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Recommended Citation
Leonard C. Crouch, Judicial Tendencies of the Court of Appeals During the Incumbency of Chief Judge Hiscock, 12 Cornell L. Rev. 137 (1927)
Available at: http://scholarship.law.cornell.edu/clr/vol12/iss2/1

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Judicial Tendencies of the Court of Appeals During the Incumbency of Chief Judge Hiscock*

LEONARD C. CROUCH†

Holdsworth, in his recently published work on the Sources and Literature of English Law,1 shows us that there came a time in the later years of the 13th century when it is apparent that the day for philosophical treatises on the law, such as Bracton's, had gone by. "The common law," says he, "was becoming a special subject known only to practitioners of the royal courts; and what these practitioners wanted was short rules about writs, up-to-date knowledge of the rules of procedure, the most recent cautelae or tips in the art of tripping up an opponent. But these rules could best be learned by attending to the decisions of the courts." Philosophy was left to the impractical and the day of the case lawyer began. The American lawyer of the late 18th century found it useful to have certain conscious dealings with philosophy, but when the Revolution was over, the constitution adopted and a small, healthy and growing body of case law stood on the shelves, he found himself wanting substantially the same things as his 13th century brother. Since then the rationale of his art has, for the most part, been to find a case in point, and, failing that, to urge upon the court the necessity for a development of law to cover his client's case.2 Curiously enough, when he was forced to the latter course, he was dealing with the stuff of philosophy, though it is fair to say that he probably did not know it.

It has been authoritatively stated that the process of judicial decision in the doubtful case—"when the balance wavers"—is swayed consciously or unconsciously by ultimate conceptions. The lawyer who argues and the judge who decides the case deal, as to the question in hand, with the origin, with the growth, and especially with the

*An address delivered before the Fourth Annual Meeting of the Cornell Law Association, November 13, 1926.
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1P. 35.
2Cf. (1926) 40 Harv. L. Rev. 144, 145.
end or aim of the principle of law involved. That means, whether the lawyer or judge realizes it or not, that he is dealing with the philosophy of law.3

For the most part this philosophy is the potent factor which controls and measures the adjustment of law to life. With the thing itself lawyers and judges have always been more or less familiar. Judge Pound has said:

"What is antiquated today was once modern and practical. Call it sociological justice or any other hard name from the vocabulary of technical philosophy as you will, the courts have always in a greater or less degree given ear to those who contend for a modification of the old rule to conform to modern conditions."4

He mentions Sir Matthew Hale, who in spite of a belief in witchcraft, was yet able to state modern doctrines in a modern way when once they had been established outside of courts of justice. The work of Coke in making over mediaeval law,5 of Holt and Mansfield in settling the principles of modern commercial law,6 and of Kent in working out a body of law applicable to the then prevailing conditions in our own state, are other instances.7 As applied to a particular doctrine, an illustration may be found in the history of the master’s liability for the acts of his servant, which shows four stages of development by decisions of the courts under the influence of changing conditions and opinions.8

The phrase used by Judge Pound to qualify the statement that the courts have always given ear to the plea for progress was well chosen. "In a greater or less degree" is a qualification in which is implied a varying and uneven growth. There have been periods when the law was well nigh static, not so much, perhaps, because the ear of the courts was unwilling as because social conditions were static or because the prevailing philosophy seemed to demand rigidity. There have been other periods when the law, like life itself, was informed with a quickening spirit, ready to put a doubtful doctrine to the test of reality, and, if found wanting, to scrap it, if possible;9 if not, to circumvent it by methods well known and occasionally resorted

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4Cuthbert W. Pound, The Relation of the Practicing Lawyer to the Efficient Administration of Justice (1924) 9 CORNELL LAW QUARTERLY 242.
5HOLDSWORThE, SOURCES AND LITERATURE OF ENGLISH LAW (1925), 140.
6LORD BIRKENHEAD, FOURTEEN ENGLISH JUDGES (1926), 186; Pollock, The Genius of the Common Law (1911), 83, 84.
8VINOGrADOFF, COMMON SENSE IN LAW, (1920) 193-195.
9Oppenheim v. Kridel, 236 N. Y. 156, 140 N. E. 227 (1923) is an instance.
JUDICIAL TENDENCIES OF COURT OF APPEALS

While one speaks of periods, lines of demarcation cannot always be sharply drawn. The law, again like life, is a continuous tapestry with the figures of one stage gradually merging into those of the next. It is a matter of common knowledge, however, that the transition from the social life of the 19th century to that of the 20th has been swift and striking. So great has been the change that one might almost say there had been a break in social continuity. A competent critic, reviewing the mass of literature in every field dealing with the political and social conditions of the last century, said recently:

"The prime cause of these many books in which the American past becomes vivid and often romantic is that nineteenth century America is gone, is dead, except in its influences, is historically remote, and widely different from our present. We read of the New England 'Forties or of the South in Reconstruction or of Henry Ward Beecher or Grover Cleveland as we read in Plutarch, Clarendon, or Macauley."

A number of those books deal with the social life of the 'Nineties. They bear titles intended to characterize the period—"The Yellow 'Nineties," "The Mauve Decade," "The Romantic 'Nineties," and, most suggestive of all, "The Moulting 'Nineties." Moulting indeed they were. Old standards of social conduct and economic relations began to drop away, to be replaced by others unforeseen and almost undreamed of. The time was instinct with the spirit of change. It was thought of as the end of an era, and so it was.

The frontier and free land vanished together; population began to thicken and to become preponderantly urban; the corporation succeeded the individual operator, and the trust succeeded the small corporation; immigration poured foreign material into the melting pot so fast that the melting well-nigh ceased, with the result that the Puritan standards of moral conduct were crowded to the wall; and just on the horizon were the automobile, the aeroplane, the radio, and the whole sweep of mechanical and scientific advance.

Out of this welter of economic, industrial and social changes came to the courts novel and unheard-of problems, not to be solved by precedents, for there were none; nor to be satisfactorily solved by analogies drawn from history and from settled and existing principles. It may be admitted that the courts generally did not

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10 Pound, supra note 7 at 166, 167.
quickly grasp the significance of the changing conditions. The failure to do so led not only to discontent with and criticism of the courts as governmental agencies—something which was not entirely unknown—but it led also to an attack upon the common law itself, something which had never happened before. The chief source of the discontent was in the constitutional decisions construing legislative acts, dealing with social and industrial problems. This led to demands or proposed remedies whereby constitutional power, as between the courts and the legislature, should be re-adjusted.

But the attack was extended to the whole body of law with a somewhat shrill demand that law be made consonant with justice—"justice" meaning the ethical concepts of Main Street. The tendency was away from an extreme of government of laws and not of men; a tendency, perhaps, toward the continental theory of free legal decision. The criticism which began at the turn of the century was well marked in its tendencies by 1906, when Judge Hiscock first went on the Court of Appeals, and reached its climax in the progressive years of 1912 and 1913. That the judges of our courts during those years did not readily break away from established doctrine, is not strange to those of us whose earlier training was in the same school of thought. If you will step across the campus with me and go for a few moments to the top floor of Morrill Hall, where, in the early 'Nineties, the Law School carried on in a few dreary rooms, I will show you briefly what that training was. The first concept there drilled into us was that the end or aim of law was to secure to the individual certain natural and inalienable rights. We were so informed by the Declaration of Independence—and also, as I remember it, by Dean Hutchins, under whom we had "the misfortune" to read both the introduction and the opening chapter to the first book of Blackstone's Commentaries—at least so much of them as were included in the Second Edition of Chase's Blackstone, current in the year 1890. And on page 78 of that edition you will find these words:

"The third absolute right inherent in every Englishman is that of property; which consists in the free use and enjoyment and disposal of all his acquisitions without any control or dimi-
nution, save only by the laws of the land. So great, moreover, is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community. Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights. In vain it may be urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no."

And so when we encountered the then recently decided case of In Re Jacobs, which permitted Mr. Jacobs to continue making cigars in his own home, although forbidden to do so by statute enacted to meet the social need of health regulation, it seemed entirely sound to us, philosophically and otherwise. And we noted it as a useful authority in the event some future client should be hauled up for doing what he had always done, though told by the legislature that he must stop.

So a few years later, when Knisley v. Pratt held that a woman employee injured by a machine left unguarded by her employer contrary to the statute, might not recover because she had assumed the risk, few of us appreciated the evil of the holding. Any other doctrine would have seemed to us, as it did to the Court, new and startling. Was it to be said that a woman upwards of twenty-one years of age was not at liberty to contract to take the risk in order to get the job? She, like her employer, was a free agent; they had equal rights. If she did not want the job on those terms, she could go elsewhere. Adam Smith, Mill and Spencer had told us so. A new breed of fanatics called sociologists were beginning to say that under actual industrial conditions this was not so, but to us they spoke without authority.

As the years went by, some of us, perhaps, caught the drift of the times and came to suspect that the number of those "unwritten and unchanging laws of heaven—laws that are not of today or yesterday, but abide forever, and of their creation knoweth no man" were somewhat fewer than we had been told was the case. But most of us, I think, were as static as the courts.

The long succession of decisions in the 'Nineties and in the first ten or twelve years of the present century, holding unconstitutional many acts of the legislature which interfered with the property rights and freedom of contract of the individual, seemed to most

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1898 N. Y. 98 (1885).
of us sound law and socially desirable. If any doubt came as a result of the close decision by the Court of Appeals in the *Lochner* case, holding the bakeshop law constitutional, it was removed when the Supreme Court reversed that decision.

In the zone of private law our attitude was the same. When *Stokes v. Stokes* said flatly that neither party to a contract was entitled to specific performance unless the other was likewise entitled, the doctrine was filed away in our minds as expressing a definite, easily understood and perfectly fair rule. That its implication ran counter to modern business practice did not occur to us any more than it did to the Court. Equally definite and fixed, although equally opposed to common business practice, was our understanding that a contract which contained no literal promise by one of the parties lacked mutuality and was unenforceable. The mere aroma of obligation would have seemed to us too thin to grasp. We had been taught to regard certainty in the law as essential. If the business practice of merchants did not conform to the rule of law, so much the worse for the merchants. Moreover, if one of our early clients had bought a wagon from a local dealer and one of its wheels had crumpled, thereby injuring him, it is very doubtful whether we should have advised him to sue the manufacturer. In fact, if we had refreshed our knowledge of the law by looking at the opinion in *Thomas v. Winchester*, we would have found from an illustration there used that there could be no recovery in such a case. "Misfortune to third persons," said the court, "not parties to the contract, would not be a natural and necessary consequence of the builder's negligence." This, of course, was contrary to the actual facts of life, but we, having been taught the distinction between legal and actual probability, accepted it as good law.

The 19th century was a period of individualism. In politics, a minimum of government was best; in economics, free competition was essential; and in law the preservation of the rights of persons and property, including freedom of contract, was fundamental. Except as he himself had willed the existence of a relation to which the law attached a sanction, an individual was to be free from exaction; nor was he to be liable unless for a fault. Some limitations
on those rights were recognized as inevitable in a social state, but for that defect the courts consoled themselves by the thought, as Judge Earl pointed out in Losee v. Buchanan, that each individual was compensated by the similar operation of those limitations on the rights of his neighbor; and in any event, those rights were not to be unnecessarily infringed. It is needless to multiply instances.

With such a background we may forgive both the Court and ourselves for a failure fully to appreciate the social and economic forces involved and to yield at once to demands which meant the overturn of reasonably fixed and settled principles, so slowly and painfully worked out.

Following those years of hesitation in the face of discontent and hostile criticism, came, and are still coming, certain definite results and certain tendencies. Among them are:

1. The setting up of administrative tribunals of many kinds, where, within limits, executive justice is administered, and, it is to be hoped, administered as the ordinary man conceives that it should be. The Court of Appeals has for the most part dealt liberally with the questions arising in this new field. For instance, in connection with the Workmen's Compensation Law, after a somewhat reactionary decision holding that proof of a claim by hearsay evidence alone was insufficient, came the Katz, the Heidemann, and other cases, giving broad and non-technical holdings on the question of what constitutes an accident arising out of employment.

2. Procedural Reform. This is a subject by itself, and may not be here considered beyond saying that both the Practice Act and the decisions under it have been subject to criticism more or less justified.

3. A tendency, at least, toward a new philosophy of law, so far as the end or aim of law—and hence its growth—is concerned. The change may first be stated in the language of Dean Pound. The law, he says, now "appears to put emphasis upon social interests; upon the demands or claims or desires involved in social life rather than upon the freedom of will of the isolated individual."
One who without previous training or study attempts to pursue and capture the ultimate concepts of law formulated by one juristic philosopher after another through most of recorded time will probably agree with Henry Adams, who once cynically said that philosophy consisted chiefly in suggesting unintelligible answers to insoluble problems. Putting aside, then, the language of philosophy, this later trend may be described by saying that in the decision of cases the courts have come to put an increased emphasis on the conditions of actual life to which the law is to be applied, where such conditions are at all involved, and less upon the terms of the law itself. Or, if we go back to what seems to me to be a classic statement of the 19th century attitude, the opinion of Judge Earl in Losee v. Buchanan, the change may be defined as a greater willingness to promote the general welfare at the price of infringing on individual rights.

The effect of this tendency, so far as the Court of Appeals is concerned, has been admirably set forth by Judge Hiscock in his Quarterly article on The Progressiveness of New York Law. To the cases there discussed one or two others may be added for illustration, and then, as casting a back-light on the process of development, reference may be made briefly to several others where the Court was invited, but declined, to depart from settled rules.

In Schnitzer v. Lang, goods received by a buyer and laid away in January were not found to be of unmerchantable quality until August. Under various precedents, delay for an arbitrary period had come to be held unreasonable as matter of law, without reference to circumstances. The Court here brought the rule back to realities by holding that mere lapse of time was not alone the test. The question was whether under all the circumstances of the particular case, the delay was reasonable or unreasonable.

With that decision may be contrasted another where the question of reasonable time under a bill of lading not covered by federal law was, on grounds of public policy, tested, not by the particular circumstances, but by the time provision of the federal law. Consistency and certainty of rule were apparently balanced against the need of equity and fairness in particular cases, and the former were found weightier.

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35 Supra note 27.
36 (1924) 9 CORNELL LAW QUARTERLY 371.
37 239 N. Y. 1, 145 N. E. 55 (1924).
39 Cf. Jacobs & Young v. Kent, 230 N. Y. 239, 245, 129 N. E. 889 (1921) where a somewhat similar process led to an opposite result.
Robinson v. Robins Dry Dock & Repair Company seems to have been a frankly pragmatic holding. By a decision of the U.S. Supreme Court, the State Compensation Law was held not to apply to maritime employment. Upon the justifiable supposition that it did, plaintiff had previously been granted relief thereunder for the death of her husband. When the decision came down, her action at law was barred by the lapse of time. The legislature passed a law which provided that persons in plaintiff's plight might commence an action after the time limited by general law. Defendant here attacked its constitutionality, and a divided court held it valid under the police power. It was recognized that in some cases the bar of the statute is a property right; but so to hold here would, in the words of the opinion, be "contrary to all prevailing ideas of justice."

With that decision one may contrast Matter of Beach v. Velzy, in the same volume of reports, where, in a compensation proceeding, the Court refused to stretch the doctrine of liability without fault beyond the limits fixed by the legislature, though the case was in a way one of hardship.

In St. Regis Paper Co. v. Hubbs & Hastings Paper Co., a buyer of paper entered into a contract for a stated amount per year for two years. The price for the first three months was fixed by the contract, which further provided that future quarterly prices were to be fixed by mutual agreement, and if the parties did not agree, the contract should terminate. There came such failure, and the seller repudiated. To the argument that the contract carried with it the fundamental obligation on the seller in good faith to attempt to agree, the Court pointed to the literal language, and said it was merely an agreement to agree, which could not be enforced.

In another case there was a similar contract, which, however, provided that the price to be agreed upon should not be more than was then charged to large consumers by another seller. When the time came to fix the price, the buyer demanded deliveries accordingly. The seller refused to comply and repudiated. The holding was as before.

[^40]: 238 N. Y. 271, 144 N. E. 579 (1924).
[^41]: 238 N. Y. 100, 143 N. E. 805 (1924).
[^42]: 235 N. Y. 30, 138 N. E. 495 (1923). The trial judge, perhaps reflecting morality as it prevailed at least in theory, had told the jury that a broad good faith was written by the law into the contract. He later concluded he had been mistaken and set the verdict aside. The Appellate Division (201 App. Div. 397, 194 N. Y. Supp. 150, 4th Dept. 1922) thought the time was at hand when the law of the charge should prevail and reinstated the verdict.
The time had not come when social interest in the exaction of ordinary business morality could outweigh the need of certainty in business transactions.

The Court in the *Kridel* case, cited in Judge Hiscock's article, found in present day actualities sufficient reason for overturning immemorial authority and giving to a wife a right of action against another woman for criminal conversation. A year or two before, in *Drobner v. Peters*, the Court felt it would be judicial legislation to sustain a right of action in an infant injured eleven days before birth when his mother fell into a negligently uncovered coal hole. While the lack of precedent is referred to, that objection was not insuperable; nor was the physiological objection that until birth the child had no existence apart from the mother; the decision seems to rest on the last paragraph of the opinion, which indicates a distrust of the prevailing *mores* in the preparation and trial of negligence actions.

The obiter holding in *Lanyon's Detective Agency v. Cochrane*, that a husband is not liable for services rendered to a wife in an action for absolute divorce against him because such an action is to dissolve the marital relationship and not to protect the wife in her condition as such, seems to rest on a logic out of touch with realities.

In *Glanzer v. Shepard*, a public weigher at the request of the seller certified a weight of beans to the buyer, knowing that payment would be made on the faith of the certificate. The certified weight was wrong and the buyer was permitted to recover, although there was no privity. The opinion says there is nothing new in principle; that one in a common calling may owe a duty to B, though A give the order or make payment. It seems to be an extension of the rule in the *MacPherson* case. But in the later case of *Jaillet v. Cashman*, the Court refused to hold one who furnished ticker service to a broker, for misinformation acted on by one of the broker's customers to his injury.

In *Harris v. Shorall* the Court in effect gave notice that outworn and inconvenient consequences flowing from the use of a seal on written instruments, as, for instance, that there could be no modification by parole, would be done away with. When the Court

47233 N. Y. 236, 135 N. E. 275 (1922).
48217 N. Y. 382, 111 N. E. 1050 (1916).
49235 N. Y. 511, 139 N. E. 714 (1923).
50Cf. BOHLEN, *supra* note 24, at 150, 151.
51230 N. Y. 343, 130 N. E. 572 (1921).
came sharply to the point in *Crowley v. Lewis*\(^{53}\) and *Cammack v. Slattery & Bro., Inc.*\(^{54}\) however, it seemed unwise to upset settled rules, when, in consequence of existing rights and otherwise, it would be necessary to make exceptions and reservations beyond the power of the Court. The step in advance was left to be taken by the legislature.

A consideration of the foregoing cases, including those mentioned by Judge Hiscock, and of others which may not, for lack of time, be specifically referred to, seems to leave the present status of sociological justice—a hard name, as Judge Pound says—in the Court of Appeals, somewhat as follows:

1. In dealing with the police power, the court has developed the doctrine from the narrow limits which grudgingly permitted restraint on personal liberty only when its exercise affected safety, health and morals\(^{55}\) to the point where Judge Hiscock says\(^{56}\) it may so deal with conditions as they exist "as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity." And that statement may well rest on the striking definition of the police power in the *La Fetra* case\(^{57}\) as "a dynamic agency, vague and undefined in scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process."

2. Wherever standards of action are involved, whether in torts (as in *MacPherson v. Buick Motor Co.*\(^{58}\)) or incidentally in contracts (as in *Schnitzer v. Lang*\(^{59}\) or in the uncertain ground between (as in *Glanzer v. Shepard*\(^{60}\)) there has been a sustained tendency to establish rules on a basis of social utility; and that in general means a greater measure of what informed popular opinion would regard as justice. But in the field of contracts the supposed need of certainty, or perhaps the old feeling that it is every man's business at his peril to look sharply after his own affairs, has prevented the formulation of a general rule that men should make good reasonable expectations, reasonably created by their promises or other conduct, and sanctioned by the moral sentiment of the community.

There have been at least three instances in the Court of Appeals

\(^{53}\)239 N. Y. 264, 146 N. E. 374 (1925).
\(^{54}\)Supra note 11.
\(^{57}\)Supra note 49.
\(^{58}\)Supra note 37.
\(^{59}\)Supra note 48.
during the period under review, however, where something like this principle has actually been applied, Judge Hiscock writing for the court in the first case.  

Section 88 of the American Law Institute's restatement of contracts formulates such a rule. Should that rule hereafter be adopted by the court, a defect of remedy under the doctrine of consideration will be cured—though the Court, as in two of the cases above referred to, seems able to find consideration when needed.

The tendency has been most strongly manifested in the field of torts. Between the Compensation Law, Section 282-e of the Highway Law (which does what the Court of Appeals refused to do in Van Blaricom v. Dodgson) and a multitude of other statutes on the one hand, and Martin v. Herzog and MacPherson v. Buick Motor Co. and like decisions on the other, we seem to have gone an appreciable way toward the doctrine of liability without fault. Experienced trial counsel say that under actual operation before a jury the difficulties of defense in cases of this character are such as almost to amount to absolute liability; and the possibilities of development under the res ipsa loquitur rule are worthy of consideration.

3. In scattered instances the Court has wiped out archaic rules where it could be done without harm to existing rights.

4. In other scattered instances decisions which satisfy one's ordinary sense of what is right and just, have been reached in spite of general principles. There is nothing new about that; though one may now classify such cases as instances where logic, history, custom or other method of decision has given way to the prevailing mores.

Jacobs & Young v. Kent and Robinson v. Robins Dry Dock & Repair Co. seem to fall into this category.

This period of storm and stress, the most critical in the history of the Court, is nearly coincident with the twenty years, now about ending, of Judge Hiscock's services thereon. It is no part of the purpose of this paper to attempt a review of his judicial work. That

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Messiah Home for Children v. Rogers, 212 N. Y. 315, 106 N. E. 59 (1914); De Cicco v. Schweizer, 221 N. Y. 431, 117 N. E. 807 (1917); Siegel v. Spear & Co., 234 N. Y. 479, 138 N. E. 414 (1923); and note thereon in (1924) 9 CORNELL LAW QUARTERLY 54.

Constr. Restatement No. 2. (1926) 34.

220 N. Y. 111, 115 N. E. 443 (1917).

114 N. E. 814 (1920).

Supra note 49.

Supra note 39.

Supra note 40.

One wonders whether they are also instances of what Dean Pound had in mind when he spoke of "judicial revolt from mechanical methods" taking "the form of 'officious kindness' and flabby equitable applications of law."—Pound, Mechanical Jurisprudence (1908) 8 COL. L. REV. 675.
must be left for some scholar who has time, expert knowledge, and critical skill. The source material is voluminous and covers the whole field of law.69

One may not, however, deal with the tendencies of the Court during those years without considering to some extent the judicial attitude of the one man who for all that period has been a member of the Court, and for half of it has been its Chief.

Enough has been said to indicate the legal training and the philosophy which he brought with him to the Court. He had them in common with all sound lawyers of his generation. During the earlier years of his term, the necessity for readjusting the comparative claims of the individual will and the social need came to be recognized. There need be no pretense that the recognition was blithely accorded. It was not. While it was in process Judge Hiscock said in the course of one opinion.70

"The doctrine that personal liberty must yield to what is supposed to be the public welfare, has not waned any during the recent years."

And in another he said:71

"We have been passing through days when many people were prodigal in their generous willingness to devise statutory cures for other people who neither demanded, desired or needed them."

In 1907 Judge Hiscock concurred with all the other members of the Court in the decision of People v. Williams,72 which held unconstitutional a provision of the Labor Law limiting the hours when women might work in factories. It fell to him, in 1915, to write in People v. Schweinler Press,73 where the Court held a similar act valid. Whatever may have been the influence of a changed Court personnel and of a sociological brief, the new point of view was frankly accepted. "What is reasonable and appropriate in such a matter," said the opinion, "must be largely decided by prevailing opinion and judgment and by reference to what has been and is being done with approval"—elsewhere.

Judge Hiscock did not sit in the Ives case,74 and his views in the Schweinler case were clearly foreshadowed by his opinions in People v.

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69During his twenty years on the Court of Appeals, the reports, volumes 184 to 243, inclusive, disclose 468 opinions by Judge Hiscock, of which 184 were written during his term as Chief Judge.
70People v. Klinck Packing Co., supra note 12 at 126.
72189 N. Y. 131, 81 N. E. 778 (1907).
73Supra note 71.
74Supra note 26.
Erie R. R. Co.,\textsuperscript{76} Musco v. Surety Co.,\textsuperscript{76} and Hathorn v. Natural Carbonic Gas Co.,\textsuperscript{77} as far back as 1909. So, when in 1916 he was elected Chief Judge, he came to the position, for all his nineteenth century training, clear-eyed to the existence of new social forces which he must have realized would influence the work of legal development, and open-minded to weigh them—with the proviso, however, that they were to be regarded as Greeks bringing gifts. In other words, I think Judge Hiscock began his work as Chief Judge with a disposition to be progressive, but to be so cautiously. And that was exactly the attitude which was required. An examination of volume 220 of the New York Reports, in which his first opinions as Chief Judge occur, will afford support for that view. In \textit{Matter of Stubbe v. Adamson,}\textsuperscript{78} the question was whether evidence might be introduced to show that the requirement of a certain ordinance was unreasonable. After pointing out that the ordinance had acquired the force and character of a statute, the opinion dealt liberally with the police power, refused to allow evidence to be adduced to overthrow the presumption of constitutionality—in other words, accepted the view of the legislature rather than of a jury as to what the social need really was; and then ended cannily by saying that it was unnecessary to determine that no case could possibly arise where such procedure would be proper. In the same volume, by way of contrast, is \textit{Van Blaricom v. Dodgson},\textsuperscript{79} where the Court was urged to say that the owner of an automobile, maintained for the pleasure of his family, should be liable for a death caused by the negligence of his son while driving the car for his own purposes. That was asking too much as things then stood. Judge Hiscock was unable to see—in the language of the opinion—"that a person who is wholly and exclusively engaged in the prosecution of his own concerns is nevertheless engaged as agent in doing something for someone else." To him the agency seemed "theoretical and attenuated." That was ten years ago, and in the meantime the legislature has saved the Court from being called on to say whether changed conditions would warrant a slight extension in the law of agency.

One who follows his opinions through the succeeding volumes will find, I think, that the same attitude has been maintained with some degree of consistency. It is impossible within the limits of such a paper as this to point out the evidence in detail. In the field of

\textsuperscript{76}198 N. Y. 369, 91 N. E. 849 (1910).
\textsuperscript{77}196 N. Y. 249, 90 N. E. 171 (1909).
\textsuperscript{78}194 N. Y. 326, 87 N. E. 504 (1909).
\textsuperscript{79}220 N. Y. 459, 116 N. E. 372 (1917).
\textsuperscript{79}\textit{Supra} note 63.
public law the social demand has been steadily recognized and broadly interpreted. Two instances may be given, because the decisions show a far-sighted comprehension of problems likely to arise from the modern tendency toward urban living.\(^8\) In one case the definition of a city purpose was made so broad and so flexible that developing views can readily be met in the future.\(^8\) In another, which involved the validity of zoning regulations, the inevitable encroachment on individual rights under modern city conditions is recognized and sanctioned.\(^8\) In the field of private law—and the attitude is entirely sane—the disposition to broaden has been more guarded, particularly so in commercial and banking cases. Certainty in the law—itself a social need—has in these cases had greater weight than any other demand. For instance, under a letter of credit the defendant bank paid a draft accompanied by a bill of lading, which described the article shipped only when supplemented by an invoice issued by the vendor, who was not the shipper. The article received by the plaintiff was not the article so described. The court was asked to say that the defective description in the bill of lading might not be aided by an invoice made out by the vendor. Judge Hiscock says:\(^8\)

"The whole process of authorizing banks to issue letters of credit under which the purchase price of goods is often paid for account of the vendee before he has had a chance to examine them is largely based on confidence in the honesty of the vendor. If the vendee is suspicious of dishonesty he can guard against it by appropriate clauses in his contract. But certainly the courts ought to exercise no power of embarrassing or confusing widespread processes of commercial life by inserting in such contracts as this one clauses which it may deem in a particular case might have been quite properly placed there but which as matter of fact the parties were content to disregard and omit."

In another instance, plaintiff sought to recover damages sustained by the delay of defendant in establishing in Bucharest a credit for 2,000,000 lei. The damage claimed was a decline in the market value of lei. The answer in the opinion is that "it is impossible to say that the lei, measured by lei, had declined in market value." In other words, the lei in Bucharest had no market value. Since the only market for standards of value recognized by the business world is the market of bankers who deal in exchange, the phrase "market value", as used in the complaint, might perhaps have been

\(^8\)Cf. People v. Colantone, 243 N. Y. 134, 152 N. E. 700 (1926), where the settled rule of evidence as to proof of reputation for good character is modified to meet urban conditions.

\(^8\)Schieffelin v. Hylan, 236 N. Y. 254, 140 N. E. 689 (1923).

\(^8\)Matter of Wulfsohn v. Burden, supra note 56.

construed to have reference to that market, and not to a market in Bucharest which did not exist. The established rule, however, was adhered to.\footnote{Richard v. American Union Bank, 241 N. Y. 163, 149 N. E. 338 (1925).}

The very recent case of Mirizio v. Mirizio\footnote{242 N. Y. 74, 150 N. E. 605 (1926).} presented a strong appeal to Judge Hiscock’s inherent sense of right and justice. It was open to the Court to so construe the word “misconduct” as to give flexibility and choice of decision in individual cases. By the term itself a standard of conduct was involved. But public policy which has attached definite duties and obligations to the contract of marriage, created a demand for rigidity which outweighed that for the supple test of prevailing opinion.

Since the tendencies of the Court is the subject matter of this paper, it has touched the attitude and work of the Chief Judge only as they seem to be related to those tendencies. The other things which one would like to say of him, one passes by. To lead a great court at a critical time was Judge Hiscock’s task. He and his associates were called upon to know and to measure new forces and to determine wisely the extent to which they should be guided by them. It requires “suppleness of mind and heart to see the world from others’ eyes, to think their thoughts with them, to measure the weight and meaning of their motives and desires.” When one is to deal with “the demands or claims or desires involved in social life” rather than with the old, fixed, familiar rights and duties, something more than logical discrimination is needed. Knowledge of men, experience in affairs, insight into matters of government, breadth of understanding, and a vision of the future—call it imagination if you will—are qualities which the judge must have, if he is to distinguish between demands which are merely of the moment and those which are of tomorrow. The distinction is vital.\footnote{A great part of the difficulties in which, at times, courts find themselves involved, arises from a failure to look forward and see what will be the result of the rules of law they declare.”—Dissenting opinion of Cullen, C. J., in People ex rel Stabile v. Warden, 202 N. Y. 138, 155, 95 N. E. 729 (1911).}

Another great judge once said:\footnote{HOLMES, COLLECTED LEGAL PAPERS (1920) 294, 295.}

“As law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action, while there is still doubt, while opposite convictions still keep a battle front against each other, the time for law has not come; the notion destined to prevail is not yet entitled to the field. It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law * * *”

To me it seems that the recognition of and steadfast holding to some such truth constitute one—if not the greatest—of the services which Judge Hiscock has rendered to the State and to the law.