The Ideal Element *in* Law

ROSCOE POUND

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Contents

Foreword by Stephen Presser vii

Table of Cases xix

I. Is There an Ideal Element in Law? 1

II. Natural Law 32

III. Law and Morals 66

IV. Rights, Interests, and Values 109

V. The End of Law:
Maintaining the Social *Status Quo* 140

VI. Promotion of Free Self-Assertion:
1. *The Sixteenth to the Eighteenth Century* 171

VII. Promotion of Free Self-Assertion:
2. *Nineteenth Century to the Present* 200

VIII. Maintaining and Furthering Civilization 230

IX. Class Interest and Economic Pressure:
The Marxian Interpretation 257

X. Later Forms of Juristic Realism 288

XI. The Humanitarian Idea 321

XII. The Authoritarian Idea 348

Epilogue 371

Glossary 375

Bibliography of Works Cited 387

Index 415

Foreword

Roscoe Pound (born on October 27, 1872, in Lincoln, Nebraska; died on July 1, 1964, in Cambridge, Massachusetts), practically unknown among the general American population today, was the most famous American jurisprudential thinker of the first half of the twentieth century. He was also the greatest twentieth-century dean of the Harvard Law School (1916–36). Through his work in building faculty and programs and in seeking international students, he made Harvard the first of the world-class American law schools. His name now graces one of Harvard's buildings, an honor accorded to only a handful of legal greats. Pound was the principal architect of a legal philosophical approach he called "sociological jurisprudence," which sought to make the law more responsive to changes in society, while still maintaining its authoritative traditional and moral character. Pound is the spiritual father of the still dominant school of American legal thought now known as "legal realism," but he might have regarded legal realism as a prodigal son.[1]

Legal realism, as practiced in the 1930s, maintained that a sensible and "realistic" jurisprudence ought to result in altering law and legal institutions to meet the needs of the times, and ought not to pay excessive deference to older concepts such as freedom of contract and restraints on the interference of state and federal governments with private agree-

1. A valuable recent biography of Pound is David Wigdor, *Roscoe Pound, Philosopher of Law* (Westport, Conn.: Greenwood Press, 1974). Pound's thought, and that of the legal realists, is nicely analyzed in N. E. H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* (Chicago: University of Chicago Press, 1997).

ments. If Pound's work was an inspiration for legal realism, then Pound is due some of the credit for laying the foundations of legal realism's greatest triumph, President Franklin D. Roosevelt's New Deal. During the New Deal, lawyers trained in legal realism expanded the role of the federal government through plastic interpretations of the U.S. Constitution and the creation of a myriad of new administrative agencies. Still, late in life Pound turned against legal realism and expressed uneasiness with the increasingly centralized federal control of American life the New Deal had spawned.

Though Pound always believed in the need for sensible legal reform, there was a tension in Pound's reformist jurisprudence, because along with his fervor for modernizing the law, Pound had a healthy respect for what he called the "taught legal tradition." Roscoe Pound favored the slow and orderly change of the law through the courts and other established legal institutions, rather than the New Deal era's radical shift of legal power from the states to the federal government. *The Ideal Element in the Law*, a series of lectures delivered at the University of Calcutta in 1948, and first published ten years later, contains a concise, and yet a mature and thorough statement of the basic tenets of Pound's jurisprudence. It is an extraordinary survey of the development of jurisprudence in Greece, Rome, Continental Europe, England, and America, and a treasure trove of information about the law with value for both lawyers and laymen. It reflects what were for Pound the most important jurisprudential problems in his last years — what goals should law and legal institutions have? How can the law be used to preserve liberty and avoid tyranny? These questions, of great concern before, during, and after World War II, the period of time when Pound developed the analysis in these lectures, are no less important now.

Pound was the son of a prominent Nebraska judge, who wanted his boy to follow in his footsteps and study the law. Pound did become a lawyer, but his love of his native prairie environment also led him to become a professionally trained and highly regarded botanist. He received a B.A. (1888) and a Ph.D. (1897) in botany from the University of Nebraska. Pound was the brightest star in a small galaxy of talented bot-

anists at Nebraska, and had as his mentor Professor Charles Bessey, an early follower of Charles Darwin. For some time Pound appears to have vacillated between the law and botany. He studied law for one year at Harvard (1889–90), when Harvard's great innovator, Dean Christopher Columbus Langdell, had introduced the case method and Socratic teaching, and was pioneering the study of law as if it were an evolutionary science. Pound did well at Harvard, and would likely have been invited to join the *Harvard Law Review* (the most prestigious honor, then and now, that a Harvard law student can secure), but was forced to return home to Lincoln, Nebraska, because of the ill-health of his father. Pound became a member of the Nebraska bar even as he continued his study of botany. He taught law at the University of Nebraska from 1890 to 1903, but also served as the director of Nebraska's state botanical survey. Along with a fellow botanist, Pound wrote a path-breaking book on plant life in Nebraska, *Phytogeography of Nebraska* (1898),[2] treating botany not as a sterile field concerned only with taxonomy and classification, but rather encompassing an understanding of the organic and evolutionary relationship among all plant life.

Pound's training as a natural scientist, and as a Darwinist under the influence of Bessey, predisposed him to see the law in terms of organic growth and to understand that only those parts of the law should survive that were useful. This was a perspective he never abandoned, as readers of this book will understand. But readers will also not be surprised to learn that while Pound understood the fact of organic change in botany and law, he never wavered from a conviction that in both fields of study there were constant principles which determined change, a constant striving toward stability and equilibrium, and a constant existence of underlying truths which could be revealed by careful observation, classification, and analysis.

Just as Pound had learned botany in the field, he learned several institutions of the law firsthand, as he helped to form the Nebraska Bar As-

2. Roscoe Pound and Frederick E. Clements, *Phytogeography of Nebraska* (Lincoln, Neb.: privately published, 1900).

sociation in 1900; served, in the capacity of an appellate judge, as the youngest member of the Nebraska Supreme Court Commission (a reform panel created to eliminate the backlog of cases in the Nebraska Supreme Court) from 1901 to 1903; and, from 1904 to 1907, served as a commissioner on uniform state laws for Nebraska, in which position he began his efforts to modernize American law. Pound was appointed dean of the Nebraska College of Law in 1903, and instituted many of the same reforms in legal education he had observed at Harvard, including close study of cases and the Socratic method of teaching. Pound also changed the course of study of the law from two to three years at Nebraska, and required every student who matriculated to be a high school graduate. At about the time Pound became dean, all that was really necessary to be admitted to practice law in Nebraska was that one be able to read, but Pound was in the forefront of a movement to make the bar more professional in character, the better to perform the job of improving the law Pound believed essential.

In August 1906, Dean Pound addressed the annual convention of the American Bar Association in St. Paul, Minnesota. His talk was titled "The Causes of Popular Dissatisfaction with the Administration of Justice," and was his first major exposition of what would become known as sociological jurisprudence. Because his talk advocated what appeared to be major changes in the law and legal practice, in order to take advantage of modern science, it struck many of Pound's listeners as radical, and some objected to its publication. Nevertheless, others who heard the talk or read the text understood that Pound was one of the most significant contemporary legal thinkers, and it immediately catapulted Pound to national notice. One important result of the talk was an offer from the dean of the Northwestern University School of Law, John Henry Wigmore, to join Northwestern's faculty. Wigmore, the author of the most famous American legal treatise, *Wigmore on Evidence*,[3] was,

3. John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdictions of the United States*, 4 vols. (Boston: Little, Brown, 1904–5).

when he hired Pound, the leading American legal scholar, and Wigmore had brought Northwestern to the forefront of national efforts to improve law and legal institutions.[4] Pound taught at Northwestern from 1907 to 1909, then at the University of Chicago for a year, and then accepted an appointment at Harvard in 1910.

To return to Harvard seems to have been Pound's goal since his untimely exit before he could receive his law degree, and once back at Harvard, Pound continued his work in legal reform, most significantly in criminal law and civil procedure. Pound believed that many legal practices of pleading and trial conduct could be improved, made simpler, and made more sure and certain. During the latter part of Pound's deanship at Harvard, however, he sought to distance himself from the more extreme of the legal realists, who were building on his sociological jurisprudence to argue for giving judges much more discretion to decide cases, and to argue that it was time to abandon the notion that the law contained within itself timeless moral and philosophical truths. The most radical of their number, Jerome Frank, argued that established legal rules, reason, and timeless truths played no role in formulating judicial decisions, which were actually, according to Frank, after-the-fact rationalizations designed to disguise judges' naked personal policy preferences.[5] Pound's disagreement with the legal realists became increasingly more strident, as he concluded that their efforts would undermine the organic character of the law, and lead to arbitrary and dangerous judicial behavior.

Following his service as Harvard Law School's dean, in 1936 Pound became the first University Professor at Harvard, and thereby was permitted to teach in any of the school's academic units. By that time he had practically become the voice of jurisprudence for the entire country. His administrative duties ceased, but his efforts at scholarship remained

4. For Wigmore and his career at Northwestern, see generally William R. Roalfe, *John Henry Wigmore, Scholar and Reformer* (Evanston: Northwestern University Press, 1977).

5. Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, 1930).

strong, and many of his most significant books were published after his retirement as dean.[6]

Pound delivered the lectures that comprise *The Ideal Element in Law* at the ripe old age of seventy-six. They still reflect Pound's early training in botany, and his emphasis on the importance of classification, but they also illustrate Pound's early-developed attention to the organic nature of the legal system, its constant principles, and its vitality. These lectures are clearly those of a mature thinker at the height of his powers, speaking to us from an earlier and, in some ways, a wiser era. The lectures were delivered in 1948, six years *before Brown* v. *Board of Education* (1954),[7] and they are blessedly free of the arrogance of the kind of imperative legal theory that began with that case. In *Brown*, for the first time, the United States Supreme Court, profoundly influenced by the kind of legal realism practiced by Frank, wholly embraced social science (in that case the nascent discipline of social psychology) as a guide for refashioning constitutional law. *Brown* based its decision to end racial segregation in the nation's public schools not on the basis of the original understanding of constitutional provisions, nor on the basis of established legal doctrines, but rather on the work of a group of social psychologists who had argued that racial separation resulted in educational disadvantages for black children. In doing so, the Supreme Court made no real pretension of exercising the traditional passive role of judges, or of following the taught legal tradition, but boldly embarked on a program of essentially legislative change that would eventually extend to ordering modifications of state criminal procedure, the abolition of the practice of allowing prayer and Bible readings in public schools, and, finally, to prohibiting states from outlawing abortion.

While all of that was in the future when Pound wrote *The Ideal Element in Law*, there were, at the time, plenty of advocates urging the activist role for the courts which was eventually manifested by *Brown* and

6. See, e.g., Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven, Conn.: Yale University Press, 1954); Roscoe Pound, *The Formative Era of American Law* (Boston: Little, Brown, 1938); Roscoe Pound, *Jurisprudence*, 5 vols. (St. Paul, Minn.: West Publishing Co., 1959).

7. *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

its progeny. These lectures are best understood, then, as part of Pound's broader efforts to defend the taught legal tradition, the common law method of adjudication in particular, and the Anglo-American jurisprudential tradition in general, as the best guarantor of liberty. Pound saw those urging the courts to undertake a program of radical social change, and in particular, the legal realists who disparaged the decisive role of legal doctrines in determining the outcome of court cases, as a real danger to American legal institutions.

The most important theme in these lectures, then, is Pound's sustained attack on these legal realists. Pound tended to rework the same materials over many decades, subtly spinning out the implications of his arguments. These lectures are a much more fully developed expression of the ideas that Pound had quickly penned in a 1931 essay.[8] That essay had been designed to rebut the wilder claims of some legal realists, most notably Jerome Frank, the author of a best-selling (for a work on the law) volume called *Law and the Modern Mind*.[9] As indicated, Frank had argued that certainty in any field of the law was an illusion, and that those who argued that the legal doctrines led to sure results, were simply victims of a frustrated childhood desire to have an omnipotent father. This purported insight of Frank's, which he borrowed from Freudian psychology, was used by Frank expressly to criticize Roscoe Pound, whose defense of the certainty in commercial and property law Frank derided as the "prattling" of a "small boy" in search of a perfect father. Readers of *The Ideal Element* will note the clear and elegant manner in which Pound skewers Frank's theories, and suggests the immature and silly nature of Frank's analysis.[10]

But if Pound has harsh words for psychological legal realists such as Frank, it is nevertheless true that *The Ideal Element in Law* also seeks to further the work of and to praise the efforts of some of the calmer legal

8. Roscoe Pound, "The Call for a Realist Jurisprudence," 44 HARVARD LAW REVIEW 697 (1931), excerpted in Stephen B. Presser and Jamil S. Zainaldin, *Law and Jurisprudence in American History*, 4th ed. (St. Paul, Minn.: West Publishing Co., 2000), 789–805.

9. See above, note 5.

10. See generally *The Ideal Element in Law*, pp. 120–27, 288–299.

realists, such as Karl Llewellyn.[11] Llewellyn, like the young Pound when he was a champion of sociological jurisprudence, recognized the important role of stable, traditional elements in American law, and also the obvious fact that many areas of the law did allow courts to engage in certain and sensible decision making.[12] Unlike Frank, Llewellyn enjoyed the friendship and, to a certain extent, the patronage of Pound, and was prepared to concede that the legal rules were, in the main, the cause of particular legal decisions. Still, Llewellyn was aware that American legal institutions could be encouraged to develop law that was more in keeping with twentieth-century needs. Llewellyn, then, like the mature Pound, appreciated both the traditional and organic as well as the evolutionary nature of the law, and Pound was determined to further efforts like Llewellyn's and disparage those like Frank's.[13]

These Indian lectures appear to have been intended as a summing of Pound's jurisprudential perspective, and it is something of a tragedy that they never received wider circulation in America. By the time they were first published, Pound's influence had begun to fade, but had they been widely disseminated, it is possible that his essentially conservative vision might have given some pause to those who sought in the 1950s, 1960s, and 1970s to use the courts to further radical social change, in the service of a renewed populism. The last few pages of this book, building on all that has gone before, comprise one of the best warnings against the tyranny of the majority, against the excesses of the welfare state, and against authoritarianism in general, that any legal scholar has ever penned.

In keeping with Pound's concerns late in his life, the book is a stirring argument for the preservation of liberty, but it is also a humbling demonstration of the cosmopolitanism and sheer learning that characterized some of the early twentieth-century legal titans such as

11. Ibid., pp. 289, 312–13.

12. See, e.g., Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown, 1960).

13. For the interesting triangular relationship among Pound, Frank, and Llewellyn, see Hull, *Roscoe Pound and Karl Llewellyn*, pp. 173–222.

Holmes,[14] Wigmore, and Pound himself. The breadth of their legal knowledge, especially when compared to legal writers of the late twentieth century, is nothing short of breathtaking. In these lectures Pound uses Greek, Roman, medieval, European, and American materials with an equal command, and it is obvious that he has been able to read many of the works on which he relies in their original languages. He gives us a picture of what a real legal scholar used to be able to do, and shames virtually all of us in the academy who look only to America (and post-1954 America, at that) for jurisprudential principles.

Whether or not Pound's sociological jurisprudence, and his inspiration of the Progressives in the beginning of the century, led inevitably to Franklin Roosevelt's New Deal, in *The Ideal Element in the Law*, Pound argues convincingly that the welfare state (or the "service state" as he calls it) cannot do everything. This book is, then, among other things, a powerful argument against redistribution, or what Pound calls the "Robin Hood" principle.[15] From the beginning of his work in the law, Pound was skeptical of populism, its expressed desire for redistribution, and its attacks on established centers of wealth and power in society. In *The Ideal Element*, Pound devotes substantial space to expounding his lifelong view that the desire for equality should not be pushed so far that it ends up destroying liberty, and Pound hints darkly that we have already gone too far down that road. In these lectures he provides very good examples not only from political mistakes of European nations, but also from the common law doctrines themselves, as they have been skewed in American jurisprudence, most clearly in torts and contracts. What Pound said in 1948 still rings remarkably true in the early twenty-first century.

Pound must have demanded a great deal of concentration from those who heard these lectures, and even one who has the text before him or her will discover that keen attention and perhaps even multiple readings

14. Holmes's erudition is displayed at its peak in Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881).

15. See, e.g., *The Ideal Element in Law*, p. 340, 357–67.

are required before Pound's arguments emerge with clarity. By the time one finishes the book, though, Pound's organizing principles should have become clear, and these lectures should easily be seen to be at least a tour de force, and, most probably, a landmark in modern jurisprudence. *The Ideal Element in Law* foreshadows or anticipates the celebrated works by Lawrence Friedman[16] and Grant Gilmore[17] on the "Death of Contract," in which they described the manner in which twentieth-century American judges eroded the theories of bargain and exchange that dominated the nineteenth century. Pound's treatment is more satisfying than Gilmore's or Friedman's, however, because Pound better understands the aspirational element of contract (the furthering of both human freedom and ordered liberty) that is missing in most contemporary analysis, and especially in the works of latter-day legal realists like Friedman and Gilmore.

The Ideal Element in Law relates the classical American efforts of Story and Blackstone to a two-thousand-year jurisprudential tradition, and its publication, at this troubled time, might make some modest steps back toward encouraging us to regard the practice of law as a calling instead of a business. While the book is accessible to anyone with an interest in law or philosophy, it ought to be required reading for anyone embarking on the professional study of law, because it gives an essential grounding in legal philosophy and legal history that are too often missing from the increasingly pragmatic American law schools.

In his prime (the period from about 1920 to 1960) Pound towered over the legal academy in a manner even greater than that of the most visible contemporary American law professors such as Richard Posner,[18]

16. Lawrence M. Friedman, *Contract Law in America: A Social and Economic Case Study* (Madison: University of Wisconsin Press, 1965).

17. Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974).

18. Richard Posner was for many years a professor at the Law School of the University of Chicago, and was then a judge and Chief Judge of the United States Court of Appeals for the Seventh Circuit. He was the major moving force behind the development of the legal academic specialty law and economics. For a sampling of Posner, see, e.g., *Eco-*

Laurence Tribe,[19] Alan Dershowitz,[20] or Ronald Dworkin.[21] Most of them have achieved fame through a fairly narrow series of endeavors either as professors, judges, or practitioners. Pound was all of those, as well as an inspired writer, lecturer, law school administrator, and almost tireless laborer on countless local, national, and international reform commissions.

Most academics have ignored Pound in recent years, and the flashiest late twentieth-century school of legal thought, the left-leaning "critical legal studies," all but trashed him. With the availability of *The Ideal Element in Law*, this modest "summa" of a lifetime of jurisprudential work in the trenches and in the study, however, Pound's indispensability to anyone who seeks to grasp the nature of American law should once again become clear. What Pound railed against as the "sporting theory of litigation," the notion that litigation ought to be a ruthless tool to achieve partisan ends, now is everywhere in evidence in twenty-first-century America, extending even, in 2000, to the election

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nomic Analysis of Law, 5th ed. (New York: Aspen Law & Business, 1998); *The Problems of Jurisprudence* (Cambridge, Mass.: Harvard University Press, 1990); *Sex and Reason* (Cambridge, Mass.: Harvard University Press, 1991).

19. Laurence Tribe, a professor at the Harvard Law School, is perhaps the leading Supreme Court advocate for what might be regarded as the liberal position on constitutional law issues. He is often invited by members of the Democratic Party to appear as their witness before Congressional hearings. His major work is Laurence H. Tribe, *American Constitutional Law*, 3rd ed. (New York: Foundation Press, 2000).

20. Alan Dershowitz, also a Harvard Law School professor, is best known for his representation of defendants in criminal trials, most notably O. J. Simpson. He is a frequent guest on cable-television network news programs, and is not known for his professional modesty. See, e.g., Alan M. Dershowitz, *Chutzpah* (Boston: Little, Brown, 1991).

21. Ronald Dworkin, for many years, divided his time between law professor duties at New York University School of Law and Oxford University. He is widely regarded as one of the leading jurisprudes of the late twentieth century, having produced scholarship that might be described as an attempt to defend the activist jurisprudence of the Warren Court by suggesting that it was grounded in natural law theory. Dworkin also has been a frequent contributor to the *New York Review of Books*. See, e.g., R. M. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996).

of the United States president. A healthy dose of Pound's wisdom, available in these lectures, might do wonders in reminding a new generation of American law students and lawyers how law ought properly to be used to preserve and protect American traditions, the rule of law, and liberty.

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Table of Cases

Ableman *v.* Booth, 20 How. 506 (1858) / *133*
Adair *v.* United States, 208 U.S. 161 (1908) / *224*
Adkins *v.* Children's Hospital, 261 U.S. 525 (1923) / *219*
Affolder *v.* N.Y.C. & St. L.R. Co., 339 U.S. 96 (1950) / *339*
Albany St., *Matter of*, 11 Wend. (N.Y.) 149 (1834) / *12*
American Ry. Express Co. *v.* Kentucky, 273 U.S. 269 (1927) / *12*
Archer Harvey & Co. *In re*, 289 Fed. 267 (1923) / *266*
Arizona Employers' Liability *Cases*, 250 U.S. 400 (1919) / *16*, *18*, *254*, *255*
Arndt *v.* Griggs, 134 U.S. 316 (1890) / *12*
Attorney General *v.* Corke [1933] Ch. 89 / *328*
Attwood *v.* Lamont [1920] 3 K.B. 571 / *211*

Baker *v.* Snell [1908] 2 K.B. 352, 355 / *328*
Baldy's *Appeal*, 40 Pa. St. 328 (1861) / *221*
Ballard *v.* Hunter, 204 U.S. 241 (1907) / *12*
Bank *v.* Cooper, 2 Yerg. 599 (Tenn. 1831) / *11*
Bank *v.* Sharp, 6 How. 301 (1848) / *221*
Barbier *v.* Connolly, 113 U.S. 27 (1885) / *14*
Barbour *v.* Louisville Board of Trade, 82 Ky. 645 (1884) / *14*
Barger *v.* Barringer, 151 N.C. 433 (1909) / *248*
Barlow *v.* Orde, L.R. 3 P.C. 164 (1870) / *82*
Bauer *v.* O'Donnell, 229 U.S. 1 (1912) / *211*
Benson *v.* Mayor, 10 Barb. 223 (1850) / *14*
Berrien *v.* Pollitzer, 165 Fed. 2d, 21 (1947) / *350*
Betts *v.* Lee, 5 Johns. (N.Y.) 348 (1810) / *100*
Bevis *v.* Bevis [1935] P. 23 / *137*
Bill Posting Co. *v.* Atlantic City, 71 N.J. Law, 72 / *248*
Birmingham Electric Co. *v.* Driver, 232 Ala. 36 (1936) / *94*
Block *v.* Hirsch, 256 U.S. 135 (1921) / *222*

Bloom *v.* Richards, 2 Ohio St. 387 (1853) / *13*
Bonham's *Case*, 8 Co. Rep. 107a, 113b, 118a / *11*, *47*
Booth, *Ex parte*, 3 Wis. 145 (1854) / *133*
Booth and Ryecraft, *In re*, 3 Wis. 157 (1854) / *133*
Borgnis *v.* Falk Co., 147 Wis. 327 (1911) / *222*
Braceville Coal Co. *v.* People, 147 Ill. 66 (1893) / *223*
Bronson *v.* Kinzie, 1 How. (U.S.) 311 (1843) / *221*
Brown *v.* Collins, 53 N.H. 442 (1873) / *276*, *327*
Brown *v.* Kendall, 6 Cush. 292 (Mass. 1850) / *89*
Bryan *v.* City, 212 Pa. St. 259 / *248*
Bullock *v.* Babcock, 3 Wend. (N.Y.) 391 (1829) / *18*
Burke *v.* Smith, 69 Mich. 380 (1888) / *247*
Bussey *v.* Amalgamated Society of Railway Servants, 24 T.L.R. 437 (1908) / *268*
Butcher's Union Co. *v.* Crescent City Co., 111 U.S. 746 (1884) / *12*, *14*, *15*, *197*

Cahill *v.* Eastman, 18 Minn. 255 (1872) / *275*
Calder *v.* Bull, 3 Dall. (U.S.) 386 (1798) / *13*
Cameron *v.* Union Automobile Ins. Co., 210 Wis. 659 (1933) / *99*
Carey *v.* Davis, 190 Ia. 120 (1921) / *94*
Carter *v.* Atlanta & St. A.B.R. Co., 338 U.S. 430 (1949) / *339*
Carter *v.* Carter, 14 Smedes & M. (Miss.) 59 (1850) / *17*
Chambliss *v.* Jordan, 50 Ga. 81 (1873) / *222*
Charing Cross Electricity Supply Co. *v.* Hydraulic Power Co. [1914] 3 K.B. 772 / *328*
Chesley *v.* King, 74 Me. 164 (1882) / *247*
Chicago B. & Q.R. Co. *v.* Chicago, 166 U.S. 226 (1897) / *14*, *197*
Chicago B. & Q.R. Co. *v.* McGuire, 219 U.S. 549 (1911) / *14*, *224*
Chicago R. Co. *v.* Levy, 160 Ill. 385 (1896) / *335*
City of London *v.* Wood, 12 Mod. 669 (1701) / *11*, *47*
Com. *v.* Adams, 114 Mass. 323 (1873) / *40*
Com. *v.* Kennedy, 170 Mass. 18 (1897) / *91*
Com. *v.* Romig, 22 Pa. D. & C. 341 (1934) / *40*
Com. *v.* Williams, 133 Pa. Super. 104 (1935) / *40*
Commonwealth *v.* Hunt, 4 Met. (Mass.) 111 (1842) / *272*
Commonwealth *v.* Kneeland, 20 Pick. (Mass.) 206 (1835) / *13*
Commonwealth *v.* Murphy, 166 Mass. 171 (1896) / *360*
Commonwealth *v.* Perry, 155 Mass. 117 (1891) / *12*
Commonwealth *v.* Rourke, 10 Cush. (Mass.) 397 (1852) / *116*
Coombs *v.* Read, 16 Gray (Mass.) 271 (1800) / *17*
Coppage *v.* Kansas, 236 U.S. 1 (1915) / *322*