[N.B. This is an excerpt from Karl Llewellyn, The Bramble Bush: On Our Law and Its Study, Oceana Publications, 1930). 41-57. This lengthy excerpt is provided only for the use by the students enrolled in POL 461 or 462 here at Purdue University. This may well be the most obtuse and difficult reading you have ever encountered. I certainly found it that way when I first read it many years ago. However, I think it is the best description of (1) how to get, i.e., learn, the material for the course. That includes the reading of cases and secondary materials, and the class discussion conducted in POL 461 and 462. While this reading focuses on reading and managing case material, the pieces of this reading are also quite useful for (2) "reading," i.e., understanding, course materials. Some of the words and phrases in this piece reflect Llewellyn’s spelling of words he makes up to convey his point. You need to read these materials very carefully. There are a number of technical, legal terms, such as ratio decidendi. You should look these words and phrases up in a legal dictionary, available either at the Purdue Library, or for purchase from a local bookstore. ]

III. THIS CASE SYSTEM: WHAT TO DO WITH THE CASES

I have now sketched for you in charcoal outline—an unkind critic might remark, in bastard caricature—the part that law and law's minions play in our society, and the general history of a case at law. All this, for your ordained affairs, is background; you will be getting restive. Indeed, in delivering these lectures orally, I have felt the need, before the second hour, of setting to work to dynamite the foreground stumps: cases in casebooks have been assigned to you; what, then, are you to do with them?

Now the first thing you are to do with an opinion is to read it. Does this sound commonplace? Does this amuse you? There is no reason why it should amuse you. You have already read past seventeen expressions of whose meaning you have no conception. So hopeless is your ignorance of their meaning that you have no hard-edged memory of having seen unmeaning symbols on the page. You have applied to the court's opinion the reading technique that you use upon the Statevpost. Is a word unfamiliar? Read on that much more quickly! Onward and upward—we must not hold up the story.

That will not do. It is a pity, but you must learn to read. To read each word. To understand each word. You are outlanders in this country of the law. You do not know the speech. It must be learned. Like any other foreign tongue, it must be learned: by seeing words, by using them until they are familiar; meantime, by constant reference to the dictionary. What, dictionary? Tort, trespass, trover, plea, assumpsit, nisi prius, venire de novo, demurrer, joinder, traverse, abatement, general issue, tender, mandamus, certiorari, adverse possession, dependent relative revocation, and the rest. Law Latin, law French, aye, or law English—what do these
strange terms mean to you? Can you rely upon the crumbs of language that remain from school? Does *cattle levant* and *couchant* mean *cows getting up and lying down*? Does *nisi prius* mean *unless before*? Or *traverse* mean an upper gallery in a church? I fear a dictionary is your only hope—a law dictionary—the one-volume kind you can keep ready on your desk. Can you trust the dictionary, is it accurate, does it give you what you want? Of course not. No dictionary does. The life of words is in the using of them, in the wide network of their long associations, in the intangible something we denominate their feel. But the bare bones to work with, the dictionary offers; and without those bare bones you may be sure the feel will never come.

The first thing to do with an opinion, then, is read it. The next thing is to get clear the actual decision, the judgment rendered. Who won, the plaintiff or the defendant? And watch your step here. You are after in first instance the plaintiff and defendant *below*, in the trial court. In order to follow through what happened you must therefore first know the outcome *below*; else you do not see what was appealed from, nor by whom. You now follow through in order to see exactly what *further* judgment has been rendered on appeal. The stage is then cleared of form—although of course you do not yet know all that these forms mean, that they imply. You can turn now to what you want peculiarly to know. Given the actual judgments below and above as your indispensable framework—what has the case decided, and what can you derive from it as to what will be decided later?

You will be looking, in the opinion, or in the preliminary matter plus the opinion, for the following: a statement of the facts the court assumes; a statement of the precise way the question has come before the court—which includes what the plaintiff wanted below, and what t& defendant did about it, the judgment below, and what the trial court did that is complained of; then the outcome on appeal, the judgment; and finally the reasons this court gives for doing what it did. This does not look so bad. But it is much worse than it looks.

For all our cases are decided, all our opinions are written, all our predictions, all our arguments are made, on certain four assumptions. They are the first presuppositions of our study. They must be rutted into you till you can juggle with them standing on your head and in your sleep.

1) *The court must decide the dispute that is before it.* It cannot refuse because the job is hard, or dubious, or dangerous.
2) *The court can decide only the particular dispute which is before it.* When it speaks to that question it speaks ex cathedra, with authority, with finality, with an almost magic power. When it speaks to the question before it, it announces *law,* and if what it announces is new, it legislates, it *makes* the law. But when it speaks to any other question at all, it says mere words, which no man needs to follow. Are such words worthless? They are not. We know them as judicial *dicta,* when they are wholly off the point at issue we call them *obiter dicta*—words dropped along the road, wayside remarks. Yet even wayside remarks shed light on the remarker. They may be very useful in the future to him, or to us. But he will not feel bound to them, as to his ex cathedra utterance. They came not hallowed by a Delphic frenzy. He may be -slow to change them; but not so slow as in the other case.

3) *The court can decide the particular dispute only according to a general rule which covers a whole class of like disputes.* Our legal theory does not admit of single decisions standing on their own. If judges are free, are indeed forced, to decide new cases for which there is no rule, they must at least make a new rule as they decide. So far, good. But how wide, or how narrow, is the general rule in this particular case? That is a troublesome matter. The practice of our case-law, however, is I think fairly stated thus: it pays to be suspicious of general rules which look to wide; it pays to go slow in feeling *certain* that a wide rule has been laid down at all, or that if seemingly laid down, it will be followed. For there is a fourth accepted canon:

4) *Everything, everything, everything, big or small, a judge may say in an opinion, is to be read with primary reference to the particular dispute, the particular question before him.* You are not to think that the words mean what they might if they stood alone. You are to have your eye on the case in hand, and to learn how to interpret all that has been said *merely* as a reason for deciding *that case that way.* At need.

Now why these canons? The first, I take it, goes back to the primary purpose of law. If the job is in first instance to settle disputes which do not otherwise get settled, then the only way to do it is to do it. And it will not matter so much *how* it is done, in a baffling instance, so long as it is done at all.

The third, that cases must be decided according to a general rule, goes back in origin less to purpose than to superstition. As long as law was felt as something ordained of God, or even as something inherently right in the order of nature, the judge was to be regarded as a mouthpiece, not as a creator; and a mouthpiece of the general, who but made clear an application to the
particular. Else he broke faith, else he was arbitrary, and either biased or corrupt. Moreover, justice demands, wherever that concept is found, that like men be treated alike in like conditions. Why, I do not know; the fact is given. That calls for general rules, and for their even application. So, too, the "separation of powers" comes in powerfully to urge that general rules are made by the Legislature or the system, not the judges, and that the judge has but to act according to the general rules there are. Finally, a philosophy even of expediency will urge the same. Whatever may be the need of shaping decision to individual cases in the juvenile court, or in the court of domestic relations, or in a business man's tribunal for commercial cases-still, when the supreme court of a state speaks, it speaks first to clear up a point of general interest. And the responsibility for formulating general policy forces a wider survey, a more thorough study of the policies involved. So, too, we gain an added guarantee against either sentimentalism or influence in individual cases. And, what is not to be disregarded, we fit with the common notion of what justice calls for.-All of which last, I may say in passing, seemed to me once too pat to be convincing. In point of fact, the clearing up by courts of points of general interest does not require any constant strain to make a rule; and the felt need to make a rule that would be safe has often led our courts to over-caution. Responsibility for formulating general policy is not, as European practice shows, essential to fine, firm and conscientious work of judges, nor does it guarantee with us the absence of disturbing factors. And, finally, the man in the street can understand so little of the distinctions lawyers take that his reliance for justice is now just what it would be under a different system: the traditional respect for and training of the bench, the character of the personnel, the substantial soundness of its output.-I take time to say this because I deem it important that early, very early in this game you meet some counterweight against what I may call the unconscious snobbery of social institutions: against the bland assumption that because things social are, therefore they must be; against the touching faith that the current rationalizations of an institution, first, fit the facts, second, exhaust the subject, third, negate other, negate better possibilities. Nowhere more than in law do you need armor against that type of ethnocentric and chronocentric snobbery-the smugness of your own tribe and your own time: We are the Greeks; all others are barbarians. For the partial cure which is provided in the arts, in business organization, and most magnificently in science, by the international character of the data, of their application, their communication-these in law are no more. Law, as against the other disciplines, is like a tree. In its own soil it roots, and shades one spot alone. Atoms and x-
rays seem to behave indifferent to whether the laboratory be in Paris or Chicago. A German appendix acts much like an American; the knife can speak a tongue more international than Volapük. But the day when the Roman sources as modernized by Bartolus Hand the other old mastiffs of the law" were serviceable equally in Italy and Germany and France--that day is past. The day is over when a dispute in Bristol could be referred to two Italian merchants, because the Italian cities were the root and flower of commercial customs of the world. If you would keep perspective, then—if you would really see the common law, you must beware of letting it submerge you. Perhaps when you see it, when you weigh it against other possibilities, you will look upon its work again and find it good. That, as a common lawyer, I may hope, and do. But I should think it a cheap valuation of our wayward, wilful, charming Mistress to feel that she must be kept from comparison, or even scrutiny, lest her charm should fail.

Back, if I may now, to the why of the two canons I have left: that the court can decide only the particular dispute before it; that all that is said is to be read with eyes on that dispute. Why these? I do believe, gentlemen, that here we have as fine a deposit of slow-growing wisdom as ever has been laid down through the centuries by the unthinking social sea. Here, hardened into institutions, carved out and given line by rationale. What is this wisdom? Look to your own discussion, look to any argument. You know where you would go. You reach, at random if hurried, more carefully if not, for a foundation, for a major premise. But never for itself. Its interest lies in leading to the conclusion you are headed for. You shape its words, its content, to an end decreed. More, with your mind upon your object you use words, you bring in illustrations, you deploy and advance and concentrate again. When you have done, you have said much you did not mean. You did not mean, that is, except in reference to your point. You have brought generalization after generalization up, and discharged it at your goal; all, in the heat of argument, were over-stated. None would you stand to, if your opponent should urge them to another issue.

So with the judge. Nay, more so with the judge. He is not merely human, as are you. He is, as well, a lawyer; which you, yet, are not. A lawyer, and as such skilled in manipulating the resources of persuasion at his hand. A lawyer, and as such prone without thought to twist analogies, and rules, and instances, to his conclusion. A lawyer, and as such peculiarly prone to disregard the implications which do not bear directly on his case.

More, as a practiced campaigner in the art of exposition, he has learned that one must prepare the way for argument. You set the mood, the tone, you lay the intellectual foundation-all
with the case in mind, with the conclusion-all, because those who hear you also have the case in
mind, without the niggling criticism which may later follow. You wind up, as a pitcher will wind
up—and in the pitcher's case, the wind-up often is superfluous. As in the pitcher's case, it has
been known to be intentionally misleading.

With this it should be clear, then, why our canons thunder. Why we create a class of
dicta, of unnecessary words, which later readers, their minds now on quite other cases, can mark
off as not quite essential to the argument. Why we create a class of obiter dicta, the wilder
flailings of the pitcher's arms, the wilder motions of his gum-ruminant jaws, Why we set about,
as our job, to crack the kernel from the nut, to find the true rule the case in fact decides: the rule
of the case.

Now for a while I am going to risk confusion for the sake of talking simply. I am going to
treat as the rule of the case the ratio decidendi, the rule the court tells you is the rule of the case,
the ground, as the phrase goes, upon which the court itself has rested its decision. For there is
where you must begin, and such refinements as are needed may come after.

The court, I will assume, has talked for five pages, only one of which portrayed the facts
assumed. The rest has been discussion. And judgment has been given for the party who won
below: judgment affirmed. We seek the rule.

The first thing to note is this: no rule can be the ratio decidendi from which the actual
judgment (here: affirmance) does not follow. Unless affirmance follows from a rule, it cannot be
the rule which produced an actual holding of affirmance. But the holding is the decision, and the
court speaks ex cathedra only as to the dispute decided, and only as to the decision it has made.
At this point, too, I think you begin to see the bearing of the procedural issue. There can be a
decision (and so an ex cathedra ratio) only as to a point which is before the court. But points
come before a court of review by way of specific complaint about specific action of the court
below, and in no other way. Hence nothing can be held which is not thus brought up.

You will have noted that these two statements are not quite the same. For the losing party
may have complained of five, or fourteen, different rulings by the court below, but the final
judgment below is affirmed or reversed but once. If you see what is ahead you will see that—on
my argument to date—I am about to be driven either into inconsistency or into an affront to
common sense. For obviously the court will in many or most instances take up the objections
made before it, one by one. Now in that event we shall meet either of two phenomena, and very
likely both at once. I shall assume this time, to set my picture more neatly, that the court reverses the judgment below. Then either it will say that the court below was wrong on all five points, or it will say that although right on less than all, it was nonetheless wrong on at least one. Suppose, first, it says: wrong on all. It is clear that anyone would be sufficient for reversal. It is more than likely that the court will not rest peculiarly on any of the five. Anyone of the five rulings would then be enough to justify a reversal, and four of them are by consequence wholly unnecessary. Which, now, are which? Further, under the canon I so proudly wheeled before you, the court can decide only the particular dispute before it. Which was that particular dispute?

Again, take a case where the court rules on four points in favor of a man who won below, but reverses, for all that, on the fifth point. Of the four rulings, not a single one can be a premise for the actual holding. They are, then, dicta merely?

Here, I say, common sense and my canons seem to be at odds. The fact is, that they are both right, and yet both wrong. To that, as a phase of the doctrine of precedent, I shall return. Here merely the solution. One of the reasons, of the sound ones, often given for weighing dicta lightly, is that the background and consequences of the statement have not been illumined by the argument of counsel, have not received, as being matters to be weighed with brows a-wrinkle, the full consideration of the court. In the case put the first reason does not fit; the second, if it is to be put on at all, hangs loose and flaps. No one point being the only crucial point, and the points decided which do not lead to judgment not being absolutely necessary to decide, it may be the court has not sweated over them as it would had each stood alone. But sweated some, it has; and with due antecedent argument. Hence we have, in what we may call the multi-point decision, an intermediate type of authority. If a decision stands on two, or three, or five legs, anyone of them is much more subject to challenge than it would be if the decision stood on it alone. Yet prima facie there remains "a decision" on each one of the points concerned. It is, as Morgan well says, within the province of a court to instruct the trial court how to act on points disputed and argued in the case in hand. The same reasoning in form, yet with distinctly lesser cogency in fact, applies to the multi-points ruled in favor of the party which ultimately loses the appeal. Authorities of a third water, these; and getting watery.

But our troubles with the ratio decidendi are not over. We meet forthwith a further formal one. Our judge states his facts, he argues his position, he announces his rule. And 10, he seems but to have begun. Once clean across the plate. But he begins again, winds up again and again he
delivers his ratio—this time, to our puzzlement, the words are not the same. At this point it is broader than it was before, there it is narrower. And like as not he will warm up another time, and do the same job over—differently again. I have never made out quite why this happens. A little, it may be due to a lawyer's tendency to clinch an argument by summarizing its course, when he is through. A little, it may be due to mere sloppiness of composition, to the lack, typical of our law and all its work, of a developed sense for form, juristic or esthetic, for what the Romans knew as *elegantia*. Sometimes I get a wry suspicion that the judge repeats because he is uneasy on his ground, that he lifts up his voice, prays his conclusion over loud and louder, to gain and make conviction, much like an advertiser bare of arguments except his slogan. At other times I feel as I read opinions the thrill of adventure in an undiscovered country; the first and second statements of the ratio, with all that has led up to them, are like first and second reconnoiterings of strange hills; like first and second chartings of what has been found and what surmised—knowledge and insight growing as the opinion builds to its conclusion. But whatever the reason, recurrent almost-repetition faces us; also the worry that the repetition seldom is exact. Which phrasing are we then to tie to?

Perhaps in this, as in judging how far to trust a broadly stated rule, we may find guidance in the facts the court assumes. Surely this much is certain: the actual dispute before the court is limited as straitly by the facts as by the form which the procedural issue has assumed. What is not in the facts cannot be present for decision. Rules which proceed an inch beyond the facts must be suspect.

But how far does that help us out? What are *the* facts? The plaintiff's name is Atkinson and the defendant's Walpole. The defendant, despite his name, is an Italian by extraction, but the plaintiff's ancestors came over with the Pilgrims. The defendant has a schnautzer-dog named Walter, red hair, and $30,000 worth of life insurance. All these are facts. The case, however, does not deal with life insurance. It is about an auto accident. The defendant's auto was a Buick painted pale magenta. He is married. His wife was in the back seat, an irritable, somewhat faded blonde. She was attempting back-seat driving when the accident occurred. He had turned around to make objection. In the process the car swerved and hit the plaintiff. The sun was shining; there was a rather lovely dappled sky low to the West. The time was late October on a Tuesday. The road was smooth, concrete. It had been put in by the McCarthy Road Work Company. How many of these facts are important to the decision? How many of these facts are, as we say,
legally relevant? Is it relevant that the road was in the country or the city; that it was concrete or tarmac or of dirt; that it was a private or a public way? Is it relevant that the defendant, was driving a Buick, or a motor car, or a vehicle? Is it important that he looked around as the car swerved? Is it crucial? Would it have been the same if he had been drunk, or had swerved for fun, to see how close he could run by the plaintiff, but had missed his guess?

Is it not obvious that as soon as you pick up this statement of the facts to find its legal bearings you must discard some as of no interest whatsoever, discard others as dramatic but as legal nothings? And is it not clear, further, that when you pick up the facts which are left and which do seem relevant, you suddenly cease to deal with them in the concrete and deal with them instead in categories which you, for one reason or another, deem significant? It is not the road between Pottsville and Arlington; it is "a highway". It is not a particular pale magenta Buick eight, by number 732507, but "a motor car", and perhaps even "a vehicle". It is not a turning around to look at Adoree Walpole, but a lapse from the supposedly proper procedure of careful drivers, with which you are concerned. Each concrete fact of the case arranges itself, I say, as the representative of a much wider abstract category of facts, and it is not in itself but as a member of the category that you attribute significance to it. But what is to tell you whether to make your category "Buicks" or "motor cars" or "vehicles"? What is to tell you to make your category "road" or "public highway"? The court may tell you. But the precise point that you have up for study is how far it is safe to trust what the court says. The precise issue which you are attempting to solve is whether the court's language can be taken as it stands, or must be amplified, or must be whittled down.

This brings us at last to the case system. For the truth of the matter is a truth so obvious and trite that it is somewhat regularly overlooked by students. That no case can have a meaning by itself! Standing alone it gives you no guidance. It can give you no guidance as to how far it carries, as to how much of its language will hold water later. What counts, what gives you leads, what gives you sureness, that is the background of the other cases in relation to which you must read the one. They color the language, the technical terms, used in the opinion. But above all they give you the wherewithal to find which of the facts are significant, and in what aspect they are significant, and how far the rules laid down are to be trusted.

Here, I say, is the foundation of the case system. For what, in a case class, do we do? We have set before you, at either the editor's selection or our own, a series of opinions which in
some manner are related. They mayor may not be exactly alike in their outcome. They are always supposedly somewhat similar on their legally relevant facts. Indeed, it is the aspects in which their facts are similar which give you your first guidance as to what classes of fact will be found legally relevant, that is, will be found to operate alike, or to operate at all, upon the court. On the other hand, the states of fact are rarely, if ever, quite alike. And one of the most striking problems before you is: when you find two cases side by side which show a difference in result, then to determine what difference in their facts, or what difference in the procedural set-up, has produced that difference in result. Those are the two problems which must be in your mind as you examine the language of the opinions. I repeat them. First, what are the significant categories of fact, and what is their significance to the court? Second, what differences in facts or in procedural set-up produce differences in the court’s action when situations are otherwise alike?

This then, is the case system game, the game of matching cases. We proceed by a rough application of the logical method of comparison and difference.

And here there are three things that need saying. The first is that by this matching of facts and issues in the different cases we get, to come back to where we started, some indication of when the court in a given case has over-generalized; of when, on the other hand, it has meant all the ratio decidendi that it said. "The Supreme Court of the United States," remarks the sage Professor T. R. Powell, “are by no means such fools as they talk, or as the people are who think them so." We go into the matter expecting a certain amount of inconsistency in the broader language of the cases. We go into the matter set in advance to find distinctions by means of which we can reconcile and harmonize the outcomes of the cases, even though the rules that the courts seem to lay down in their deciding may be inconsistent. We are prepared to whittle down the categories of the facts, to limit the rule of one case to its new whittled narrow category, to limit the rule of the other to its new other narrow category – and thus to make two cases stand together. The first case involves a man who makes an offer and gets in his revocation before his offer is accepted. The court decides that he cannot be sued upon his promise, and says that no contract can be made unless the minds of both parties are at one at once. The second case involves a man who has made a similar offer and has mailed a revocation, but to whom 'a letter of acceptance has been sent before his revocation was received. The court holds that he can be sued upon his promise, and says that his offer was being repeated every moment from the time
that it arrived until the letter of acceptance was duly mailed. Here are two rules which are a little
difficult to put together, and to square with sense, and which are, too, a little hard to square with
the two holdings in the cases. We set to work to seek a way out which will do justice to the
holdings. We arrive perhaps at this, that it is not necessary for the two minds to be at one at once,
if the person who has received an offer thinks, and thinks reasonably, as he takes the last step of
acceptance, that the offeror is standing by the offer. And to test the rule laid down in either case,
as also to test our tentative formulation which we have built to cover both, we do two things.
First and easiest is to play variations on the facts, making the case gradually more and more
extreme until we find the place beyond which it does not seem sense to go. Suppose, for
example, our marl does think the offeror still stands to his offer, and thinks it reasonably, on all
his information; but yet a. revocation has arrived, which his own clerk has failed to bring to his
attention? We may find the stopping-place much sooner than we had expected, and thus be
forced to recast and narrow the generalization we have made, or to recast it even on wholly
different lines. The second and more difficult way of testing is to go to the books and find further
cases in which variations on the facts occur, and in which the importance of such variations has
been put to the proof. The first way is the intuitional correction of hypothesis; the second way is
the experimental test of whether an hypothesis is sound. Both are needed. The first, to save time.
The second, to make sure. For you will remember that in your casebook you have only a
sampling, a foundation for discussion, enough cases to set the problem and start you thinking.
Before you can trust your results, either those which you achieve yourselves, or those which you
take with you from the class, you must go to the writers who have read more cases and see what
they have to say.

In all of this I have been proceeding upon the assumption – and this is the second further
point about case method that I had in mind – that all the cases everywhere can stand. together. It
is- unquestionably the assumption you must also make, at first. If they can be brought together
you must bring them. At the same time you must not overlook that our law is built up statewise.
It is not built up in one piece. With fifty supreme courts plus the federal courts at work, it is
inevitable that from time to time conflicting rules emerge. The startling thing is that they have
been so few. And where a given state, say Pennsylvania, has laid down one rule, but another
state, New York, say, has laid down another, the mere fact that fifteen further states go with New
York is unlikely in the extreme to change the Pennsylvania point of view. A common law in one
sense is therefore non-existent on that point. What we have is fifteen states deciding one way, one state deciding another way and thirty states whose law is still uncertain. Yet in these circumstances, we do speak of "common law", and for this reason: True though it is that each state sticks, in the main, to its own authorities, when it has them, yet common to all the states is large fundamental body of institutions which show at least a brother-and-sister type of likeness, which, to a surprising extent, as I have indicated, can even fairly be called identical. Furthermore, the manner of dealing with the legal authorities, the way of thinking, the way of working, the way of reading cases, the reasoning from them – or from statutes – these common law techniques are in all our courts in all our states substantially alike. And finally, if in a given state a point has not been settled, the court will turn to the decisions of the country as a whole as to a common reservoir of law. If there is but a single line of decision that court, although it never decided on the point before, is likely to lead off its argument: "It is well settled". If the decisions are divided on the point, the court is more likely than not to go with any substantial majority which may exist. But whether it goes with the majority or with the minority or picks a third variant of its own, it works with the materials from the other states almost as if they were its own, save that there is rarely anyone of them which carries the sanction of transcendent authority.

Hence, in your matching of cases, you may, as a last resort when unable to make the cases fit together, fall back upon the answer: here is a conflict; these cases represent two different points of view.

You must, however, before you do that, make sure that they come from different jurisdictions, else one will have to be regarded as flatly overruling the other. Which brings me to the point of dates. Not the least important feature in the cases you are comparing will be their dates. For you must assume that the law, like any other human institution, has undergone, still undergoes development, clarification, change, as time, goes on, as experience accumulates, as conditions vary. The earlier cases in a series, therefore, while they may stand unchanged today, are yet more likely to be forerunners, to be indications of the first gropings with a problem, rather than to present its final solution even in the state from which they come. That holds particularly for cases prior to 1800. It holds in many fields of law for cases of much more recent date. But in any event you will be concerned to place the case in time as well as in space, if putting it together with the others makes for difficulty.
The third thing that needs saying as you set to matching cases, is that on your materials, often indeed on all the materials that there are, a perfect working out of comparison and difference cannot be had. In the first case you have facts \(a\) and \(b\) and \(c\), procedural set-up \(m\), and outcome \(x\). In the second case you have, if you are lucky, procedural set-up \(m\) again, but this time with facts \(a\) and \(b\) and \(d\), and outcome \(y\). How, now, are you to know with any certainty whether the changed result is due in the second instance to the absence of fact \(c\) or to the presence of the new fact \(d\)? The court may tell you. But I repeat: your object is to test the telling of the court.

You turn to your third case. Here once more is the outcome \(x\), and the facts are \(b\) and \(c\) and \(e\); but fact \(a\) is missing, and the procedural set-up this time is not \(m\) but \(n\). This strengthens somewhat your suspicion that fact \(c\) is the lad who works the changed result. But an experimentum crucis still is lacking. Cases, in life are not made to our hand. A scientific approach to 'prediction we may have, and we may use it as far as our materials will permit. An exact science in result we have not now. Carry this in your minds: a scientific approach, no more. Onto the green, with luck, your science takes you. But when it comes to putting you will work by art and hunch.

Where are we now? We have seen the background of the cases. We have seen what they consist of. We have seen that they must be read and analyzed for their facts, for their procedural issue and for their decision. We have seen that they are to be matched together to see which are the facts which have the legal consequences, and in what categories we must class the facts with that in view. And out of this same matching process we can reach a judgment as to how much of the language, even in the ratio decidendi, the court has really meant.

But if you arrive at the conclusion that a given court did not mean all it said in the express ratio decidendi it laid down, that the case must really be confined to facts narrower than the court itself assumed to be its measure, then you are ready for the distinction that I hinted at earlier in this lecture, the distinction between the ratio decidendi, the court's own version of the rule of the case, and the true rule of the case, to wit, what it will be made to stand for by another later court. For one of the vital elements of our doctrine of precedent is this: that any later, court can always reexamine a prior case, and under the principle that the court could decide only what was before it, and that the older case must now be read with that in view, can arrive at the conclusion that the dispute before the earlier court was much narrower than that court thought it was, called therefore for the application of a much narrower rule. Indeed, the argument goes
further. It goes on to state that no broader rule could have been laid down ex-cathedra, because to do that would have transcended the powers of the earlier court.

You have seen further that out of the matching of a number of related cases it is your job to formulate a rule that covers them all in harmony, if that can be done, and to test your formulation against possible variants on the facts. Finally, to test it, if there is time, against what writers on the subject have to say, and against other cases.

It does not pay to go too early to the writers. To do so is to come under strong temptation to skip through the process of case matching on your own. If your chin is square enough, then you may risk it. If you can take what the writer says not as an answer, but as an hypothesis, if you have patience to test it against the cases in your book, and to read, too, some of those the writer cites to see how far they bear out his own conclusions, then you are better off when you consult the writer early. But otherwise, and if you try to use him as a trot, you court disaster.

Now you come into class. There you find the instructor carrying on the same process I have been describing, save that he is more skilful, that he has more knowledge and more insight. He points distinctions which had not yet occurred to you. He tries cases on you you had never thought about. He speaks from a background rich with knowledge of specific states of fact and of their background. Precisely for that reason it is necessary, it is vital, it is the very basic element of case law study, for you to have done your matching of the cases before you meet with his. For it is not by watching him juggle the balls that you will learn. It is by matching his results against your own, by criticizing the process you have gone through in the light of the process he is going through. Indeed if you have not tried the game yourself, you, will not follow him. The man who sees line-play in the football game is the man who once tried playing on the line himself. A Harlem audience responds to niceties in tap-dancing you do not even know are hard to do. Let me repeat: you will get little out of your instruction unless daily, repeatedly, consistently, you try the game out to the end the weary night before. At the same time, with growing skill, you will bring criticism to bear on the man behind the desk as well. You will, if he is human, find inconsistencies between his work today and what he did or said five weeks ago. That will be useful for him. It will be infinitely more for you.

What now of preparation for your case class? Your cases are assigned. Before they can be used they have to be digested. Experience shows that it is well to brief them. Briefing is valuable if only for the impending discussion, Briefing is well nigh essential when it comes to the review.
Make no mistake in this. Day to day, at ten or fifteen pages every day, it still is possible to keep your material well enough in mind to follow much that will go on in class. But when you come to attempting to review 300, 400 or 500 pages at once, you will find that your mind is blank as to most of the cases, and there is no time to fill that blank with meat. There is one. answer and there is only one: your brief, or abstract, or digest.

There is another point at which the brief is valuable. You cannot take adequate notes on class discussion in your casebook, yet you need in one place the substance of a case and the notes on its discussion. The classic plan is briefing on gummed paper, and the pasting of the briefs into the relevant passages in your notes. At this point I would make one remark. The class discussion will show you often that your brief is bad. The thing to do before you paste it in is to make it over. Before you paste it, make it over right.

And one thing more. Briefing, I say, is valuable. Briefing, I say, is well nigh essential. Briefing is also the saddest trap that ever awaited a law student, if he does not watch his step. For the practice under pressure of time, as eyes grow tired in the evening, or the movies lure, is to brief cases one by one, and therefore blindly. Now if I have made one point in this discussion it should be this: that a case read by itself is meaningless, is nil, is blank, is blah. Briefing should begin at the earliest with the second case of an assignment. Only after you have read the second case have you any idea what to do with the first. Briefing, I say again, is a problem of putting down what in the one case bears upon the problem -stated by the other cases. Each brief should be in terms of what this case adds to what I already know about this subject. Hence at least two cases must be read before any can be intelligently briefed. And as you pass to the third case and the fourth case, you have accomplished nothing unless both in your reading and your briefing of them you work at them with reference to the cases that have gone before. What does the case add, what difference does it make, to what I already know? This is the keynote of the brief. For this same reason, when you ever do any research in law, you must distrust your briefs, and distrust most the earliest ones you made. The earlier in the research the brief was made, the less you knew when you made it; hence, the more worthless it is. Read through the first-found case again, and see! The chances are the first half of the briefs made in anyone job of research belong on the ash-heap. The cases blossom under further study, under new reading. They yield more wisdom as your wisdom grows.
What, now, should a brief contain? (1) First, as a finder: the title and its page in the casebook. (2) Second, to orient it in the law, the state and date. From now on, the order becomes largely immaterial. I give you one possible and useful order. (3) What, precisely, did the plaintiff want? What did he ask for? This is one most vital and one almost regularly overlooked feature of a brief. This is the first start in coming to the question. (4) Contrariwise, what did the defendant want and how did the case come to an issue? (5) What did the trial court do; that is, what was the judgment below? (6) Finally, what action of the trial court is complained of? When you have these things in your brief, and only then, are you prepared to look for either relevant facts or relevant rules of law. When you have found these things, and only then, have you your cross-lines laid to spot the question in the case. (7) I find it useful to put down next the outcome of appeal. You see why that is useful. It at once makes clear whether the language of the court in a given passage was or was not necessary to the decision. (8) Then come the facts of the case as assumed by the court. I warn you, I warn you strongly, against cutting the facts down too far. If you cherish any hope of insight into what difference the rules make to people, you will have to keep an eye out to some of the more striking details of the facts, as the court gives them. I know you will lose patience with them. But observe this, my friends. *You will be impatient with the facts to the precise extent to which you need them.* If you do not need them, if you already have some knowledge of the background of the case, the facts will not be boring; they will interest you. If they pester and upset you, that is a sign that you know so little about what the case means in life that these facts need desperate study.

Which facts, then, are significant? I recur again to my proposition. One case will not tell you. Only the group of cases will give you any start at solving that. The more cases you read, therefore, before you brief any, the better off you are, provided only that you brief them each one in the light of all.

And finally, remember this: it is where the facts (as illumined, as selected, as classified in the light of other cases) cross with the issue given by the procedural set-up, that the narrow-issue question of the case is found. *And only there.*

(9) After the facts, the ratio decidendi, phrased preferably substantially according along the lines taken by the court. (10) If you do not like the language of the court, in the light of the other cases, here is the place to note down how you think it should have phrased the rule.
Beyond this, notes are a matter of discretion. (11) I have always found it useful to indicate something of the line of argument the court indulged in, for reasons which I hope to make appear. (12) A beginning law student, moreover, finds in the cases many remarks as to the law, which although they have no bearing on the subject he is studying, are highly interesting and informative. It was my practice when a student to note those down, but to note them by themselves, where they helped memory but did not get in the way of review.

So much for the brief. And if you follow this advice you will discover that by the time the last brief is made the class is well prepared. For you cannot brief four cases each with reference to the other without having already put them together, without having already phrased the results that you have come to on them all. Your last brief will have incorporated, at least by implication, all the rest. And let me say once again, that till they all are put together, and some of the bearings of your phrasing thought over, you will not be prepared, you will not know what any of them is about.

IV. THIS CASE SYSTEM: PRECEDENT

There are psychologists who delight in talking of an apperceptive mass. I am not quite sure what such an apperceptive mass may be, nor of whether it is at all. But I am very sure that these psychologists have a strong truth by the tail. The only question, as A. G. Keller used to put it, is whether, for all our firm grip on the tail, we shall have skill and patience to work up over the rump.

The truth that we have seized upon is this: you see in your case almost exactly what you brought to it, and hardly more. If you bring much, you see much. If you bring nothing, that is what you see. A little, each case will add to what you knew. The measure of what it adds, again, is what you bring.

This point I dwelt on lovingly in the last lecture, in regard to briefing. I shall dwell on it now again, in reference to review. Case study progresses slowly. It works intensively. It works, because it must work intensively, upon a tiny body of material day by day. Hence you can seem to do the work, and seem to follow, although each day you have in mind the cases for the day, and nothing more. At this point, gentlemen, we meet the rump. You seem to do the work. But if you are to do it, you require, each day, each week, to build your new material together with your old. You require to enlarge, above all you require to consolidate, your apperceptive mass in law. You require to bring to each new case and each new briefing the whole of the body of the
knowledge you have that far met. The crux of your briefing: “What does this case add?” develops value to you in exact proportion to the size and quality of the existing stock of skill to which the new addition will be made.

Now I know well that you have heard all this before. I know that you have met before our old familiar frog: three feet a day he climbs out of the slickery pit, two feet each night he slides down as he sleeps. The benighted frog does not dig in betweenwhiles. He takes no thought about his apperceptive mass. He does not, in the military jargon, consolidate his position. Having no tail he does not see the problem of surmounting rumps.

Yet you perhaps lay claim to being more than frogs. Presumably, at least in theory, you own intelligence. The Dean's office vouches that you have got by our private lunacy commission. You should thus understand me, when I tell you that the only road to making the slow-moving case instruction gain momentum is to accelerate the learning process day by day. The quantity of new material studied you will not much increase. The quantity and quality of what you get out of your new material you can jack up daily. But in one way only: by daily, by weekly, going over, arranging, consolidating what you have. Our class instruction is invaluable to you. But, I insisted yesterday, valuable only as you labor through the problems first yourself, as you prepare yourself to see what goes on in the class. And, I insist today, valuable only as you work through the problems afterward yourself (or in a group), build what you have seen into a working part of your equipment for tomorrow. Our class instruction, as a catalyzer, is all that you have hoped. But by itself it is a poorer show than Keith's, at higher prices.

Now I have told you. Before this lecture closes I shall hope to indicate enough niceties in the material, enough lines fine, yet profitable to follow, to stir in you some realization of the meaning of the telling. Just this last thing to end the exhortation: your instructors, many of them, have taught some cases ten or twenty times, and studied those cases over each time before they taught them. Constantly, they are finding new things, new light, new problems, in that same material. They have meanwhile increased their apperceptive mass. They sit triumphantly astride the beast!

One other point I wish to make in the same connection. Note-taking is well nigh essential. Writing helps memory. Writing records. What seems so easy to remember slips away. You need it, if you would consolidate. But note-taking, like briefing, is a treacherous tool. Notes that have any value are not copied down. Before the writing down, goes a critique. Notes that
have value are not what is said: they are a selection, a working up, of what is said – a preservation of the queries opened by the instructor, a preservation of the independent queries which occur to you. If you are actively-though silently-engaged in the discussion, your mind must open queries as the class proceeds. Those things belong in your notes. What the instructor gives as information then has some reference value. You can see its setting. You can judge whether it is holding or mere dictum.

It is much harder, it is much slower to take notes this way. It is much harder: reacting, rephrasing. You must think to take a note. Selecting in the light of the discussion the essential from the surrounding whirl of words, you have to give attention, to be using the stuff between your ears, throughout the whole discussion. So, too, it is much harder, much slower, to brief cases with intelligence. It is much harder, slower, to put in daily time upon consolidation of your notes. These things take guts, some mental and some moral. They are the conjugations and declensions and syntax of your study of the law; they are your plant, your engine, your machine. If they are grubbed through once, and grubbed through hard, if they are once put together and set moving-then you have them. The outlay on investment is complete. Within a month or two they payout dividends. Within six months you find them a bonanza. Then your machine is oiled and running smoothly, while your neighbor who speeded blithely through the football season knocks and stalls. This is a wisdom hidden from the frog.

So, I have said my piece. Let us get on to something interesting.