereas "the common lawyer is at his worst when confronted with a legislative text"¹³

in the teeth of conscious instruction. Indeed one line along which Pound's development of Maitland's "tough law" and Ehrlich's "power of untrue doctrine to realize itself" could reward still further development would be in detailed study of the cross-play when the other influence he mentions, that of judge, advocate and counsellor, are at work on correction of schoolmen's theory. In present day case-law, at least, we then have a battle of a taught tradition against a learned tradition; for how to escape from taught doctrine and shape both judgment and new doctrine to the living fact has not for some generations been in the tradition of curricular instruction.

11. There is a fascinating study to be made on the process of this: the persistent separation of vocabulary, for instance, as between common law in the narrow sense and equity, even while equity develops or absorbs case-law techniques closely similar to those on the strict common law side; the manner in which and degree to which the incursion of statute may have driven the case-law branches together; the incursion of case-law technique into administration, as distinct from the effect of the mere necessities of economy and internal policing—and the like. We know little about any of this which can be regarded as documented, even over small areas. The most suggestive material is again and as usual Max Weber's *Rechtssoziologie*, in *WIRTSCHAFT UND GESELLSCHAFT* (2d ed. 1925). And compare GOEBEL, *FELONY AND MISDEMEANOR* (1937) cc. IV, V; Malcolm Mason's forthcoming book on the course of legal institutions in Tudor England.

12. What, for instance, is an American lawyer raised on modern Contract theory and the Sales Act to do with a modern English lawyer to whom in Sales a "condition" is as of course an "obligation," but one which, at least until acceptance of the goods, is to be distinguished from a "warranty;" or with a Frenchman who, perceiving *ce qu'il doit*, perceives no point at all in indicating the precise consequence if "he" doesn't? Whereas he can at once understand Waite's use of the terms [SALES (2d ed. 1938) 11 ff.] because, *aware of the diversity of usage*, Waite explains at length and in advance what his terms will mean and why.

13. Pound, *op. cit. supra* note 1, at 18. Stone's discussion in the same volume picks up, as Landis and Radin have, the problem of developing the alternative available common law attitudes. And it is fair to argue that these, while still not to be relied on, must be gaining some ground, else statutory drafting in simpler, broader terms would neither survive nor spread. "In the course of employment," even as later whittled by "out of," has received, for instance, a moderately sympathetic development by the courts. So have the Wagner and Little Wagner Acts. And contrast the whittling of the bona fide

unless it be when he attempts to build a sweeping abstraction or a systematic theoretical structure. Indeed a whole institution borrowed by us outright from the Continent would be pinched by surrounding institutions among which it would be thrust, would lack drive and comfort in development (say *commandite*, *Grundschild*, the notarized contract); whereas such adaptations of our own vague trust-concept as the trust receipt and the Massachusetts trust, if once accepted in a new jurisdiction, have made themselves at once at home and settled in beside the native legal fauna. The very fact—for it is a fact—that a case or even a series of cases from another State cannot be really grasped by one who lacks knowledge of the context of neighboring, interlocking rules and of the procedure, only points the power of the common law idea; for we *use* such cases, one by one or in groups, *as if* we understood them, and their use affects our law. On the other hand, this looseness of use of out-State precedents points up the essential looseness of the common law itself and of its thinking methods: if the concepts did not lack sharpness, we should be conscious of the need for accommodation of borrowed material in regions beyond the immediate case in hand; if the techniques of our own local case-law were not largely flexible, inconsistent among themselves, and too familiar in their inconsistency for notice, we should be struck and estranged by opinions which varied from our own particular cleanly perceived or consistently practiced line of technique—thus, if we were distinction-men *alone*, we could not fail of revulsion at reasoning from broad vague principle (however useful); if we were principle-men, *only*, we could not stomach mere unreasoning reliance on the all-fours case. Pound also has his finger on the pulse of law common to us when he insists on the tremendous influence of our *relational* thinking—indeed of our relational *perceiving*. Not only do we easily and comfortably think in terms of Master and Servant, Landlord and Tenant, and the like; which we do. But even where we have no such double headings of thought, we give to our concepts single names which stand as units, their feet in fact, their heads in legal consequence: agency, trust, contract, offer, acceptance, suretyship. It is mistaken to conceive such (*e.g.*, agency, suretyship) as breaking in upon relational thinking: their effect is relational because it is situational; because the typically common-law fusion and confusion of the law and fact sides of the single term forces in constantly new legal color as the situation changes, and constantly shifting application without the handicap of surmounting rigorous legal definition.¹⁴ Meanwhile the reservoir of case and writing serves not merely

purchase purposes of the recording acts with the furthering treatment accorded to the unclear more recent sections on negotiable documents of title.

14. The most striking case of this has been our double and parallel development of "private" "property," from the individual owner into "the" corporate "person," and from active possessory use-control-and-disposition into the modern complex with use, possession, control, return, and disposition not only largely separate but themselves further

to irrigate our local parched lands, it serves to feed proposed uniform statutes which, out of what is taken as *common* experience, provide a given State at one step with fifty or five hundred essentially case-law decisions.¹⁵ It serves to check or re-orient or even remodel the rule of many a State which finds itself out of line. It sells law books. It finances its own perpetuation. It adds subtly to the feeling of the oneness of a nation. Its very phases of non-commonness, set against its own ideal, constitute a constant attack on personal and legal provincialism, an invitation and challenge to awareness, comparison, critique. And truly common to all of our States, though rarely mentioned, are aspects of the work of those judges who (and the fact is no small part of our partly common case-law system) still hold the ideological center of the legal stage:¹⁶ the signed opinion; the open, signed special concurrence or dissent;¹⁷ that "feel" for fact in the cause in hand which means at once a sensitivity and a groping—a feel derived only in part from our peculiar received categories, our received lines of sizing up the legally significant in a situation; a feel working often *despite* those categories: a *case-law* feel for fact which is one of the most significant features of the law system *common* to American jurisdictions. Along with it goes a notably

subdivided. But the quiet and unnoticed relational and situational shifting to which common law terminology lends itself with such peculiar ease is built to bridge smaller gaps, not industrial and financial revolutions. It does grateful work within its compass.

15. This aspect of a semi-codifying uniform law has been too often overlooked. Consider the terrific waste which is prevented when each individual state no longer has to work out for itself its attitude on purported sale of fungible goods. Whereas there have been . . . jurisdictions busy with the public officer's disqualification to earn a reward, a matter which half a dozen cases could have gotten moderately clear for all of us.

16. The "rule of law," in any of its senses, is not peculiar to the common law; witness the very idea of *Rechtsstaat*, or the Continental jurists' insistence upon the legislative rule even at times as dwarfing the judge. But the judge-in-the-center is a definite part of our traditional thinking about law. A common lawyer, British or American, thinks "judge" when he hears the word "law." Not only do our books not move in terms of "the legislator," but, for instance, "administrative law" suggests to us *court control* of administration, not the administrative self-regulation, self-policing, "self"-review out of which our own history has budded off a Court of the Exchequer, a Court of Customs Appeals, a Board of Tax Appeals. And of course our own non-English brand of "supremacy of law," judicial review, though no necessary consequence of the judge-as-the-center, would yet be hard to conceive in a system in which the judge had not been the very heart of thinking about law. Whatever the gain for jurisprudence in widening its scope to include non-judicial phases of control by state officials or others—and I think that gain to be great—the working common law will not soon or willingly let go this focussing of thought upon the judge. And no realistic case-lawyer would care to see any widening of the scope of vision blur that focus. I have some difficulty in following the emphasis and implications of Pound's treatment of the judge's position, *FUTURE OF THE COMMON LAW* 15 ff, but none in following those in *1 LAW—A CENTURY OF PROGRESS* (1937) 9, ff.

17. For some beginnings toward study of the private law effects of these things see my *PRAJUDIZIENRECHT* (1933) §§ 42, 43, and *On Warranty of Quality: II* (1937) 37 *COL. L. REV.* 341.

common aptitude for strongarming a needed result "out of" rules which do not contain it; a veritable gift for pertinent logical fallacy¹⁸—and a notably common and often baffling failure to make explicit when strongarming or fallacy will be used, and when not. *In the measure to which* the country's other-than-strictly legal institutions show common form and common developmental strains, these last-mentioned factors in the courts drive despite all strictly legal differences toward a semi-community of result. But in the measure to which out-State ways of living and sizing up are not our ways, these common legal factors push toward de-community of results at law—and so, under case-law, of rules and of institutions.¹⁹

In a word, while the legal language, the legal concepts, the loose use of both, and a reservoir of rules (loosely phrased) and principles (vague but appealing) might be thought to make up the common law in the United States, these all together constitute much less of it than is comfortable for any (if any there be) who may believe in law as consisting merely of precepts or rules; and too close scrutiny of the actually accepted variant rules and wider precepts reduces somewhat sadly under any such belief the area of the common law. Whereas certain phases of legal institutions and their working, notably those which can be summed up as "a case-law *scheme of things*" are truly common, because the very divergencies among the particular case law schemes are divergencies in *emphasis* upon one or another of elements which are, for all that, common to them all.

The common presence of the case-law ideal that doctrine must in the long run square with the course of the decisions, coupled with the persistence of the common law ideal of a universal or (at worst) a best and widely prevailing doctrinal formulation of precise rule and guiding principle, affords these papers on Our Case-Law of Contract an area within which to work.

ON THE REQUISITES OF RULES

In the preceding paper it was noted²⁰ that rules of case-law for judges and rules of case-law for counsellors had no occasion to be the same;

18. For a superb collection of examples of judicial fallacy in logic, pertinent and impertinent, see Treusch, *The Syllogism*, in HALL, *READINGS IN JURISPRUDENCE* (1938) 539. My own view is that fallacy will remain an essential technique in good judging until the premises of judicial action become both more explicit and more fluid. *ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES* (Brookings, 1931) 89 ff. A practical art like judging calls not only for creative imagination but at times for creative fallacy. Cf. also MORRIS, *HOW LAWYERS THINK*, and my review (1938) 51 *HARV. L. REV.* 757.

19. Extremely illuminating here is Moore and Sussman, *Debiting Direct Discounts* (1931) 40 *YALE L. J.* 381, 555, 752, 928, 1055, 1219. A minor effort over a longer time-range is my own *On Warranty of Quality* (1936) 36 *COL. L. REV.* 699; (1937) 37 *COL. L. REV.* 341.

20. 47 *YALE L. J.* 1257 ff.

that the counsellor's interest (the advocate's is different²¹) centered in prediction of what judges would do, so that in case of doubt he had no rule, or at best one to be phrased in terms of variant likelihoods; whereas any rule designed for judges in a case of unpredictable outcome could be quite certain in form, the question being whether, with authority ambiguous and wisdom speculative, the judge would care to make his own that particular certain rule, as against its competitive rule or rules of equally decisive and certain *form*.²²

Indeed the distinction could readily be carried further, so far as to challenge the title of rules for counsellors to be called rules of law at all; for such rules are not normative, they command nothing, they contain no element of Oughtness, they do not even *directly* guide the counsellor's action in his counselling. They are of the nature of a weather forecast: they state facts or probable or possible facts about future judicial conduct in the light of which a counsellor proceeds to do his counselling. Yet a good strong stream of usage regards such predictions as "rules" of case-law²³ and we have seen that past decision and language

21. The advocate begins with a conclusion and with a range of minor premise partly forced on him by the facts or record and his adversary, partly and within limits set by facts or record malleable. His first concern with rules is to *find or frame* one or more which, if made to hold an available minor, will force his needed conclusion. His second concern is to *persuade* the chosen rule of law into acceptance by the tribunal as the proper rule for the case, and then to persuade acceptance of some available minor as fitting under that rule. The psychological process of argument often enough takes the form chiefly of making the conclusion appeal as desirable, and using the fact-argument to sell the chosen rule; but that is nothing to our purpose here. Here it imports only to note that the advocate resembles the judge in that he must weigh the competing rules (latent or explicit), and in that in argument he deals with his chosen rule as being both certain in form, wise in result, and (typically) as already solidly established. He differs from the judge in that his primary concern in selection among the competitors is not to pick the wise rule nor the just one if he can, but to pick the one which will win *his* cause: *i.e.*, one which holds his case, his way, and inescapably; and which can be made to appeal as either too settled to unsettle, or as too wise not to adopt. It is in judging his range of possibility and safety and his line of persuasion that his view of rules resembles the counsellor's somewhat; but his base-line is not "What *will* they do?"—a little abstractly about unknown future judges argued to by unknown future advocates on unknown future facts of unknown flavor—but "what can *this* bench be got to do?" Predictability and leeway are factors here sought for, but in terms of the persuasive or compelling power they may be made to yield. Thus, in the main, an accurate grasp of the rules for counsellors and also of the rules for judges in a field suffices to *orient* any advocate's thinking; but his further intensive exploration of the possibilities turns so much on the single bench and single cause as to move into art too individuated and delicate for general writing on "a field" of law.

22. As will appear, I think many rules rather indeterminate in form to be extremely useful for judges and even for counsellors, even in case of doubt: issue-pointing rules which marshal the relevant factors around the vital criterion. But rules for judges *can* always blossom into utter formal certainty.

23. Since Holmes the usage has grown; and so long as the two levels of thought (what Ought to be decided under our legal scheme? *versus* what Will be, under that

in a case-law scheme is indeed related with remarkable similarity to the authoritative rule on the one hand and to future decision on the other, the needs of the case in hand going far to determine both in the same direction from among the malleable possibilities. So that it pays to retain the same word to describe both kinds of "rule", so only the distinction between them can be kept in mind. That distinction itself comes out perhaps even more forcefully when one remembers that rules in the proper sense always have as their office *to guide action*, and when one then looks around for what in the counsellor's work corresponds in function to the rule of case-law for the judge. One finds the answer in those rules for counselling which have so queerly and so long been relegated to the manuals of office practice along with rules for office management and for handling clients: rules which tell what to do, in the light of what judges will do; as rules of case-law tell judges what to do with the case in hand. Let each partner individually indorse the partnership note; put the waiver of protest not on the back of the note but on the face; guard the request in a guaranty as the apple of your eye—these are in their own sphere rules as well settled as the presumption of consideration in a negotiable instrument; settled, however, by experiment and experience, not, save within a single law-office, by authority. This is not the place to discuss such rules for counselling further, unless to repeat amazement that whereas no medical book (where accumulated experience with disease corresponds to accumulated experience with litigation, and authoritative Nature to the authoritative court) would conceive of failing to discuss and recommend procedures of diagnosis and treatment, the law book which undertakes such valuable discussion is still a rarity. The point here, however, is the divergence in function between the rule of case-law for the counsellor and that for the judge, and by consequence the likelihood of divergence in their content and their wording on the same point.²⁴

Along the same line, *principles* of case-law serve wholly different functions for these two interested groups of law-men, and must diverge hugely. That very vagueness and breadth of principle for judges which can set a judge free of narrower past decisions (as being "misapplication" or neglect of the principle), and which even in a changing world can afford

same scheme?) are not confused, there is virtue in the appeal to outcome—especially in case-law.

24. By the same token, a judge needs rules for multitudes of freak or silly cases which a counsellor controlling the facts can skirt, and about which he needs to know no more than that there lie three miles of reef and shoal. On the other hand, where action simply has to be taken, and counselling requires the shaping of fact perhaps for litigation in an untried field such as emerges under Fair Trade Acts or Labor Relations Acts, the counsellor's lack of power to choose authoritatively when in doubt requires a precision in his foretelling which courts can take a generation to work out in telling him.

him a flexible and yet serviceably constant guidance²⁵—that is for the counsellor a warning that outcome will depend unpleasantly on what may appear at the time and to the man to be the equities. The very principles of case-law or for case-law which can be stars for judges' steering thus turn for counsellors into little more than convenient devices for sorting and pigeon-holing their knowledge of judicial reactions.

But rules of case-law for judges and rules of case-law for counsellors do have one common attribute and requisite if they are to serve their ends. They must be *meaningful*—a fifth attribute to be added to the characteristics of the ideal rule of case-law already discussed;²⁶ a fifth attribute which needs no less stress because it could in a first canvass be assumed as implicit in the very concept of a "rule."

For if a formula is going to be a rule in the strict sense, that is, directly to guide action, that formula must be understandable and clear about what action it is which is to be guided, and how, and whither. It must state clearly how to deal with cases on the raw facts as they arise. I distrust the notion of attributes being "inherent" in any concept; but this attribute comes close to being inherent in this concept. And it is not waste of words to remind of this, for it also comes close to the essence

25. See Gardner, *An Inquiry into the Principles of the Law of Contracts* (1932) 46 HARV. L. REV. 1, 41: "There is another method of conducting government which has proved more or less effective on occasions—that of striving to erect standards of conduct by which men may judge others' acts and their own. It may be doubted whether any other method of achieving certainty in law is possible; indeed, whether there is any other method of long maintaining anything which can properly be described as law at all. In a society exposed to an unending stream of revolutionary inventions and subjected to constant changes in economic structure . . ." Here is the case for Principle in beauty, in conciseness; and I do not see that a realistic thinker can greatly quarrel with its essence. To its essence any man's attempt to find a chunk of order, a touch more of simplicity, must recur. Without quarreling, I yet urge to caution, both in spotting the lines of principle, in phrasing it, in trusting it, and in expecting too much certainty to result from it. Quantity of appellate litigation is a good rough indicator that results in such litigation are not easily foreseeable by the bar. The very appeal of the multitude of cases Cardozo stamps "fore-doomed to affirmance without opinion" shows in their multitude an uncertainty factor which all the other factors taken together cannot wholly explain away. Compare in the light of this, within the one "field" of negotiable paper (though I do think "it" to be at least four fields—payment-paper [checks], interim credit paper [notes], scrambled short-term paper [short term collection drafts], and investment paper) the fate of one principle, which we can symbolize as that of bona fide purchase for value, and of another, which we can symbolize as proper diligence to protect and notify conditional obligors. The b.f.p. principle is expressed in the N. I. L. in rather broad language setting up standards. The diligence principle is expressed in a multitude of detailed rules. The bulk of appellate litigation digested in BEUTEL'S BRANNAN merely on the § 52 phase of the former (disregarding the greater bulk on *c.g.* the "value" phase alone) exceeds the total bulk of digests on the diligence phase. I conclude that, along with principle, rules have their realm of service. I am tempted to conclude that half or more of the appellate litigation about either has turned on faulty tailoring of the word to the end. (Calculation based on 1932 ed.)

26. 47 YALE L. J. 1256.

of accepted authority that its pronouncements go unchallenged, even though their meaning be unclear or lacking: a formula once accepted as "the rule" (or a theory or analysis once accepted as "the" theory or analysis) of *our authoritative law* claims and gets repetition, whether it prove meaningful or not in actual use. For there is in law as in magic such a thing as "obligatory" ritual. And in law, as in magic, power is attributed to repetition of the proper words, without inquiry into their meaning.²⁷ Indeed, I have wondered whether one main goal of Holmes in inventing and overstating to prospective lawyers²⁸ his prediction formula "what the courts will do in fact *and nothing else*" may not have been to give young men new and fresh eyes for case-results *as a means* to constructing case-closer and life-closer rules for courts' judging. In any event, a "rule" for counsellors, as a predictive formula, is under no less pressure to be meaningful as applied to emergent raw fact, or else be useless.

Now accepted rules about our case-law which are utterly devoid of such meaning are hard to find. Most so-called rules do indicate at least something about what facts they apply to, *or* something about some legal consequence; and, mostly, *something* of both. But what needs note is that until even the most precise of expressions about legal consequence is

27. It is the peculiar glory of case-law that its own pre-suppositions carry the urge and wherewithal for reform where this has happened. And contrary to the light belief of most laymen when they happen to be in the phase of rebelling against legal technicality instead of in the alternating phase of being impressed with legal form or legal majesty, the law-folk show no peculiar tendency toward meaningless ritual. On the contrary, they have shown a peculiar and a peculiarly skilful guild-drive to work free of such, and at worst to make rituals which were threatening to become meaningless take over new, live meaning—on which, beside the story of the forms of action, set its modern equal, the judicial rebuilding of our own Constitution. The difficulty for the law-folk has been two-fold: first that the only systematically *accumulated* tools of their trade have been authoritative words; the counsellor's skill, the advocate's art, the judge's intuition, all being left for random learning and more random-record. And, second, the difficulty has been that authoritative misguess in law, especially in judge's pronouncement or writer's announcement, lacks the immediate and palpable demonstration of un-wisdom which accompanies the misguess of a highly authoritative layman that no shoal lies West by South, or that the price of wheat will soar within a month. The law-folk, hampered as are no others by such ritual-inducing factors, have yet as a guild struggled to conquer both with a persistence and with a degree of success which I count one of the mighty achievements of the human spirit. But it was not when they were resting on the oars.

For the development of similar ritual, its non-testing, and its possibilities of development from within its own basic material, see Hamilton, *Price—By Way of Litigation* (1938) 38 Col. L. Rev. 1008, especially at 1023 ff.

28. The circumstances and motivation of THE PATH OF THE LAW call for illumination. The point of view expressed on what is meant by law is foreshadowed a full quarter-century before; but it is over-developed in 1897, and, as so over-developed, it is out of harmony with much else in the work of a peculiarly integrated thinker. *He* never repeated it.

guided to the facts which may emerge, the supposed rule can acquire no meaning *in life* (as distinct from, say, a meaning in logic).

Take, for instance, in the Offer and Acceptance field, the too current formulations on when, pending execution of an intended writing, the expressions of agreement do, and when they do not, constitute offer and acceptance. The Restatement, Section 26, says, in effect, that either may be the case. This is true. Comment (a) says that it is very reasonable that sometimes one should be the case, sometimes the other. This is also true. Comment (b) says that you can also phrase the issue as one between a mere memorial and the exclusive operative consummation. And this is true. Comment (c) says that even a memorial may operate to change an agreement reached without it. True no less. But further, deponent Restatement saith not. Result: the opinion can write (and often does) in precisely the same language for any case on the problem, no matter which way the case comes out, and almost no guidance is given by "the settled rule" as to what to fill in on the one blank space: "In our opinion this case falls clearly within the . . . branch of the rule." Yet there is, and has been, good and shrewd judicial discussion of useful criteria to use²⁰—persuasive, too, I suggest, to any court to which it might be quoted—*because it helps*.

29. Perhaps most notably the serviceable homespun on *what helps tell which* branch of the rule ought to apply, by Emery, J., in *Mississippi and Dominion S. S. Co. v. Swift*, 86 Me. 248, 258-9, 29 Atl. 1063, 1067 (1894) quoted by COSTIGAN, *CASES ON CONTRACTS* (2d ed. 1932) 79, and GOBLE, *CASES ON CONTRACTS* (1937) 41. Williston's text quotes it not; he has a different "test" [1 *CONTRACTS* (1936) § 28] which is either as meaningless for actual adjudication or prediction as is the settled rule, or else is horrendous; of which more in the second part hereof, for the difficulty goes to the whole orthodox attack on Offer and Acceptance. Emery's language about how to know when to use one branch of the rule and when the other is a rare type of judicial language in these cases. Its non-quotation is either deliberate or is due to failure to see where significance lies, for Williston's *CASES ON CONTRACTS* quote from the same opinion a run-of-the-mine phrasing of "the rule" (1st ed. 1903, p. 19) (2d ed. 1922, p. 15). This though Emery is no stylist, and none too surefooted on expressing exact meanings. What is more, and worse, is that neither Corbin's first *CASES ON CONTRACTS* (1921) nor his second (1933) quote Emery's real juice about what Corbin would call "*How to Know Which Operative Facts the Case Presents*," although both follow Williston in using Emery's language as an extra statement of "the rule" and in citing oodles of cases holding each way without giving the result of analyzing their facts. I have located nothing on the matter in Havighurst's *CONTRACTS CASES* (1934) nor in Sharp's mimeographed material (1938); each is occupied with other lines of development.

I submit that as to an important point, and one lying closer home to the practicing lawyer than most points in Offer and Acceptance, the evidence is moderately persuasive that the thorough acceptance of a sounding formula easy to roll on the tongue has drawn off the attention of both good judges and good scholars from the fact that the formula gave actually little light, and therefore only set the real problem for inquiry. Strong judges, conscious of their job, can make out even with such a formula: for it leaves them complete leeway to do justice in the case. Weak judges, or stupid, or must pity in the circumstance, as counsel hound them. Judges with bias might even disfavor the production of a more adequate rule. The counsellor belongs as to this "rule" with the weak or stupid judge; it gives him hold for neither hand nor foot.

More frequent than such near-meaninglessness, both in the Offer and Acceptance field and in Contract at large, is *misguidance* by an accepted rule which has not been adequately worked over to determine the degree (or direction) of its meaning. Non-guidance *per se* is vicious only passively, by leaving decision in confusion while it sirens us from the hunt for what might prove a significant and good rule for the problem-situation: Misguidance is worse; for by taking attention off the true issue, it hampers the courts' appreciation of the facts; and by setting up not only a false criterion but alleged authority that such is the only allowable criterion, it hampers intelligent judgment even when the facts drive through into appreciation; and by often (and unpredictably) failing to hamper, it produces needless uncertainty of result and turmoil of combat and judgment; and by working out wisely *part* of the time, it confuses its own cure.

A touching example may be found in two old North Carolina cases. In the first,³⁰ one gentleman had ordered carpets, by specification, from

But the lulled scholar has nothing to see here but a job undone. Any individual can properly say: I have been busy elsewhere. But that the Restating team, hard working and conscious of the need for care, muffed Emery's challenge (which Costigan had seen and signalled) and that the two leaders (differently trained) both spotted and both used Emery's opinion, but both without spotting and exploiting its contribution to the only issue which could give living meaning to the sonorous "rule"—*that demonstrates the lulling power in an accepted formula, however hollow.*

For I repeat, in all of Offer and Acceptance, few "rules" or situations can possibly be as practically important to the student whom scholars teach as this one. This is one of the few in which the future lawyer may hope to get a chance to *shape* the facts, not merely to argue over the picked bones of their prior slaughter. Some lulling must intervene, to keep this situation from peculiar and intensive study. Indeed, in the offing, as Williston and Thompson remind us [1 CONTRACTS (1936) § 28] is even the supervening cloudbank of the "parol evidence rule."

30. Crook v. Cowan, 64 N. C. 743 (1870).

I make no apology for adducing two cases whose precise problems have since their time been, both, pretty well solved, and so solved as to decently reconcile (I believe) the consciences of these fighting judges. For the North Carolina judges were fighting out a battle which will recur so long as case-law remains and as soon as it revives upon this Earth: the four-cornered unrefereed dog-fight between the patent fact and decency of *each* side (that makes two), the inadequate available respectable techniques which do not allow the true issue to be clearly either seen or seized, and the groping fear that an over-use of such techniques to do rather decent justice today may give unforeseeable trouble tomorrow. The two cases in one jurisdiction; the dubiousness of the first; the sharp division passionately repeated; the overarguing by instinct first, though without the proper technical tools; then by own precedent, or by own pride of position, or what?—these are part of our case-law of tomorrow as of yesterday. Plenty of undreamed of problems will they put their teeth into—with results like these of North Carolina, followed by the spread of Langdell, followed by the dicta of Bishop v. Eaton, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437 (1894), followed, I hope, by more of the same conflicting and progressing lines of both integrating and resilient thought. The great stroke of Bishop v. Eaton, now canonized, [RESTATEMENT, CONTRACTS (1932) § 56] was but a dictum. But it made such lovely sense.

another. The other did not reply, but put the goods in work, and shipped them. On receipt of another, and telegraphic, inquiry, he again failed to reply. He had already shipped the finished goods. The express company then let the carpets lie at destination indefinitely, saying nothing. The prospective buyer filled his needs elsewhere, and, when finally aware of the situation, rejected the goods. Suit was for the price. The judges had available only rules which did not touch what should have been the issue: no contract without agreement; if a contract for sale, then delivery earns the price. Hence the majority sensibly and eloquently found "agreement" in the putting of the carpets in work, and then found delivery in shipment. The dissent sensibly and eloquently found a buyer reasonable who needed an answer, could not get one, and, after trying to get an answer, bought elsewhere. But the dissent was further—having no proper premise available—constrained to deny any efficacy to making the carpets or even to shipping them; while the majority was for similar reasons constrained to allow the price, despite what one can fairly call the seller's repetitive and outrageous silence even after notice of trouble at the other end. Lacking the concept of a condition constructed in proper circumstances, that proper notice be given of an acceptance already accomplished by taking or beginning the invited action,³¹ neither majority nor minority could handle both the situation of this case and that of its successor³² where revocation occurred after the invited action of shipment, which, had the goods not been destroyed, would reasonably have resulted of itself in any needed notification.

Accepted "rules" of case-law may thus fail not only by untruth, as when they say unambiguously to court or counsellor that a given out-

31. Phrased well for unilaterals, RESTATEMENT, § 56. The phrasing there, on these very peculiar facts, might raise the question of whether this kind of express company's receiving for transmission fairly makes notice unnecessary; but that is a question which the explicit telegraphic inquiry ought to solve. For while § 56 is not drawn to cover abnormal conditions in which the offeror gets no use out of what would ordinarily be adequate means of knowing of acceptance and the offeree has no adequate means of knowing of the offeror's lack in that respect—a supervening impossibility situation erupting into Offer and Acceptance—yet the Section puts forward clearly a concept which the courts under discussion simply did not have, a lovely issue-sharpener, and puts forward also horse-sense criteria about its use. These give a line in, even when the presuppositions of the Section may fail on either side.

32. *Ober v. Smith*, 78 N. C. 313 (1878).

With the difficulties facing the court in these two cases compare those raised when an insurance risk has been officially approved, but the prospective insured has not been notified. See Patterson, *The Delivery of a Life-Insurance Policy* (1919) 33 HARV. L. REV. 198. When the suit is against the insured on a premium note the precise concept needed is the one needed here. Indeed, considering that one of the two main things an insured pays for is assurance against worry, and that he even has in furtherance thereof a right to specifically procure delivery of a policy, then the case for insistence on a condition of prompt notification becomes overwhelming. Why is § 56, then, so carefully barred by its wording from application to acceptance by a promise? See Part II.

come on the facts has been the course of decision (and therefore should—or will—continue so) when such is not the fact; and that is the falsity of rule to which the mind turns first.³³ A number of “rules” about the formation of unilaterals will be submitted in a later portion of this paper as candidates to illustrate this. But a rule for judges may fail by unwisdom, in counselling as right a poor decision; this is peculiarly frequent in a realm of ripened “conflict”, or in any field, though the rule be uniform, in which the real issue has not yet been diagnosed and articulated—a matter immediately to be further discussed and clearly illustrated by the North Carolina cases. Or rules may fail by meaninglessness, by using words which say little or nothing about the outcome on the facts: so when “the rule is certain” but there is no agreement anywhere “about its application.” This is the case of the simulacrum. False rule, bad rule, and words which are not even a rule are alike in this: *they evidence doctrine which has either failed to study the fact-situation or has lost touch with it.* And a brief inspection of the genesis of case-law doctrine in puzzling situations goes far to make clear both how these diseases of doctrine come upon us, and wherein lies their cure.

CONFUSION

The matter begins with three facts well-nigh inherent in our case-law scheme. One—of which repetition is inevitable—is that courts do commonly study the facts and react to them and strive to find some way of getting to a just result.³⁴ One is that we require them, or they have come to require themselves, not only to decide, but to lay down a rule for all “like” cases. The third, that our judges, when in puzzlement, show the well-known attribute of *homo sapiens* in conscious honest thought: in the main they *do* more wisely than they rationalize. (Which is why hard cases often make bad law.) The doctrine of dictum, together with the current disregard thereof at will, represent a perception of this last fact caught into institutional form and utility, making available, easy and correct at once the discard of bad guesses in past opinions and the capitalization of the good.³⁵ (Which is why hard cases often make law better.)

33. The more I study case-law, the more important I think it to disentangle from “wrong or false” rules for counsellors the good stuff which they hold. They are mostly incautious and overwide generalizations. On the side of rules for judges, false rules are more complex. They also need examination and disentanglement of the good stuff in them; but this is a much harder job, because, in any case of doubt, you are likely to find them to be an *advocate's* proposed rule (see note 21) which to you is “false” chiefly because you do not like it. Still we do have purely false rules lying around. See *infra*.

34. “A good common law argument begins, and can often be very nearly ended, by a penetrating exposition of the facts.” Gardner, *supra* note 25, at 3.

35. I still hold, on this, to the position stated, on which rest the BRAMBLE BUSH (1930), *cf.*, *e.g.*, 129; and my PRÄJUDIZIENRECHT (1933), *cf.*, *c.g.*, § 63. Over the long haul our appellate judges have demonstrated that they do better work when their power

Indeed, it is a commonplace for lawyers that the reasoning in the case of first impression is a tricky thing. Strewn here and yonder are the marvels, the prophetic masterpieces of our law, in which a whole new legal situation was grasped at its first emergence, and shaped for the decades or the centuries, to follow. Yet even there, the lawyer walks softly, for only later decision tests the fairest-seeming prophecy.³⁶ And the run of first impression opinions show sad need of re-working, and they mostly get it. (Else bad law will indeed make hard cases.) On the other hand, as one puts together first impression cases which he remembers or rereads, what percentage of them were, as *cases*, unwisely decided?³⁷ This is what commentators on the unruly case of first impression tend to pass by. Add, then, especially out of that nineteenth century when the ways of the English judges (at least in commercial cases) bore real resemblance to our current judicial practices, add the recurrent English agreement on outcome, buttressed by two to four divergent lines of emphasis or even of premise for decision. What does this mean, save an agreement on doing, accompanied by experiment in telling why and whither? The English instances attest the groping character of the rule-making; as do ours in lesser measure. But even in ours, our relative satisfaction with the bulk of actual individual results attest that the deciding had a touch more sure than did the reasoning.

is seen as wider, and as a job for conscious responsible choice, than when it is seen as narrower or non-existent and done in the dark. See Corbin, *The Law and the Judges*, 3 YALE REVIEW 234 (1914); and most recently, *The Common Law of the United States* (1938) 47 YALE L. J. 1351.

36. As illustrations: Pillans v. Van Mierop, 3 Burr. 1663 (K. B. 1765), whose essence on letters of credit took a century and a half to reestablish, whose essence on acceptance dehors the instrument is still troubled, and whose possible bearings on other standard written engagements of business men ("firm offers" and the like) still grope toward recognition. Or the Slaughter-House cases, 16 Wall. 36 (U. S. 1873), whose doctrine played like a pendulum starting high, for a generation, and swung the other way for two generations, and may be swinging back. Or another of Mansfield's, Heylyn v. Adamson, 2 Burr. 669 (K. B. 1758), whose careful qualification of the indorser's freedom from liability for failure of diligence was repeatedly conditioned on supervening insolvency of the expected payor—a vital condition later sloughed off by uncommercial judges, re-developed, for checks alone, when deposit banking came in, and then frozen by the Negotiable Instruments Law in this halfway condition—modified only by rules of waiver after the event which make orthodox theories of consideration go green at the gills.

37. Adams v. Lindsell, 1 B. & Ald. 681 (K. B. 1818), for one. See RESTATEMENT, CONTRACTS (1932) § 51. Crook v. Cowan, 64 N. C. 743 (1870), cited *supra* note 30, for another. Seixas v. Woods, 2 Caines 48 (N. Y. 1804) for a third—but there the court thought itself bound by authority. Judged as of the time, place, and circumstances, Pinnel's Case, 5 Coke 117a (C. P. 1602), came out in proper fashion, so far as one can see, as far as one can see, as did Chandelor v. Lopus, Cro. Jac. 4, 79 Eng. Rep. 3 (Ex. 1603), for all their aftermath of travail. Even Littlejohn v. Shaw, 159 N. Y. 188, 53 N. E. 810 (1899) was sound on its facts and issue. Each man must think in the fields in which he has read widely; in mine, the first impression cases have worked out well as between the litigants. Talk with men from other fields shows them concurring.

Yet a developed legal structure, hydra-headed in personnel and dealing with the long-range interaction of kaleidoscopic interests, cannot rest content with mere case-judgment. Rules must be framed to hold the whole together. Rules must be framed to hold up—and hold down—judges who are not supermen. Rules must be framed to guide long-range transactions in advance.³⁸ The search is for significance in their framing, and for accurate admeasurement of their proper scope (and, where they cannot be counted on for precision, for tailoring them toward fairness in any circumstance). "Confusion," whether among the cases of a single jurisdiction or among all the cases, exists as long as either the situation is described differently by different courts, or diverse criteria for decision are announced. "Confusion," like "conflict," is in our current usage a term referring to articulated doctrine, not to the course of actual decision. Actual decision may run one way only, and yet leave behind what we know as "confusion." For instance, when Hershey in 1917 discussed bankers' credits, he exposed and illuminated a problem, and suggested a brilliant solution, in a way which resembles a case of first impression in the finest judicial hands.³⁹ When McCurdy in 1922 then classified seven

38. The exact degree and incidence of this need is not clear. I have attempted to raise a number of questions about it. *What Price Contract?* (1931) 40 YALE L. J. 704. And in the particular field of Offer and Acceptance, it is a matter of relatively minor moment, because in the great bulk of transactions not carefully held unclosed until the final papers are signed, men do not know rules or consult lawyers, but go ahead and then (in the cases threatening litigation) change their minds or become dissatisfied with results, and consult a lawyer only to see whether he can—under the rules—get them out. That is: they are not much guided in their "operative" action by the rules.

But even if this be true beyond its cautious statement, Offer and Acceptance Law is a part of Contract Law. And Contract Law has phases—metropolitan real estate, 12-month supply contracts, indenture-issues, big construction deals, intricate partnership agreements, organized baseball, national marketing set-ups, etc., etc.—in which forward consultation, planning, and drafting become vital. And our ideology of Contract Law is that "It" is one for A and B and *any* of the deals of *any* A and *any* B. By necessary psychological contagion (and really *explaining* the contagion will give either a Freudian, a behaviorist, or a gestaltist psychologist a nervous breakdown, though each has something to contribute to an explanation)—by necessary contagion, even situations or whole portions of the Contract field in which advance knowledge of the negotiators about the law is both unnecessary and absent in fact will nonetheless be affected by the held ideology that *rules must be framed to guide transactions in advance*. For that is the kind of ideology which seeps through even the intuitive bulkheads erected by sense for the more concrete situation. It is not one of the Sunday School variety of ideologies, itself bulk-headed in advance from the working practice of the six days. It is, in its limited sphere, the emotionally charged and penetrating kind of ideology for judges and lawyers which for laymen as laymen grows up around such almost terrifically dynamic ideas as Flag, Constitution, White Man, Business, Faith, Science, Practical, Mother, Crime. It is therefore to be reckoned with as always one present factor, whatever other factors may be present.

39. Hershey, *Letters of Credit* (1918) 32 HARV. L. REV. 1. Be it noted that Hershey was two years ahead of even the market collapse which began to produce the cases. He was also, and even more so, in advance of theory, and bold to put and make clear

diverse theories which had been advanced to uphold the "irrevocable" banker's credit, he described "confusion", and sought for a "true" single articulate rationale to clear that confusion up.⁴⁰ The course of *decision* had meanwhile become plain: once relied on, the promise was effective, though with some divergence as to the extent of the remedy, and with the intricate relations between the credit and the underlying commercial or banking transaction still to be explored; and the case of attempted revocation before any reliance at all (to which certain divergences of theory *might* become crucial) had never been presented.⁴¹ But the really awkward

a vital problem, and to wrestle with its solution. This, *mit Verlaub*, is case-law scholarship, indeed. And by a practicing lawyer.

If a young man were permitted a backward glance at American legal scholarship, that glance would have to do with the degree to which Hershey's challenge, care, and dispassionate workmanship have over twenty years come to be increasingly the standard, and the standard conscientiously striven for, in the contributions of the practicing lawyer to the Journals. Even a young man can remember a time when a manuscript submitted on law office stationery was more likely to be a sloppy two-hour revision of none too good a brief. And can observe that today the professional scholar does well to button back his ears when the thoughtful and informed practitioner takes time for scholarship.

On the other hand, the effect of the so-called "main purpose" rule under the Statute of Frauds is as to doctrine in utter confusion. But the results, as I hope to show later, are not.

40. McCurdy, *Commercial Letters of Credit* (1922) 35 HARV. L. REV. 539 (seven theories); *The Right of the Beneficiary Under A Commercial Letter of Credit* (1924) 37 HARV. L. REV. 323.

41. See FINKELSTEIN, *LEGAL ASPECTS OF COMMERCIAL LETTERS OF CREDIT* (1930); Neidle and Bishop, *Commercial Letters of Credit: Effect of Suspension of Issuing Bank* (1932) 32 COL. L. REV. 1.

Amusingly enough, when attempted revocation without prior reliance was presented, it came without the label "Letter of Credit", and was drawn into a wholly different orbit of influence, that of "Trust", instead of "Contract". This paper is not on foreign banking, nor on Trusts, but the circumstance deserves note because it shows the vitality of legal ideology, and of what label calls forth an ideology, to shift the incidence of pressure of fact; and because it suggests the role counsel plays in spotting possibilities and urging this label or that.

There are transactions in banking, peculiarly frequent in international banking, which, stripped to essence, come to this: London Bank requests New York Bank to pay on Jones' request (with or without conditions) because Smith has arranged that with the London Bank; and will New York Bank please advise and pay, and London Bank will cover. Now when this set-up hit our courts in terms of the question: Can New York Bank, after promising Jones, and his reliance, revoke—and after the promise had been put in the form of a normally handsome document on check-paper headed "Letter of Credit"—it was seen as a new variety of Contract. But when the same set-up hit the courts in terms of Smith's arrangement with London Bank: charge my account (or take this payment), and tell New York Bank to pay to Jones' order, and advise him—then it looked like Trust. (God save the *res*!) I personally think the matter, on the Oughts, one to be worked out in terms of a combination of banking necessities and the underlying transaction, so that I am disinterested in either theory, as being "a" sound solution. But it is, for purposes of this paper, exciting to see how in the one case the commanding *communication* has fought down all supposed objections out of consideration theory; and

confusion of *result* which attends the "clear" doctrine on Conditional Acceptance⁴² is *not* felt as "confusion." Neither is the almost amusing discrepancy between the "clear" doctrine on formation of the "true" unilateral and the cases.⁴³ To such matters we must recur, on the point of curative procedures; here they serve to stress that the term "confusion" refers currently to a failure of agreement upon *articulation* of a problem or of a rule.

The next point is obvious: confusion of doctrine cannot rest indefinitely confused. Sooner or later, some definition (or various definitions) of "the" situation acquires currency. Some judge or counsel has a flash of insight—good or bad—and his idea takes hold.⁴⁴ The old familiar *Cooke v. Oxley* presents all the elements of confusion happily compressed into a single case.⁴⁵ The declaration set out what would today be seen as an offer open till four, and then accepted. But neither counsel nor court had then available any concept of a *continuing* offer. Face to face dealing was still the picture, with deals closed or else nugatory before the speakers parted. The pleader therefore goes on to set out further an offer *and* acceptance of present sale *upon condition*, the condition being a further notice *by the plaintiff* of *his* agreement before four: This meets the ideological requirement of some present and immediate agreement. The court cuts through it, not for lack of agreement, but for lack of a consideration. What happened at four o'clock Buller sees as one-sided, and so no *agreement*; but to get out of the argument that the nine o'clock deal was a complete sale "from the time when the condition was complied with", Buller is forced to hurdle the pleadings and strongarm

how, in the other case, the whole problem of communication and promise drops out of sight, and results turn instead on what (despite all known realities about *what* Smith really "gives" the bank) the *originating* arrangement looks like "Trust"—in the "eye of the law." It is also fragrant to observe that Hershey, who understood his banking, saw and tried to use both ends at once.

42. Developed in Part II.

43. Developed in Part II.

44. Hamilton, in *Price—By Way of Litigation* (1938) 38 COL. L. REV. 1008, points in note 24, p. 1017, and on p. 1018, by indirection, at the role of counsel, moving into the role of judges, for one possible once, inside the same skins. Suppose his suggestion to be wholly accurate, it would be but nice theater driving home a point which does not turn on identities of person. In all our case-law, what with the conjunction of case-profusion with hydra-headed case-law doctrinal technique, the advocate's profession *must* be creative, and the mainly creative factor, and the judges must be largely mediating and selective. A Holmes, deciding on grounds adduced by neither counsel, or a Mansfield, using the case in hand as a springboard for regulating a whole institution: these stand out because of rarity.

45. 3 T. R. 653 (K. B. 1790). The most extravagant display I have yet met of existing confusion of doctrine in the face of clear fact, as also of exhaustive legal ingenuity in testing every line conceived by a fertile advocate's imagination, is the first case on fictitious payee, *Minet v. Gibson*, 3 T. R. 481 (K. B. 1789). The court cut through to factual need.

into the facts the *defendant's* four o'clock agreement as being part of a condition which had been pleaded as consisting only in notice by the plaintiff. Now turn this face-to-face pattern of thinking loose upon a deal by correspondence, where the presupposition of any possible face to face agreement simply fails, and anything can happen.⁴⁶ As we know, almost anything has. Massachusetts set up a standard picture of a revocable continuing offer with attempted acceptance binding only on receipt, the detailed qualifications of which have never been worked out. Our generally accepted standard picture is revocable continuing offer with acceptance binding when mailed, painfully developed through a mass of groping rationale to overwhelm most suggested qualifications (the wholly lost letter, the overhauling countermand, the letter recalled before delivery—but contrast the insurance cases re time of obligating the acceptor, and the obligation-through-action cases re revocability.) The Germans, from a thoroughly similar base-line, moved into a standard picture of irrevocable offer plus acceptance binding only on receipt, which also has needed its exploration of qualifications in detail.⁴⁷ All were forced into some type of rationale over three-quarters of a century before details of implication could be settled. The Germans set up a standard picture of an irrevocable offer with the letter of acceptance operating only if received. The only given certainty was that when deals got to being made by correspondence, the doctrine and ideology of face-to-face dealing would have to sprout some new shoot to meet the situation in which the old double-ended concept of "communication" had to split into a "communication begun" which was not and could not be for a while a "communication received". Neither was there any need for the choice made in *Adams v. Lindsell* to develop as it did. Had a lost accepting letter been presented in the next case, or the withdrawal power under the United States Postal Regulations been exercised early, either, say, in conjunction with an offer not made by mail, but taken away for consideration, it is an even chance or better than our law on the point would have developed refinements which it has not. It would not matter. For if the doctrinal definition of a situation, when achieved, and however achieved, is adequate to grasp

46. For instance, Patterson's discussion, *supra* note 32, at 211 ff., simply cannot be wiggled out of: "this coexistence in point of time . . . is utterly unattainable in the case of contracts *inter absentes*". Add: what we have to think of as contract not only occurs, but keeps occurring as of course, *inter absentes*. Doctrine has to meet fact grown inexorable.

47. See Nussbaum, *Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine* (1936) 36 COL. L. REV. 920. Nussbaum has given us notable illumination, in setting the successively emerging official rules against their background of legal philosophy, and of the other rules of the time in the system in question. But what one may hope he will add to his discussion is an equally keen study of the detailed case-troubles which *each* line of ruling has elicited, and of the answers reached—and of the degree to which those answers do or do not converge.

the situation in life without outrageous inconvenience, we can make out with it. So only the doctrine be intelligible.

For men's dealings are not built in terms of recourse to law so much as lawyers tend to think.⁴⁸ It is even at times startling to consider the degree of inconvenience, expense, hindrance, delay, miscarriage of intention, which laymen will stand for from the law, where the law impinges only occasionally or where the practice of using counsel is established.⁴⁹ Against that is to set the *courts'* dissatisfaction with results which bother: which, together with counsel's ingenuity in making sane results seem doctrinally plausible, is the mainspring of case-law readjustment.

Where the doctrinal definition of the situation, when achieved, is too greatly inadequate, then if the situation is of frequent recurrence in appellate dispute one of two results is well-nigh inevitable. The one is the development of "conflict". The other is covert confusion of result. The third major possibility: wooden, persistent grinding out of injustice, occurs and will occur again;⁵⁰ but it is not a dominant characteristic of our courts even when fighting to clear decks of a top-heavy docket.

Covert confusion of result has been mentioned. It means that courts' reactions to facts are at work at odds with their reactions to accepted doctrine, reaching results which are unpredictable. It is present doctrine, for instance, that offers without consideration do not stand against revocation, and that the receipt of agreed consideration may be inquired into. A recited dollar, unreceived, either will or will not make a land option stick; and I do not think the cases classify by states, nor by whether "[L.S.]" is on the paper, nor wholly by whether the deal is a concealed

48. And Mentchikoff notes here that some of my own writing on printed "form-contracts" may well require revision. I suggest, for further study that printed forms may prove to have at least three divergent lines of origin and drive: (1) internal administration, ease of policing, and cheapening of operation (merchandising to consumer or retailer); (2) standardization of competition (with almost inevitable drive toward shifting of the standardizers' risks—realty operators' standard forms); and (3) setting the background for quick action under understood and balanced conditions (bought and sold notes on an exchange). At least, these; and with need for further study.

49. See *On Warranty of Quality: II* (1937) 37 COL. L. REV. 341; and contrast the specialized statute-drafting and statute-urging which particular counsel do from time to time.

50. Pound's *Mechanical Jurisprudence* (1908) 8 COL. L. REV. 605 has not been bettered for portrayal of this or for its critique. Yet thirty years, and Cardozo, have intervened. And Cardozo's intervention left marks especially on that phase of law in which the State's influence is less directly felt. A second edition of the 1908 paper, with particular attention to torts, contracts, trusts, and the like, would rest on newer fact which would make the earlier critique appear prophetic. I do not like Pound's over-mechanical "stages" of law. But no man can fail to see a difference in judicial attitude between 1898 and 1938, in "private" law cases. And Pound's phrasing in terms of stages has come close to both foreseeing this, and getting at its dynamics. The phrasing is bad history, and it is worse sociology, but it has for all that an essential and even distinguished juridical rightness.

brokerage, nor by whether the price seems fair and the deal honest in the option-holder; though a study along all these lines at once might make some sense out of what seems on first gathering of the cases to be a welter. One thing, however, seems sure, and that is that the jurisdiction which has flatly held the recital of the dollar in a land option for a fair price to be conclusive cannot be *relied* on to rule the same way on a recited consideration in a non-negotiable note, nor where gold has been struck during the life of the option, nor where the recited and unpaid dollar is the alleged price of release for an injury which then turns out to be really troublesome. In a word, we do not know where we are at. Again, it is present orthodox doctrine that a correspondence is to be atomized, and examined letter by letter from the beginning, each document being preliminary, or offer, or rejection, or counteroffer, or what have you, and exerting its full legal impact as of its own moment in the sun. But what lawyer, save after study of the personnel of a given bench at a given time, and of his own case on its net facts, will undertake to predict whether a court will not go to bat on a correspondence only *after looking it all through first*, and wind up with "In the light of the whole and the action of the parties we think there was clearly a contract. If the plaintiff's letter of May 21 was not an acceptance, the beginning of the work in June and defendants' letter of July 7 at all events show that an understanding had been reached. It is argued that the letter of July 7 did not meet the letter of May 21 in terms, and this may be true; and, further that any offer the letter of May 21 might contain had lapsed. But this suggestion appears in the defendants' letters only in August after the market had broken," etc. So long as the cases will not go a single road in their attack on such a problem, the outcome of new cases lies in covert confusion. And covert confusion is a certain sign that something about the doctrine covering it is wrong. The tool for guiding decision and for predicting decision is not yet adequate. The situation needs redefinition.

CONFLICT

No less does it, typically, if the road taken out of confusion has been that into explicit conflict of doctrine.

Two types of conflict are somewhat similar in nature and result, yet different enough to warrant notice. In the immediately familiar type, the conflict lies not in defining the situation, but in the rules about what to do with it: can a defaulting builder recover his net contribution in *quantum meruit*? In the more interesting type the conflict lies in definition of the problem situation itself. Rewards are either a matter of rewards or they are a matter of contract—with perhaps a whole series of conclusions to be derived or worked out from the categorization. A warranty of goods

is a collateral contract or it is part of the sales contract. A "compensated surety" is a professional insurer or "he" is a darling of equity. More frequently than not, such differences in definition have to do with whether to include some situation, seen as a unit at least for problem purposes, in the sphere of some established body of law already gathered under an articulate concept; the alternative being to mark it off for peculiar treatment. Sometimes the peculiar treatment may be conceded, and inclusion under the broader concept will then threaten "the" doctrine there: if a parol gift of land is really an unexecuted enforced promise, and an unexecuted enforced promise is really a contract, then what about "the" doctrine of consideration "in contracts"? Such a conflict reminds one of the struggle of an immunity against Crown law, or of a State against some assertion of Federal legal power. The separatist urges reason for diversity and lack of warrant for any claim to uniform jurisdiction, rule and outcome. The argument is from history in the cases (as with parol gifts) or from needed shift in policy (as with the "compensated" professional surety company.) And the general problem presented lies at the heart of any attempted synthesis of our case-law of Contract, the cases indicating among other things that a deal more of home-rule prevails in fact in portions of the field than it has been orthodox doctrine's fashion to concede.

But it is when a situation as a perceived unit stands cleanly on its own for definition that the nature of the whole conflict problem is carved into sharpest relief, as is the normally wise road out. Let me recall the old question of whether "a bill of lading" (meaning *any* honest shipping document, not just some particular one in hand) was "merely equivalent to the goods" or was a "quasi-negotiable document".⁵¹ It is indubitable that the approach to a shipping document as "merely representing the goods" fitted cleanly into that open credit railroad shipment which we have since learned to mark off as being "straight"; if anything, the so-called common law theory tended to give too much verbal credit to such a "bill of lading", so far as concerns transfer of *possession*, for the carrier had both privilege and practice of delivering the goods to the named consignee without inquiry. On the other hand, overseas shipments ran regularly to "order or assigns"; the bill of lading was in practice taken up before the goods would be turned over; it was in practice frequently drawn against and the draft discounted; the bill of lading was therefore currently taken as adequate evidence of full control and power to dispose. The solution lay in observing that "the situation" was in fact *two* situations, factually distinct, different in need. The British, whose lay language had not fallen into the practice of naming railroad shipping

51. Initial canvassing of this material in my *CASES AND MATERIALS ON SALES* (1930); detailed development in my *Purchase for Value and the Course of Trade* (to appear).

receipts "bills of lading",⁵² escaped our word-induced and useless conflict of legal doctrine. We ourselves emerged from it by readjusting our definition of "the" situation in terms of the divergent situations-in-life, and discovering a criterion for significant subdivision of what had broadly and blindly been regarded as a single unit-type.

Problem and method are clear: Conflict gives rise to suspicion that each view may have something in it, and that neither is wholly just to such wisdom as lies in the other. The situation-types in question are subjected to re-study, with an eye to why some cases should have gone (and should again go) one way and some another. We emerge with a discrimination which has been often felt, sometimes (in neglected cases) perhaps even articulated, at least foreshadowed. Now it becomes conscious, and we tailor new rules based on new differentiation: two types of bill of lading, each just to its own purposes, each available to any user, de-confused and freed of a conflict in doctrine which itself rested on a confusion of fact.

Indeed, whether conflict is achieved slowly as a second stage to which confusion is a first or bursts out suddenly and fullblown, one who follows the story of conflict of rule or of situation-diagnosis can hardly help but be struck by the degree to which the earlier cases which articulate the conflict, like the cases at first impression, are well decided on the facts in hand.⁵³ Typically each of the opposing rules is wise enough as applied to the group of situations in the mind of the court which announces it.

52. "An official detailed receipt given by the master of a vessel to the person consigning goods, by which he makes himself responsible for their safe delivery to the consignee." Shorter Oxford English Dictionary (1933).

53. In the warranty field, see my *On Warranty of Quality*, esp. II, *supra* note 19. On the election problem in conditional sales, see Comments, *The Seller's Remedies in Conditional Sales in Massachusetts—A Study in Case Law* (1929) 29 COL. L. REV. 960 and same "in California and in Mississippi" (1929) 29 COL. L. REV. 1123. On buyer's waiver by failing to specify, see Eno, *Price Movement and Unstated Objections to Defective Performance of Sales Contracts* (1935) 44 YALE L. J. 782. On the effect of taking a bill of lading to seller's order, see Comment, *Significance of the Concept "Title" where the Seller Retains the Bill of Lading to Goods* (1929) 29 COL. L. REV. 1100. On the "passing of title" by misshipment referable to the contract, see my *Through Title to Contract*, 15 N. Y. U. L. Q. REV. 159 (1938). The problem leading to Sales Act, § 49 is of the same nature and history. See WILLISTON, *SALES* (2d ed. 1924) § 484 ff. Related is the history of the election doctrine in buyer's remedy. Comment, *Buyer's Election of Remedies Under the Sales Act* (1938) 38 COL. L. REV. 888. Or the divergence in contract doctrine on the point of *Ayer v. Western Union*, 79 Me. 493, 10 Atl. 495 (1887), which hides essentially an effort to get the risk shifted to the delinquent telegraph company. Comment, *Telegraphic Mishap in Business Transactions* (1937) 37 COL. L. REV. 980. Closely similar is the problem of mutuality at law where its requirement defies orthodox consideration doctrine Comment (1938) 38 COL. L. REV. 830. And square on the point is the pre-existing duty rule, as between contracting parties, with hardship-readjustment still doctrinally undifferentiated from hold-up; as is the quarrel over whether "waiver" changes contractual obligation. Of current amusement

Again and again the early opinions show the judge cautious in marking out the factual limits of the case before him, in indicating why, for the case in hand, his rule is excellent policy—only to have later writer, counsel or court slough off the needed qualification.⁵⁴ A further observation can be made: as the conflicting rules, now known as such, enter on their rivalry for favor, new courts have often tended strongly to choose between them in terms of the case in hand at the moment of choice. Rigidification into mechanical slapping of the majority rule or even of the jurisdiction's prior choosing upon a case it does not fit, is a phenomenon of what might almost be called the "maturity" of conflict.

In consequence, any resolution of conflict is unlikely to be wise which simply prefers the one rule over the other. Occasionally, conflict does signal merely persistent unwisdom in one group of courts.⁵⁵ Much more frequently, it signals a situation too broadly defined, a factual criterion or a number of such which have been felt and responded to, in the case-decisions, but which have not yet found voice and words. Conflict, like confusion in either doctrine or result, and like doctrine false to cases, warns to reexamination of the situation-in-life.⁵⁶

value is the soundness of Kent's decision and of Story's, in the cases which lead through *Swift v. Tyson* to the *Tompkins* case.

54. Cardozo's insight here has already been quoted. Take Kent's "course of trade" when *Coddington v. Bay*, 5 Johns. Ch. 54 (N. Y. Ch. 1821) went up to his own Court of Errors and Appeals, 20 Johns. 637 (N. Y. 1822).

Mansfield's supervening insolvency of the proper party to pay, in *Heylyn v. Adamson*, 2 Burr. 669 (K. B. 1758) and one might almost add Cardozo's own miffing in the *Palsgraff* case, of the essential line of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916).

55. I think this plain, on the rule of the Sales Act, § 6(2). The English rule simply does not have sense; and that was made moderately clear by Holmes in 1872. *Grain Elevators: On the Title to Grain in Public Warehouses* (1872) 6 AM. L. REV. 450. I think it moderately plain, on the point of Sales Act, § 69(2), which made the wrong choice; and moderately plain on the omission from the Sales Act of the English rule on measurement, which the English have whittled to the point of showing obvious regret at having it around to need whittling. I think it moderately plain that the requirement that an offer for reward be known, to be acceptable, is simply silly. But I doubt not some of my judgments, even in these "obvious" cases, may be challenged. If so, the point approaches making. I can show situations a-plenty where my judgment is obviously wise. But will not my challenger have situations which show his challenge to be wise? Do we not perhaps need then to *discriminate*?

56. One qualification, already suggested, needs repeating here. There are doctrinal controversies which rest on ideological difference. Of these, there are those which rest on vital ideological difference, and those which rest on teapot ideological difference. Whether "acceptance" by mail requires to be received to be "communicated", etc. is of the latter type. Big-endians and Little-endians may indeed fight and die, and enjoy it. But law and legal rule are practical tools for practical men, and have as their job to center on practical issues. And most conflicts of legal doctrine do just that.

RULES WHICH ARE LEGAL-CONSEQUENCE-VOCABULARY,
AND THEIR USES

The cheapest peace comes via opiate. Doctrine can *seem* to solve the problem of reexamination by setting up a pair or more of diverse legal consequences for use in the problem situation—and let it go at that. At which point one recalls the requisites of meaningfulness for a rule: it must signal and sharpen the real issue, and it must give indication to the judge as to what facts are to fall, to the counsellor indication of what facts will fall, on either side. Any rule which merely defines a term of art *in terms of legal consequence* (rather than in terms of operative fact) will, be it repeated, remain without significance in life until it is accompanied and supplemented by other rules which root it in the soil of fact; the same holds true of any pair of rules which define two categories covering a field of fact, but which speak only in terms of diverse legal consequence; or indeed of any rule which lays down merely that one legal consequence follows from another. As soon as, and to the extent to, which, such rules acquire rooting in fact, they become well-nigh indispensable tools for handling a complex legal life; but only then. Thus the division of proposals-in-fact into those which empower to acceptance and those which do not is in first instance a matter purely of legal vocabulary: the one class consists of what produces the legal consequence, acceptability-in-law, the other class consists of what does not; in Hohfeld's terms, the one does, the other does not, create a power of acceptance-in-law in an addressee of the language. And acceptance-in-law cannot well be accurately defined save as "that which makes stick-in-law such words as legally are capable of being made — in law — to stick," accompanied, orthodoxly, by a further rule that in a bilateral deal if the offeror is thus obligated, so and simultaneously is the acceptor: in reasoning (though not in temporal sequence of event) one legal consequence from another, and thus far without footing in fact.

Even reduced—artificially reduced, if you will—to barest vocabulary, the division of a field along such lines would represent a juridical advance over either confusion or conflict of doctrine. For such a division states that there is a problem of discrimination present within a more or less defined field of fact: words which *may* contain a promise-on-condition, which *may be* of legal interest and effect. And by providing two categories of contradictory legal consequence the division challenges to the making of the needed discrimination. Still, if it does nothing more, it gives no guidance. Guidance—or misguidance—derives not from mere division, but from the nature of our language and from the fact that the great body of our legal terms are not only derived from lay language but are still used in lay language, and in their impact carry connotations of lay fact which of necessity somewhat direct their application.

It is an old story, already referred to, that our case-law has been peculiarly averse to the coinage of terms which are baldly technical and which are therefore easy to mark off as terms purely of legal consequence; that our typical terms are used at once as descriptions of fact and as indications of legal consequence or of whole bodies of legal consequence; that rigorous and systematic *legal* definition is avoided as if by instinctive perception that it would impair our characteristic case-to-case fluidity of judgment. A continental lawyer gasps when he hears a judge announcing happily that a conditional "acceptance" (a factual term, purely) is no "acceptance" (a legal term, purely) or that this "offer" was a "mere preliminary negotiation". And one cannot ostrich the fact that our thinking, teaching, deciding and especially opinion-writing would gain much in clarity and simplicity if it were our practice to use one pure fact-word for the problematical fact set-up and a different word for the category-in-issue which is charged with legal consequence. Is this *proposal* an Offer? Is this *countermand* a Revocation? Is this *expiration* a Lapse? Is this *reply* a Rejection or Inquiry or Counter-offer or Cross-offer or Acceptance? Is this *agreement* a Contract?

Despite Continental gasping, however, and the teaching value of such discrete and issue-sharpening terms, the way of our law is what the way of our law is. Hence it is almost impossible to find pairs of designation of legal consequence whose names do not willy-nilly tend to point some issue as *the* issue; and half the time the terms have come into use not in what a Continental would conceive as fused and confused groping with law-and-fact at once, but in sound case-law feeling for the value of terms which guide decision. Our immediate concern is, however, not with genesis but with result: for if the terms do turn out ill-adjusted to difficult purpose, then they either guide little, or guide badly.

As an instance of superb labeling, take *penalty* and *liquidated damages*. A tyro who had never read a case on the point could spot the lines of the discrimination to be made and wrestle intelligently with a novel state of fact.⁵⁷ Note how strongly the two terms are impregnated with fact-flavor, the one with punishment, the other with reasonable arrangement in the circumstances; note how the legal consequence flavor *coincides* with the fact-flavor. Note, finally, that the terms are spicy with the *why* of

57. When our labels with law at one end and fact at the other are like these, they offer a short cut in action, a saving in discussion, a precision both for adjudication and for counsellor's prophecy, which makes the more systematic Continental methods look crude. When our same double-ended labels shoot enough off the target, and the Continentals stay on their target, then we are the silly-lookers. Here, as in the matter of Code and Case, or in the matter of Philosophical Implication and Pragmatic Action, or of Law and Fact, the question is not one between methods, but one of getting out of any method what it has to give. A question which reminds a little of the problem of Conflict, just discussed. For excellent discussion, see E. N. Garland's forthcoming *CONTEMPORARY AMERICAN REALISTIC JURISPRUDENCE AND THE THEORY OF JUSTICE*, c. III.

the distinction to be taken, so that novel situations may hope for wise and moderately predictable integration with the precedented. Contrast now the terms in use in the Offer and Acceptance region.

A few decades back Offer (which was an invitation to deal) was set against a Mere Invitation to Deal. Which did not prove peculiarly helpful. Today the introduction of "*Preliminary Negotiation*" helps materially to point the issue. If for Offer we were now to write "*Definitive Offer*", the two terms would talk, almost without cases, as do "Penalty" and "Liquidated Damages". Have not our rulings suffered, in the interim?—"Acceptance" and "Rejection" do say their piece; but they have given us trouble by the suggestion that they exhaust the field of Reply, which they do not. "Acceptance" and "Conditional Acceptance", coupled with the queer doctrine that offer and acceptance must match like the halves of an indenture, draw off attention from the true issue in two directions at once. The issue is, have the parties, for the parties' purposes, agreed on what is to the parties a closed deal? Hence, if as in the *Phoenix* case⁵⁸ one party requires assurance that the other party really understands and agrees to observe some condition "implied in law" in the offer, there is no deal closed in fact until that assurance has been obtained; and to impose legal obligation is to use a mailed fist on the unsuspecting. Whereas (turning now not to orthodox doctrine but to misled courts) to read "conditional acceptance" as meaning "acceptance coupled with a clause", although the deal is plainly on,⁵⁹ is to overlook, in the teeth of horse-sense, even three good and accepted doctrinal possibilities: (1) The one most used: the clause is precatory only; (2) the one more frequent in fact—"I suggest this further arrangement"—a further offer, added to an initial acceptance; (3) one almost as frequent in fact: "Moreover, I am willing to do not only the lawyers' say-so on what I must, but what I think is convenient to you, and probably is what you mean me to."

In sum, the fact that a rule or a pair of rules may amount chiefly to the fixing of a vocabulary about legal consequence, to a pigeon-holing system built largely in terms of result, does not deny utility to such rules. Use they may have, and *accurate* vocabulary will serve both order in the law and neatness in problem-posing. But such rules must be seen for what they are if they are to guide either decision or prediction; in *both*

58. *Phoenix Iron & Steel Co. v. Wilkoff*, 253 Fed. 165 (C. C. A. 6th, 1918), 1 A. L. R. 1508 (1919). In 1 WILLISTON AND THOMPSON, *CONTRACTS* (1936) § 78, this matter is skilfully treated, and on the whole soundly. How that treatment squares with WILLISTON AND THOMPSON § 77 (which, see its n.2, is not unaware of occasional need for criticizing holdings) is beyond this author. There is no consistency in the cases. The judges have been misled by faulty doctrinal phrasing of issue. There is therefore only one thing to do: draw the issue cleanly, to its purpose, and divide sheep-holdings from goat-holdings. For although this may not lead to clarity, no other procedure can offer even a hope.

59. Proposal for sale of stock or even land, "Accepted send stock (or deed) with draft."

aspects, their significance lies in what indication their language either gives of itself, or is accompanied by, in complementary rules, as to what facts fit which of the rival pigeonholes, and why. This needs emphasis because the *classification here contains in itself the result*. Precedents are apposite in terms of their *manner of classifying the raw facts* before the court, and of the rationale of such classification. Hence only when rules of vocabulary are spotted for what they are can one hope for court and writer *consistently* to avoid disposing of precedents upon their *artifacts*.—"That" (a case with like raw facts) "was a case where no formal agreement had been required"—as if the manner of determining that very question were not the inwards of the precedent.⁶⁰

In view, moreover, of the tendency of the concept "rule" to suggest some definiteness and fixity, we shall do well to recall that much useful charting of travel can be done by way of indicating merely direction, across a country whose boundaries and even detailed landscape may still be blind to us. If the lines of proper cleavage be moderately clear, detail can then be accumulated as we go, and mistaken judgment on detail (as in the case of principle) can then be left behind. But for a rule or concept to take more definite shape, or to expand, intelligently and intelligibly, the core of *purpose* must be clear—and must be just to the situation. Out of the root of this *purpose*-line of significance, the other—that of what facts call the rule into application—can be left to grow and change; this, as I understand it, is what is being said by those who urge that case-law depends on Principle.

THE MAGIC OF OFFER AND ACCEPTANCE

Even case-law judges persist in an urge to shape results to the life-situation as they see it. Through open confusion and conflict runs their desire to find a doctrinal definition of any situation which is just to that situation in life. Through the covert confusion of result typically attendant on accepted doctrine which either is at odds with life or is non-significant, runs the same urge and sap, unevenly and unpredictably choked back by some doctrinal block, or else bursting through. *No large-scale doctrinal dichotomy, then, which too much misfits life can hope to fit the cases*; the more outlandish the one misfit, the more probable and pervasive the other.

60. One of the goals of rule-making is to find external indicia which both clearly and without undue hardship on the uninitiate guide the application of such rules. Contrast the effective advance indications afforded by color of paper and heading, as between bills of lading, with the gropings in the field of the Statute of Frauds and of the Parol Evidence Rule, as printings are confused with individuated writings, or probable deals with doubtful ones.

The great dichotomy in the orthodox doctrine of Offer and Acceptance is that between bilateral and unilateral contract.⁶¹ But there have been signs over thirty years or more of difficulty with it and its implications. Perhaps it is time to recanvass the *life-situation* with which it has to deal. And so to recanvass the cases which its office is to reflect and to guide.

This will not be easy doing. The rules of Offer and Acceptance have been worked over; they have been written over; they have been shaped and rubbed smooth with pumice, they wear the rich deep polish of a thousand class rooms; they have a grip on the vision and indeed on the affections held by no other rules "of law," real or pseudo. For it was Offer and Acceptance which first led each of us out of laydom into The Law. Puzzled, befogged, adrift in the strange words and technique of cases, with only our sane feeling of what was decent for a compass, we felt the warm sun suddenly, we knew that we were arriving, we knew we too could "think like a lawyer": That was when we learned to down seasickness as A revoked when B was almost up the flag-pole. Within the first October, we had achieved a technical glee in justifying judgment then for A; and succulent memory lingers, of the way our dumber brethren were pilloried as Laymen still. This is therefore no area of "rules" to be disturbed. It is an area where we *want* no disturbance, and will brook none. It is the Rabbit-Hole down which we fell into the Law, and to him who has gone down it, no queer phenomenon is strange; he has been magicked; the logic of Wonderland we then entered makes mere discrepant decision negligible. And it is not only hard, it is obnoxious, for any of us who have gone through that experience to even conceive of Offer and Acceptance as perhaps in need of re-examination.

I, too, am of the generation to whom Offer and Acceptance in traditional garb were as the rising of the sun. It had always been; it would always be; and it somehow was good. And the Law said, "Let there be Promise for a Promise *or* Promise for an Act." And that binds eyes as ancient China did a little lady's feet. Our generation will not easily regain a normal vision. But it does help a little to realize that it was not really so in the beginning. Story's remarks on Offer and Acceptance were largely not law when written in 1844, and still are not. Parsons, in 1853, attempted to open the subject on the cases; but Langdell could not stomach Parsons' views. Nor are they what we have learned. The analysis which to all of us has been as if eternal, with its neatly boxed "Did A want a promise *or* an act?", its straight-line rigid consequences, its integration

61. The argument is that the classical bilateral-unilateral distinction dies as it approaches fact either of life or of case decision. I put forward as a major piece of evidence the prominence which that distinction has in the table of contents of 1 WILLISTON AND THOMPSON, *op. cit. supra* note 58, and the lack of correspondence of the text, and much more of the notes, to the suggestions in the table of contents. The RESTATEMENT shows the distinction only in the background, coloring much, but not explicitly, as a fundamental cleavage.

into an equally neat theory of consideration, that analysis appears in print first less than seventy years ago. A good part of the cases we still study antedate it—and their decisions are far from squaring with it, especially with its class-room implications.

ACCEPTANCE

In the melodrama of the first year class room, and its aftermath, Acceptance is the villain of the piece, double-dealing at every step, and masking it all beneath the neatly barbered black moustache of a single word that comes by stealth upon the stage only after the "Nature of the Offer" has set traps at every step for any unsuspecting honest man.

"Acceptance" is a single word, but it is a word at once of meaning in fact (roughly: "agreeing") and meaning in law (roughly: "what makes an Offer stick."). That might seem bad enough, but it is the kind of ambiguity our law is familiar with and is moderately competent to handle without much thought. The trouble lies elsewhere. The trouble lies in that Acceptance is in addition, as it shuttles and shifts between the unilateral and the bilateral situations, a term with radically divergent *legal* connotations in the two; and with radically divergent *factual* implications in the two. This portends trouble. It produces it. It is the kind of ambiguity which no law is competent to handle without very careful thought. For observe:

Acceptance in the bilateral, on the side of legal consequence, means in first instance the barring of an offeror from getting out on his own motion *before* he has received an iota of the ultimate substance of his bargain. It means a legal effect which calls into play the whole law of conditions and breach. But in the unilateral situation orthodox doctrine takes this same term and uses it to mean the obligating of an offeror only *after* he has received the uttermost jot of everything bargained for; in orthodox doctrine about unilateral-formation, acceptance is a term whose use *excludes* from operation (before or after acceptance) the law of constructive conditions and of their fulfillment; the theory being that an offeror "is master of his offer"; the theory being that there must be "a contract" before such concepts as substantial performance can have relevance. In the bilateral, "Acceptance" carries no implication that suit by the acceptor will ever lie; in the orthodox unilateral theory, "Acceptance" means that only Providence can save the offeror. Two concepts; one label. Now the dominant pattern of thought is set by the bilateral situation, it is the usual situation, it is the normal one, it gives the word—on the legal side—its tone. The pattern of thought is: such notions as substantiality or partial compliance have no relevance to Acceptance; nothing but the *whole* of what is asked for is enough; which is a sane enough idea when the whole of what is supposed to be asked for consists

in the uttering of words. Ergo nothing but the whole of "what is asked for" will bar the offeror from getting out on his own motion. Transfer this attitude and reasoning bodily to the unilateral situation, and "principle" rises up to struggle with sense.

For on the fact-side, too, in regard to what facts will "constitute an acceptance," *i.e.*, be facts with whatever result is connoted by that term, the deep and abiding flavor of the word in our thought and in our language derives no less from the bilateral situation. The picture the word calls up is that of *agreeing*, and the agreeing dominantly pictured is agreeing by *words* of agreement; the doctrines on rejection, revocation, counteroffer, conditional acceptance, and acceptance itself are doctrines whose timbers are cases construing *correspondence*; where letter or telegram can be matched at leisure against telegram or letter. The necessary result has been to pepper the word, on the side of the facts to be classified as constituting an Acceptance, with this idea of expressed agreement as being a necessary element. Hence, even in a situation in which the word "agreement" or "assent" is factually all but meaningless or entirely so, the talk will be of agreement or assent: so in the reward cases. Knowledge of an offered reward and intent to earn a reward are concepts with body to them; but assent to an offer of reward—expressed "assent", where *words of agreement* will be nugatory—is a wraith or scholar's nightmare. The observation goes further: when faced by the reliance cases, orthodox doctrine first denied them, then attempted to remove them from the field of Acceptance entirely, thereby shutting out their beautiful illumination of the unilateral situation.⁶² Of this, more hereinafter; of immediate concern is that the picture of agreement in words, dominated in its turn by the matching of correspondence, so easily and imperceptibly leads into the idea of *exact* agreement that we have even come to seek a rationale for that requirement: "Of course the offeror can completely control the terms of his offer." The next step again follows, to the same result—not inevitably, but almost so: "No *Acceptance* [in law] can occur until the offeror has received all that he asked for." The stage is now set for the double meaning and the double dealing: "all that he asked for," built in a bilateral background to mean

62. Without attempting here to anticipate the detail of a later paper, it may yet be suggested that a number of scholars who use tort-law as a basis for judging the proper effect of revoking an offer for a unilateral, or of negligently inducing belief that there has been a promise, have nonetheless accepted as of course, but without drawing the inferences, ethical and legal justifications for hog-tying any man who knowingly utters "I accept." My own guess is that wisdom lies in binding such a person to his utterance, and that the place of tort analogy in contract law lies elsewhere than in the law of agreement. Certainly it is important that unilateral-contract ideology should not be allowed to drown out the utter immateriality of reliance-detriment when promises are clear and decent on both sides. Not so much in reliance as in decent promise then decently enforced lies the essential base-line and the line of growth. There simply *is* more to promise than there is to tort.

"all the *promises* he asked for, without an iota of performance," will be used in the unilateral situation to mean "the whole of the expected stuff itself." As if they were the same.⁶³

Given this unnoticed use of the single word in multiguity, the nature of man's mind requires that the flavor which the word *acceptance* draws from the factually dominant and heavily documented bilateral situation on the side both of law and of fact should combine to drive orthodox theory into exacting utter completion of the bargained-for performance before the offeror's unilateral promise may stick. Dramatically, then, and beguilingly, the promise is stated to be offered for "*an act*"—a simple unit, a single-stroke thing happening as does a promise in one instant—and the startling double-shift of meaning drops from sight.

Persisting difficulty with the acceptance concept has continued to manifest itself in the very process of reforming doctrine. Thus to Corbin, anent the bilateral, "acceptance" was that act of an offeree which exercised the power conferred by the offeror. And with what legal effect? I can find one only: it bars the offeror's later revocation (and so, normally and with due qualification, the promising offeree's.) Yet when the unilateral situation moves into discussion, even Corbin's own incisive and effective argument for recognition that the offer may become irrevocable before all the bargained-for conditions have been performed (which for his bilateral would have meant to him "acceptance") was coupled with the repeated pronouncement that of course there is no "acceptance" and "no contract" until such full performance.⁶⁴ Pollock had earlier seen the point, as he pondered the "pure" unilateral theory put forward by Ashley in its rigor: "The offer is *irrevocably accepted* by the first unequivocal commencement of the act."⁶⁵ There is more to be said about whether this is law, unqualified; and about the phrase "the act"; but Pollock's use of "accept" is clearly at one with our usage in the bilateral situation. From which one might reason that respectability does not demand confusion.⁶⁶

63. The duplicity of Acceptance is commonly masked in discussion by beginning with Offer. Now out of Offer, as out of a major premise or a magician's high hat, anything can be taken which is first put in. Yet the cases signal trouble for inadequate theoretical analysis: "The practical approach of the modern law has engrafted an important exception upon the fundamental rule that, since the offeror is master of his offer, its terms must be strictly complied with." 1 WILLISTON AND THOMPSON, *op. cit. supra* note 29, § 78 A. The section has to do with performance as being effective, where the offer is conceived as calling for a promise. When an "exception" is practical, important, modern, and conceded law, it may be time to consider whether the "principle" has any of these attributes.

64. See Corbin, *Offer and Acceptance* (1917) 26 YALE L. J. 169.

65. Pollock, Book Review (1912) 28 L. Q. REV. 100.

66. Yet respectability does urge toward confusion. Faced with the one situation in which promise for promise, bald, really meant something (insurance not voided by the insured's failure to perform his "independent" promise to pay the premium) so shrewd and skilful a scholar as Patterson thought wise to follow Harriman in arguing that this

The truth of the matter is that out of the decisions a relatively clear and homogeneous doctrine of offer and acceptance can be built to cover *the initiation of business deals* and can include a fair number of cases which now escape the rubric; I even suspect that the lines of needed adaptation to hold the non-business phases of the family cases and the readjustment aspects of a going business relation will prove neither over-difficult to find nor over-complex to follow. But the effort to develop such doctrine will involve temporary and tentative discard of certain orthodoxish axioms. *The initiation of business deals* will be treated as a homogeneous core of material for discussion. *Mutual assent* will be tentatively regarded not as a legal requisite for contractual obligation but as a fact which commonly leads thereto, and commonly is found where contractual obligation is. But, not being a "legal requisite," it will be treated as present only where it is present in fact and not by courteous fiction. Above all, that great dichotomy of the first year class-room, the division of Contract into two major categories of formation, the bilateral and the pure "unilateral", will be subjected to rather stubbornly skeptical scrutiny. The suspicion is that that dichotomy represents doctrine divorced from life, and therefore does not comfortably hold the cases, and therefore is misleading; and that it spawns unnecessary difficulties. To be sure, no line of analysis can properly be said to be wrong, merely because it divides mankind, say, into such a dichotomy as those who are bearded ladies and those who are not. But such a line of analysis does suggest the presence of more bearded ladies than there are, which tends to mislead. And it raises questions as to just who is a bearded lady, and what the consequences are of being one, which may be fascinating and certainly offer dramatic teaching possibilities, but which still are hardly the most useful training material to be had for a crowded curriculum. Finally, the learning on the subject, when achieved, is almost sure to be cast in terms which obscure more practical distinctions such as those of nationality or sex. Enough of illustrative comment: the hypothesis of this paper is that unilaterals, at large, for purposes of studying formation, are not usefully conceived as one of two coordinate bodies of Contracts cases; that the classical class-room pure unilateral, in particular, is not an important type on which an innocent law student's teeth should be cut to the eternal misshaping of his view of Contract, but belongs in the freak-tent as an interesting and often instructive curiosity.

for once classically pure bilateral was in essence unilateral! *The Delivery of a Life Insurance Policy*, *supra* note 32, at 199.