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## THE RULE OF PRECEDENTS

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*Stare decisis et non quieta movere*, which may be freely translated, to abide by precedents and disturb not settled principles, is a doctrine that has been variously referred to as "the rule of precedents;" "the sheet-anchor of our jurisprudence;" "a will o' the wisp;" "a moral obligation;" and "the bogie man striding across the road of progress." It is a characteristic principle of Anglo-American law, which fundamentally distinguishes it from the legal systems of Continental Europe, none of which has ever adopted the maxim.<sup>1</sup> While knowledge of the precise date and origin of this far-reaching principle is as hazy as the history of the beginning of the Hanseatic League, the time may not be far distant when some scholar will solve the problem. We know that there was no common law at the time of the Norman Conquest, for in *Leges Henrici Primi*, which was written about the year 1118, or roughly half a century after the battle of Hastings, the compiler mentions three main contemporaneous bodies of custom, the Mercian law, the Dane law and the West Saxon law.

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<sup>1</sup> Bisschopp, *Modern Roman-Dutch Law* (1926) 42 L. Q. REV. 237, 238. A few civil law jurisdictions outside of Continental Europe have borrowed the English system of judicial precedents including Scotland, Louisiana and Quebec. Walton, *Relationship of Law of France to Law of Scotland* (1902) 14 JURD. REV. 17.

The subsequently established King's Courts, destined to survive numerous local courts, by a process of selection, adaptation and extension, procured a coalescing of these "*coutumes*" into a nation-wide system and substituted judiciary law for customary law; which was accomplished so skilfully that the historic fiction arose that the common law was of immemorial antiquity, and Magna Carta's phrase "the law of the land" in the 39th chapter of that memorable document, evidences the thoroughness with which the amalgamation of the "*coutumes*" had been effected in a comparatively short period of time. Even then there seems to have been no recognized doctrine of judicial precedents, for the famous case of the Prior of Lewes against the Bishop of Ely<sup>2</sup> decided in the year 1304, often erroneously stated to be a case wherein a precedent was cited, merely contains an assertion by counsel (Herle) that the judgment to be given would thereafter be an authority. At the same time it must be recognized that the writings of Bracton at a time prior to the date of Herle's argument and subsequent to the signing of Magna Carta contain some 400 citations of judicial decisions. Manifestly the discovery of the origin, shaping and formulation of the maxim *Stare decisis* is of more than antiquarian interest, for the indices of text-books, digests and reports often reveal a confusion of thought as to its nature, as for example, when they index an illustration of the doctrine of "the law of the case" or an application of *res judicata* under the heading, "*Stare decisis*, etc." It goes without saying that those who agree with the judge who looks on the rule as a sheet-anchor as well as those who despairingly incline to the opinion of the judge who regards it as a will o' the wisp, would gladly welcome such a valuable aid towards the composing of their differences. To many people the history of the rule seems to be that of Topsy, it "just grewed."

There seems to be a recent tendency in a few jurisdictions for courts of last resort to enlarge the working of the maxim to *stare deciso*, and to cite the famous case of *Beamish v. Beamish*<sup>3</sup> as authority for the proposition that a decision of an ap-

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<sup>2</sup> Y. B. 32-33 Edw. I, 30-34 (1304).

<sup>3</sup> 9 H. L. Cas. 274, 338, 344, 349, 353 (1859).

pellate court is of binding authority upon itself as well as upon all inferior courts. It is most earnestly submitted that so far as the feature of self-limitation is concerned such a principle has no place in American jurisdictions. The rule in the House of Lords derives its sanction from a peculiarity of the British Constitution whereby law once declared by the House of Lords can be changed by Act of Parliament alone. It does not apply to the Privy Council<sup>4</sup>. Furthermore the rule is not so inflexible as it sounds, for it does not apply to cases where a statute has been overlooked,<sup>5</sup> nor does it prevent taking cognizance of changes in public policy; so that we see that to some extent, at least, *non qujeta movere* is still of weight in the House of Lords and the maxim *cessante ratione legis, cessat ipsa lex*, has not been discarded entirely. This latter fact is clearly shown by the case of *Nordenfeldt v. Maxim Nordenfeldt Guns & Ammunition Co.*,<sup>6</sup> which changed the pre-existing rule about contracts in restraint of trade so far as to approve of a contract in world-wide restraint. A glance at the opinions of Lords Herschell, Watson and Ashbourne, shows that even a series of decisions based upon grounds of public policy does not have binding authority where changed conditions require harmonious re-adjustment. Courts deal with men as they are and conditions as they exist and as a matter of justice, fitness and expediency, and sometimes of necessity judicial policies change with change of customs. Recognition of change of environmental facts is a potent factor in the adjustment of legal principles to modern conditions. For instance, Chief Justice Taney's revision of the juridical definition of navigable waters<sup>7</sup> was in great part based upon recognition of the changes effected by the invention and development of mechanical propulsion of ships making it possible for vessels to be independent of wind and tide and enabling them to breast powerful currents. Sometimes a change of manners and customs occasions conditions wherein justice and convenience

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<sup>4</sup> *Kielley v. Carson*, 4 Moore P. C. 63, 91 (1842); *Read v. Bishop of London*, [1892] A. C. 644, 654.

<sup>5</sup> *Tramway Co. v. County Council*, [1898] A. C. 375, 380.

<sup>6</sup> [1894] A. C. 535, 547, 553, 558.

<sup>7</sup> *The Genessee Chief v. Fitzhugh*, 12 How. 443 (U. S. 1852).

require that exceptions be engrafted on a general rule of law. In such a case courts often recognize the alterations effected by social changes and give effect to them; as in the leading case of *Corbett v. Poelnitz*,<sup>8</sup> where the court decided that under the then novel device of separation agreements, a married woman's incapacity to contract would not be available to her as a defense to an action of contract where she was living apart from her husband under an agreement of separation. This recognition of social change is particularly noticeable in the law of status, which was practically revolutionized in a generation.<sup>9</sup> In this connection it is surmised that much of the difficulty and confusion which arose in the early development of the law of employer and employee might have been avoided by a prompt recognition of the environmental social and industrial changes occasioned by the inauguration of an industrial era, instead of trying to pour new wine into old bottles by treating the new status as though it were that of master and servant.

There is now a marked tendency in a school of writers on legal questions to lay especial stress upon "economic law," and other social phenomena. One recent critic asserting that a distinguished court had shown "ignorance of economic law,"—a rather ambiguous statement if wrested from its context, for, of course, what was meant was a supposed failure to take judicial notice of a matter of economic fact, or what used to be known as a principle of political economy. While undoubtedly the courts of today are willing to take cognizance of well attested facts, they are mindful of the risk of adopting ephemeral theories of economics or sociology, and many observers will not agree with the opinion of the brilliant writer on social psychology that the law is fossiliferous. This open-mindedness in appellate courts has been especially noticeable in dealing with questions of constitutional law, an "observational science" in which courts study the logic of events. Thus the case of *People v. Williams*<sup>10</sup> in which a unanimous court declared unconstitutional a statute pro-

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<sup>8</sup> 1 Durn. & E. 5 (Eng. 1785).

<sup>9</sup> F. G. McKean, Jr., *A Useful Maxim* (1926) 4 N. CAR. L. REV. 118.

<sup>10</sup> 189 N. Y. 131, 81 N. E. 141 (1907).

hibiting night work for women as a denial to women of equal rights with men, was overruled by the decision of *People v. Charles Schweinler Press*<sup>11</sup> on consideration of facts found by the State legislature. No less willingness to change a decision predicated upon assumptions as to facts was shown by the Supreme Court of the United States when it modified the doctrine of *Lochner v. New York*<sup>12</sup> in the leading case of *Bunting v. Oregon*,<sup>13</sup> which affirmed the constitutionality of an hours of labor statute. This willingness of our American courts of last resort to recognize change of environmental facts has been so marked throughout the course of their history that a great lawyer and famous teacher and text-book writer is said to have remarked that "constitutional law is not a system of law." The adaptability of American constitutions to modern conditions has been finely phrased by the Supreme Court of Wisconsin in the following language:

"Where there is no express Constitutional command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of the Constitution's adoption must have their due weight; but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of construction and interpretation."<sup>14</sup>

The vexed question whether judges declare law or make it, reminds the average lawyer of the ancient allegory of the shield which was gold on one side and silver on the other. Those who contend that judges make and do not declare law will concede that the opposite theory has been a potent influence in legal development manifesting itself, for instance, in the oft-quoted maxim *Jus dicere et non jus dare*, and frequently revealed by the declarations of judges that they will travel *super antiquas vias*.

<sup>11</sup> 214 N. Y. 395, 108 N. E. 639 (1915).

<sup>12</sup> 198 U. S. 45, 64 (1905).

<sup>13</sup> 243 U. S. 426 (1917).

<sup>14</sup> *Borgnis v. Falk Co.*, 147 Wis. 327, 349, 350, 133 N. W. 209, 215, 216 (1911).

On the other hand even extreme adherents of the declaratory school must admit that decisions void of precedent often make law. A persistent factor at all times in the growth of law has been the feeling that it is something to be arrived at by discovery and research. Even the compiler of the Code of Hammurabi attributed his work to a revelation from the god Shamash. Mr. Jenks in his fascinating work, "Law and Politics in the Middle Ages,"<sup>15</sup> cites a passage in Schmid's "*Gesetze der Angelsachsen*"<sup>16</sup> showing how the question whether the children of a deceased child should have a share in the estate of their deceased grandfather together with their uncles was settled under Otto the Great. It was felt that neither enactment nor custom covered the case, that ordinary human agencies were inadequate to solve the problem, and therefore the ruler, as chief magistrate, ordered a battle by champions.<sup>17</sup> In common law jurisdictions the judge in deciding a case does not ask himself what rule he shall formulate but what existing rules and principles are applicable to the problem placed before him for solution. If his is a court of first instance, or an intermediate tribunal, he seeks first for the most recent case on all fours which has been decided by the appellate court of his jurisdiction, and if there be found a pertinent precedent therein, it is binding upon him.<sup>18</sup> He is thus restricted because appellate courts exist to ensure uniformity of decision in their respective jurisdictions. If there be no precedent, it may be deemed that such fact is a conclusive answer to a contention set forth by a party litigant;<sup>19</sup> but ordinarily, in such a case, some established maxim or principle of the local system will be followed or a solution borrowed from some other jurisdic-

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<sup>15</sup> At p. 9.

<sup>16</sup> At p. 500.

<sup>17</sup> A curious parallel to this appeal to a court of arms is the way in which the question of Secession with its background of South Carolina Nullification and the Hartford Convention, and of numerous arguments adduced in its favor East of the Hudson as well as South of the Potomac, was definitely settled by the conflict which waged from the bombardment of Fort Sumter to the surrender at Appomatox.

<sup>18</sup> *Hill v. Railroad*, 143 N. C. 539, 588, 55 S. E. 854, 871 (1906); *Caples v. State*, 3 Okla. Cr. 72, 104 Pac. 493 (1909); *Bernard v. Monongahela Natural Gas Co.*, 216 Pa. 362, 65 Atl. 801 (1907).

<sup>19</sup> *Mirehouse v. Rennell*, 8 Bing. 490, 542 (Eng. 1832).

tion or legal system, care being taken to ensure that the selected material be such as harmonizes with the general law, maxims, customs and usages of the jurisdiction into which it is introduced. If a prior decision of his own court be cited, the obligation to follow it varies according to circumstances. For example, an uncontested proceeding, consent decree or an *ex parte* action does not carry much weight, while on the other hand a well-contested suit, especially a test case in which real and substantial conflicts of interests have been disposed of, (particularly where the community has acquiesced in the results and governed itself accordingly), should not be overruled except for very cogent reasons, such as oversight of a statute or failure to observe some requirement of constitutional law. As it is difficult to change a rule of property, except by legislative enactment, without unsettling titles, the safest course would be for a lower court, even though it disapprove of its doctrine, to abide by the rule it has previously followed and leave its alteration to the highest appellate court of the jurisdiction. This for a two-fold reason: first, to settle the matter in the Federal courts which follow a "rule of property" as established by the highest court of a state even on common law principles;<sup>20</sup> and secondly to have the comforting feeling that if it clearly appears that the rule is harmful and unjust or opposed to good business practice it will be reversed, and such reversal take effect not only in the district from which the appeal shall have been taken, but throughout the entire state. When all is said and done, even an appellate court is very reluctant to change a rule of property.<sup>21</sup> While not within the purview of the 14th Amendment of the United States Constitution,<sup>22</sup> the tendency is to change only such judicial rules of property as would be constitutional if enacted by a legislature with retrospective effect; thus expediency no less than the moral force of the principle *stare decisis* inclines courts to abide by

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<sup>20</sup> *Chicago v. Robbins*, 2 Black 418 (U. S. 1863).

<sup>21</sup> *Board of Commissioners v. Allman*, 142 Ind. 573, 42 N. E. 206 (1895); *Kirby v. Boyette*, 118 N. C. 244, 24 S. E. 18 (1896); *Struthers v. Railway*, 87 Pa. 282 (1878); *Reed v. Geddes*, 287 Pa. 274, 135 Atl. 232 (1926); *McInnis v. Lyman*, 62 Wis. 191, 22 N. W. 405 (1885); *State v. Sutherland*, 166 Wis. 511, 166 N. W. 14 (1918); *Read v. Bishop of London*, *supra* note 4.

<sup>22</sup> *O'Niell v. Northern Colo. Irrigation Co.*, 242 U. S. 20 (1916).

precedent in such cases. Of course changes affecting contingent interests and expectancies and which do not disturb vested rights will be unhesitatingly corrected. In addition, courts will overrule palpably unreasonable or mischievous precedents regardless of the question of "rules of property."<sup>23</sup> It is hardly necessary to labor the point that precedents and rules of construction have considerably less weight in the interpretation of wills than in the construction of other writings such as deeds and leases which owing to statutory requirements or customary usage are more uniform.<sup>24</sup> Sir William Jones's frequently quoted jest that "no will has a brother," has been turned to earnest by decisions that the same words may express different intentions according to context or attending circumstances.<sup>25</sup> Some scriveners try to avoid this difficulty by inserting an explanatory clause, "Hereby intending, etc."

Another wide class of cases in which courts hesitate to overrule precedents arises where contracts have been made in reliance upon a decision. While a change of decision in such a case does not deprive of property without due process of law within the meaning of the 14th Amendment of the Constitution of the United States,<sup>26</sup> nor constitute an impairment of a contract within the accepted interpretations of Section 10, Article I, of the Federal Constitution;<sup>27</sup> still a court generally deems it advisable to abide by a decision upon the faith of which solemn agreements have been entered into. It has even been held in some jurisdictions that a state court has no power to impair the obligations of an existing contract by a change of decision;<sup>28</sup> thus

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<sup>23</sup> *Boon v. Bowers*, 30 Miss. 246 (1855); *Rumsey v. Railroad Co.*, 133 N. Y. 79, 30 N. E. 654 (1892); *Ray v. Natural Gas Co.*, 138 Pa. 576, 20 Atl. 1065 (1891).

<sup>24</sup> *Colton v. Colton*, 127 U. S. 300 (1888); *Bergman v. Arnhold*, 242 Ill. 218, 89 N. E. 1000 (1909); *In re Griffith's Will*, 172 Wis. 630, 179 N. W. 768 (1920).

<sup>25</sup> *Fidelity Trust Co. v. Bobloski*, 228 Pa. 52, 76 Atl. 720 (1910).

<sup>26</sup> *Central Land Co. v. Laidley*, 159 U. S. 103 (1894); *Milwaukee Electric Light Co. v. Wisconsin*, 252 U. S. 100 (1900).

<sup>27</sup> *Cross Lake Club v. Louisiana*, 224 U. S. 632 (1912); *Railroad v. City of Cleveland*, 235 U. S. 50 (1914); *Tidal Oil Co. v. Flanagan*, 263 U. S. 444 (1924).

<sup>28</sup> *Harmon v. Auditor*, 123 Ill. 122, 13 N. E. 161 (1887); *Haskett v. Maxey*, 134 Ind. 182, 33 N. E. 358 (1893).

assimilating rules of decision to statutes; but in general, the question of overruling precedents in contract as in property law, is pre-eminently a matter for the exercise of sound judicial discretion. It follows from these considerations that the principle of *stare decisis* has obligatory force in the case of a rule which has been effective for many years and upon whose basis commercial business has been transacted.<sup>29</sup>

Precedents are generally followed unless the injury done by them is so great as to demand their reversal;<sup>30</sup> and provided also that greater wrong and injury be not inflicted by a change of decision.<sup>31</sup> If the balance of public or social convenience requires that an erroneous series of precedents be given binding authority, the principle *communis error facit jus* becomes effective,<sup>32</sup> and as "the law will rather suffer a particular mischief than a general inconvenience,"<sup>33</sup> the merits of a particular case in which the question of following or reversing a series of precedents may arise, would not outweigh considerations of public policy in forgetfulness of the danger that hard cases have a tendency to make bad law. Courts have no power to abolish any established principle;<sup>34</sup> such as the unenforceability of a contract to tempt a man to transgress the law,<sup>35</sup> and the duty to utilize the delegated powers conferred by that "perennial fountain of justice"<sup>36</sup> and source of much of the law of contracts, quasi-contracts, torts and quasi-torts—the *Statute of Westminster II*. Even the tremendous prestige of Lord Mansfield could not prevail to the extent of abolishing the doctrine of consideration in

<sup>29</sup> *National Bank v. Railway Co.*, 157 Cal. 573, 108 Pac. 676 (1910).

<sup>30</sup> *Paul v. Davis*, 100 Ind. 422 (1884); *Hill v. Railroad*, 143 N. C. 539, 55 S. E. 854 (1906); *Kelley v. Rhodes*, 7 Wyo. 237, 51 Pac. 593 (1898).

<sup>31</sup> *Calhoun Mining Co. v. Ajax Mining Co.*, 27 Colo. 1, 59 Pac. 607 (1900); *McEvoy v. City of Saulte Ste. Marie*, 136 Mich. 172, 98 N. W. 1006 (1904); *City of Wahoo v. Nethaway*, 73 Neb. 54, 102 N. W. 86 (1905).

<sup>32</sup> *Kirby v. Boyette*, 118 N. C. 244, 24 S. E. 18 (1896); *Callender v. Life Insurance Co.*, 23 Pa. 471 (1854).

<sup>33</sup> *Cox v. Rolt*, 2 Wils. K. B. 253 (Eng. 1764).

<sup>34</sup> *Aud v. Magruder*, 10 Cal. 282 (1858); *Paul v. Davis*, 100 Ind. 422 (1884); *Francis v. Telegraph Co.*, 58 Minn. 252, 59 N. W. 1078 (1894); DICEY, *LAW & OPINION IN ENGLAND* (1914) 488.

<sup>35</sup> *Collins v. Blantern*, 2 Wils. K. B. 341, 349 (Eng. 1767).

<sup>36</sup> *Ames, Law and Morals*, (1908) 22 HARV. L. REV. 97, 107.

a branch of the law of contracts. Where, however, the tooth of time and the buffetings of experience have proved the unreliability of a rule, it should be abolished, as in the case of the misleading fiction that every man is presumed to know the law, founded in great part upon repeated references to an overruled argument of counsel on the losing part of a reported case.<sup>37</sup> But after all, rules of law, like maxims, are a species of legal short-hand (to borrow Sir John Salmond's illuminating phrase), and even when couched in terms of the absolute are mostly relative. When a rule satisfies the feeling of legal right (the Rechtsgefühl of Dr. von Jhering), courts do not delve deeper. Where, however, a court is not satisfied with the apparent doctrine of a rule seemingly in point, it endeavors to shake off the kind of hypnosis induced by catch words and rhythmic phrases intended to be the equivalent of approved statements of legal doctrine, and which sometimes appear in syllabus or digest and text-book, find a place in a plausible brief appeal to a busy trial court and run their course until experience demands their re-statement. A revision is bound to come sooner or later, in such cases, for even a long series of decisions does not always cause an unsound doctrine to stand.<sup>38</sup> Again, a decision concededly correct in its results is not, for that reason alone, to be taken as a complete statement of an abstract proposition, without limitation or restriction, when applied to a case differing in its state of facts.<sup>39</sup> Nor is a case necessarily binding or persuasive authority for a proposition which appears to follow logically from it.<sup>40</sup>

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<sup>37</sup> F. G. McKean, Jr., *The Presumption of Legal Knowledge* (1927) 12 ST. LOUIS L. REV. 96. The above-mentioned presumption, often mistaken as an equivalent and interchangeable phrase for the maxim *ignorantia legis neminem excusat*, has been unequivocally rejected in the land of its birth and in at least two American jurisdictions.

<sup>38</sup> *Barden v. Railroad*, 154 U. S. 288, 322 (1894); *Mason v. Nelson Cotton Co.*, 148 N. C. 492, 62 S. E. 625 (1908); *Rumsey v. Railroad*, 133 N. Y. 79, 30 N. E. 654 (1892); *Leavitt v. Morrow*, 6 Ohio 71 (1856); POLLOCK, *THE GENIUS OF THE COMMON LAW* (1912) 113; LIEBER, *HERMANEUTICS* (Hammond's ed. 1880) 209.

<sup>39</sup> *Holcombe v. Bonnell*, 32 Mich. 6 (1875); *Quinn v. Leathem* [1901] A. C. 495.

<sup>40</sup> *Quinn v. Leathem*, *supra* note 39; HOLMES, *THE COMMON LAW* (1881) 36.

Many reams have been written about that lineal descendant of *Swift v. Tyson*, the much discussed case of *Gelpcke v. Dubuque*.<sup>41</sup> As finally explained in the case of *Tidal Oil Co. v. Flanagan*,<sup>42</sup> the doctrine seems to amount to this: That where municipal or county bonds or some other form of contracts have been declared valid by the Supreme Court of their state, prior to their issue, and such validity has been denied by the same court after their issue or making, Federal courts, where they have jurisdiction to decide as to the validity of such securities under the diversity of citizenship clause of the United States Constitution, will feel themselves entirely free to rule on the subject; but where the question arises on an appeal from the state courts to the United State Supreme Court, the last decision of the highest state court will be followed.

The general subject of torts reminds one of Chief Justice Willes' reported *dictum* that the common-law consists of statutes worn out by time for, as pointed out by many writers, the greater part of the law on the subject has developed under the sanction of the *Statute of Westminster II*.<sup>43</sup> The topic is a complex and intricate subject upon which it is difficult to generalize. First and foremost, however, it may be conceded that no precedent or series of precedents is binding where fundamental principles have been ignored or overlooked. Next there is the consideration that the law leans against the invention or creation of rights of action, opposed to which is the maxim *ubi jus ibi remedium*.<sup>44</sup> There is probably no branch of law which is more affected by environmental facts than that which has to do with private wrongs. Social, economic and industrial changes and conditions, the public policy and felt necessities of the time all play their part. Even change of public opinion has a recognized influence. As no man has a vested right to do wrong, precedents *per se* have less weight in the law of torts than in that of con-

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<sup>41</sup> 1 Wall. 175 (U. S. 1864). For a most interesting discussion, see THAYER, LEGAL ESSAYS (1923 ed.) 150, 151.

<sup>42</sup> 263 U. S. 444 (1924).

<sup>43</sup> (1284) WESTMINSTER II (13 Edw. I), c. 24.

<sup>44</sup> *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R. 9 Ex. 218 (1874).

tracts and property. New applications of tort principles constantly arise, and commentators are kept busy revising categories and seeking names for newly discovered species of torts. Many varieties of torts have received their first recognition within the memory of people now living. *Lumley v. Gye*,<sup>45</sup> establishing that procurement of a breach of contract constitutes a tort; *Western Counties Manure Co., v. The Lawes Chemical Manure Co.*,<sup>46</sup> formulating a rule that disparagement of goods is a tort; *Zielitzki v. Obadisk*,<sup>47</sup> laying down the rule that negligent dissemination of falsehood resulting in nervous injury is actionable; are a few of many instances of recognition of torts not to be found in the older books of the law. Much of the subject consists of conclusions of fact termed presumptions of law for the reason that they are not within the purview of a jury. Numerous acts which, in times past, have been considered phases of the principle *damnum absque injuria* have been subsequently recognized as torts in the light of newly discovered facts or upon new analysis of the subject-matter. Thus engaging in business for the sole purpose of wrecking a man's means of livelihood without justification or excuse is now recognized as a tort.<sup>48</sup> The rule in *Acton v. Blundell*,<sup>49</sup> which still has an unsettling influence in many jurisdictions, that interference with waters in subterranean courses is *damnum absque injuria*, has been discarded in the case of *Collins v. Chartiers Gas Co.*,<sup>50</sup> wherein the Supreme Court of Pennsylvania speaking through Mr. Justice Mitchell, took judicial notice of the advance of geological knowledge of subterranean conditions making it possible to avoid disturbing a neighbor's property values, and made interference with such rights a tort, saying, *inter alia*, "If the boundaries of knowledge have been so enlarged as to make an end of the reason, then, *cessante ratione cessat ipse lex*." Among

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<sup>45</sup> 2 El. & Bl. 216 (Eng. 1853).

<sup>46</sup> *Supra* note 44.

<sup>47</sup> [1921] 3 West. Wkly. 229 (Can. 1921).

<sup>48</sup> *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946 (1909).

<sup>49</sup> 12 M. & W. 324, 353 (Eng. 1843).

<sup>50</sup> 131 Pa. 143, 159, 18 Atl. 1012, 1013 (1890).

other classes of torts which may be expected to obtain judicial recognition in the future are acts once deemed harmless but since found to be injurious to public health and ascertained to be a cause of personal injury. Some anomalous phases of the doctrine of imputed negligence may be changed in the direction of abolishing legal responsibility without personal fault, as has already been done in Wisconsin where, in the case of *Chase v. American Cartage Co.*,<sup>51</sup> it was decided that a rule of imputed contributory negligence could lawfully be changed by a court of last resort. Tort liability without fault, more often of statutory rather than common law origin, has been frequently dealt with by commentators as quasi-delict or an anomaly. Generally speaking it arises in cases where there is ownership, possession or control of an agency with potentialities for doing harm. As a matter of business practice such liability is customarily guarded against by insurance. Prior to the era of machinery, it had so narrow a scope that instances of its application could be enumerated in a very short paragraph. At the time of the first enactment of Workmen's Compensation Acts, many members of the legal profession were doubtful as to the constitutionality and fairness of such legislation, but these doubts have been dispelled. The case of *Jensen v. Southern Pacific Co.*,<sup>52</sup> in which the judiciary of New York unequivocally overruled a prior decision that such legislation was unconstitutional, is a handsome illustration of the alacrity with which the courts of today will admit and correct judicial error. "New occasions teach new duties," which constantly lead to a modification of ancient formulas in the law of torts even where such formulas have been recognized in a flood of precedents. Revision of theory also leads to unhesitating reversal of long series of decisions, as in the case of *Citizens Life Insurance Co., v. Brown*<sup>53</sup> which discountenanced the theory that malice can not be applied to corporations and therefore that they cannot be guilty of libel, and held that libels published in the course of his employment by an officer or agent

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<sup>51</sup> 176 Wis. 235, 186 N. W. 598 (1922).

<sup>52</sup> 215 N. Y. 514, 109 N. E. 600 (1915).

<sup>53</sup> [1904] A. C. 423 (1904).

of a corporation are answerable for by the company on the principle of agency.

There is little that is stereotyped about rascality, consequently new forms of old crimes and new crimes arise from generation to generation. Except where checked by statute or fundamental law, courts of common law frequently avail themselves of categories within which to include acts which are opposed to current ethical standards. "All such crimes as especially affect public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they injuriously affect the public policy and economy."<sup>54</sup> The principle embodied in the phrase *contra bonos mores* has been far-reaching in the development of criminal law and was undoubtedly a potent factor in impelling the court in the case of *Commonwealth v. Randolph*<sup>55</sup> to decide that solicitation to commit murder was a crime, although such decision was absolutely devoid of local precedent. There is no vested right in erroneous precedents in criminal law<sup>56</sup> and it is submitted that in cases which are *contra bonos mores* adherence to settled principles is much more important than a perfunctory following of precedent. The *ratio legis* of crimes *mala in se*, to use a phrase which it has been a passing fad for some writers to ridicule, is, it is conceived, of almost overwhelming importance, and again, principle should not be overridden by precedent. On the other hand, if these views be correct, in dealing with offences merely *mala prohibita*, the rule would be to adhere more closely to precedent, for *stare decisis* should protect those whose alleged infractions of statutes which do not involve moral turpitude, and which have previously been solemnly decided to be lawful. It is difficult to agree with the view sometimes taken that an erroneous interpretation of a criminal statute upon a matter involving moral turpitude, which error furnishes a loophole opposed to the public interest, should be adhered to as a "rule of

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<sup>54</sup> *Commonwealth v. McHale*, 97 Pa. 397, 410 (1881).

<sup>55</sup> 146 Pa. 83, 23 Atl. 388 (1892).

<sup>56</sup> *State v. Mathews*, 143 Tenn. 463, 226 S. W. 203 (1920). *Contra: People v. Tomkins*, 186 N. Y. 413, 79 N. E. 326 (1906).

liberty," and that the principle *stare decisis* supports such a position<sup>57</sup>—here as in many other interpretations of the function of the rule of precedents, the concluding phrase *et non quieta movere* seems to have been lost sight of. Leaving aside the question of the constitutionality of such a stand, which results in nullification by admitted misconstruction of valid legislation, the policy of such an attitude seems very doubtful, although the present writer has observed that at least one jurist has expressed approval of the case just referred to and, in addition, such approval seems to be supported by the views of some writers to whom the retrospective character of a changed decision looms large as a Brocken shadow. Retrospective law as such, even retrospective statutory law, is far from being unknown to American jurisprudence;<sup>58</sup> and assuredly there would be a marked tendency for judiciary law to block, were courts to yield unreservedly to the views of writers who object to tribunals correcting their decisions wherever such correction would be retrospective in its effect. It has been said by a number of such critics that in such cases correction should be left to the legislature, but it is submitted that it would be irksome and unreasonable, if not impossible, to expect that body to examine and correct errors in judicial opinions; at the same time, there is this much to be urged in favor of the objections to judiciary correction of prior error that if the correction of a legal flaw, while highly desirable, would be likely to have a disturbing and harmful effect, there is enough public spirit in bar associations to assure that the matter would be brought to the attention of

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<sup>57</sup> *People v. Tomkins*, *supra* note 56.

<sup>58</sup> *Calder v. Bull*, 3 Dall. 386 (U. S. 1798); *Railroad v. Nesbit*, 10 How. 395, 401 (U. S. 1850); *Satterlee v. Matthewson*, 27 U. S. 380, 412 (1882); *Gross v. Mortgage Co.*, 108 U. S. 477 (1883); *Elwell v. Daggs*, 108 U. S. 143 (1883); *Campbell v. Holt*, 115 U. S. 620 (1885); *League v. Texas*, 184 U. S. 156 (1901); *Luria v. United States*, 231 U. S. 9, 26 (1913); *Brushaber v. Union Pac. R. R.*, 240 U. S. 1 (1916); *Bankers Trust Co. v. Blodgett*, 260 U. S. 647 (1923); *Paul v. Davis*, 100 Ind. 422 (1884); *State v. New Orleans*, 32 La. Ann. 709 (1880); *Hewitt v. Wilcox*, 1 Metc. 154 (Mass. 1840); *Washburn v. Franklin*, 24 How. Pr. 515 (N. Y. 1861); *Brearley School v. Ward*, 201 N. Y. 358, 94 N. E. 1001 (1911); *Hopkins v. Lincoln Trust Co.*, 115 Misc. Rep. 257, 187 N. Y. Supp. 883 (1921); *Lewis v. McElvain*, 16 Ohio St. 347 (1847); *Marsh v. Nelson*, 101 Pa. 51 (1882); *Bates v. Callum*, 177 Pa. 633, 35 Atl. 861 (1896).

the proper legislative body for appropriate action. The maxim *stare decisis*, etc., does not appear to have very great weight in the law of evidence and procedure, as a general rule.<sup>59</sup> Comparatively little adjective law is of much antiquity, and a great deal of the learning on the subject which was extant when the United States Supreme Court commenced business by adopting the practice of the Courts of Kings Bench and Chancery, is as obsolete, for all practical purposes, as the flint-lock musket. "The dead hand of the common law rule of 1789 should no longer be applied," is the outspoken doctrine of *Rosen v. United States*,<sup>60</sup> in abolishing the old rule of the disqualification of witnesses convicted of crime; and, in general, "as all rules of procedure are intended to secure the administration of justice in an orderly manner, it does not seem reasonable that a rule of procedure should be observed where it is apparent that a strict adherence thereto will work injustice."<sup>61</sup> This means that courts will relax or modify a rule of procedure, or even of evidence in order to prevent injustice, no matter how long the practice may have been observed.<sup>62</sup> In other words they will treat such rules as directory rather than mandatory, adherence to first principles rather than blind following of precedents being the prime consideration. Furthermore, when the existence of a right is once established, even in a case without precedent, a court will adapt a suitable remedy wherever possible.<sup>63</sup> The modern trend is for courts to restate adjective law in accordance with the public policy of the time, the balance of public or social advantage, and in compliance with the teachings of experience "which is the life of the law." Rules of procedure are in a measure traffic regulations for the guidance of actual controversies, and the increasing pressure of social necessity requires reasonable order,

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<sup>59</sup> *Daniels v. State*, 2 Penn. 586, 48 Atl. 196 (Del. 1901); *Wetzstein v. Mining Co.*, 25 Mont. 135, 63 Pac. 1043 (1901); *Commonwealth v. Lehigh Valley R. R.*, 165 Pa. 162, 30 Atl. 836 (1895); *McCaffrey v. Schwartz*, 285 Pa. 561, 572, 132 Atl. 810, 814 (1926).

<sup>60</sup> 245 U. S. 467 (1918).

<sup>61</sup> *Ransom v. City of Pierre*, 101 Fed. 300, 310 (C. C. A. 8th, 1900).

<sup>62</sup> *Simkins v. White*, 43 W. Va. 125, 27 S. E. 361 (1897); *Baker v. Madison*, 62 Wis. 137, 22 N. W. 141 (1885).

<sup>63</sup> *Birkley v. Prograve*, 1 East 220 (Eng. 1801).

certainty and celerity in the conduct of legal business, consistent with adaptability to pressing needs and the demands of justice. This is predicated upon careful observance of the procedural requirements of court and legislature upon the part of parties litigant, for as President Coolidge has well expressed it, "justice delayed is justice denied;" consequently lax or slovenly pleading and disregard of prescribed methods or forms devised to facilitate litigation is a palpable wrong in the delay caused to those who may be awaiting an opportunity of having their day in court.

Many metaphors have been employed by legists in describing the development of law. "Legal chemistry," "legal architecture," and a "coral reef," are only a few. Taking it all in all, the history of our law has shown its unfolding to be "line upon line, line upon line; precept upon precept, precept upon precept; here a little, there a little." Perhaps no better statement of the conscious aim of the jurists of our legal system can be found, than by employing the neat phraseology of the great scholar and theologian whose published sayings show familiarity with the legal system of the great empire of which he was a citizen. "Prove all things, hold fast to that which is good."