K. LLEWELLYN, THE BRAMBLE BUSH

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But it will have occurred to you that despite all that I have said in favor of precedent, there are objections. It may be the ignorance or folly, or idleness, or bias of the predecessor which chains a new strong judge. It may be, too, that conditions have changed, and that the precedent, good when it was made, has since become outworn. The rule laid down the first time that a case came up may have been badly phrased, may have failed to foresee the types of dispute which later came to plague the court. Our society is changing, and law, if it is to fit society, must also change. Our society is stable, else it would not be a society, and law which is to fit it must stay fixed. Both truths are true at once. Perhaps some reconciliation lies along this line; that the stability is needed most greatly in large things, that the change is needed most in matters of detail. At any rate, it now becomes our task to inquire into how the system of precedent which we actually have works out in fact, accomplishing at once stability and change.

We turn first to what I may call the orthodox doctrine of precedent . . . . Every case lays down a rule, the rule of the case. The express ratio decidendi is prima facie the rule of the case, since it is the ground upon which the court chose to rest its decision. But a later court can reexamine the case and can invoke the canon that no judge has power to decide what is not before him, can, through examination of the facts or of the procedural issue, narrow the picture of what was actually before the court and can hold that the ruling made requires to be understood as thus restricted. In the extreme form this results in what is known as expressly "confining the case to its particular facts." This rule holds only of redheaded Walpoles in pale magenta Buick cars. And when you find this said of a past case you know that in effect it has been overruled. Only a convention, a somewhat absurd convention, prevents flat overruling in such instances. It seems to be felt as definitely improper to state that the court in a prior case was wrong, peculiarly so if that case was in the same court which is speaking now. It seems to be felt that this would undermine the dogma of the infallibility of courts. So lip service is done to that dogma, while the rule which the prior court laid down is disembowelled. The execution proceeds with due respect, with mandarin courtesy.

Now this orthodox view of the authority of precedent—which I shall call the *strict* view—is but *one of two views* which seem to me wholly contradictory to each other. It is in practice the dogma which is applied to *unwelcome* precedents. It is the recognized, legitimate, honorable technique for whittling precedents away, for making the lawyer, in his argument, and the court, in its decision, free of them. It is a surgeon's knife.

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It is orthodox, I think, because it has been more discussed than is the other. Consider the situation. It is not easy thus to carve a case to pieces. It takes thought, it takes conscious thought, it takes analysis. There is no great art and no great difficulty in merely looking at a case, reading its language, and then applying some sentence which is there expressly stated. But there is difficulty in going underneath what is said, in making a keen reexamination of the case that stood before the court, in showing that the language used was quite beside the point, as the point is revealed under the lens of leisured microscopic refinement. . . . The strict doctrine, then, is the technique to be learned. *But not to be mistaken for the whole.*

For when you turn to the actual operations of the courts, or, indeed, to the arguments of lawyers, you will find a totally different view of precedent at work beside this first one. That I shall call, to give it a name, the *loose view* of precedent. That is the view that a court has decided, and decided authoritatively, *any* points or all points on which it chose to rest a case, or on which it chose, after due argument, to pass. No matter how broad the statement, no matter how unnecessary on the facts or the procedural issues, if that was the rule the court laid down, then that the court has held. Indeed, this view carries over often into dicta, and even into dicta which are grandly obiter. In its extreme form this results in thinking and arguing exclusively from *language* that is found in past opinions, and in citing and working with that language wholly without reference to the facts of the case which called the language forth.

Now it is obvious that this is a device not for cutting past opinions away from judges' feet, but for using them as a springboard when they are found convenient. This is a device for *capitalizing welcome precedents.* And both the lawyers and the judges use it so. And judged by the *practice* of the most respected courts, as of the courts of ordinary stature, this doctrine of precedent is like the other, recognized, legitimate, honorable.

What I wish to sink deep into your minds about the doctrine of precedent, therefore, is that it is two-headed. It is Janus-faced. That it is not one doctrine, nor one line of doctrine, but two, and two which, *applied at the same time to the same precedent, are contradictory of each other.* That there is one doctrine for getting rid of precedents deemed troublesome and one doctrine for making use of precedents that seem helpful. That these two doctrines exist side by side. That the same lawyer in the same brief, the same judge in the same opinion, may be using the one doctrine, the technically strict one, to cut down half the older cases that he deals with, and using the other doctrine, the loose one, for building with the other half. Until you realize this you do not see how it is possible for law to change and to develop, and yet to stand on the past. You do not see how it is possible to avoid the past mistakes of courts, and yet to make use of every happy insight for which a judge in writing may have found expression. Indeed it seems to me that here we may have part of the answer to the problem as to whether precedent is not as bad as good—supporting a weak judge with the labors of strong predecessors, but binding a strong judge by the errors of the weak. For look again at this matter of the *difficulty* of the doctrine. The strict view—that view that cuts the past away—is *hard* to use. An ignorant, an unskilful judge will find it hard to use: the past will bind him. But the skilful judge—he whom we would make free—*is* thus made free. He has the knife in hand: and he can free himself.

Nor, until you see this double aspect of the doctrine-in-action, do you appreciate how little, in detail, you can predict *out of the rules alone*: how much you must turn, for purposes of prediction, to the reactions of the judges to the facts and to the life around them. Think again in this connection of an English court, all the judges unanimous upon the conclusion, all the judges in disagreement as to what rule the outcome should be rested on.

Applying this two-faced doctrine of precedent to your work in a case class you get, it seems to me, some such result as this: You read each case from the angle of its *maximum* value as a precedent . . . . Contrariwise, you will also read each case for its *minimum* value as a precedent, to set against the maximum. In doing this you have your eyes out for the narrow issue in the case, the narrower the better. The first question is, how much can this case fairly be made to stand for by a later court to whom the precedent is welcome? You may well add—though this will be slightly flawed authority—the dicta which appear to have been well considered. The second question is, how much is there in this case that cannot be got around, even by a later court that wishes to avoid it?

You have now the tools for arguing from that case as counsel on *either* side of a new case. You turn them to the problem of prediction. Which view will this . . . court, on a later case on slightly different facts, take: will it choose the narrow or the loose? . . . Here you will call to your aid the matter of attitude that I have been discussing. Here you will use all that you know of individual judges, or of the trends in specific courts, or, indeed, of the trend in the line of business, or in the situation, or in the times at large—in anything which you may expect to become apparent and important to the court in later cases. But always and always, you will bear in mind that each precedent has not one value, but two, and that the two are wide apart, and that whichever value a later court assigns to it, such assignment will be respectable, traditionally sound, dogmatically correct. Above all, as you turn this information to your own training you will, I hope, come to see that in most doubtful cases the precedents *must* speak ambiguously until the court has made up its mind whether each one of them is welcome or unwelcome. And that the job of persuasion which falls upon you will call, therefore, not only for providing a technical ladder to reach on authority the result that you contend for, but even more, if you are to have *your* use of the precedents made as *you* propose it, the job calls for you, on the facts, to persuade the court your case is sound.

People—and they are curiously many—who think that precedent produces or ever did produce a certainty that did not involve matters of judgment and of persuasion, or who think that what I have described involves improper equivocation by the courts or departure from the courtways of some golden age—such people simply do not know our system of precedent in which they live.