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Some Reflections on the Role of Judicial Precedent

John T. Loughran

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Some Reflections on the Role of Judicial Precedent

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Chief Judge of the Court of Appeals of the State of New York. Charles Evans Hughes Memorial Lecture, delivered December 18, 1952.

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TABLE OF LEADING ARTICLES—AUTHORS

BRENNER, FRANK, *The Impulsive Murder and the Degree Device* 274
CONWAY, FRANCIS X., *Subsequent Oral Promise to Perform Another's Duty and the New York Statute of Frauds* 119
DESMOND, CHARLES S., *Natural Law and the American Constitution* 235
DIX, MAURICE J., *The Economic Entity* 254
LOUGHRAN, JOHN T., *Some Reflections on the Role of Judicial Precedent* 1
MCANIFF, JOHN E., *The Natural Law—Its Nature, Scope and Sanction* 246
MCNIECE, HAROLD F., & THORNTON, JOHN V., *Military Law from Pearl Harbor to Korea* 155
SCHLESINGER, EMIL, *A Summary and Critique of the Law of Peaceful Picketing in New York* 20

TABLE OF LEADING ARTICLES—TITLES

A SUMMARY AND CRITIQUE OF THE LAW OF PEACEFUL PICKETING IN NEW YORK. *Emil Schlesinger* 20
MILITARY LAW FROM PEARL HARBOR TO KOREA. *Harold F. McNiece and John V. Thornton* 155
NATURAL LAW AND THE AMERICAN CONSTITUTION. *Charles S. Desmond* 235
SOME REFLECTIONS ON THE ROLE OF JUDICIAL PRECEDENT. *John T. Loughran* 1
SUBSEQUENT ORAL PROMISE TO PERFORM ANOTHER'S DUTY AND THE NEW YORK STATUTE OF FRAUDS. *Francis X. Conway* 119
THE ECONOMIC ENTITY. *Maurice J. Dix* 254
THE IMPULSIVE MURDER AND THE DEGREE DEVICE. *Frank Brenner* 274
THE NATURAL LAW—ITS NATURE, SCOPE AND SANCTION. *John E. McAniff* 246

TABLE OF BOOK REVIEWS—AUTHORS

CLAGETT: ADMINISTRATION OF JUSTICE IN LATIN AMERICA. *Edward D. Re* 318
GUTTMACHER AND WEIHOFEN: PSYCHIATRY AND THE LAW. *Godfrey P. Schmidt* 220
FOREWORD: MCCAFFREY: STATUTORY CONSTRUCTION. *John F. X. Finn* 226
REVIEW OF UNIVERSITY OF NOTRE DAME NATURAL LAW INSTITUTE. *Godfrey P. Schmidt* 110
VANDERBILT: CASES AND MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION. *Victor S. Kilkenny* 113
VEALE: ADVANCE TO BARBARISM. *Godfrey P. Schmidt* 320

INDEX—DIGEST

Page references in bold face type are to Leading Articles; in plain type to Comments, Recent Decisions and Book Reviews.

CONFLICT OF LAWS

Recognition of custody decree 299-302
Validity of marriage 302-305

CONSTITUTIONAL LAW

See also *Jurisprudence, Labor Law, Statute of Limitations*
Declaration obtained by use of a hidden microphone admissible 95-97
Waiver of a unanimous verdict in a criminal action 305-308

CONTRACTS

See also *Jurisprudence, Labor Law, Statute of Frauds*
Refusal of court to enforce award of punitive damages for breach of contract 202-205

CORPORATIONS

The Economic Entity **254-273**
—Claims by stockholders **265-270**
—Designation by the law of equity **254-257**
—Designation by the law of equity **258**
—Designation by public policy **272**
—Personal interest in conflict with public interest **271**
Consideration for the issuance of stock 311-314
Stockholders' action to compel declaration of dividend 97-101

COURTS

See also *Military Law*
—Court of Military Appeals **155, 166-171**

CRIMINAL LAW

The Impulsive Murder and the Degree Device **274-297**
—At common law **275-277**
—Capital punishment **277**
—English attitude **288-291**
—Evaluation of degree device **291-297**
—Premeditation and deliberation **282-288**
Formal information not a requisite to jurisdiction of the subject matter where defendant submits affidavit of facts and pleads guilty 101-105
Merger of offenses 314-317

EQUITY

Jurisdiction in interpleader actions 205-207

EVIDENCE

See *Constitutional Law*

JURISPRUDENCE

See also *Natural Law*
The Role of Judicial Precedent **1-19**
—Application of *Stare Decisis* **15-19**
—Authoritative force of *Stare Decisis* **1-15**
—Bills and Notes **11-12**
—Condemnation proceedings **10-11**
—Constitutional Law **2-3, 13-14**
—Contracts **5, 17-18**
—Criminal Law **5-6**
—Flexibility of the doctrine **2, 13**
—Legislature **14-15**
—Mortgages **7**
—Personal Property **4**
—Proof of civil liability by a conviction in a criminal action **7**
—Torts **6, 9-10, 12-13, 16-17**
—Trustees **7**
Clagett: Administration of Justice in Latin America, a book review 318-320
Guttmacher and Weihofen: Psychiatry and the Law, a book review 220-226
Veale: Advance to Barbarism, a book review 320-322

LABOR LAW

A Summary and Critique of the Law of Peaceful Picketing in New York **20-74**
—Constitutional law **23, 40**
—Contracts **24**
—Injunction **20-22, 25-27, 31, 40, 51-59**
—Restraint of trade **34**
—Right to organize **27**
—Yellow dog contract **22-23**

MILITARY LAW

Military Law from Pearl Harbor to Korea **155-182**
—Before Pearl Harbor **156-157**
—Deficiencies in the Uniform Code of Military Justice **163-166**
—Establishment of the Uniform Code of Military Justice **160-163**
—Evolution since Pearl Harbor **155-182**
—Judicial review of courts-martial **171-177**
—Judicial review of military commissions **177-180**
—Legal effect of martial law **180-181**
—Need for reform **157-160**

NATURAL LAW

Natural Law and the American Constitution **235-245**
—Constitutional Amendments **238-239**
—Declaration of Independence **235-237**

—Magna Carta 239
—Philosophical developments 239-241
—State Constitutions 244
—State Court decisions 244-245
The Natural Law—Its Nature, Scope, and Sanction 246-253
—Meaning of the Natural Law 246-247
—Precepts of the Natural Law 247-248
—Rights attached to Natural Law 249-252
—Sanctions derived from the Natural Law 252-253
Barrett: Review of University of Notre Dame Natural Law Institute, 1950 Proceedings, Vol. IV, a book review 110-113

NEGLIGENCE

See also *Statute of Limitations*
Liability as to guests 212-216

PRACTICE AND PROCEDURE

Vanderbilt: Cases and Materials on Modern Procedure and Judicial Administration, a book review 113-116

SECURITIES

Regulation of Security Issues of Public Utilities by the New York Public Service Commission 77-94
—Power of the Commission to impose conditions 90-92
—Reclassification of stock 81-83
—Refunding 83-88
—Short term notes 80-81
—Statutory basis 78-80

STATUTES

Foreword: McCaffrey: Statutory Construction, a book review 226-228
English
National Defense Act of 1950 162
New English Courts-Martial Act, 1951 161
Federal
Articles of War
Sec. 11 162
Sec. 88 165
Clayton Anti-Trust Act 21
Constitution
Art. 1, sec. 8 62
Art. III, sec. 2 305
Art. IV, sec. 1 299, 308
Amend. IV 95-96
Amend. VI 238
Amend. VII 238
Federal Interpleader Statutes
Sec. 1335 207
Federal Power Act, 1935 77
Internal Revenue Code
Sec. 23(a)(1)(A) 208
Sec. 23(e)(2) 211
Sec. 23(g) 210
Sec. 23(x) 107-109
Sec. 24(a)(1) 107-108
Sec. 115(c) 210
Sec. 117 210
Sec. 117(d)(2) 212
Sec. 117(e)(1) 212
Sec. 1003(a)(3) 105, 107
National Industrial Recovery Act 25
Norris-LaGuardia Act 21-38
Public Utility Holding Company Act of 1935 77
Securities Act of 1933 77
Taft-Hartley Law 30-47, 62-74
Uniform Code of Military Justice
Art. 1 165
Art. 26 163, 164
Art. 27 162
Art. 31 168
Art. 37 165
Art. 39 163
Art. 51 163, 167
Art. 59 170
Art. 67 155, 161, 163
Art. 76 171
Wagner Act 25, 38
State
California
Penal Code
Sec. 189 274
Sec. 193 279
New York
Civil Practice Act
Sec. 49 217
Sec. 51-A 205, 207
Sec. 232 206, 207
Sec. 287-a 206
Sec. 287-d 206
Sec. 876-a 25-37, 47, 56-61
Sec. 1448-69 202
Sec. 1461 202
Sec. 1462 202
Code of Criminal Procedure
Sec. 419 314
Sec. 420 314
Sec. 517 315
Constitution
Art I, Sec. 6 315
Art. VI, Sec. 7 119
Domestic Relations Law
Sec. 5(3) 302
Sec. 7 302
Sec. 8 303
General Corporations Law
Sec. 61(b) 97-101
Labor Relations Act 25-27, 35, 45, 47
Negotiable Instruments Law
Sec. 3 136
Partnership Law
Sec. 67(2) 139
Penal Law
Sec. 43 101-105
Sec. 1044 274

Sec. 1045 277
Sec. 1045A 277
Sec. 1046 274
Sec. 1050 279
Sec. 1053B 279
Sec. 1110 304
Sec. 1296 279
Sec. 1298 279
Sec. 1938 315
Personal Property Law
Sec. 31 121
Public Service Law
Sec. 69 79-84
Sec. 114 85-86
Stock Corporation Law
Sec. 19 147
Sec. 36 80-82
Sec. 38 80-82
Sec. 69 311-313
Pennsylvania
Constitution
Sec. 38 277
Laws
1786, Sec. 1 277
1790, Sec. 1 277
1794, c.257, Sec. 2 274
Traction Company Act of 1887 261

STATUTE OF FRAUDS

Subsequent Oral Promise to Perform Another's Duty and the New York Statute of Frauds 119-154
—Evolution of the New York Rule 124-130
—Intention of the parties as affecting the problem 138-142
—"Main purpose rule"—exception to the statute 121-123, 154
—New York rule 123, 148-153
—When such oral promises might be enforceable 131-148

STATUTE OF LIMITATIONS

Application of the law of the forum 308-311
Time of sale of defective goods determining right of action 216-219

SURETYSHIP

See *Statute of Frauds*

TAXATION

Extrinsic circumstances operated to constitute a trust for a minor for a future interest. 105-107
Indirect medical expenses non-deductible 107-109
Legal fees incurred in deficiency redetermination non-deductible 207-210
Losses from sales or exchanges of capital assets—capital losses 210-212

TORTS

See also *Jurisprudence, Negligence*
Disinterested Malevolence as an Actionable Wrong 185-201
—At early common law 187-191
—Defense of justification 198-200
—New York Rule 195-199
—Recovery made dependent upon actual damage inflicted 185-186
—Reluctance of New York to accept the doctrine 193-195

TABLE OF CASES

Page references in bold face type are to Leading Articles; in plain type to Comments, Recent Decisions and Book Reviews.

Ackley v. Parmenter 128, 129
Adamson v. California 243
Adkins v. Children's Hospital 13
Advance Music Corp. v. American Tobacco Co. 197, 198
Aikens v. Wisconsin 191, 195, 196
Albrecht v. United States 103
Algoma Plywood v. W.E.R.B. 69
Allen Bradley Local 111 v. W.E.R.B. 68, 69
Allen v. Flood 190
Allen v. Philadelphia Company 262
Amalgamated Association v. W.E.R.B. 70
American Bank and Trust Co. v. Atlanta 186, 193, 194
A.F. of L. v. Swing 20, 23, 38, 46, 47
American Guild of Musical Artists Inc. v. Petrillo 33, 196, 197, 198
American President Lines v. King .. 58
Arrowsmith v. Commissioner 210
Arthur C. Stifel v. Commissioner .. 105
Art Steel Co. v. Velazquez 72
Auburn and Cato Plank Road Co. v. Douglas 187

B. and C. Electrical Construction Co. v. Owen 311, 312
Bank of Hartford County v. Waterman 217
Baillis v. Fuchs 32
Barile v. Fisher 195
Beardsley v. Kilmer 193, 195, 197, 198, 199
Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n 23
Belknap v. Bender 133
Betz v. Brady 243
Bingham's Trust v. Commissioner . 208
Bossert v. Dhuy 21, 23
Briggs v. Partridge 5
Brown v. Guarantee Co. 266
Brown v. Mississippi 243
Brown v. Watson 311
Brown v. Weber .. 125, 127, 129, 131, 140, 141, 143, 144, 147, 148, 149
Buchalter v. New York 245
Building Service Employee's International Union v. Gazzam 45, 47
Bulkley v. Shaw 144, 147, 148
Busch Jewelry Co. Inc. v. United Retail Employees Union Local 830 30, 31

Cafeteria Employees Union v. Angelos 31
Calder v. Bull 243
Caldwell v. Tinker 186, 187
Campione v. Campione 303
Cammack v. Commissioner 208
Cammack v. J. B. Slattery and Bros. Inc. 5
Cannon v. Robertson 107
Carpenters and Joiners Union of America v. Ritter's Cafe .. 39, 40, 46, 47
Carroll Building Corp. v. Greenberg Plumbing Supplies Inc. 187
Cobb v. Commissioner 209
Collins v. American News Co. 188
Commissioner v. Brandegee 105
Commissioner v. Lowden 106
Commissioner v. Sharp 106
Commissioner v. Switlik 211, 212
Commissioner v. Stringham 103
Commonwealth v. Jones 281
Consolidated Edison Co. v. Maltbie 85
Consolidated Rock Products v. DuBois 272
Costaro v. Simons 71, 74
Cross v. Armstrong 206
Crowley v. Lewis 5
Cullings v. Goetz 6
Cunningham v. Cunningham 303
Curran v. Galen 188

Dalury v. Rezinas 188, 189
Dapsens v. Lambret 191
Davis v. Patrick 147
De Neri v. Gene Louis, Inc. 34
Dickinson v. United States 306
Di Gironimo v. American Seed Co. 218
Dincher v. The Marlin Firearms Co. 216
Dinney and Robbins, Inc. v. Davis 36
Drobner v. Peters 10
Duplex Printing Press Co. v. Deering 23

Edjomac Amusement Corp. v. Empire State Motion Picture Operators' Union Inc. 29
Emerson v. Slater 122
Estin v. Estin 301
Exchange Bakery and Restaurant Inc. v. Rifkin 23, 24
Ex Parte Quirin 177, 179
Eyston v. Studd 228

Fensterwold v. Burk 304
Feuchtenwanger v. Central Bank and Trust Co. 206
Fisher v. United States 287
Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union 34, 36
Fordren v. Commissioner 106
Forsling v. Mickelson 215
Freeman v. United States 305
Fudickar v. The Guardian Mutual Life Ins. Co. 203

Giboney v. Empire Storage and Ice Company 41, 42, 46, 47
Goldfinger v. Feintuch 29, 30
Goldman v. United States 96

Goodwins, Inc. v. Hagedorn 48, 49, 51, 52, 53, 55, 57, 59, 62, 71, 72, 74
Gordon v. Elliman ... 97
Gray v. Fogarty ... 195

Haber and Fink, Inc. v. "Jones" .. 47, 48
Hanna v. Stedman ... 206
Havey v. Commissioner ... 109
Hebert v. Louisiana ... 243
Heiser v. Woodruff ... 271, 272
Henry v. Henson ... 216
Hiatt v. Brown ... 173
Hibdon v. United States ... 305
Higgins v. Commissioner ... 208
His Majesty's Treasury v. Banker's Trust Co. ... 205
Hitchman Coal and Coke Co. v. Mitchell ... 22
Hughes v. Superior Court of California ... 20, 43, 47
Humphrey v. Smith ... 172
Hurtado v. California ... 243
Hutton v. Watters ... 192
Hymes v. New York Central R.R. Co. 16

Iles v. Lamphere ... 216
Incuria v. Incuria ... 303
In re Loewers Gambrinus Brewery Co. ... 269, 270
In re Pittsburgh Railway ... 255, 261
In re Watertown Paper Co. ... 270
In re Yamashita ... 177, 179
International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helper's Union v. Hanke .. 44, 47
International Union v. W.E.R.B. .. 70, 71
International Union v. O'Brien 70

John L. Seymour v. Commissioner 108
Jones v. Van Heusen Charles Co. .. 99

Keeble v. Hickeringill ... 190
Kennedy v. Johns-Manville Corp. .. 218
Ketchum v. Duncan ... 272
Kieskhefer v. Commissioner 106, 107
Kiff v. Youmans ... 187, 188
Kitchner v. Williams ... 217
Klein v. Freedman ... 54
Kreiger v. Kreiger ... 301
Kreviczky v. Lorber ... 196
Kropp v. Shepsky ... 244, 245

Lamkin v. Palmer ... 132, 133, 134
Langan v. First Trust and Deposit Co. ... 191, 196, 199
Lauf v. E. G. Skinner and Co. ... 38
Leonard v. Vredenburg ... 124, 127, 129, 130, 133

Levberg v. Schumacker ... 227
Levine v. Benn ... 199
Low v. United States ... 306
Lykes v. United States ... 208
Madfes v. Beverley Development Corp. ... 4
Madsen v. Kinsella ... 180
Mallory v. Gillett 124, 125, 126, 127, 129, 130, 131, 132, 142
M'Naughton's Case ... 286
Matter of May ... 245, 302
Matter of Mencher ... 203
Matter of the Application of Long Island Lighting Co. v. Maltbie .. 86
Matter of Wilkins ... 203
May v. Anderson ... 299
May's Furs and Ready to Wear Inc. v. Bauer ... 32, 59
Meyer v. Nebraska ... 244
Milk Wagon Drivers' Union v. Meadowmoor Dairies ... 20, 31, 46
Mitchell v. Mitchell ... 303
Monnier v. Renaud ... 191
Mooney v. Holohan ... 243
Morgan v. Mutual Life Ins. Co. 206
Morris v. Tuthill ... 187

Nann v. Raimist ... 24
Nash v. Mennan ... 58
National Protective Association v. Cumming ... 21, 23, 59
Nelson v. Boynton 122, 124, 125, 129, 131
New York ex rel. Halvey v. Halvey 299
New York Life Ins. Co. v. Dunlevy . 206
North American Co. v. Securities and Exchange Commission ... 263
North American Oil v. Burnet 210
Nueslein v. District of Columbia .. 96

Olmstead v. United States ... 96
On Lee v. United States ... 95
Opera on Tour, Inc. v. Weber .. 32, 195, 196, 197

Packer v. The University ... 244
Pagano, Inc. v. New York Life Ins. Co. ... 197, 198, 199
Paige v. State of New York ... 12
Palko v. Connecticut ... 243
Patton v. United States ... 306, 307
Pennoyer v. Neff ... 206
People v. Bell ... 102
People v. Caruso ... 285, 286
People v. Daghita ... 316
People ex rel. Sampson v. Dunning 104
People v. Hutchinson ... 316
People v. Jacoby ... 102
People v. Lupo ... 314
People v. Nixon ... 15
Pepper v. Litton ... 272
Pickard v. Collins ... 187
Pierce v. The Society of Sisters .. 244
Plankinton Packing Co. v. W.E.R.B. 70
Prince de Wagram v. Marias ... 190
Public Service Commission v. N.Y. and Richmond Gas Co. ... 81
Publishers' Ass'n of New York City v. Newspaper and Mail Deliverers' Union ... 202

Quinn v. Leathem 190, 192

Raabe v. Squier 131, 132, 133
Reding v. Kroll, et Donnersback .. 190
Re Patchogue Electric Light Co. .. 80, 81
Richardson Press v. Albright 134, 136, 137, 138, 139, 140, 142, 143, 147, 148, 152
Roaback v. Motion Picture Operator's Union 192
Rochester Gas and Electric Corp. v. Maltbie 91, 92
Rose Embroidery Corp. v. Freedman 56
Rosenkranz v. Schreiber Brewing Co. 143, 144, 146, 147, 152
Rubin v. Irving Trust Co. 250
Rural Ind. School Dist. No. 10 v. Independent School District 227

Samuel Ochs v. Commissioner 107
Sanders v. Gillespie 127
Schita v. King 176
Schmidt v. Merchants Despatch Transportation Co. 217
Schumacker and Sons, Inc. v. Horowitz 57
Selton Service, Inc. v. Dioguardi .. 53, 54
S.G.V. Co. of Del. v. S.G.V. Co of Pa. 268
Skinner and Co. v. Shew and Co. .. 187
Smith v. O'Grady 102
Snyder v. Massachusetts 243
S. S. Pennock Co. v. Ferretti 48, 55
Stalban v. Friedman 34
State v. Gin Pon 282
State v. Majone 286
State v. Mee 102
Steuers v. Episcopal Church History Co. 312
Stillwell Theatre v. Kaplan 24, 29, 35
Strekalousky v. Delaney 106, 107
Stuart v. Palmer 245
Swift and Co. v. Bankers Trust Co. 11

Swinton v. W. J. Bush and Co. 98, 99, 100
Tarrytown Road Restaurant, Inc. v. Hotel, Restaurant and Beverage Dispensers Union, Local 178 57
Taylor v. Standard Gas Co. and Electric Co. 272
The Harrisburg 310
Thompson v. Boekhout 28, 29, 32
Thornhill v. Alabama .. 20, 38, 39, 40, 46
Thuente v. Hart Motors 215
Tighe v. Morrison 144, 145
Tuttle v. Buck 192
Twining v. New Jersey 243

United States v. Clay 167, 168
United States v. Morge 168
Urie v. Thompson 217

Van Voorhis v. Brintnall 303, 304
Vest v. Kramer 217

Weismer v. Douglass 245
Wells v. Simonds Abrasive Co. 303
White v. Rintoul 123, 128, 130, 131, 132, 133, 134, 135, 137, 142, 143, 147, 148, 149, 150, 153
White v. Schnoebelen 217
Wightman v. Wightman 246
Williams v. McGowan 208
Williams v. North Carolina 300, 301
Witschard v. Brody and Sons, Inc. 141, 142, 143, 147, 148, 152
Wohl v. Bakery and Pastry Drivers Union 38, 39, 40, 46
Wolchok v. Kovenetsky 34
Woods v. Lancet 10
Wood v. Guarantee Trust Co. .. 267, 272
Wynehamer v. People 244

Yarborough v. Yarborough 299, 300

Zovick v. Eaton 317

John T. Loughran

1889-1953

While this issue of the Fordham Law Review *was on the press, the Editors learned of the sad and sudden death of the Honorable John T. Loughran, Chief Judge of the Court of Appeals of New York. His address, delivered as the Charles Evans Hughes Memorial Lecture before the New York County Lawyers Association in December 1952, appears as a leading article in this number.*

Judge Loughran was born in Kingston, New York, in February 1889, and was educated at the Kingston Academy. He matriculated in the Fordham University School of Law in September 1908 where he continued for three scholastic years. In June 1911, he received his degree of LL.B. from the School *summa cum laude*. Subsequent to his admission to the Bar he practiced law in his native city until September 1912, when he was appointed to the faculty of the Law School. Promoted first to Associate Professor and then to Professor of Law, he taught successive generations of law students for eighteen years. He also engaged in the practice of law during most of this period in this city. In the Fall of 1930, he was elected a Justice of the Supreme Court of New York for the Third Judicial District. He assumed office in January 1931, and served for over three years, impressing all of the members of the Bar who came in contact with him by his judicial temperament, his unfailing courtesy, his remarkable memory and his learning in law.

In the Spring of 1934, he was appointed by the Governor of the State a Judge of the Court of Appeals to fill a vacancy on the Court. Nominated for a full term by all parties, he was elected an Associate Judge in the following fall and continued to serve in that capacity until 1945. In that year Governor Dewey appointed him Chief Judge of the Court upon the death of Chief Judge Irving Lehman. Again nominated by all parties, he was elected for a full term in that office in which he was serving when God called him home on March 31, 1953. In April 1952, he received the Gold Medal awarded by the Law Alumni for the first time in that year and to be awarded annually to a distinguished graduate of the School.

His death constitutes a great loss to the State and to his Court as well as to the School of Law.

The Editors extend their deep sympathy to his son and family and pray God to grant eternal repose to his soul.

FORDHAM LAW REVIEW

VOLUME XXII — MARCH, 1953 — NUMBER 1

SOME REFLECTIONS ON THE ROLE OF JUDICIAL PRECEDENT

JOHN T. LOUGHRAN†

I. THE AUTHORITATIVE FORCE OF PRECEDENTS

RECENT years have produced a great number of learned disquisitions by jurists and legal scholars in respect of the nature, the function and the scope of the age-old legal doctrine of stare decisis. There are those who have urged the complete abolition of the doctrine. They would leave the courts free to approach each case on its individual merits and to decide it on fresh considerations of equity and fairness, without being shackled by what they call the "dead hand" of the past. But the doctrine of stare decisis has not lacked ardent and capable proponents, who have defended it as a source of stability and as an invaluable technique of judicial decision. With that defense, however, there has come a reappraisal and reevaluation of the basic function and limitations of the doctrine.

I cannot agree with those who would cast the courts completely adrift from the moorings provided by the wisdom and experience of those who preceded us. On the other hand, I cannot go along with those who insist upon a rigid and mechanical adherence to the decisions of the past, without regard to the impact of later day social, economical and political changes that have been wrought in the world about us. Indeed if we were to be limited to slavish adherence to precedents and were not free to apply the decisions and their underlying principles to changing conditions and situations which did not exist and were not contemplated when the decisions were made, our decisional law would in great measure be no more advanced today than it was many generations ago. The common law has been able to maintain its preeminent place over the centuries because of its stability and its inherent capacity for keeping pace with the demands of an ever-changing and ever-growing civilization.

The interests of stability obviously demand a large measure of continuity with the past; and the learning and experience of our judicial

† Chief Judge of the Court of Appeals of the State of New York.
Charles Evans Hughes Memorial Lecture, delivered December 18, 1952.

forebears supply invaluable tools for coping with present-day problems. Even so, the danger is ever present that deference to the teachings of the past may lead us to approach current issues with minds attuned only to the spirit and attitudes of a by-gone day and may deprive us of the quality of being responsive to the needs and interests of the here and now. Our basic approach to the role of precedent in the judicial process is the key which will determine whether we shall have a dynamic or a static body of common law.

Although there are instances of deference to custom and precedent to be found even in primitive societies, the doctrine of stare decisis as we know it in the common law began to take root with the publication of the year books in the Fifteenth Century and by the end of the Eighteenth Century it had become firmly established. In Great Britain there is still a pretty rigid adherence to precedent, and the House of Lords considers itself absolutely bound by its prior decisions. Even in Great Britain, however, there is a tendency to ameliorate the harshness of prior decisions through the process of distinguishing them on the facts. And even Blackstone, who staunchly espoused the supremacy of precedents as the exclusive source of the law, declared in his commentaries that a court could refuse to follow a precedent which was, to use his phrase, "flatly absurd or unjust."

In our country, on the other hand, the doctrine is a more flexible one, and appellate courts, both federal and state, have declared it to be their duty, as well as their right, to re-examine and correct their own prior decisions which later experience has shown to be clearly erroneous or to have been based on conditions which have materially altered or have acquired a new significance.

The United States Supreme Court has squarely announced that "when convinced of former error, this Court has never felt constrained to follow precedent."[1] Indeed, the Supreme Court has on numerous occasions, particularly in the field of constitutional law, overruled or departed from prior decisions, to the consternation of some conservative minded lawyers and litigants as well as of some dissenting members of that tribunal itself.

In our own Court of Appeals we have similarly, from the earliest times, affirmed our right and duty to re-examine a question previously decided by our Court when it appeared that the prior decision was plainly erroneous or was the product of institutions or doctrines which had changed. In an opinion rendered as early as 1850, Judge Harris said: "This court [. . .] may, and undoubtedly ought, when satisfied that either itself, or its predecessor, has fallen into a mistake, to overrule its own error. I . . . hold

1. Smith v. Allwright *et al.*, 321 U.S. 649, 665 (1944). See also Helvering v. Hallock *et al.*, 309 U.S. 106 (1940).

it to be the duty of every judge and every court to examine its own decisions, and the decisions of other courts without fear, and to revise them without reluctance. But when a question has been well considered and deliberately determined, whatever might have been the views of the court before which the question is again brought, had it been *res nova,* it is not at liberty to disturb or unsettle such decision, unless impelled by *'the most cogent reasons.'* "[2]

Expressions similar to the words I have quoted from Judge Harris, are to be found in many other opinions rendered by the Court of Appeals. Thus, the older Judge O'Brien in an early case said:

". . . the doctrine of *stare decisis,* like almost every other legal rule, is not without its exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such cases it is the duty of courts to re-examine the question."[3]

Judge O'Brien further cited a comment by Chancellor Kent in his *Commentaries*[4] that more than a thousand cases could then be pointed out in the English and American reports, which had been overruled, doubted or limited in their application.

There is no question, then, of the power and duty, at least of the courts in this country, to overrule their own prior decisions in proper cases. Problems, however, still remain as to when that power will be exercised, and in respect of the extent to which a prior decision must ordinarily be accorded authoritative force as a precedent.

Nor is there any doubt that the basic tradition of the common law and sound considerations of policy demand that adherence to precedent shall be the rule and not the exception, and that departure from that rule shall be sanctioned only where the justification and need are clear and cogent. The rule of stare decisis embodies a wise and important social policy. It at once provides the stability and fair measure of certainty which are prime requisites in any body of law. It enables lawyers to advise their clients and permits clients to regulate their affairs, with reference to the authoritative rules of conduct that the courts may be expected to apply. In other words, stare decisis assures the supremacy of the law as well as uniformity and equality in the application of its principles and precepts. If judges were to be free, or indeed under the necessity, to decide cases without reference to principles and doctrines tested by experience and declared in prior decisions, there would be danger that each judge might become a law unto himself, with resultant chaos and utter uncertainty. Without the element of continuity, the law could not fulfill its true function of

2. Baker *et al.* v. Lorillard, 4 N.Y. 257, 261 (1850).

3. Rumsey *et al.* v. New York & N.E.R. Co., 133 N.Y. 79, 85, 30 N.E. 654, 655 (1892).

4. Vol. 1, p. 477 (13 ed. 1844).

regulating and protecting the interests of the various groups that make up society. Hence it is important to bear in mind that the overruling of a precedent may often cause more harm than good by the unsettling effect that it may have upon transactions concluded in reliance on the previously declared rules. Stare decisis also serves the further function of enabling judges to dispose of their work more readily, without facing the arduous task of re-examining the basis and soundness of every rule of law in cases that come before them.

In our own Court of Appeals we do not lightly overrule prior decisions of the Court in which the point at issue has been deliberately considered and passed upon. The Court has said:

> "We should not undermine the law by reversing a decision of this court unless it has been demonstrated to be erroneous through the failure by us to consider a statute, prior decision, material fact or other substantial feature, or unless through changed conditions it has become obviously harmful or detrimental to society. . . ."[5]

There are indeed certain fields of the law in which our Court has found adherence to settled rules to be especially desirable. Preservation of the stability of property interests or of the security of contracts, wills, trusts or of commercial transactions generally, may thus often demand retention even of antiquated rules. A case we had in 1929 is illustrative of this point: *Madfes v. Beverly Development Corp.* et al.[6] The problem there presented was whether gas ranges supplied by a landlord for the use of tenants in an apartment house were to be considered as part of the realty within the meaning of the conditional sales law.[7] The issue was squarely presented whether the Court should follow a decision rendered by it in 1913[8] that such gas ranges remained personal property even after their attachment to the real estate. In a dissenting opinion, Judge Crane observed that apartment houses had become massive things and that gas ranges were standard equipment therein, and he urged that it would be pressing the facts "into an old-fashioned mold" to hold that such ranges, after attachment to the real estate, did not become a part thereof. A majority of the Court, however, rejected that contention and pointed out that the conditions mentioned by Judge Crane were in existence at the time the earlier case was decided, and that the Court had nevertheless there laid down a rule of property which had doubtless governed the conduct of buyer and seller in innumerable sales which had since been made. Hence we refused to alter a rule of property so well established, stating that the legislature could provide any necessary relief.

5. Matter of Grifenhagen v. Ordway *et al.*, 218 N.Y. 451, 458, 113 N.E. 516, 518 (1916).
6. 251 N.Y. 12, 166 N.E. 787 (1929).
7. N.Y. PERSONAL PROPERTY LAW § 67.
8. Central Union Gas Co. v. Browning, 210 N.Y. 10, 103 N.E. 822 (1913).

Similarly, in 1925 in *Crowley v. Lewis* et al.,[9] the Court felt itself bound to follow the early rule of *Briggs* et al. *v. Partridge* et al.[10] that a contract under seal could not be enforced against an undisclosed principal. The Court said: "We do not feel at liberty to change a rule so well understood and so often enforced. If such a change is to be made, it must be by legislative fiat." In support of that decision, the Court declared: "Thousands of sealed instruments must have been executed in reliance upon the authority of *Briggs* et al. *v. Partridge* et al. Many times the seal must have been used for the express purpose of relieving the undisclosed principal from personal liability. It may not be unwise to preserve the distinction for this especial purpose. But whether wise or unwise the distinction now exists."

In another decision in 1925, *Cammack v. J. B. Slattery & Bro., Inc.*,[11] the Court, dividing four to two, declined to overrule the ancient doctrine that a parol executory contract was ineffective to modify a contract under seal, notwithstanding that in prior cases the Court had questioned the soundness of the doctrine and had refused to apply it where the later contract was partly executed. The Court acknowledged that the ancient rules relating to seals were technical and incongruous. None the less for that, however, a majority of the Court felt that radical modification of those rules was best left to the legislature, since that body could avoid any injustice as regards contracts previously executed by giving the legislation only a prospective application. Judges Cardozo and Lehman dissented without opinion. Judge Cardozo indicated the basis of his dissent in one of his classic essays[12] in which he observed that the *Cammack* case afforded a fitting opportunity to uproot an ancient evil and keep the decisional law in pace with the movement of events, without injury to any interest worthy of protection. He added that no party dealing fairly could then honestly claim that when he entered into the parol contract modifying the prior contract under seal, he relied on the ancient doctrine which denied effect to the modifying contract.

The remedy was provided some years later in the form of legislation limiting the legal effect of seals upon written instruments.[13]

In the field of criminal law, the strong public policy which scrupulously protects the rights of an individual accused of crime, has insisted that the courts shall not overrule the settled interpretation of a criminal statute so as to make criminal, conduct previously held not to be vio-

9. 239 N.Y. 264, 146 N.E. 374 (1925).

10. 64 N.Y. 357 (1876).

11. 241 N.Y. 39, 148 N.E. 784 (1925).

12. PARADOXES OF LEGAL SCIENCE 71, 72 (1928).

13. N.Y. CIV. PRAC. ACT § 342.

lative of statute. The Court of Appeals has regarded the settled interpretation of the criminal statute in such a case as establishing "a rule of personal liberty quite as firmly established in this state" as is a rule of real property, which the court could not change "without enacting in effect an *ex post facto* law."[14] Such considerations would not, however, preclude the courts from altering an antiquated judicially declared rule or doctrine even in the field of criminal law, where the change would be beneficial rather than harmful to a defendant.

Reference to situations in which stare decisis serves the function of preserving the stability of property interests or the security of contracts, wills, trusts and commercial transactions generally, presents but a fragmentary phase of the doctrine. In fact, there are numerous other situations in which the Court of Appeals, and other courts as well, have regarded themselves bound by stare decisis to follow an earlier doctrine or rule which they themselves might not apply in a case of first impression, even where there has been no question of the security of property interests or any elements of reliance upon previous decisions. As Judge Cardozo has observed, "Sometimes the commitment to an outworn policy is too firm to be broken by the tools of the judicial process."[15]

Many such examples can be cited in which the court has been influenced by the settled nature of the challenged rule. Thus, in the leading case of *Cullings v. Goetz* et al.,[16] the Court of Appeals rejected assaults made upon the general rule that an owner of real property, who has turned over control of the premises to a lessee, is not liable in tort to a third person injured as the result of the owner's failure to fulfill his contract with the lessee to keep the premises in repair. Though the Restatement of Torts had adopted the contrary view, and though there was countervailing authority in other jurisdictions, the Court declared:

"The doctrine, wise or unwise in its origin, has worked itself by common acquiescence into the tissues of our law. It is too deeply imbedded to be superseded or ignored. Hardly a day goes by in our great centers of population but it is applied by judges and juries in cases great and small."[17]

Perhaps the contention could have been made in *Cullings v. Goetz* et al. that owners of real property had relied on the previously declared law in entering into contracts with their lessees to make repairs, but no such consideration was stressed in the opinion.

Long continued acquiescence was also assigned in another case as

14. People v. Tompkins, 186 N.Y. 413, 416, 79 N.E. 326, 327 (1906).
15. See Cardozo, *op. cit. supra* note 12, at 63.
16. 256 N.Y. 287, 176 N.E. 397 (1931).
17. *Id.* at 291, 292, 176 N.E. at 398.

the reason for not interfering with prior decisions which sustained the right of testamentary trustees to commissions computed on the basis of gross, rather than net, rentals of real property owned by the estate; though a minority of the Court in this instance disputed the claim that the proposition in question was so well established as to be beyond attack.[18]

On the other hand, the Court of Appeals did not hesitate in one case to reject a long continued practice in mortgage foreclosure proceedings founded upon decisions of the Appellate Division, where the question had not previously been presented to the Court of Appeals.[19] But that was not an instance of disregard of the principle of stare decisis, since there was no decision on the question in the Court of Appeals.

In 1932[20] the Court declined to depart from the long established rule that a conviction in a criminal action is not conclusive proof in a civil action of the facts on which the judgment of conviction rests, notwithstanding that the Court recognized that the rule itself might well be subject to criticism and that the reasons which earlier cases had assigned for the rule had become "weak and outdated." Declaring that the situation could be corrected by the legislature, the Court nevertheless acknowledged that it might take it on itself to provide a remedy "were the occasion imperative and the necessity clear," but held that in this instance "established precedents are not to be lightly set aside even though they seem archaic."[21]

A large number of the cases in which the doctrine of stare decisis has been held to immunize challenged rules or doctrines against judicial alteration have involved the construction of statutes.[22] In that situation, where the legislature has acted in the field, there is of course strong warrant for the view that an allegedly erroneous construction of the legislature's intention should be left for correction by the legislature itself, at least where the interpretation is of long standing and the claim of error is not indisputable. Even here, however, no inflexible proposition can be laid down that the court will under no circumstances itself step in and correct its own error of interpretation.

In the application of stare decisis generally, the question whether an issue once determined shall be re-examined in a later case, is neces-

18. Matter of Schinasi, 277 N.Y. 252, 14 N.E. 2d 58 (1938).

19. Prudence Co. v. 160 W. 73rd St. Corp. *et al.*, 260 N.Y. 205, 183 N.E. 365 (1932).

20. Schindler v. Royal Ins. Co., 258 N.Y. 310, 179 N.E. 711 (1932).

21. *Id.* at 314, 179 N.E. at 712.

22. *E.g.*, Matter of Hodges, 294 N.Y. 58, 60 N.E. 2d 540 (1945); Sweet & Co. v Provident Loan Society, 279 N.Y. 540, 18 N.E. 2d 847 (1938); Maher *et al.* v. Randolph, 275 N.Y. 80, 9 N.E. 2d 786 (1937); Meyers v. Credit Lyonnais, 259 N.Y. 399, 182 N.E. 61 (1932).

sarily one of degree, to be determined by reference to a variety of considerations. The courts are particularly loath to indulge in the abrupt abandonment of settled principles and distinctions that have been carefully developed over the years.[23] It is not essential, however, to preserve a particular rule against overturning, that there be a long line of cases in which it has been applied, though that circumstance would weigh heavily in its favor. Even a single, carefully considered decision is thus endowed with authoritative force as a precedent, and this notwithstanding that it has been rendered by a divided court.[24] Nor does the weight of a precedent necessarily deteriorate with age. It is likewise ordinarily not alone sufficient to warrant reconsideration that the court, or a majority thereof, would be inclined to render a contrary decision were the matter *res nova.*

Whether the occasion will be deemed sufficiently impelling to call for a change of decision by the courts, will often turn on a combination of the aforementioned factors, and especially pertinent considerations in this regard will be the basic soundness of the challenged doctrine and the continued existence and validity of the conditions and circumstances under which it arose. Thus, "precedents drawn from the days of travel by stagecoach do not fit the conditions of travel today." Although basic principles may not change from one generation to another, "the things subject to the principle do change," as "the needs of life in a developing civilization require."[25]

Cogent considerations for denying continued authoritative force to a decision as a precedent are to be found where the decision is the product of conditions which have since radically altered, or the decision is grounded on distinctions which have been eliminated by subsequent judicial action or by statute. Even then, however, the life of the precedent may not be at an end. Though the reasons which originally impelled the decision may no longer exist, the underlying principle may still be a valid one, or it may still have some legitimate function with appropriate modifications. The courts may then reaffirm or adapt the old rule or doctrine on the basis of some new rationale, in which event it will embark on a new career. If, on the other hand, the old rule is at variance with modern-day needs and conceptions of justice and fair dealing, it may well be scrapped or refused extension beyond the precise facts on which it was predicated.

Other factors, too, may sometimes serve to tip the scales in favor of

23. See Ultramares Corp. v. Touche *et al.*, 255 N.Y. 170, 187, 174 N.E. 441, 447 (1931).

24. Semanchuck v. Fifth Ave. & 37th St. Corp., 290 N.Y. 412, 420, 49 N.E. 2d 507, 509 (1943).

25. MacPherson v. Buick Motor Co., 217 N.Y. 382, 391, 111 N.E. 1050, 1053 (1916).

change. There may thus have been a significant trend of authority in other jurisdictions contrary to the challenged decision in the period following its rendition. Or a competing body of doctrine may have developed within the same jurisdiction which is in principle or spirit, if not in letter, inconsistent with the decision in question. Gradual erosion of the authoritative force of a questionable precedent is thus often accomplished by the courts' refusal to extend the precedent by analogy to situations not within its exact letter. As the rule applied in such situations gains adoption in an increasing number of cases, the demise of the older precedent becomes but a matter of time.

Sometimes, in the development of a line of cases stemming from an initial decisional rule newly applied in a novel situation, or involving the interpretation of a novel statute, the courts may find it necessary to reject some prior decision or the language used in some prior opinion in rounding out the underlying principles on the basis of experience.[26]

Often, indeed, departure from a particular precedent may be demanded in the interest of reaffirming a principle of broader scope and greater soundness, from which such precedent was itself an aberration.[27] The refusal in such circumstances to follow the errant decision, notwithstanding that it be the latest in line, is not a denial, but rather effectuation, of the doctrine of stare decisis.

There is, in short, no simple formula for determining when the courts will themselves undertake the role of revisers and when they will defer in that respect to the legislature. The answer will generally turn on the compelling force of the considerations favoring change as compared with the factors of stability and certainty. In some instances, however, judicial intervention may be inappropriate because the proposed change is one which "could not safely be made without the kind of factual investigation" for which the legislature, rather than the courts, is equipped.[28]

We were recently squarely confronted in our Court with the problem whether a precedent of an earlier day barred us from applying a rule of liability in tort which a majority of us deemed to be clearly more consonant with policy and with the weight of authority in other jurisdictions. The issue specifically was whether an action for negligence lay to recover for prenatal injuries sustained by an infant plaintiff in the ninth month of the mother's pregnancy. Our Court had in

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26. See Jaybird Mining Co. v. Weir, 271 U.S. 609 (1926); Matter of Masse v. James H. Robinson Co. *et al.*, 301 N.Y. 34, 37, 92 N.E. 2d 56, 57 (1950); Matter of Cameron v. Ellis Construction Co. *et al.*, 252 N.Y. 394, 399, 169 N.E. 622, 624 (1930).

27. *Cf.* Helvering v. Hallock *et al.*, 309 U.S. 106, 119 (1940).

28. See Woods v. Lancet, 303 N.Y. 349, 355, 102 N.E. 2d 691, 694 (1951).

the earlier case of *Drobner v. Peters*[29] in 1921 held, with one dissent, that no such action could be brought. In reaching that conclusion, a majority of the Court, though sympathetic to the plaintiff's claim, emphasized that the weight of authority at that time denied any right of action for the benefit of the unborn child, and reference was also made to the difficulty of proving causal connection in such a case and to the theoretical lack of separate existence of the unborn infant. Judge Pound, writing for the majority, reasoned in this way: "The conditions of negligence law at the present time do not suggest that the reasons in favor of recovery so far outweigh those which may be advanced against it as to call for judicial legislation on the question."[30]

When the issue came before us again in the later case of *Woods v. Lancet* [31] in 1951, we found that there had been a pronounced trend of authority in other jurisdictions since the date of our earlier decision, as well as commentary by legal writers, supporting a right of action. A majority of our Court, in an opinion by Judge Desmond, felt that the rationale of the earlier decision was no longer supportable, and that it was our duty, as well as our right, "to adapt and alter [the] decisional law to produce common-sense justice." Concluding that the principal reason assigned by the Court for its holding in the earlier case—lack of precedent—no longer existed, and that there was no other sound basis for such a holding, we declined to follow *Drobner v. Peters* and sustained the infant's right to maintain the action.

Two members of our Court dissented on the ground that while a change in the law was desirable, it should be accomplished by legislative rather than judicial action. They felt that if a right of action were to be granted, it should be done, not "by a judicial decision on the facts in a single case," but by carefully considered legislation which could provide a solution for various problems presented by the subject. The majority of our Court, however, considered that we would be abdicating "our own function, in a field peculiarly nonstatutory," were we to "refuse to reconsider an old and unsatisfactory court-made rule." We deemed the courts fully qualified to deal with the situation in the traditional common law manner, meeting the problems as they arose in specific cases.

Sometimes indeed legislative action may serve as the impetus for a change in the decisional law. An example is to be found in a recent condemnation case[32] which called into question the continued validity

29. 232 N.Y. 220, 133 N.E. 567 (1921).
30. *Id.* at 224, 133 N.E. at 568.
31. See note 28 *supra*.
32. Village of Lawrence v. Greenwood *et al.*, 300 N.Y. 231, 90 N.E. 2d 53 (1949).

of a rule announced in some early decisions[33] that an expert witness called for the purpose of proving value could not testify on *direct* examination as to the sales prices of other comparable property in the neighborhood. In a unanimous decision we declined to follow that rule as unsound and antiquated. We noted that there was a definite countervailing trend of authority in this State, manifested both in legislation and judicial decision toward permitting proof of value by direct evidence of sales of comparable property in the neighborhood. We further noted that the reason assigned for the early rule was not the irrelevancy of such testimony, but rather that collateral issues would thereby be presented. Our conclusion, however, was that while the rule may originally have had pragmatic value in the early days when the court calendars were cluttered with a great number of elevated railroad cases, we knew of no trial conditions of the present day which would "warrant the exclusion of relevant testimony in favor of trial expediency."

In another significant case, *Swift & Co. v. Bankers Trust Co.* et al.,[34] the problem presented was whether the obligation and effect of a check drawn in Illinois and payable in New York were to be determined for the purpose of ascertaining its validity with reference to the law of Illinois or that of New York. The Court of Appeals had, in an early case,[35] held that the rights and obligations of the holder and the drawer of a dishonored check were to be determined by the law of the place where the check was by its terms payable. In a later case involving a bill of exchange, however, the Court has held that the contract of the drawer of the bill was to be determined with regard to its form, nature, obligation and effect by the law of the place where the bill was drawn (i.e., where the contract was made).[36] The Court there distinguished its earlier decision on the basis that it involved a check, and that a check differed from a bill of exchange in that the drawer of a check contracted to pay at the place where the check was payable whereas the drawer of a bill of exchange contracted to pay at the place where the instrument was drawn.

Confronted by these two decisions, the Court in an opinion by Judge Lehman, chose "upon authority and upon principle" to "readopt the rule as formulated" in the bill of exchange case and to extend it to checks. The Court pointed out that the foundation of the distinction

33. See Robinson *et al.* v. New York Elevated R.R. Co., 175 N.Y. 219, 67 N.E. 431 (1903) and cases there cited.

34. 280 N.Y. 135, 19 N.E. 2d 992 (1939).

35. Hibernia National Bank v. Lacombe *et al.*, 84 N.Y. 367 (1881).

36. Amsinck *et al.* v. Rogers *et al.*, 189 N.Y. 252, 82 N.E. 134 (1907).

drawn in the earlier case between checks and bills of exchange, founded upon mercantile custom, had been destroyed by the negotiable instruments law, which in general applies the same rules to both types of instruments, and that it was incumbent upon the Court to select a uniform rule applicable to both. In selecting the rule previously applied to bills of exchange, which made the law of the place of contracting the controlling law for determining the validity of the instrument, the Court noted that that rule had been adopted by the Restatement of the Conflict of Laws.

The influence of statutory revision upon the course of decisional law, is further illustrated by a line of cases relating to the immunity of governmental instrumentalities from liability in tort. The immunity from suit that is conceded to sovereignty, originally led the courts in this State to exempt from liability for the torts of its agents and employees, not only the State and every one of its municipal divisions, but even a private charitable institution to which the State had delegated one of the functions of government, such as the care of wayward or delinquent children.[37] The private institution was held to enjoy the State's immunity in so far as it performed a function of the State as its agent. In 1929, however, the State, by action of the legislature, waived its sovereign immunity from liability for the torts of its officers and employees, and consented to the presentation of claims therefor in the Court of Claims.[38] Problems then arose as to the effect of such waiver in respect of the tortious acts of agents or employees of municipal divisions of the State or of private institutions exercising State functions.

The issue was first presented in the case of *Paige v. State of New York*,[39] whether the State had, by its waiver, assumed liability for injuries suffered by a person confined in a privately operated quasi-penal institution for wayward children as the result of the negligence of an employee of such institution, and the Court of Appeals, by a divided vote, resolved the issue in the affirmative. The statute was thus construed in the view that it constituted "a recognition and acknowledgment of a moral duty demanded by the principles of equity and justice."[40]

It was then a short step to the proposition, soon thereafter declared,[41] that the derivative immunity of the private institution as an agent of

37. See, *e.g.*, Corbett v. St. Vincent's Industrial School, 177 N.Y. 16, 68 N.E. 997 (1903).

38. N.Y. Laws of 1929, c. 467, adding § 12-a of COURT OF CLAIMS ACT; now § 8.

39. 269 N.Y. 352, 199 N.E. 617 (1936).

40. *Id.* at 356, 199 N.E. at 618, quoting from Jackson v. State of New York, 261 N.Y. 134, 138, 184 N.E. 735, 736 (1933).

41. Bloom *et al.* v. Jewish Board of Guardians, 286 N.Y. 349, 36 N.E. 2d 617 (1941).

the State fell with the State's waiver of its own immunity. "The same principles of justice and equity which constrained the State to reject the immunity conceded to it as sovereign," we there held, "dictates the conclusion that the derivative immunity of the agent does not survive when the immunity of the principal is destroyed."[42]

Equally compelling was the conclusion reached in two subsequent decisions, that the previous immunity of the civil divisions of the State—its counties, cities, towns and villages—for the torts of their officers and employees, was also at an end. Since such divisions do not have any independent sovereignty, and since their exemption from liability was rested on the State's immunity, we held that such exemption was terminated by the State's waiver, "even if no separate statute sanctions that enlarged liability in a given instance."[43]

Just as there are fields in which adherence to precedent is especially desirable, so there are other zones in which a larger measure of flexibility is committed to the courts. The United States Supreme Court has thus pointed out that "in constitutional questions, where correction depends upon" the difficult process of constitutional "amendment and not upon legislative action," that "Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."[44] The Supreme Court has indeed on many occasions overruled prior decisions on constitutional questions where that course has been deemed demanded by "the lessons of experience and the force of better reasoning."[45] Since this is a Charles Evans Hughes Memorial Lecture, I note that Chief Justice Hughes himself did not hesitate squarely to overrule, as a departure from principle, the earlier decision of his Court in *Adkins* et al. *v. Children's Hospital*[46] on the issue of the validity of minimum wage legislation, when that issue came before the Court again years later in a changed atmosphere of opinion.[47]

In this State it is not as difficult to obtain a constitutional amendment as it is in the federal area, and the reasoning of the federal decisions may therefore not be fully applicable. We have ourselves, however, on occasions overruled prior decisions involving the construction or application of the State Constitution.[48] I wrote the opinion in one

42. *Id.* at 352, 36 N.E. 2d at 618.

43. Bernardine v. City of New York *et al.*, 294 N.Y. 361, 62 N.E. 2d 604 (1945); Holmes v. County of Erie, 291 N.Y. 798, 53 N.E. 2d 369 (1944).

44. Smith v. Allwright *et al.*, 321 U.S. 649, 665 (1944).

45. See Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); Douglas, *Stare Decisis*, 4 BAR ASS'N RECORD 152 (1949).

46. 261 U.S. 525 (1923).

47. West Coast Hotel Co. v. Parrish *et al.*, 300 U.S. 379 (1937).

48. See, *e.g.*, Klein v. Maravelas, 219 N.Y. 383, 114 N.E. 809 (1916).

such case[49] where the question was the constitutionality of a New York statute of 1933 which imposed a stamp tax on transfers of shares of par value corporate stock, measured solely by the number of shares transferred and without regard to the actual or face value of the shares. The Court of Appeals had in a decision rendered in 1907 declared invalid a similar tax statute. Since the date of the earlier decision, however, the legislature had authorized the issuance of shares of no par value, thereby adopting the view that face value as a symbol of the real worth of shares in a corporation was a conception that had been rebutted by experience. That change in policy and the consequent alteration of the corporate structure brought in its train problems of taxation which spread beyond the field of the newly authorized shares. It appeared that, to avoid taxation, many corporations thereafter reduced the face value of their par value shares, creating a serious problem for the State taxing authorities. Against the background of these intervening changes in corporate organization and in the State's policy, we re-examined the basis of the 1907 decision in the light of certain expressions of the United States Supreme Court on a related question, and we concluded that the earlier decision was unsound and could not stand in the way of the new legislation.

Other subjects in which greater flexibility is desirable have been said to be those of evidence and of procedure generally.[50] Indeed, there have been many proposals to commit the entire field of procedure to rules of court which could be readily modified as occasion demanded.

There are a number of instances in which the courts have exercised the power to revise their own decisional law governing procedure without waiting for action by the legislature. One line of such cases concerns the interpretation of what is now Section 1296, subdivision 7, of the Civil. Practice Act. That subdivision provides that upon judicial review of a quasi-judicial determination made by an administrative agency, the court shall determine, among other matters, "whether, upon all the evidence, there was such a preponderance of proof against the existence of any of . . . [the] facts [essential to the determination] that the verdict of a jury, affirming the existence thereof, rendered in an action in the supreme court triable by a jury, would be set aside by the court as against the weight of the evidence."

As suggested by a literal reading of its broad language, the statute was interpreted in several early decisions as expanding the scope of review that would otherwise prevail and as authorizing the courts to review the administrative agency's determination on the question of

49. Vaughan *et al.* v. State, 272 N.Y. 102, 5 N.E. 2d 53 (1936).
50. See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 156 (1928).

the weight of the evidence.[51] Such an interpretation was, however, inconsistent with the general current of decisions in the federal sphere and in other state jurisdictions, and with the policy of subsequently enacted statutes in this State governing particular agencies, which narrowly limited the scope of review open to the courts. In that view the courts are powerless to review the administrative agency's determination on the weight of evidence, their function being limited to ascertaining whether the determination is supported by substantial evidence—i.e., such evidence as a reasonable mind might accept as adequate to support a conclusion. Under the impetus of this decisional and legislative trend in favor of narrowing the zone of judicial interference with administrative determinations, the Court of Appeals gradually altered the earlier interpretation of the language of Section 1296, subdivision 7, of the Civil Practice Act so as to read into it the limitations of the substantial evidence rule.[52] And the latter-day interpretation is indeed now firmly entrenched.

Another example of a procedural change by court decision is to be found in the case of *People v. Nixon* et al.[53] where the Court rejected and declined to follow, as artificial and unjust, earlier decisions which required the defendant in a criminal case tried without a jury in an inferior court to make a formal motion to dismiss in order to preserve for appeal the point that the evidence was legally insufficient to warrant conviction. The Court there stated:

"It is right that this court should hesitate to overrule a previous decision, but when convinced that an artificial rule of practice, created by it, is erroneous and hampers the administration of justice, it is its duty to refuse to perpetuate previous error."[54]

II. Application of Precedents

Lest my discussion concerning the overruling of precedents may serve to give an erroneous impression, I must emphasize that in the majority of cases that come before our Court, no question arises as to the authoritative force of applicable precedents. Where problem does arise as to the application of precedent, it is generally that of determining whether the facts in the particular case are such as to fall within the ambit of one or another of the established precedents.

51. People *ex rel.* Gilson v. Gibbons, 231 N.Y. 171, 177, 131 N.E. 879, 880, 881 (1921); People *ex rel.* McAleer v. French, 119 N.Y. 502; 508, 23 N.E. 1061, 1063 (1890).

52. Matter of Miller v. Kling, 291 N.Y. 65, 50 N.E. 2d 546 (1943); Matter of Webber v. Town of Cheektowaga *et al.*, 284 N.Y. 377, 31 N.E. 2d 495 (1940). *Cf.* Matter of Roge v. Valentine, 280 N.Y. 268, 20 N.E. 2d 751 (1939); People *ex rel.* Guincy v. Valentine, 274 N.Y. 331, 8 N.E. 2d 880 (1937).

53. 248 N.Y. 182, 161 N.E. 463 (1928).

54. *Id.* at 192, 161 N.E. at 467.

There are, however, occasions where one aspect of the facts will call into play one principle or precedent, and another phase will suggest a countervailing principle or precedent. The problem then is to determine which of the competing principles or doctrines is entitled to prevail in the case. The answer to that question may in some instances turn on an analysis of the factual situation. In other cases, the answer may depend on which is the more dominant of the contending interests represented by the respective precedents. That will require an appraisal of the underlying considerations of policy, of equity and justice, as well as those of history and of logic. As has often been observed, law represents a quest for probabilities rather than absolute certainties and the various principles and rules that are to be extracted from decided cases cannot in all circumstances be mechanically and inflexibly applied by logical methods alone, without consideration of the consequences. The rules laid down in prior cases must be subjected to scrutiny as the occasion demands, with an eye to whether the law is serving its true function—the achievement of justice according to law. A rule followed in one case may thus have untoward consequences if extended by a process of logical deduction to a different set of facts. The propriety of such an extension must be judged, not alone by reference to principles of logic but by evaluation of considerations of fairness and of the public welfare.

The danger of pursuing general maxims to their logical conclusions, without regard to the practical consequences, finds illustration in the case of *Hynes v. New York Central R. R. Co.*[55] In that case the plaintiff's intestate, a lad of 16, had been swimming with two companions on the Bronx side of the Harlem River, a navigable stream. Along that side of the river was the right of way of the defendant, the New York Central Railroad, which operated its trains there by high tension wires strung on poles and crossarms. Projecting from the defendant's bulkhead above the waters of the river, was a plank or springboard from which boys of the neighborhood used to dive. This springboard projected beyond the line of the defendant's property, and out over the water, for a distance of some seven feet. Plaintiff's intestate climbed on the springboard, intending to leap into the water. As he stood there, poised for his dive, a crossarm with electric wires fell from the defendant's pole, and the wires struck the boy and flung him from the shattered board to his death.

The courts below held that the springboard, though projecting beyond the line of the defendant's property, was nevertheless to be re-

55. 231 N.Y. 229, 131 N.E. 898 (1921).

garded as a fixture annexed to, and therefore part of, the defendant's property, and that the boy was consequently a trespasser on the defendant's land. In that light their conclusion was that the defendant owed no duty to the boy except to refrain from causing him wilful or wanton injury.

The Court of Appeals divided, four to three, on the propriety of the application and extension of the concept of trespass to the facts of this case.

The majority of the Court, in an opinion by Judge Cardozo, emphasized that the dominant consideration was that as a bather lawfully engaged in the use of a public waterway, the boy was entitled to reasonable protection against destruction by the defendant's wires, and that though in a technical sense he was an intruder on the defendant's land, realists would more readily say that he was "still on public waters in the exercise of public rights."[56] Analyzing the factual situation, the Court observed that the lad's "every act . . . from his first plunge into the river until the moment of his death, was in the enjoyment of the public waters, and under cover of the protection which his presence in those waters gave him," and that "the use of the springboard was not an abandonment of his rights as bather" but "was a mere by-play, an incident, subordinate and ancillary to the execution of his primary purpose, the enjoyment of the highways."[57] The Court further observed that the use of the springboard was not the cause of the disaster, and that the boy would have met his death even if he had been below the springboard or beside it. In short, as Judge Cardozo analyzed the case, there was no moment when the lad was beyond the pale of the duty owed by the defendant to persons lawfully using the public water way.

In determining that the concept of trespass had to yield in that case to the competing principle governing the public's rights in the use of the public waterways, the Court frankly acknowledged that it was giving effect to considerations of policy and justice, as well as to those of analogy.

Growth of the law is indeed made possible only by viewing decisional rules laid down in the past, not as hard and fast formulas but as flexible standards, which the courts must evaluate in terms of underlying principles and consequences, and this may require modification or adjustment as it is sought to apply them to different shadings of fact that may arise from time to time.

Our Court was thus confronted some years ago with the problem

56. *Id.* at 236, 131 N.E. at 900.
57. *Id.* at 234, 131 N.E. at 899.

of applying the ancient rules and precedents governing the essential elements of a covenant running with the land, to a present-day situation.[58] Specifically, the issue was whether a covenant by a grantee of a lot in a new residential development to contribute a fixed sum each year to the maintenance of roads, parks, beaches and sewers in the development, was a covenant that ran with the land so as to be enforceable against a subsequent purchaser. One of the essentials of such a covenant, as declared by precedent, was that it be one "touching" or "concerning" the land, and there were some decisions that, as a general rule, a covenant to pay a sum of money was a personal affirmative covenant which did not "touch" or "concern" the land. Some exceptions had, however, been recognized to that general rule, and our analysis of the decisions yielded the principle that the covenant must be one which in purpose and effect substantially affects the legal rights flowing from the ownership of the land and connected with the land. The question, in short, was one of substance rather than form, and we concluded that, though there was no precedent squarely in point, the covenant in that case was one that touched or concerned the land, since in substance it directly affected the easement or right of common enjoyment that the property owner would have with others in the roads, parks, beaches and sewers of the development, to the maintenance of which he had convenanted to contribute.

A further problem in the same case was whether the covenant was enforceable upon the suit of a corporate association of the various property owners, which was the assignee of the benefit of the covenant but did not have title to any property in the development and had no interest of its own in the enforcement of the covenant. It was urged that the requisite privity of estate was lacking as between the parties, and as a matter of precedent no right to enforce even a restrictive covenant had been previously sustained in this State where the plaintiff did not own property which would benefit by such enforcement. Here again, however, looking to substance rather than form, we sustained the plaintiff's right of action on the theory that it was merely the instrumentality through which the property owners, who did have a sufficient interest to enforce the covenant, were acting for the advancement of their common interests. We observed that "only blind adherence to an ancient formula devised to meet entirely different conditions" could constrain us to the contrary conclusion.

In the application of precedent, it is of primary importance to determine what it is that is vested with authoritative force. It has been aptly observed that "A judicial opinion, like evidence, is only binding

58. Neponsit Property Owner's Ass'n, Inc. v. Emigrant Industrial Savings Bank, 278 N.Y. 248, 15 N.E. 2d 793 (1938).

so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance."[59] Our Court has accordingly declared that "in applying cases which have been decided, what may have been said in an opinion should be confined to and limited by the facts of the case" in which "the expressions relied upon were made, and should not be extended to cases where the facts are essentially different."[60]

It is indeed vital for the courts to guard against "the notion that because a principle has been formulated as the *ratio decidendi* of a given problem, it is therefore to be applied as a solvent of other problems, regardless of consequences, regardless of deflecting factors, inflexibly and automatically, in all its pristine generality."[61]

The doctrine of adherence to precedent, in short, does not demand merely mechanical application of principles, rules or attitudes enunciated in the past. It has not prevented the New York courts from approaching present-day problems in a spirit of fairness and responsiveness to current needs.[62] It has not prevented them from breathing new content into common law theories of liability as experience has broadened their outlook and given them deeper insight into the underlying problems. It has, in general, not prevented them from striving to give full effect to the true function of the common law as a stable regulatory force, but at the same time, as "a living organism which grows and moves in response to the larger and fuller development of the nation."[63]

59. See Colonial City Traction Co. v. Kingston City R. Co., 154 N.Y. 493, 495, 48 N.E. 900, 901 (1897).

60. Crane v. Bennett, 177 N.Y. 106, 112, 69 N.E. 274, 276 (1904).

61. See Cardozo, *Jurisprudence*, N.Y. St. Bar Ass'n Rep. 263, 291 (1932).

62. See Ultramares Corp. v. Touche *et al.*, 255 N.Y. 170, 180, 181, 174 N.E. 441, 445 (1931).

63. See Oppenheim v. Kridel, 236 N.Y. 156, 164, 140 N.E. 227, 230 (1923).