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Recommended Citation
Max Radin, Trial of the Calf, 32 Cornell L. Rev. 137 (1946)
Available at: http://scholarship.law.cornell.edu/clr/vol32/iss2/2
THE TRAIL OF THE CALF*

MAX RADIN

Some fifty years ago, Sam Walter Foss, a minor New England poet—a sort of superior Edgar Guest—wrote a poem that has been much quoted. It is called "The Calf-Path." I should not have dared to cite it before this audience, if it were not for the fact that it has actually been incorporated in part in court-decisions and in other legal documents. It has, accordingly, been denatured and is no longer frivolous verse but nothing else than a fragment of law. It runs in part as follows:

THE CALF-PATH

One day through the primeval wood
A calf walked home as good calves should:

But made a trail all bent askew,
A crooked trail as all calves do.

*  *  *

The trail was taken up next day
By a lone dog that passed that way;

And then a wise bell-wether sheep
Pursued the trail o'er vale and steep,

*  *  *

And from that day, o'er hill and glade,
Through those old woods a path was made.

*This paper was presented at the Conference of Federal Judges of the Ninth Circuit, held at San Francisco, California, September 5, 1946.

1Foss, Sam Walter, Whiffs from Wild Meadows (1905).

A more conventionally literary expression of a very similar idea is that of William Cowper—Tirocinium or A Review of Schools, Ii. 251-256:

"The slaves of custom and established mode,
With packhorse constancy we keep the road,
Crooked or straight, through quags and thorny dells,
True to the jingling of our leader's bells.
To follow foolish precedents, and wink
With both our eyes, is easier than to think."

We may also compare Bacon, Francis, Essays (ed. A. S. West 1899) No. XI, Of Great Place, p. 29.

"In the Discharge of thy Place, set before thee the best Examples; . . . Reforme, therefore, without Braverie or Scandal of former Time and Persons; but yet set it downe to thy selfe, as well to create good Precedents as to follow them."

A general statement is to be found in Hobbes, Leviathan, ii, 26.
And many men wound in and out,
And dodged and turned and bent about,

And uttered words of righteous wrath
Because 'twas such a crooked path;

But still they followed—do not laugh—
The first migrations of that calf,

And through this winding wood-way stalked
Because he wobbled when he walked.

This forest path became a lane,
That bent and turned and turned again;

This crooked lane became a road,
Where many a poor horse with his load

Toiled on beneath the burning sun,
And traveled some three miles in one.

* * *
The years passed on in swiftness fleet,
The road became a village street;

And this, before men were aware,
A city's crowded thoroughfare.

And soon the central street was this
Of a renowned metropolis;

And men two centuries and a half
Trod in the footsteps of that calf.

* * *
For thus such reverence is lent
To well-established precedent.

* * *
But how the wise old wood-gods laugh,
Who saw the first primeval calf!

* * *

Now, as a matter of fact, Mr. Foss and the thousands to whom these verses made a strong appeal, were wrong both as woodsmen and as lawyers. If a person confronted by a thick primeval forest finds a path through it, even a winding and crooked path, and instead of following it, prefers to hew a straight road through the immemorial oaks and pines that bar his way, he
may well exhaust his strength and he certainly will not arrive at his goal on the other side of the forest as quickly as if he had followed the already existing trail.

And so far as the law is concerned, the analogy is of extremely dubious validity, since it assumes what is demonstrably false, namely, that following a precedent is like going along a path already marked out and definite, going along it more or less passively and without the need of conscious self-direction. Following precedents is not like this at all, as I hope we shall see, but is a much more complicated and difficult process.

Following precedent in law is, to be sure, not a new thing. The common law in relatively recent times made a virtue of it. Other systems, such as the civil and the canon law, made a vice of it. *Legibus non exemplis iudicandum*, it was sternly declared. But the use of precedent for some purpose is absolutely unavoidable in every system of law, and the question has really been not whether precedent should in general be followed, but where and under what circumstances it was desirable to disregard it, and I shall call attention once more to the fact that neither following nor disregarding a precedent is as easy as it seems.

The difficulty is as old as Aristotle. I venture to bring Aristotle into this discussion because he has been cited and interpreted and commented on not only in heavily learned books on legal philosophy, but in actual cases by eminent common law judges. Judge Frank of the Second Circuit has made Aristotle familiar to us in the pages of the Federal Reporter. But long before Judge Frank, the great Plowden not only quoted Aristotle's *Nico-

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2This is set forth as a general rule in a constitution of Justinian of 529 A.D. promulgated while the Corpus was being compiled: (C. Just. 7, 45, 13). The emperor goes on to say: *sed omnes indices nostros veritatem [et] legum et iustitiae sequi sanctim.* Evidently the "footsteps of justice" are assumed to be more direct than that of our calf. This constitution was solemnly read at a special consistory in the palace of the Emperor. The phrase of the text became a medieval brocard.

Precedents as a source of law were specifically recognized in the older Roman law. They are enumerated as third in the list of sources by Cicero: *Topica*, V, 28; *leges, senatusconsulta, res iudicatae, jurispritorum auctoritas, edicta magistratum, mos aequitas*. They are always distinguished from the fourth source, i.e., the opinions of the jurisconsults. By a curious twist in semantics, the word denoting these opinions, *jurisprudencia*, in most Continental languages (Fr. *jurisprudence*, It. *giurisprudenza*, Sp. *jurisprudencia*) has been transferred to judicial precedents, and contrasted with "doctrine" (Fr. *doctrine*, It. *dottrina*, Sp. *doctrina*) which expresses learned opinion.

According to a constitution of Severus (D 1, 3, 38) a series of similar decisions has legal force only where the "law" is ambiguous. But when this provision appears in the Basilica, the restriction is omitted. (2, 1, 46 ed. Haenel, I, 39) "In interpreting laws attention should be paid to the custom of the state and how similar cases have always been decided."

machiavellian Ethics, but discussed a passage in some detail, rejecting the interpretation of a medieval commentator and substituting his own. And not only Plowden, but Coke and Hale do not hesitate to quote him in support of their doctrines. I am therefore still within the orbit of the common law when I refer to Aristotle.

Aristotle pointed out that it is not merely bad logic but that it is absolutely impossible to proceed from one specific case to another, or, to put it in logical terms, from one particular to another particular. If it is decided that a particular person, one Richard Roe, legally owes another particular person, one John Doe, $100, provided Richard has agreed to pay that sum upon John's agreement on his part to deliver a particular commodity, let us say, an identified typewriter, to Richard, and if this is all we know of the facts of the case, and there is no "opinion," we have merely learned that Richard owes John this sum. There is no way we can proceed from that proposition to a new proposition unless we make a greater or smaller generalization out of it. We could say that all persons anywhere and any time who make this agreement in return for a promise owe the amount of money they have agreed to pay. Or we could say that all persons of mental competence and full age who, without being fraudulently induced or forcibly coerced, make this agreement, owe this money when a promise is made in return, provided the other party of full age and competence is not already under a legal duty to perform, has not himself been coerced or defrauded and is ready to perform, and provided further that the goods are usable by the purchaser.

This is a much narrower generalization than the first. We might make the first even more general by saying: "Everybody who makes a solemn promise must keep it." And we might make the second even narrower by saying: "Only certain special classes of persons are so bound unless they change their minds." Those who wish to follow the case of Doe v. Roe—the trail of the primeval calf—will have to make up their minds how far they will go in generalizing it. They will indicate the choice they have made in what is now commonly called their "opinion" and this opinion will

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6 Aristotle, Analytica Priora, i, 24. The medieval formula ran: ex mere particularibus nihil sequitur. Cf. Überweg, FRIEDERICH, SYSTEM OF LOGIC (Lindsay tr. 1871) 385, § 107. The formal fallacies that are involved in the absence of any general statement are those of "Illicit Process" and "Undistributed Middle."
be an answer to the question of why they rendered judgment as they did. In a number of jurisdictions, the judges are required by the law or the constitution to give reasons for their judgments. Giving a reason will in the last analysis turn out to be nothing more nor less than finding the generalization into which the particular proposition—the proposition that Richard under the circumstances of this case does in fact owe to John $100—can be put.

Whether the discovery of this general proposition is made by an almost instantaneous flash of intuition—it does happen that way sometimes—or by a careful series of syllogisms usually put in loose literary form, need not concern us now. Cardozo in his now classic book *The Nature of the Judicial Process,* has pointed out that the course of reasoning is frequently, perhaps generally, backward from conclusion to premise, but in any case, however it is reached, a general proposition will be announced as a premise somewhere in the opinion.

Now, a good deal of the opinion will be devoted to showing just why the court chose to stop at this generalization rather than at some earlier stage of generalizing. This often becomes somewhat polemical. Other stages in the process of generalization may have their advocates on the same court, and the judge writing the opinion may wish to set forth why he declined to go as far as some of his brethren, or, on the contrary, would have preferred to go much farther.

In the course of this debate in the judge's chamber by the judge with himself or with his law-secretary, or by the judge in conference with his brethren, what is likely to come up frequently is a reference to other cases—cases which are like the case before him in some respects, but necessarily unlike it in others, since two events cannot be identical. But this similarity is not determined by a sociological study of the two particular situations or any other forms of scientific tabulation of facts derived from the two situations. It is determined by the fact that the judge finds that both particulars, the precedent and the case at bar, can be fitted—sometimes it needs a little pulling and hauling—into the same general proposition.

What is more to the point, it appears that in the precedent a previous court has already selected a general proposition and announced it as the major premise from which the judgment was derived. If then the case at bar can be put into this same generalization, the judge can spare himself

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the need of finding a generalization for himself, and he will doubtless de-
clare that he is “following a precedent.”

But, as a matter of fact, he often selects a generalization considerably
less extensive than the one announced by the previous court and in that case
he still claims to be following the precedent. Indeed, a famous English
judge declared that one could select an extremely narrow generalization for
the precedent and would yet, in doing so, be following it.\(^9\)

We must keep in mind that the judge is confronted in dealing with a prece-
dent, not merely with the particular situation of the case there decided, but
with the opinion which is attached to the decision and professes to justify
it and which contains as a thesis to be defended, some general proposition, a
principle, a doctrine. Now, observe that this in most instances is a theoreti-
cal and more or less abstract doctrine, and indeed is abstract in precise and
direct ratio to its generality. Abstract and general propositions seem pro-
found and wise and there are voices among both lawyers and laymen which
assert that a relatively small number of such profound and wise general doc-
trines would suffice for all the purposes of the law, and judges are sharply
scolded if they do not subsume their decisions under some broad principle.\(^10\)

I have said that to many persons the qualities of breadth and generality
are in themselves good qualities. Judges, however, especially our judges,
have long realized that principles, broad or narrow, have in some way to be
appraised, and that goodness and generality are not synonymous. Some
principles, by a standard not always consciously formulated, are to be re-
garded as better than others. When the court accepts the precedent but
reduces the range of generality, it rejects the announced basis of the previous
decision because it does not quite like the broad generalization selected
by the preceding judge. Or else, instead of merely reducing the range of
generalization, it finds a wholly different one for the previous decision, one
that contradicts what the opinion in the precedent sets up as the source of
the decision, but reaches the same result.

In other words, following a precedent is a complicated process. The par-
ticular instance which is said to be the precedent can only be recognized
as one if it is traced back into a stage of generalization, which seems to the
following court to be a proposition of merit. This merit will be measured
by considerations which are frequently intimately bound up with the court’s
sense of justice or the furtherance of community interest.

[sc. the decision] can be quoted for a proposition that may seem to follow logically
from it.”

\(^10\)I have attempted to examine this process in detail in Case Law and Stare Decisis
(1933) 33 Col. L. Rev. 199-212.
And just as it is not as easy as the words imply to “follow” a precedent, so it is sometimes not so easy as it looks to refuse to follow it, to do what is called “overruling” it. We shall find that in a great many instances when the court says it is “overruling” a decision, it need not have done so at all: They could have “distinguished” it. This process, that of distinguishing, is derived from a technique of interpretation particularly developed in medieval times and applied both to legal and theological texts.\(^\text{1}\) I shall deal with it again later. Here I merely wish to say that the English House of Lords which in modern times has rarely in set terms “overruled” a previous decision, has carried the technique of distinguishing to a very high pitch of ingenuity. In many instances, where they have “distinguished” a precedent advanced, many an American court would have bluntly “overruled” it. On the other hand, when a precedent has been overruled in our courts, critics of the overruling decision have often declared that the two cases were perfectly compatible and could easily have been distinguished.\(^\text{2}\)

What the House of Lords or other court means by “distinguishing” is that without considering whether they would have decided the previous case in the way the previous court did, they certainly do not approve of the doctrinal generalization which the previous court used. And the American court, when it “overrules” a precedent, equally is not so much concerned with the question of whether the previous case was rightly decided as it is to express its emphatic disagreement with the doctrine or doctrines set forth in the previous case.

They are quite justified in using the term “overruling” because when they do, they are fairly sure that, if they use that word, the case is not likely to be cited again before them. The term “overrule” in practice means just that. It means: “Do not cite this case hereafter in your arguments.”\(^\text{3}\) For lawyers in citing cases rarely consider the actual case involved but merely use the opinion in order to cull from it such general statements as they think will afford good major premises for their own conclusions. It is just these general statements which the court has decided to reject and their “overruling” enforces this rejection.

\(^\text{1}\) Cf. Grabmann, Die Geschichte der scholastischen Methode (1911).
\(^\text{3}\) Cf. my article on Stability in Law in BRANDEIS SOCIETY (1944).
Judges approve or reject the generalization on the basis of considerations of justice, reason, community welfare. But they may approve of it for a wholly different reason. They may approve of it because it has been used so often, in cases, in learned books, in legal discourse generally, that it has become what an eminent judge called the *cantilena* of lawyers,\(^4\) that is, a sort of pious chant which will no more be questioned than any other part of a long repeated ritual. That this value is not recognized by laymen is not a condemnation. A long accepted doctrine—that is to say, a long accepted abstract general proposition—elicits a certain attachment from people who have grown up with it, and it will therefore be in part withdrawn from criticism by that fact. We remember how long the dubiously moral and economically unsatisfactory doctrine of *caveat emptor* was repeated and used by common law judges who were perfectly capable of seeing its unsuitability to the society in which they lived.

While, accordingly, the rule which we fondly and incorrectly call *stare decisis* involves a process very different from that which is often pictured, a new and fundamental question arises when the rule itself is examined. Why should precedent be followed? There is not now and there never was in any common law jurisdiction any statutory mandate requiring courts to follow precedents. There have been in civil law jurisdictions peremptory statutes requiring courts to disregard precedents.\(^5\) And in many common law jurisdictions there are statutory provisions which could easily be so interpreted.

But while no statute requires precedents to be followed, there is no doubt that the common law is assumed to be a system in which precedents are not merely permissible but are "controlling." And there is no lack of authoritative pronouncements by judges that the rule exists and must guide their action. We may take a statement from a widely used encyclopedia of law,

\(^4\) Lord Denman in O'Connell v. Queen, 11 Cl. & Finn. 373 (1844).

\(^5\) *Preussisches Landrecht; Einleitung* § 6; *Öster. Bürgerliches Gesetzbuhr* § 12. The modern codes of France, Germany and Switzerland which have become the models of most modern states pointedly omit previous decisions in the enumeration of sources of law. We may add the *ley organica de poder judicial* of Spain.

But a fuller realization of facts has created a change of view. The establishment of supreme courts in many modern constitutional states was predicated on a need of unity of law and has placed upon these courts a duty "de persévérer dans la doctrine qu'elle a une fois affirmée" (M. Faye, cited in M. P. Fabreguettes, *La Logique Judiciaire et l'Art de Juger* (1914) 288). It was long ago shown that in essentials the practice of the French *Cour de Cassation*, and of civil supreme courts generally, was not essentially different from that of a common law court. *Cf.* Henry, *Jurisprudence Constante and Stare Decisis Contrasted* (1929) 15 A. B. A. J. 11-13 which, however, seems to me to miss some of the most important elements of similarity. We may note further the decision of the Spanish Trib. Sup. of Dec. 11, 1922.
in which the wording of the text is, as we know, for the most part a mosaic of phrases taken from decisions. The rule, it is there said, is to be based on:

"Considerations of expediency and public policy, it being indispensable to a due administration of justice, especially by a court of last resort, that a question once deliberately examined and decided should be considered as settled and closed to further argument . . . the courts are slow to interfere with the principle announced by the decision, and it may be upheld, even though they would decide otherwise were the question a new one, although the doctrine will not be applied to the extent of perpetuating error."

The statement may be said to be a typical one. The reasons assigned are nothing less than overwhelming, "expediency," "public policy," "indispensability to a due administration of justice," a requirement that settled principles must be "closed to further argument." And then the whole case is given away when it is said that this rule, indispensable, expedient, foreclosing further argument, required by public policy, must not be allowed to perpetuate "error." Clearly, if only those decisions must be "followed" which are not erroneous, the rule is of little help, since the fact that the principle is "settled" is according to this declaration not a guaranty that it is right, that is to say that it is not something which "perpetuates error."

Some courts have even declared that in such a case overruling is a duty.

"The court may and undoubtedly ought, when satisfied that either itself or its predecessor, has fallen into a mistake, to overrule its own error. I go further and hold it to be the duty of every judge and every court to examine its own decisions without fear and overrule them without reluctance."

Evidently, if we cannot recognize rightness or correctness by the mere fact that it is an established rule, we must have another test of rightness. As we know, a common synonym for "right" in such matters is "reason." "A legal principle to be correctly settled, must be founded on sound reason," said one court and at about the same time, another court declared that a certain rule was "founded in reason and should not be applied to banish reason from law."

Judges are therefore required to distinguish precedents and divide them

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1615 C. J. 918. It is interesting to contrast this statement with the statement of the supplement to the encyclopedia, 21 C. J. S. 302, in which the basis of the doctrine seems to be purely the equitable one of estoppel.


18Norton v. Randolph, 176 Ala. 381, 58 So. 283 (1912).

19Cincinnati v. Taft, 63 Ohio St. 141, 161, 58 N. E. 63, 65 (1900).
into two classes, those that are reasonable, *i.e.* “good,” and those that are not, to follow the former and to refuse to follow the latter, which in practice means to announce that the general doctrine or doctrines set forth in the former class of precedents are good doctrines and may be used to rationalize decisions, and that the general doctrines set forth in the latter class are bad doctrines and may not be so used.

That would not mean that the only test judges are to use is their unaided reason and that they need not look at precedents at all. It merely means that unreasonable doctrines are to be rejected. For we must not fall into the common pitfall of supposing that there are two kinds of propositions only, reasonable and unreasonable. There are three, reasonable, not unreasonable or neutral, and unreasonable. The great majority of legal doctrines, especially what we call the technical rules, are in the intermediate class.

Let us take an example.

John Doe leaves a watch to be repaired by Stiles. The latter sells it to Richard Roe who has no reason to suspect Stiles. As between John and Richard, who shall have it? The established precedents at the common law proclaim the rule that the owner prevails over the bona fide purchaser in such situations. This is not unreasonable. In other systems, the courts have set up the rule that the bona fide purchaser prevails, which again is not unreasonable. There is consequently no good ground for rejecting the common law rule founded on precedent.

But when John buys a watch from Stiles and leaves it with Stiles who thereupon sells it to Richard, the common law rule seems unreasonable and generally by statute it has been changed. Those courts that changed it without the aid of a statute acted on the principle announced by the court in the old New York case. They applied the touchstone of reason, found the rule as here applied defective and reduced its generality.

But while the application of reason—which is not always as easy as I have here assumed it to be—enables us to reject unreasonable precedents, it does not quite give us the basis for accepting precedents at all. We must always remember that the inclination of courts to rely on precedent is one which laymen have denounced from time immemorial, even if it is true that it is denounced chiefly by those laymen who are adversely affected by it. If we attempt to justify the practice of law to the laity we must somewhere find a good reason for following any precedents, even not-unreasonable precedents, especially when there are several possible decisions all of which could be made to sound not unreasonable.
A Federal court once summed up the reasons for the rule of \textit{stare decisis} by saying that it provided "stability, certainty and symmetry" for the law.\textsuperscript{20} Of these "stability" and "symmetry" are terms of architecture, and as applied to the law are metaphors. We can, to be sure, not avoid metaphors in any form of human discourse, but in the case of one of the qualities here mentioned, we need not depend on them. That is the quality of certainty.

Can the law be certain? Many a lawyer has echoed the cynical jibe about the "glorious uncertainty of the law."\textsuperscript{21} But as a matter of fact for the vast majority of the situations in which men get into relations which conceivably could come into a court, the law is reasonably certain. It is the law for example that men should pay for the meals they consume in restaurants, that they should pay for the houses they have occupied. It is the law that a man should support his wife and children, that he should not marry another woman while his former wife is still living, unless, with due regard to \textit{Williams v. North Carolina}, he gets a divorce in a court that has jurisdiction.\textsuperscript{22} It is just possible that there may be a slight touch of uncertainty in the last-named situation, but in general we can say that the extent of matters regulated by the law about which we can give a substantially certain answer, more certain surely than that which can be given by other persons engaged in studying human relations, economists, sociologists or historians, that this range of matters is considerable.

But these questions are not the ones that are brought before a court and they are not so brought for the very reason that the answer is tolerably certain. What the courts find before them are the marginal questions, the matters which are unusual and highly specialized, the situations which vary from the norm of human activity. What is demanded of courts by the public, sometimes with denunciatory violence, is that they decide these situations, and decide them not on the basis of the highly abnormal and specialized situation itself—which, incidentally, is always inadequately presented to them—but on some broad principle. That is to say, the public requires the courts to be Kantian philosophers. Kant, we remember, formulated as his "categorical imperative" the following command: "Act only according to that maxim which you can at the same time will to be a general law."\textsuperscript{23} That is

\textsuperscript{20}Menge v. The Madrid, 40 Fed. 677, 679 (C. C. E. D. La. 1889).
\textsuperscript{21}The phrase occurs in an eighteenth century play by Charles Macklin, \textit{Love à la Mode}, Act II, Sc. 1.
\textsuperscript{22}First case, 317 U. S. 287, 63 Sup. Ct. 207 (1942). Second case, 325 U. S. 226, 65 Sup. Ct. 1092 (1944). It is scarcely necessary to do more than name this case, which has already created a library of discussion.
\textsuperscript{23}17 KANT, \textit{EINLEITUNG ZUR TUGENDELEHRE II} (Sämtliche Werke, Hartenstein ed. 1868) 192.
a dreadfully hard thing to do. Indeed, I think it is quite impossible. And its impossibility lies, it seems to me, in the fact that both for ethical philosophers and for judges there are a great many "maxims" or "principles" that could be set up as a general law—not for all mankind, to be sure, but for many people. And they all have the grievous defect for our present purposes that we cannot be sure which one will be chosen.

But, in any case, is there any guaranty that in these marginal cases, if some approximation to certainty were attainable, the rule of precedent, of stare decisis, will secure it? Well, I once practised law in the State of New York, which contains many centers of economic and social activity and where, consequently, an exceptionally large number of these marginal situations are sure to arise, and in fact do arise. One of the most widely used of the reports of decided cases in New York is the New York Supplement, in which are printed reports of cases running from minor courts of record through the Appellate Division of the Supreme Court, which is a formidable tribunal and which for the vast majority of cases is the final court. If one is looking for categories to fit a proposed decision, I think a search through this repository will give for any case at least one pair of doctrines, into either of which the situation to be judged will fit, but which unfortunately will demand contradictory results. The same thing could be said of almost every other set of reports. Indeed, the fact that a case is in the reports at all is in itself evidence that when the situation arose, the law was uncertain, in spite of the generations during which stare decisis has been dominant.24

It may be worth noting that while common lawyers have proclaimed as the special virtue of the rule of precedent that it provides certainty, civil lawyers have as vigorously declared that the reason that on their part they reject the rule is that it causes uncertainty.25 We can of course retort that their claim is equally unfounded when they say that to procure certainty "it is necessary to rely exclusively on statutes. But the only inference from this century-long experience in both systems is that in the marginal situations, which are the special business of courts, certainty is just what we cannot have.26

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24Those who will may attempt to work out Coke's pronouncement in the introduction to the Ninth Part of his Reports (ed. 1826, vol. 6, p. xxxvii). "And I affirm it constantly that the law is not uncertain in abstracto, but in concreto, and the uncertainty thereof is hominis vitium and not professionis." For most litigants concrete uncertainty is ill compensated by abstract certainty.

25Mariano d'Amelio while accepting the necessity of resorting to decisions, declares that they inevitably produce uncertainty in the law. "Per sue fluctuazioni che hanno resa mal certa la legge." 17 ENCICL. ITAL. 374. It is the main theme of L. A. Muratori's book, Dei difetti della giurisprudenza, c. 6, pp. 30-37, 46-48. (Opere Minori, vol. 17:2, 1762).

26Much the best discussion of the notion and effect of precedents at the common law
What about the qualities of stability and symmetry? I think it is perfectly clear that so far as the second of these is concerned, it has nothing whatever to do with the rule of stare decisis. It could be attained, perhaps more easily, if we attached all decisions to a particular section of some code, and never cited precedents at all. In fact, in the debate between common lawyers and civilians that has arisen sporadically since the days of Sir John Fortescue, common lawyers have been willing to concede greater neatness and symmetry to the rival system and countered with the assertion that symmetry and neatness were irrelevant.

They are not irrelevant, metaphors though they are. The purpose, however, has less to do with the litigants than with the lawyers—who, in this case, include the judges. The latter do not profess to keep all the law in mind, but they must keep a good deal of it. And they can do so only by classifications. What Tennyson called the "wilderness of single instances" simply will not stay in the mind, and the neater, the tidier, the more symmetrical our classifications, the better our minds will hold them. And, of course, the neater and more symmetrical our classifications, the more easily shall we find the doctrine that we are looking for in the constantly mounting number of cyclopedias and digests that our law has produced, so to speak, casually.

Lay-critics who denounce the law as a maze or a wilderness or a jungle would not, I think, want it tidied up, if the neat and symmetrical garden they say they prefer contained nothing but noxious growths, belladonna, aconite, poison-oak, or weeds. I admit that this metaphorical way of talking is un-

is to be found in Professor C. K. Allen, Law in the Making (3rd ed. 1939) 151-304. This incorporates the substance of his article Case Law: An Unwarranted Intervention (1935) 51 L. Q. Rev. 333, in which he fully refutes Sir William Holdsworth's extraordinary attempt to defend the impossible.

The entire passage deserves quotation. It is in Aylmer's Field, ll. 436-440. Tennyson's hero sets to:

"Mastering the lawless science of our law
That codeless myriad of precedent
That wilderness of single instances
Thro' which a few, by wit and fortune led
May beat a pathway out to wealth and fame."

It is curious that in 1864 this stereotyped conception of the task of a lawyer seemed worthy of poetical expression. And if we compare it with the lines Tennyson wrote as early as 1833 (published in 1842) about England, just after the first Reform Bill:

"A land of settled government,
A land of just and old renown,
Where Freedom slowly broadens down
From precedent to precedent,"

it becomes something of a question to know why freedom may proceed from precedent to precedent, but law may not.
fortunate. One of the difficulties in using metaphors about the law is that they beget other metaphors. To return to plain speech, there would be nothing desirable about a symmetrical law, unless it was a good law—"consonant with reason," "just," "in accord with natural equity," to quote actual decided cases. And equally there would be nothing desirable about the other quality, "stability," unless the stable law was also a good law.

No law has ever been stable in the sense that new doctrines, new principles—fundamentally new doctrines and principles—have not constantly arisen. That has been true even when what Lord Denman called the *cantilena* of lawyers has been repeated without change of a syllable. Here and there certain doctrines have maintained their obstinate continuity, but on the whole, the face of the law is profoundly changed in every century, and certainly within a brief period measured by national history. It is often said that our common law is what Coke said, and that it especially includes his errors. That is true for some doctrines applied to real property, but in almost everything else, Coke would scarcely have recognized the law we apply as something with which he ever had any concern.

Those—chiefly lawyers—who have raised the loudest outcry against what they have asserted is an impairment of legal stability have as a rule done so in behalf of doctrines which were themselves rather violent departures from previously prevailing rules. When the Norris-LaGuardia Act was passed, it was denounced as a removal of a pillar of the legal edifice. But the labor-injunction, which that statute sharply limited, was itself a conscious innovation established by quite recent decisions. The plaster of the pillar had scarcely had time to harden into concrete. The same thing was said when the fellow-servant doctrine was abrogated—usually but not always by statute. The cornerstone of the law of master and servant, we were mournfully told, had been impiously wrenched away. But that cornerstone had been somewhat surreptitiously wedged into the building within the memory of living men, and had seemed to many observers rather a source of danger than an additional means of strength.

Stability in another sense—without metaphors—is a quality of a good law. And that sense lies behind much of the complaints against overruling of decisions, complaints which are as a rule encased in metaphors and presented in terms of grandiloquent rhetoric. Lawyers are familiar with the statement that when a legal doctrine has become a "rule of property," it ought not to be changed retroactively. Unfortunately every decision is inevitably retro-

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28 O'Connell v. Queen, 11 Cl. & Finn. 373 (1844), cited supra note 14.
active. The final determination may be many years after the action was brought. And the dispute which led to the action arose out of transactions which might have been entered into years before that. Those who enter into transactions relying on a doctrine that a court has officially and formally declared to be right may reasonably complain, if when the transaction is finally judged, the court rejects the doctrine.

This looks like sound sense and elementary fairness. It is in fact the one justification of the rule of precedent which those who denounce precedents as pedantic and dull conservatism are generally careful to overlook. It is quite true that in a sense this justification involves in logic a begging of the question. Those entering into a transaction have a right to rely on an accepted doctrine only if they have reasonable ground to believe that a court will follow it, in other words, that a rule of stare decisis already exists.

But logic has nothing to do with the matter. We expect our friends and business associates not to mislead us about matters which are our common concern, and we surely can ask that of courts. I am not sure what an old Illinois court meant when it said that "law should be a shield and a guide and not a snare"—these metaphors offer a precarious footing to travellers along the trail of the primeval calf—but I can make out pretty well what the court, speaking through Justice Melvin, meant in the case of Hollywood Lumber Co. v. Love.

"The decision of Williams v. Santa Clara Mining Association, 66 Cal. 200 [5 Pac. 85] [after the code and overruling Fuquay v. Stickney, 41 Cal. 583, decided under a very similar statute], was the first one upon the subject after the adoption of the codes. It has probably been generally followed. Attorneys have doubtless advised their clients upon the law there announced, and property rights have been acquired on the faith of it . . . For almost a quarter of a century that case has been the leading authority in California upon the interpretation of the statutes now before us. [C. C. P. 1186, 1192]. If there were any good reason for a change in the rule . . . , the Legislature has had abundant opportunity for an unequivocal declaration of such change."

We shall find many repetitions of phrases like these in the books. Notice, however, the use of words like "probably been generally followed," "attorneys have doubtless advised their clients," "property rights [doubtless] have been acquired," "the Legislature has had abundant opportunity." Under the particular facts, I think we should agree with the courts that these speculative assumptions were in accord with the facts, but they remain speculative.

29Hopkins v. McCann, 19 Ill. 113, 115 (1857).
30155 Cal. 270, 274, 100 Pac. 698, 700 (1909).
assumptions. There is no indication that the record showed such advice by attorneys or acquisition of property rights with knowledge of the decisions. And of course the reference to the legislature is a pure formality. To make it a reality, there would have to be evidence that the matter was ever presented to the legislature at all, or that the lawyer members of the legislature were familiar with this doctrine.

Still a court is justified in making these assumptions where common experience, especially common professional experience, seems to justify it. And occasionally a court actually seeks information about whether a doctrine questioned actually had been relied on. To be completely consistent, this should doubtless be made a common practice, but it is a difficult thing to ascertain and courts can often with perfect safety indulge in the assumptions of the *Hollywood Lumber* case.

Once *stare decisis* is put on this ground other questions arise. Courts have hesitated to apply *stare decisis* in criminal law. Violators, said a Mississippi court, have no vested interest in a wrong decision. But surely the very thing at issue is whether the accused is a violator, and if a court had announced a doctrine that took his act out of the class of violations, he may well have felt that he could freely do what in this case he was punished for doing. And in *People v. Tompkins* the court made a point of that. Rules of personal liberty are as important as rules of property, declared the *per curiam* opinion, in a court presided over by Chief Judge Cullen, and in this instance in 1906 they applied a rule laid down in 1837.

Courts have differed on whether *stare decisis* applies in matters of evidence, procedure, or constitutional law, on whether a single case is enough, on whether a decision by a divided court is enough to establish a precedent, or whether the rule applies in the construction of statutes. It would seem that if such a test as reliance—which of course is a sort of estoppel—is adopted, the doubt on these subjects could be resolved on a basis of reason and equity.

I may cite as an instance of a misconception of the rule of precedent the case of *Frye v. Hubbell* decided in New Hampshire in 1909. In that case, Chief Justice Parsons took occasion to reject a rule which had been announced in a relatively large number of New Hampshire decisions. The rule is the familiar one which, some of us recall, was drilled into us in our

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32 Lanier v. State, 57 Miss. 102, 107 (1879).
33186 N. Y. 413, 79 N. E. 326 (1906).
34 People v. Clough, 17 Wend. 351 (N. Y. 1837), restated in McCord v. People, 46 N. Y. 470 (1871).
3574 N. H. 358, 68 Atl. 325 (1907).
student days as a fundamental maxim of the common law, to the effect that
one cannot satisfy a debt of a liquidated amount by the payment of a smaller
sum, even if the creditor accepts it in full satisfaction.

The rule is not a sensible one and has often been criticized. Persons in
commercial transactions have found it to be a nuisance. It is easily evaded,
if the debtor is aware of it, by the pitiful and somewhat ludicrous subter-
fuge of adding an article of slight value, a pencil or a box of matches, to
the sum paid.

Chief Justice Parsons in the New Hampshire case quite properly did not
like the rule although it had been often asserted in the New Hampshire courts
and although like all of us he had grown up in the unwavering belief that
it was fundamental common law. He found that the early cases in support
of it cite Pinnel's case, as reported by Coke—really Pinnel v. Cole. This
was decided in 1602, not by Coke who was not then on the Bench. Parsons
thereupon did the extraordinary thing of reading Pinnel's case which, as a
matter of fact, is very short. He found that Coke undoubtedly in the course
of the case expressly asserts the rule no less than three times. Further, the
rule is categorically stated in the head-notes found in most editions of the
Reports. But it suddenly appears at the end of the brief report that the
Court gave Pinnel judgment not because he had only been paid in part but
because the defense had pleaded badly. The defendant pleaded that Pinnel
had accepted £ 5-2-2 in full satisfaction for a debt of £ 8-10 but he did not
plead that he had paid it in full satisfaction. He should have pleaded both.
There is strong intimation in the case—which, we must repeat, Coke did not
decide but merely reported—that, if Cole had pleaded both payment and
acceptance, the payment would have been good.

Parsons thereupon declares that since the New Hampshire cases are based
on Pinnel's case, and since the actual decision in Pinnel's case does not sup-
port the rule at all, the cases are wrong, being built on no foundation, and
the rule does not exist in New Hampshire.

But evidently a rule more than a century old in that state, frequently an-
nounced in opinions and generally accepted as a statement of law, is as much
a rule of New Hampshire law as if the decision in Pinnel's case had actually
justified it. Far and away the best reason for rejecting it would have been
that it is "flatly absurd" and that so far from arranging their affairs as
if the rule were in existence, the two parties made their agreement as if
there was no such rule. Certainly, if the creditor promised to accept, know-

371 BL. COMM. * 70.
ing that he was not bound and intending to disregard his promise, he does not commend himself much to the special protection of the court.

What Parsons might well have done, as courts in other jurisdictions had done in regard to this very rule, would have been to reject it out of hand, however often it had been recited in opinions. It was not statutory and there was no element of estoppel in it, except in regard to the trouble he would cause professors of the law of contract, who would have to change their idea of what was fundamental in the common law.

We may take as a more recent example of what an unfortunate decision may do even in a court which as long ago as 1810 declared itself free to overrule precedents,\textsuperscript{38} the case of \textit{Davis v. Department of Labor}.\textsuperscript{39} The court was there faced with the case of \textit{Southern Pacific Co. v. Jensen},\textsuperscript{40} decided in 1917. Mr. Justice Frankfurter in his concurring opinion called it an “ill-starred decision” which “frustrated the purpose” of Congress.\textsuperscript{41} But he thought it could not be overruled without creating more confusion. The majority speaking through Mr. Justice Black is equally of the opinion that the decision “defeats the purpose of the federal act,” and calls attention to the burden imposed.

“Employees are asked to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership.”\textsuperscript{42}

The majority determined that without overruling the \textit{Jensen} case they would seek to do justice in the specific case.

The Chief Justice in his dissent suggested that if the \textit{Jensen} case were overruled he would join in the decision.\textsuperscript{43} It is hard to see how the \textit{Davis} case has either helped to unravel the admitted confusion caused by the \textit{Jensen} case and those which followed it or brought any light to the twilight zone so often mentioned in the three opinions of the \textit{Davis} case.

In one famous case, the Supreme Court of the United States declared that a court might quite properly and constitutionally say that the precedent was wrong but that since one of the litigants had plainly relied upon it, it would be followed in this case but not hereafter.\textsuperscript{44} There is, of course, the danger

\textsuperscript{38}Louisville R. R. v. Letson, 2 How. 497, 554-556 (U. S. 1844).
\textsuperscript{39}317 U. S. 249, 63 Sup. Ct. 225 (1942).
\textsuperscript{40}244 U. S. 205, 37 Sup. Ct. 524 (1917).
\textsuperscript{42}Id. at 254, 63 Sup. Ct. at 228.
\textsuperscript{43}Id. at 263, 63 Sup. Ct. at 232.
\textsuperscript{44}Great North. R. R. v. Sunburst Oil Co., 287 U. S. 358, 364, 53 Sup. Ct. 145, 148 (1932). \textit{Cf.} People v. Ryan, 152 Cal. 364, 368, 92 Pac. 853, 855 (1907); Moore v. Chal-
that when the case came up again, the court, especially if it had changed in personnel, might declare this announcement about future decisions to be mere dictum—as, strictly speaking, it was—and follow the doctrine objected to, which is now supported by at least two decisions. This, however, is not very likely and the decision in the *Sunburst Oil Co.* case is a commendable determination by our highest tribunal that a court never acts so much like a court as when it combines the duty of setting forth correct doctrines with the protection of litigants who have reasonably come to rely on doctrines not quite so good.

We have seen that according to Mr. Foss, the millions who followed the trail of the calf through the primeval forest did so without thinking about it at all. So far as the legal trail is concerned, it is a common assumption that judges have been under a duty to follow it, even when they were sure there was a better way of getting through. That, I wish to repeat, has never been the law, certainly not in the United States and not even in England.45

I should like briefly to advert once more to the English practice which is so often contrasted with ours to our disadvantage. In the older common law, there is no trace of the doctrine that precedents are controlling. Coke makes no such statement. For him the common law is a perfect, coherent system of complete rationality with which Parliament, if it were wise, would not meddle. This system becomes known to the upper ranks of practitioners and is “locked in their breasts” much as the Divine Law is deposited in the Church—and Coke would not have hesitated to use the comparison. But it was quite possible in Coke’s mind that incompetent, wicked and foolish judges would misstate or pervert it, and the proof that they had done so would be rendered by the fact that their judgment was unreasonable.

Blackstone, indeed, says that “precedents and rules must be followed, unless flatly absurd or unjust.”46 But he leaves the door wide open to those who wish to disregard a precedent by the qualification he makes. He really is saying what we have already examined, to-wit, that precedents must be followed if they either contain rules about indifferent matters or are just and reasonable, a statement which makes his “must” a good deal less than peremptory.

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45The nearest Coke comes to the statement is his citation of the alleged maxim, *argumentum ab auctoritate est fortissimum in lege.* Co. Lit. *254a.* His frequently contemptuous reference to the ignorance of preceding judges indicates sufficiently that decisions as such could scarcely claim to make law.

461 BL. COMM. *70.*
It is not until late in the nineteenth century that the House of Lords makes a formal declaration that it is bound by its previous decisions. But if we look even at these statements and at the practice of the House of Lords both before and after judicial pronouncement, we shall find that the binding obligation is not overwhelming. The technique of "distinction" is used by English courts far more elaborately than it is elsewhere, and it is in England that it has been sternly asserted that only the precise situation adjudged is a precedent—a doctrine which has the misfortune of conflicting with the way the human mind operates, as well as being contrary to what courts in fact do.

As a matter of fact, in England, before Coke and after, indeed ever since there were courts anywhere, we shall find that precedents are followed—which means that announced doctrines are repeated—not because they must be followed, but because they are uttered by men whose reputation gives whatever they say a high authority. Blackstone adds to what we have quoted the following:

"... for though their [sc. of the precedents] reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration."

Most judges feel much more strongly than this negative supposition about opinions to which great names of the past have been appended. Judges must evaluate the doctrines presented to them by standards which are assumed to be derived from reason and justice, one of which is a logical and the other a moral term. They are terribly hard things to be sure of, and all men are glad to have the protection of a great name in applying them. Where no great name is available but merely a tradition of the "sages of the law," they can accept the rationalization of Blackstone that somehow the men of past ages were just and reasonable.

Perhaps, as all laymen think in their heart, human inertia has something to do with it. Why go to the difficulty of weighing and testing a legal proposition if the assay has already been made and the report is before us? Scholars and historians constantly accept these second-hand reports in dealing with matters presented to them, and the so-called exact scientists do this much more frequently than they admit. As I have suggested at the beginning, people follow the trail of the calf because it is easier to do than

47Blackstone is here paraphrasing two passages from the Digest of Justinian which he quotes (D. 1. 3. 20, 21). Both date from the second century A.D. One is from Neratius Priscus and the other from Julian, one of the very greatest of Roman lawyers. The medieval glossators found considerable difficulty with these statements.
to hew a new path through the forest. As far as the law is concerned, lawyers cannot always be sure that if they did undertake to hew a new path, it would be a better one.

But following a guide whom we trust is not really what stare decisis means. There is no must in it, in spite of Blackstone. These precedents may have a presumption in their favor, or reason or justice may support them, or the doctrines they announce are at least as good as contradictory doctrines, but they exercise no real compulsion by being precedents.

The Ohio court which I have already quoted, stated that:

"Precedents are to be regarded as the great storehouse of experience; not always to be followed, but to be looked to as beacon-lights...."

Even so. Perhaps we run a risk when we disregard a duly authenticated guide, but we have Scriptural warrant for saying that there is also a certain risk in following without reflection the most authorized guides.49

That precedents are today openly admitted by courts to be anything but controlling, and at most persuasive in various degrees, is a commonplace. I shall briefly refer to the curious misconception, so violently advanced by persons not wholly disinterested, to the effect that this is a novel and revolutionary idea, first declared by those men who since 1936 have become members of the Supreme Court of the United States.

We can go back as far as the case of the Genesee Chief50 in which in 1851 the court speaking through Taney overruled the case of the Thomas Jefferson51 decided in 1825, because, as we noted before, it was not likely to have created a "rule of property." It is only necessary to examine the formidable list of cases in which the Supreme Court has overruled its previous decisions to be aware of the announced policy on this question, a policy which was treated by Sir Thomas Holland as an alarming discovery in 1924.52 The cases have been twice collected in the United States Reports, once by Mr. Justice Brandeis in Burnet v. Coronado Oil Co.,53 and again by Mr. Justice Jackson in Helvering v. Griffiths.54 As already mentioned, they go as far back as 1810.

The practice of overruling "without reluctance," as the New York court said, precedents that seemed wrong, was thus established long ago in the

49Cf. Micah 7:5; Matthew 23:16.
50Genesee Chief v. Fitzhugh, 12 How. 443, 458-459 (U. S. 1851).
51The Thomas Jefferson, 10 Wheat. 428 (U. S. 1825).
52HOLLAND, JURISPRUDENCE (13th ed. 1924) 70.
Supreme Court and indeed has been more emphatically announced in other courts. It was a California court of two generations ago that declared that one of its own precedents was so bad that a lawyer who relied on it would show his incompetence; and it was a Pennsylvania court of nearly a century ago which said:

"Of course I am not saying that we must consecrate the mere blunders of those who went before us, and stumble every time we come to the place where they have stumbled."

But in any case, it is worth while noting that the use of precedents even as beacon lights has become a different thing today from what it once apparently was. I have taken the trouble to examine a volume of recent reports of the highest New York court, the Court of Appeals (292 N. Y.). In every case argued, counsel on both sides have urged upon the court a whole flood of cases. But when the court comes to examine the matter and render its decision, it uses very few or sometimes none at all. And when they do quote cases, they are likely to quote cases from other jurisdictions or from inferior courts, neither of which groups, of course, can possibly "control" them.

Not only that, when they do quote cases from the Court of Appeals, they deal with them largely as illustrations, or cull from them phrases that seem to them well-expressed. In several instances, they reverse a decision of the Appellate Division without citing a single case. At no time do we find any statement that repeats the old formula: "The rule is so well established that we cannot now change it, even if we thought it wrong."

We have followed the trail of the calf, and we have found that in many cases it is quite likely to lead us through the woods, provided we stop from time to time to take our bearings. There is always a danger that if we do not, the path will not lead us out of the woods but land us in a morass. And

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55Alferitz v. Borgwardt, 126 Cal. 201, 208, 58 Pac. 460, 462 (1899), which supports its right to overrule a case by citing other cases.
the trouble with this particular metaphor as applied to the law is that if
we wish to continue it, there are a great many calf-paths and we must often
choose whether we will go to the right or the left—the words carry no modern
political implications. Another trouble with the calf-path is that it is a
metaphor.

Metaphor for metaphor, I can think of better ones. A famous German
jurist—also a poet in a small way—Joseph Kohler, said that the law was a
ship on a fathomless ocean and that Justice was not the port to which it
was bound, but the star by which it directed its course. But we had better
abandon metaphors, even fine ones, and remember that the rule of prece-
dent, or of stare decisis, is a means and not an end. It has a real function,
but this function is not exclusively that of perpetuating itself. Like every-
thing else in the law, those who apply it must know it for what it is. It is
far from being as easy or as simple as it sounds. It will give us neither cer-
tainty, nor symmetry, nor stability by any automatic process, even if these
three qualities were desirable in themselves. But it can be made an instrument
of fairness in applying the law, and that is a sufficient justification.
The one class of cases in which the rule of precedent may properly exercise
a compulsion in courts is that in which the doctrines and ideas announced
by previous courts have become so much a part of the legal background that
men have conducted their affairs on the assumption that these doctrines will
be maintained. It is unfortunate that this should be described as a "rule
of property," since there are many other situations besides those involving
property in which the same equitable considerations may demand that a
court forego examination of a previously declared rule.

When the court finds that such a rule, in spite of being definitely inte-
grated in the social and economic life of the community is, in Blackstone's
phrase, "flatly absurd and unjust," there is no reason why they should not
follow the example of the Wyoming court, sanctioned by the approval of
the Supreme Court of the United States,59 and declare that when this reliance
on the existence of an announced doctrine can be proved, they will enforce
it and when they cannot, they will hereafter discard it.

Where there is no such reliance and where the court's objection to an
established doctrine is not its injustice, present or prospective, but merely
what the Roman jurists would have called its inelegance, the court has
merely to consider whether it is worth disturbing the mental habits of their
"brethren at the bar" by expressing disapproval of a formula with which

59See note 44 supra.
these brethren have become familiar and of which they have sometimes grown fond. There seems no very good reason why they should gratuitously effect this disturbance, and no overwhelming reason why they should not, if they think the statement of the law would be improved thereby. In such instances neither the maintenance nor the rejection of what we shall doubtless continue to call the rule of *stare decisis* is of first rate importance.