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## The Decisions of the Court of Appeals in Recent Years and How They Have Affected Substantive Law\*

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No more delicate task comes to an Appellate Judge than the adjustment of the law of the past to the social needs of today. "All law is a compromise between the past and the present, between tradition and convenience."<sup>1</sup> The efforts of the Court of Appeals during the last years to effect this compromise, to determine in each case what weight to give to stability—what weight to growth and progress—that is the subject of my discussion. For sometimes unconsciously, such a balance holds the final factor in many decisions. Stability and change are both essential. These opposites must be reconciled. How well the reconciliation has been effected we lawyers of today can not say. In this spot, more might have been done. There, too much. The experiment can proceed only by the method of trial and error. No man may predict success in advance. We can but bear in mind that the attempt must be made. Therefore, this is to be no criticism, but a history. I speak purely for myself. As Judge Pound stated lately in an article in the *Harvard Law Review*, "The suggestions are presented, not *ex cathedra*, but as one lawyer speaking to others on a controverted question, in order to widen the discussion, not to end it. Chancellor Kent said of his 'Battery Opinions' 'They cost nothing and bind no one'."<sup>2</sup>

Even if criticism were possible, a critic could influence our profession merely here and there. With the facts before them all men will not reach the same conclusion. There must be stability in the law. There must be growth. Yet where stability or where growth is the more important, this is the point of division. Some, attached to the past, will mourn every departure from the common law. They

\*Address before Bar Association of the City of New York, March 24, 1927.

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<sup>1</sup>BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* (1901) 607.

<sup>2</sup>Pound, *The Judicial Power* (1922) 35 *HARV. L. REV.* 787.

may not completely agree with Mr. Justice Blackstone in the well known case of *Perrin v. Blake*. "Whatever their parentage," he says, speaking of certain technical rules, "they are now adopted by the common law of England, incorporated into its body, and so interwoven with its policy that no court of justice in this Kingdom has either the power or (I trust) the inclination to disturb them."<sup>3</sup> Even conservatives of today are not all ready to go to such a length. They may better agree with the modified view of that distinguished lawyer, Judge Dillon—some of us may remember him lecturing in the old Columbia Law School on Great Jones Street. Judge Dillon said, back in 1864: "We have conducted our examination of this question, fully impressed with the conviction that it is dangerous to innovate, although it must be admitted to be sometimes necessary to do so, and are gratified in the belief that the conclusion we have reached neither involves the introduction into the law of evidence of any new principle nor the subverting of any old ones."<sup>4</sup>

But, these conservatives say, the precedents contained in the reports, although they now amount, as Mr. Justice Stone has pointed out, to about 18,500 volumes and increase each year by about 350 more,<sup>5</sup> and the logical deductions to be gathered from them, are to guide the courts to a correct decision in every case. Here and there injustice may result, but certainty is the main consideration.

Other men, seeing the needs of our expanding life, impressed with the new relationships caused by modern civilization and modern business minimize the applicability of ancient customs. They quote Bryce. Courts are not to be blind "to the truth that the first business of law is to subserve the well being of the people and to win their confidence as well as command their obedience."<sup>6</sup> They quote our late great Chief Judge. "The administration of the law is a practical matter. . . . Where possible it must with reasonable flexibility adjust itself to new and changing conditions and in accordance with recognized principles must attempt to solve the problems of life in a well ordered, fair and reasonable way which will secure the approval of well informed and intelligent opinion."<sup>7</sup> There is, they add, a considerable percentage of ill-decided cases. Even many of those that represented the law of the day, no longer should be held to bind us. Certainty is of less importance, if courts are to

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<sup>3</sup>1 HARGRAVE, LAW TRACTS 489, 498 (1772).

<sup>4</sup>County v. Ingalls, 16 Iowa 81, 85 (1864).

<sup>5</sup>Stone, *Law Simplification* (1923) 23 COL. L. REV. 319.

<sup>6</sup>*Supra* note 1, at 635.

<sup>7</sup>Hiscock, *Progressiveness of New York Law* (1924) 9 CORNELL LAW QUARTERLY 371.

retain public confidence, than decisions in each particular case, which do justice then and there. Not only do they call for statutory change, but they ask the courts to abandon ancient landmarks to reach that result.

There is a basis for each view. The truth may lie between the two extremes. Pragmatism is often an answer to our troubles. Not a philosophical theory, complete and logical and flawless. Not a rule hedged about with exceptions meaningless today. Some compromise that on the whole works well.

Many of you are familiar with the lectures of Chief Judge Cardozo at Yale University where he speaks of the two tendencies. We must have certainty that the individual may so regulate his life as to keep within the bounds of law; that the lawyer may give advice with assurance; that the judge may be guided to his decisions. So we appeal to precedents, and draw logical deductions from them which we apply to modern conditions. Or when the precedents are too numerous, we crystalize them into Codes and again start on a new series of decisions which in turn become precedents for the future. Thus is certainty preserved. But a changeless law is a sign of decay. It is not the law of the Medes and Persians "which altereth not" that marks a growing civilization. New situations continually arise, to which old principles fit badly or not at all; to which logical inferences from these principles cause absurd results. The legislature may act. Usually it does not. Then what are the courts to do? Are they to follow old paths? Are they to cut new trails? Certainty or growth? When and where and how?

No man, I think, may give an answer always applicable. A generalization of Dean Pound gives slight aid. Some branches of the law, as inheritance, real estate and commercial contracts, call for the greater stability. Rules as to torts permit of change with greater freedom. Still we are carried but a short way. A particular case is to be decided. What theory is to govern?

Here is ground for the statesman—perhaps for the prophet—rather than for the judge. It is the most serious question that confronts an appellate court. As statesmen differ in their views of governmental problems, so will judges in the results reached by them. How and when certainty should be abandoned will depend upon their conception of the needs and ends of the law.

The praetor with his edicts, until they too hardened into rules, was free to follow his ideas of natural justice. The chancellors, until they too became bound by precedent, might correct by their injunctions abuses caused by the letter of the common law. No such wide

latitude is allowed a modern judge. Still he has some freedom. He may and must balance the two opposing necessities.

If change is to come, the how is comparatively unimportant. It may be made by distinctions without reality. It may be announced frankly. The when, is the important point. Most of us will agree that it is for the wise judge to see that it is not unnecessary; that it is not too radical for the needs of the day; that it will, so far as foresight can determine, promote honest conduct without too great disturbance of present rules; that it will as little as possible affect existing rights. These after all are mere words. Their importance lies in the interpretation to be given to them. As well say, "As growth must needs come, change should be made when it is advisable." Whether thought advisable or not depends upon the mental attitude of the appellate court. This will show even in the interpretation of statutes. The Court of Appeals is told on criminal appeals "to give judgment without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties."<sup>8</sup> To one this means as slight a departure from old rules as the language will permit. The wrongful admission or exclusion of a material bit of evidence he says affects the substantial rights of the accused. To another, if the defendant seems in fact guilty, it does not. Only where his guilt is really doubtful, and if the evidence is so important that it would probably alter the verdict of the jury should there be a reversal.

So the practicing lawyer is in a dilemma. Is his case one where precedent will prevail, or one where change will come? No man can say with certainty. Ordinarily he is safe in reliance on his precedents. But it may not be so. His judgment and common sense must guide him as, let him hope, they will guide the judges of the appellate court.

As briefly as possible I intend to refer to decisions of the Court of Appeals made in the last ten years or so. Many of the cases, while novel questions may have been presented on the facts, do not show conscious alteration of old rules, or the conscious refusal to make alterations. Yet they may indicate the tendency of that court. Some are cases where changes have been made or new principles have been announced modifying what theretofore was considered the substantive law or the law of evidence. And there are others, where change was urged, where it might have been made, but where it was denied as inconvenient, or as too deeply touching existing rights. I begin with the latter.

As we all know, a private seal has lost much of its ancient im-

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<sup>8</sup>C. C. P. § 542.

portance. No longer is an impression on wax required, although still there must be some mark or the like affixed to the signatures to make the document a sealed instrument.<sup>9</sup> With the passing of the older formalities it was said that the older rules as to the peculiar effects of sealed instruments should be also ignored. Indeed much encouragement had been given by the Court of Appeals to such a claim. In *Harris v. Shorall*,<sup>10</sup> it was intimated that the rule that a sealed instrument might not be modified by a parol unexecuted contract had no longer practical reason for its support. Then came, however, two cases where the force and effect to be given to a seal was directly involved.<sup>11</sup> In them the court was required to consider the result of a change upon existing rights. In the first, it was held that a contract under seal might not be enforced against undisclosed principals. In the second, that such a contract so far as unexecuted might be modified only by a contract itself under seal. The answer to the criticisms of these decisions is that there are many instruments made in reliance upon the present rules. Sealed agreements as to real estate are executed expressly to protect undisclosed principals. If change be wise, it should come from the legislature which may make it prospective only, not from the courts which can not.

A corporation as we all know, is a legal entity, wholly distinct from its stockholders. For its acts and defaults it and not they are liable. It has been argued, however, that where one person owns substantially all the stock and is in complete control he should be responsible for its torts. To permit him to escape is the evasion of justice because of a mere legal fiction. Again, however, the Court of Appeals has not yielded to these arguments.<sup>12</sup> It has thought that in spite of injustice here and there, public policy is better served, on the whole, by preserving the old distinction.

Again, it has refused to change the rules as to champerty when land held adversely is conveyed,<sup>13</sup> and also the so-called "residue of a residue" rule.<sup>14</sup> Perhaps in both these cases the abandonment of precedent would have caused no particular harm. In the second case, the court said that the reason given for the rule was not very apparent, satisfactory or convincing. In the first, the court was told by a professor whose pet theories seem to have been ignored that

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<sup>9</sup>*Empire Trust Co. v. Heinze*, 242 N. Y. 475, 152 N. E. 266 (1926).

<sup>10</sup>230 N. Y. 343, 130 N. E. 572 (1921).

<sup>11</sup>*Crowley v. Lewis*, 239 N. Y. 264, 146 N. E. 374 (1925); *Cammack v. Slattery*, 241 N. Y. 39, 148 N. E. 781 (1925).

<sup>12</sup>*Elenkrieg v. Seibrecht*, 238 N. Y. 254, 144 N. E. 519 (1924); *Berkey v. Railway Co.*, 244 N. Y. 84, 155 N. E. 58 (1926).

<sup>13</sup>*People v. Ladew*, 237 N. Y. 413, 143 N. E. 238 (1924).

<sup>14</sup>*Wright v. Wright*, 225 N. Y. 329, 122 N. E. 213 (1919).

"it would be difficult to find in reported cases a clearer illustration of the importance of equipping lawyers and judges with adequate analytical tools with which to work. For want of such an equipment the majority of the Court of Appeals" (six out of seven) "seem to the present writer to have reached a decision in an important case by means of an argument which can not stand the test of careful analysis and one for which, in the light of the policy established by past decisions it is difficult to see any justification."<sup>15</sup> Unable to appeal he seems to have chosen the second alternative said to be open to defeated suitors. As for the court, it may pray with King David, "Let the righteous rather smite me friendly and reprove me; but let not their precious balms break my head." Apparently it was thought that certainty with regard to wills and real estate was more important than logical consistency. Perhaps too, there was the more reluctance to abandon established precedents, as in each case justice seemed to lie with the successful party.

Two more examples, this time in respect to torts. One who negligently causes a fire has been held responsible only for damages suffered by property adjoining that on which the fire started.<sup>16</sup> I see no real basis for such a rule. It was a matter of practical expediency. Yet notwithstanding sharp criticism, when the court was asked to review its previous decision, while it did say it was not to be extended,<sup>17</sup> it refused to make the alteration suggested.<sup>18</sup>

A more interesting case has to do with negligent injuries done to an unborn child. The courts have usually refused to permit a recovery in such cases on the theory that the child was not a separate person at the time, although this is not true as to property rights. Nor as to some crimes. If one injures a child before birth so that he dies thereafter it may be manslaughter. The Court of Appeals followed the existing rule, largely on grounds of policy.<sup>19</sup> Possibly it had also in mind the difficulty of tracing in such cases the relation between effect and cause. The result so reached may be compared with another case where an equally long line of decisions was overruled and relief afforded. At common law, a wife might not bring an action for criminal conversation against the paramour of her husband. The reasons, the court said, were archaic. Modern conditions and modern legislation rendered them no longer applicable.

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<sup>15</sup>(1925) 34 YALE L. J. 409.

<sup>16</sup>Hoffman v. King, 160 N. Y. 618, 55 N. E. 401 (1899).

<sup>17</sup>Davies v. R. R. 215 N. Y. 181, 109 N. E. 95 (1915).

<sup>18</sup>Rose v. R. R. 236 N. Y. 568, 142 N. E. 287 (1923); Moore v. Co., 240 N. Y. 673, 148 N. E. 753 (1925).

<sup>19</sup>Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567 (1921).

"The common law is not rigid and inflexible, a thing dead to all surrounding and changing conditions; it does expand with reason. The common law is not a compendium of mechanical rules written in fixed and indelible characters but a living organism which grows and moves in response to the larger and fuller development of the nation. . . . Courts exist for the purpose of ameliorating the harshness of ancient laws inconsistent with modern progress when it can be done without interfering with vested rights."<sup>20</sup>

In turning to cases where changes have been made or which involve decisions under a novel state of facts, our attention is at once called to the wide extension of the so-called police power—"a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirements of due process."<sup>21</sup> "It extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity."<sup>22</sup> The court had gone far before the ten years to which we are now limiting the discussion. It has gone farther since.

In earlier years, it was a concept that a man might do as he would with his own, except insofar as he offended what was then considered some legal right of his neighbor. So as to his right to contract freely. The State might not interfere. True, this was not universally so. Upon making due compensation, it might take property which was required for public use. But generally it might not limit the owner's use of his property. Nor might it interfere with freedom of contract or the right of the citizen to engage in business how and when and where he chose. Although some limitation was admitted to be necessary, little emphasis was placed upon the actual conditions of today. One of the earlier indications of a different view came as to a business said to be affected with a public interest. But the courts adhered with much strictness to the older doctrine.

In *Ives v. So. Buffalo R. R. Co.*,<sup>23</sup> for instance, the Workmen's Compensation Act was held unconstitutional as depriving the manufacturer of his property without due process of law. In *People v. Williams*,<sup>24</sup> it was said that the State might not prohibit a contract with a woman for employment in a factory during certain hours. In *People v. Marx*<sup>25</sup> it was decided the State might not prohibit the

<sup>20</sup>*Oppenheim v. Kridel*, 236 N. Y. 156, 164, 140 N. E. 227 (1923).

<sup>21</sup>*People v. La Fetra*, 230 N. Y. 429, 430, 130 N. E. 601 (1921).

<sup>22</sup>*Matter of Wulfsohn v. Burden*, 241 N. Y. 288, 298, 150 N. E. 120 (1925).

<sup>23</sup>201 N. Y. 271, 94 N. E. 431 (1911).

<sup>24</sup>189 N. Y. 131, 81 N. E. 778 (1907).

<sup>25</sup>99 N. Y. 377, 2 N. E. 29 (1885).

manufacture and sale of oleomargarine. These cases are but illustrations of the limited power conceded to the State to interfere with the affairs of its citizens. Property, contracts, business—no meddling with either. I do not suggest that they were mistakenly decided. The opinions were rendered by able judges giving their considerate conclusions. They spoke the philosophy of the day. Even though under the somewhat vague theory of the police power much was then allowed, no such wide extension was given to it as now. All change is not progress, if by progress we mean an alteration for the better. But for good or ill the change has come. We are on the open sea. The old landmarks have sunk below the horizon. We have some charts to guide us, but we must depend largely upon the skill and judgment of the captain.

I for one do not lament the past. Mere rigidity means death, not life. As always, law must express the needs and the desires and the theories of the community. It can not by formulas check the changing philosophy of the people as to its government. To this it must conform, perhaps slowly, perhaps with hesitation—but conform if it will live. The philosophy may be unwise—the wisdom of our fathers may be greater than our own. I do not pretend to know. Wise or foolish it is going to control. All the courts may do is to follow these changes—acting as a check, perhaps, but yielding in the end.

So it is that a review of recent decisions indicates that the court has of late continually expanded the scope of permissible governmental interference with what were once thought almost sacred rights.

I do not need to speak of these cases in detail. That has been done many times. As to property—the rent laws have been held constitutional.<sup>26</sup> The zoning laws as well;<sup>27</sup> and also provisions of the tenement house law.<sup>28</sup> So the State may release and protect beaver without liability to those whose property is thereby damaged.<sup>29</sup> Generally it is said “the State may establish regulations reasonably necessary to secure the general welfare of the community by the exercise of its police power although the rights of private property are curtailed and freedom of contract is abridged.”<sup>30</sup>

Business and freedom to contract have been limited by laws providing as to night work for women,<sup>31</sup> as to the sale of theatre

<sup>26</sup>People *ex rel.* Dunham v. La Fetra, *supra* note 21, at 429.

<sup>27</sup>Trust Co. v. Williams Co., 229 N. Y. 313, 128 N. E. 209 (1920).

<sup>28</sup>Altz v. Leiberson, 233 N. Y. 16, 134 N. E. 703 (1922).

<sup>29</sup>Barrett v. The People, 220 N. Y. 423, 116 N. E. 99 (1917).

<sup>30</sup>People *ex rel.* Dunham v. La Fetra, *supra* note 21.

<sup>31</sup>People v. Schweinler Press, 214 N. Y. 395, 108 N. E. 639 (1915).

tickets,<sup>32</sup> although here the court may have gone too far; as to the sale of patent medicines,<sup>33</sup> or of jewelry at night.<sup>34</sup> These and many other like provisions have met with the approval of the court. The State may regulate secret societies,<sup>35</sup> and it may enact what we know as blue sky laws.<sup>36</sup> In fact, it is difficult to fix a limit that some day may not be overpassed. Now, however, it is safe to say that at least the courts will not tolerate what amounts to total confiscation of private property. Nor may the legislature now prohibit a lawful common and ordinary business, however far it may regulate its practice.<sup>37</sup> No one can go much farther. Still less may one predict the future. "The needs of successive generations", said Chief Judge Cardozo, in *Klein v. Marvelas*,<sup>38</sup> "may make restrictions imperative today which were vain and capricious to the vision of times past." So I leave this subject, as indeed it must be left, with no attempt to define the limits of the police power now—much less to predict what they may be in ten or fifty years, yet with the confident hope that the courts will effect a wise reconciliation between the reasonable rights of the individual and the public necessity.

The war and its results have raised questions new to our state courts. What are they to say of the unrecognized Soviet government of Russia, for instance? May that government be sued or may it sue here? It may not be sued. That is clear. The goods of an American citizen stored in Russia are confiscated without right, by mere force. Was this a conversion? Was the Soviet, admitted to be a *de facto* government, to be treated as an ordinary foreign corporation? The court held this might not be done. Within its own territory the Soviet was a sovereign power. Non-recognition did not alter this undoubted fact. And as a sovereign it might not be sued in our courts without its own consent. The question of redress, if redress there is to be, is a political one. It must rest with the State Department.<sup>39</sup> Again, a similar action was brought against one of the ephemeral revolutionary governments controlling for a time a portion of Siberia. If in truth a *de facto* government, it might not be sued. If not, if it might be considered merely a corporation, when armed forces conquered its territory and extinguished its powers

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<sup>32</sup>People v. Weller, 237 N. Y. 316, 143 N. E. 205 (1924).

<sup>33</sup>Fougera v. The City, 224 N. Y. 269, 120 N. E. 642 (1918).

<sup>34</sup>Biddles v. Enright, 239 N. Y. 354, 146 N. E. 625 (1925).

<sup>35</sup>Peo. ex rel. Bryant v. Zimmerman, 241 N. Y. 405, 150 N. E. 497 (1926).

<sup>36</sup>Dunham v. Ottinger, 243 N. Y. 423 (1926); People v. Radio Corp. 244 N. Y. 33 (1926).

<sup>37</sup>People v. Beakes Dairy Corp., 222 N. Y. 416, 191 N. E. 115 (1918).

<sup>38</sup>219 N. Y. 383, 386 114 N. E. 809 (1916).

<sup>39</sup>Wulfsohn v. Russian Republic, 234 N. Y. 372, 138 N. E. 24 (1923).

its existence ceased. Alive or dead no valid judgment might be obtained against it.<sup>40</sup>

A different result was reached when the Soviet attempted to use our courts. Now the question of recognition became material. If recognized a foreign government may sue here. Not as of right, however, but because of comity, and; where unrecognized, no such comity exists. So a demurrer to the complaint was sustained.<sup>41</sup>

Another class of cases deals with the results here of decrees of the Soviet government, nationalizing property in Russia, confiscating debts and terminating the life of corporations. These decrees have been passed by a government having control of life and property within its own borders. This is a fact, not a theory. Non-recognition determines only what effect we shall give to them.

This much, I think is settled. A contract made by a citizen of New York, to be performed in Russia, with an individual here whether Russian or not, may be enforced in our courts. Neither the fact that assets in Russia from which money would normally be paid, have been seized; nor that the Russian government has assumed liability; nor that it has attempted to confiscate the debt is a defense.<sup>42</sup> It may be that at times decrees of non-recognized but *de facto* governments will be recognized by us, if consistent with our public policy and our theories of equity and justice. But not so here. Suppose, however, the promisor is a Russian corporation. May it take advantage of these decrees of its own government? May it claim to be dead, that its obligations have been assumed by another who under the decision in the *Wulfsohn* case<sup>43</sup> is immune from suit? The answer was in the negative. "The defendant asks us to declare", the court said, "its death as a means to the nullification of its debts and the confiscation of its assets by the government of its domicile. Neither the public policy of the nation . . . nor any consideration of equity or justice exacts an exception in such conditions to the need of recognition."<sup>44</sup> As to the attempt of the Soviet to cancel the debts of the nationalized corporations, even had there been recognition, the decree would have had no extra-territorial effect.

Another situation may arise. A Russian corporation may be a plaintiff. It may seek to recover a bank balance here. Shall the court say that it is dead as the Omsk government was dead? That

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<sup>40</sup>*Nankivel v. Omsk All Russian Government*, 237 N. Y. 150, 142 N. E. 569 (1923).

<sup>41</sup>*Russian Republic v. Cibrario*, 235 N. Y. 255, 139 N. E. 259 (1923).

<sup>42</sup>*Sokoloff v. The Bank*, 239 N. Y. 158, 145 N. E. 917 (1924).

<sup>43</sup>*Supra* note 22.

<sup>44</sup>*James v. Second Russian Ins. Co.*, 239 N. Y. 248, 256, 146 N. E. 369 (1925).

any claim it may have is transferred to the Soviet? May a government *de facto* regulate its national corporations? May this be one of the exceptions to which the court has referred? In no case has the question yet been answered. In one, it was held that upon the testimony presented there was nothing to show any decree dissolving the corporation.<sup>45</sup> Nor was the question decided in a second case, where the plaintiff was defeated, but on the ground that if our courts took jurisdiction their judgment might not protect the defendant from the possibility of a double recovery.<sup>46</sup> In a still later case brought by a corporation for similar relief, where the danger of a double recovery was absent, it succeeded.<sup>47</sup> Here, however, there was a finding of fact by which the court was bound, that the corporate existence continued.

The last case to be decided was brought by a Russian, who obtained his policy in Russia against the New York Life Insurance Company.<sup>48</sup> Again, the effect of these decrees upon a Russian in Russia was not considered.

Another line of cases deals with the rights of enemy aliens and the effect of the war upon prior contracts made with them. In *Techt v. Hughes*<sup>49</sup> may be found a discussion as to their status, even though they may reside here and be personally loyal to our government. The same case speaks of treaties made with a nation with whom we are subsequently at war, and the rule was laid down that "provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected." As to contracts, the general rule was stated in *Neumond v. Farmers Feed Company*.<sup>50</sup> "The effect of war upon an existing contract between belligerents will vary with the nature of the obligation that is yet to be fulfilled. If the contract has been fully executed by the enemy before the outbreak of hostilities, if all that is left is a unilateral obligation for the payment of a debt the obligation is suspended. The citizen must pay his debt when the war is at an end. On the other hand, if the contract is still executory at the beginning of the war, if there are mutual obligations that are yet to be fulfilled, the contract will be terminated when the essential purpose of the parties would be thwarted by delay or the business efficacy or value of their bargain materially impaired."

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<sup>45</sup>Joint Stock Co. v. The Bank, 240 N. Y. 368, 148 N. E. 552 (1925).

<sup>46</sup>Russian Reinsurance Co. v. Stoddard, 240 N. Y. 149, 147 N. E. 703 (1925).

<sup>47</sup>First Russian Ins. Co. v. Beha, 240 N. Y. 601, 148 N. E. 722 (1925).

<sup>48</sup>Sliosberg v. New York Life Ins. Co., Feb. 1927.

<sup>49</sup>229 N. Y. 222, 128 N. E. 185 (1920).

<sup>50</sup>244 N. Y. 202, 155 N. E. 100 (1926).

With the outbreak of the war and with the increasing probability that we would become involved in the struggle, attempts were made to transmit money to Europe. They gave rise to a number of questions. The most important was as to the real nature of the transaction where money is paid to a bank for the purpose of establishing in some foreign country a credit for the person paying. Does the bank make a present sale of exchange? If so, certain serious consequences follow. Or does it enter into an executory contract to render certain services? In *Equitable Trust Company v. Keene*<sup>51</sup> the reply to the question was limited by the form of the complaint which the court considered. But in *Gravenhorst v. Zimmerman*<sup>52</sup> it was fairly presented. In that case, the money was paid to a New York bank for "a wireless transfer" of marks to Berlin. The court held that this was a contract for future action, not the sale of an existing right. It was not like the purchase of a draft or bill of exchange where one "obtains a written order by the drawer upon the drawee which by commercial usage and even by statutory enactment in some jurisdictions has come to be recognized as the symbol and equivalent of money, and which enables one who has obtained it without further action by the drawer to obtain from the drawee the moneys which it represents." The banker may have no existing foreign credit. That he simply agrees to create. Nor does any trust relationship exist between the banker and his customer.<sup>53</sup> Doubtless the court in reaching this decision on a controverted point was influenced by what it believed to be the ordinary usage and understanding of business men.

A somewhat more doubtful case was *Richard v. American Union Bank*.<sup>54</sup> The defendant agreed to establish in Roumania a credit for the plaintiff of 2,000,000 *lei* at a fixed date. It failed to do so, but later did establish such a credit. The plaintiff did not rescind the contract. Instead, he drew the *lei* deposited to his account and sued to recover damages alleging that the "market value" of the *lei* had declined since the date when the deposit should have been made. The contract was without question an executory one to be performed at Bucharest. Damages for its breach were to be measured there and by the standards of value there prevailing. As damages for a delay in establishing a credit here might not include anything for a smaller purchasing power of our dollar, so damages for establishing a credit

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<sup>51</sup>232 N. Y. 290, 133 N. E. 894 (1922).

<sup>52</sup>236 N. Y. 22, 139 N. E. 766 (1923).

<sup>53</sup>*Legniti v. The Bank*, 230 N. Y. 415, 130 N. E. 597 (1921).

<sup>54</sup>241 N. Y. 163, 149 N. E. 338 (1925).

of *leis* in Roumania, measured there, might not include the diminished purchasing power of the *lei*.

One more reference to banking matters—although this time having no relation to war conditions. Concededly, where a bank issues an irrevocable letter of credit for the benefit of the seller of goods, it assumes no duty which requires it to investigate the quality of the merchandise. It may make payment upon the presentation of the specified documents. If, however, the papers presented are proper in form, may it refuse payment because it has in fact investigated and found the goods of inferior quality? The court said it might not. That was a question between buyer and seller. If the letter of credit was in the usual form, if no such right was reserved therein, the contract of the bank was to pay on the presentation of the documents. Its duty was absolute.<sup>55</sup> Again, the court followed what it believed to be ordinary commercial usage.

Several recent cases have to do with marriage. Whatever the agreements between the parties as to their future relations prior to a civil ceremony, the law will not recognize an understanding to refrain from cohabitation until a religious ceremony is performed. The refusal to consent to ordinary matrimonial relations amounts to a desertion or abandonment. An agreement to refuse them modifies the marriage contract. However conscientious the motives for such an agreement, it will not be tolerated. Our legislature has fixed the status of this contract as a civil one, carrying with it certain rights, duties and obligations. It may not be altered by private agreement. To permit this would violate the public policy of the State<sup>56</sup>

Of interest, too, are some recent decisions in regard to foreign divorce. In *Ball v. Cross*,<sup>57</sup> a husband obtained in Nevada a decree of divorce against his wife whom he had married in Missouri, on the ground of cruelty. There was no matrimonial domicile in Nevada. The last such domicile was in Texas. The summons was served by publication and the wife neither appeared nor answered. Was the divorce valid as to her? Had she been a citizen of, and domiciled in New York our courts would have ignored the decree. She was, however, a citizen of Texas. If the law of Texas held the divorce valid, then it is not for us to declare it void. If she is freed from her matrimonial obligations in the state of her domicile, she is freed elsewhere. So we should refer to the rule there in deciding whether her later marriage to a citizen of New York was good or bad. In

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<sup>55</sup>*O'Meara Co. v. The Bank*, 239 N. Y. 386, 146 N. E. 636 (1925).

<sup>56</sup>*Mirizio v. Mirizio*, 242 N. Y. 74, 150 N. E. 605 (1926).

<sup>57</sup>231 N. Y. 329, 132 N. E. 106 (1921).

*Dean v. Dean*,<sup>58</sup> on the same theory the court followed the Canadian practice in refusing to recognize such a divorce obtained against a Canadian subject when she sued here.

In *Hubbard v. Hubbard*,<sup>59</sup> the wife, separated from her former husband whom she had married in Pennsylvania, and then domiciled in Massachusetts, had obtained a divorce against him in that state, upon service by publication and without his appearance. That husband was then a resident of New York, dying there in 1912. After the divorce, she married Mr. Hubbard also domiciled in Massachusetts. The marriage was there valid. Later they both moved to this state, and here, after the death of the former husband, Mr. Hubbard, sought to annul his marriage on the ground that the divorce was invalid. The court held that whatever the former husband might do, Mr. Hubbard might not complain. His marriage was perfectly valid where contracted. We would not act as we might have done if the former husband, who had become a citizen of New York at the time of the divorce, had moved in the matter. Our policy "does not require the establishment of this state as a forum of refuge to which parties to a marriage, validly consummated in a sister state in which they were domiciled may, they having become residents of this state, resort to have the marriage adjudged a nullity."

In *Gould v. Gould*,<sup>60</sup> while husband and wife were married in Scotland, the husband and consequently the wife were domiciled in New York. They had lived for years, however, in Paris. There the wife committed adultery. In an action begun in the French courts by the husband in which jurisdiction was obtained of the wife, a decree in his favor was granted. The Court of Appeals held that while we need not, we should, under the circumstances, recognize that decree here. To do so would not offend our public policy. But the opinion contained this caution, "If in the instant case the judgments of the courts of France disclosed that the parties were merely sojourning in France at the time the decree of divorce was granted, or that a residence in France was of such limited duration as to lead the Supreme Court to believe that the decree was the result of collusion, or the judgment not rendered for a cause recognized as sufficient cause for absolute divorce by the law of this state, it may be that the justice presiding would be justified in holding that the decree was contrary to the policy of this state and in refusal to give effect" to it.

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<sup>58</sup>241 N. Y. 240, 149 N. E. 844 (1925).

<sup>59</sup>228 N. Y. 81, 87, 126 N. E. 508 (1920).

<sup>60</sup>235 N. Y. 14, 29, 138 N. E. 490 (1922).

Those obtaining divorces in Paris, of whom we hear so much today, should heed this warning.

The question of the effect to be given to the French judgment was, therefore, finally disposed of in the exercise of discretion. The court once more reviewed the matter of foreign judgments in *Johnston v. Compagnie Generale Transatlantique*,<sup>61</sup> referring here, however, to judgments purely *in personam*. As to them it refused to follow the United States rule.

In matters of evidence, there are but two decisions that need detain us. A police officer, with no show of right, by unreasonable search procures some articles tending to show the criminality of another. Such articles are subsequently offered in evidence against the owner on his trial for crime. The Supreme Court of the United States have held that they should be rejected. To the contrary our courts hold that they should be received. The reasoning in support of the New York rule is stated in an able opinion of Chief Judge Cardozo.<sup>62</sup>

In some of the earlier cases, the court was supposed to have laid down a special rule of evidence in respect to alleged oral contracts made with one deceased, often for the support of a child, or for payment of services rendered by a surviving friend or relative. Reference to these cases are still found in briefs as authority for the proposition that contracts of this kind must be proved by disinterested witnesses and established by clear and convincing testimony. Such is not the law. In civil cases, the plaintiff need produce but a preponderance of evidence. In determining whether he has done so, the triers of facts may and should remember that death prevents speech by the alleged promisor. So they may reject evidence they would accept if he were alive to contradict. They may consider the possibility of disproof. But all this is a counsel of caution to them, not a matter of law on appeal.<sup>63</sup> This rule has several times been reiterated.<sup>64</sup>

In contracts, perhaps as important a case as any during the last ten years is *Woods v. Duff-Gordon*<sup>65</sup> where there was used the classical phrase "instinct with an obligation." In a certain contract an express promise by one party may be lacking, yet when the agreement is viewed as a whole, it may be seen to be meaningless unless such a

<sup>61</sup>242 N. Y. 381, 152 N. E. 121 (1926).

<sup>62</sup>*People v. Defore*, 242 N. Y. 13, 150 N. E. 585 (1926).

<sup>63</sup>*McKeon v. Van Slyck*, 223 N. Y. 392, 119 N. E. 851 (1918).

<sup>64</sup>*Ward v. Insurance Co.*, 225 N. Y. 314, 122 N. E. 207 (1919); *Matter of Sherman*, 227 N. Y. 350, 125 N. E. 546 (1919); *Caldwell v. Lucas*, 233 N. Y. 248, 135 N. E. 321 (1922).

<sup>65</sup>222 N. Y. 88, 118 N. E. 214 (1917).

promise is implied. The grant to him of certain rights, requires the assumption by him of correlative duties. The courts will interpret such contracts as business men would ordinarily understand them and they would understand the contract as intended to have business efficacy.

The extent and application of the rule in *Lawrence v. Fox*<sup>66</sup> has been before the court on several occasions. Probably it is not fully settled. In *Seaver v. Ransom*,<sup>67</sup> the court said that the recovery by a third party for promises made for his benefit is at present confined to four classes of cases: (1) where there is a pecuniary obligation running from the promisee to the beneficiary; (2) where the contract is made for the benefit of a wife, affianced wife, or child of a party to the contract; (3) in public contract cases, and (4) where, at the request of a party to the contract, the promise runs directly to the beneficiary. But the second rule was here extended to cover the case of a dependent niece, the court quoting with approval the statement of the Appellate Division: "The doctrine of *Lawrence v. Fox* is progressive, not retrogressive. The course of late decisions is to enlarge, not limit the effect of that case." How far, under different circumstances the court may extend the rule it is difficult to say. It may finally adopt the general doctrine that any third person, for whose benefit a contract was intended can sue on it. Perhaps that way justice and common sense lie.

I need not refer in detail to the course of the court in rationalizing the rule as to the need of mutuality in obtaining a decree for the specific performance of a contract. In *Waddle v. Cabana*<sup>68</sup> it was pointed out that the particular contract in question was mutual in its obligation and remedy. But in *Epstein v. Gluckin*<sup>69</sup> it was distinctly held that "what equity exacts today as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or to defendant. Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end."

There are other decisions on the law of contracts which I might discuss had I the time. Policies of insurance, their provisions with the rules as to waiver;<sup>70</sup> sales of food and the warranties and obli-

<sup>66</sup>20 N. Y. 268 (1859).

<sup>67</sup>224 N. Y. 233, 120 N. E. 639 (1918).

<sup>68</sup>220 N. Y. 18, 114 N. E. 1054 (1917).

<sup>69</sup>233 N. Y. 490, 494, 135 N. E. 861 (1922).

<sup>70</sup>*McCormack v. Ins. Co.*, 220 N. Y. 447, 116 N. E. 74 (1917); *Greentaner v. Ins. Co.*, 228 N. Y. 388, 127 N. E. 249 (1920); *Satz v. Bonding Co.*, 243 N. Y. 385 (1926); *Kwiatowski v. Brotherhood*, 243 N. Y. 394 (1926).

gations in connection therewith;<sup>71</sup> the responsibility of a municipality for the quality of the water furnished by it to consumers;<sup>72</sup> where on a sale a mistake is made as to the identity of the buyer;<sup>73</sup> damages arising from a breach of a contract to sell;<sup>74</sup> the rule as to deliveries and the effect of an extension of time;<sup>75</sup> public contracts with their references to plans and specifications;<sup>76</sup> matters relating to the election of remedies;<sup>77</sup> are all subjects of interest to the lawyer and judge but may not be dealt with here. There are, too, many cases dealing with the new arbitration law, intended fairly to carry out its purposes and to promote the requirements of business in a great commercial center. There are also discussions as to when a foreign corporation is doing business within the state so that it may be here sued or taxed. Many of these cases may not be new departures. They may not involve new rules or new theories. They do indicate, I think, a liberal outlook, a desire, while preserving what is best in the past, still to regard the needs of the present.

Let us turn to other subjects. As to wills, less and less heed is given to technical rules of construction. More and more the effort is to discover the real intent of the testator, and, where found, if possible to effectuate it.<sup>78</sup>

In regard to real property, one of the most important decisions related to the title to the beds of the great lakes in the western part of the state lying east of the Massachusetts Cession line and not on any state boundary. As to those west of that line different considerations are applicable. Where the State by patent conveys a lot according to a certain map, which map shows the lot running to the shores of one of these greater lakes, does the patentee take title to the center, as he would under like circumstances in case of a pond or in case of such a navigable stream as the Oswego River? Very probably not, the court said. It was not essential, however, to determine the question for if the abutter under such circumstances held title to the line of low water reached in the ordinary dry season, the result was decisive of the issues presented. That he did was held

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<sup>71</sup>Rinaldi v. Mohican Co., 225 N. Y. 70, 121 N. E. 471 (1919).

<sup>72</sup>Canavan v. The City, 229 N. Y. 473, 128 N. E. 882 (1920).

<sup>73</sup>Phelps v. McQuade, 220 N. Y. 232, 115 N. E. 441 (1917).

<sup>74</sup>Orester v. Rubber Co., 228 N. Y. 134, 126 N. E. 510 (1920).

<sup>75</sup>Trainor v. Amsinck, 236 N. Y. 392, 140 N. E. 931 (1923); Murray v. Ledgerwood Co., 241 N. Y. 455, 150 N. E. 514 (1925).

<sup>76</sup>Faver v. The City, 222 N. Y. 255, 118 N. E. 609 (1918); Leary v. The City, 222 N. Y. 337, 118 N. E. 249 (1918); Matter of Semper, 227 N. Y. 151, 124 N. E. 743 (1919); Foundation Co. v. The State, 233 N. Y. 177, 135 N. E. 236 (1922).

<sup>77</sup>Schenck v. Telephone Co., 238 N. Y. 308, 144 N. E. 592 (1924).

<sup>78</sup>Matter of Bump, 234 N. Y. 60, 136 N. E. 295 (1922); Ins. Co. v. Winthrop, 237 N. Y. 93, 142 N. E. 431 (1924); Matter of Neil, 238 N. Y. 138, 144 N. E. 481 (1924); Matter of Trevor, 239 N. Y. 6, 145 N. E. 66 (1924).

by the court in a close decision. The questions as to whether the public in times of high water had not the right of navigation where a boat may float, or whether "low water mark" means the mark to which the water may sink in extraordinary seasons or simply its ordinary and usual low level, were expressly reserved.<sup>79</sup>

As has been suggested in regard to torts, the court has somewhat greater freedom as to innovation. Harry C. Fisher was the originator of so-called "comic" strips which have become known under the name of "Mutt and Jeff." Most of you probably have seen them. Because of them the author earned a very large income. But his rights were protected by no copyright. The court held that to copy these grotesque figures and to use the names "Mutt and Jeff" placing them in new situations and with new letter-press attached was unfair competition. It would lead the public to believe that it was buying the cartoons of Fisher. The words and figures had obtained a secondary meaning, to the effect that he had originated them and that his "genius" pervades all that they appear to do and say. Having originated the figures and names he had acquired a property right in them which should be protected.<sup>80</sup> This opinion was the last prepared before his death by Judge Chase, for so many years a faithful and able member of the Court of Appeals, a man whom all remember with admiration and respect.

A traveller on his way to New York dies on a steamship. His body is embalmed and could have been carried into port without risk or trouble. Within twenty hours of land, however, it is cast into the sea, although his effects showed the name and address of a son and contained money much in excess of the cost of sending him a notification. The son was held to be entitled to damages for mental distress and anguish caused by this act. The court based its decision largely upon certain common law rules relating to the disposal of the dead admitting that their application to the case at bar was novel.<sup>81</sup>

A springboard annexed to a railroad's land extends out over the Harlem River. It was a fixture, a permanent improvement of its right of way. One standing on the board over the water and beyond the line of the railroad property is killed because of the negligent maintenance by the railroad of one of its electric wires. If the springboard affixed to the land is part of the real estate of the railroad, then the injured party is a trespasser and may not recover. If being

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<sup>79</sup>Stewart v. Turney, 237 N. Y. 117, 142 N. E. 437 (1924).

<sup>80</sup>Fisher v. Star Company, 231 N. Y. 414, 132 N. E. 133 (1921).

<sup>81</sup>Finlay v. Atlantic Transport Co., 220 N. Y. 249, 115 N. E. 715 (1917).

above the river, a public highway, he was rightfully there, he may recover. Which alternative was the court to choose? It did choose the more liberal one,<sup>82</sup> although with so strong a dissent as to show that the choice was far from inevitable. A like liberal view was taken in an earlier case where at night responding to an alarm a fireman enters a private alley used to deliver goods to the premises and falls into an unlighted and unguarded hole.<sup>83</sup> Was he a trespasser or licensee so that no affirmative care was due him? Clearly he was not a trespasser. But was he there by the implied invitation of the owner? The court, against the weight of authority in this country, thought that he was. In any event, he was more than a bare licensee. He entered the property as of right, over a way prepared as a means of access for those entitled to enter.

In England, it is held that there is no duty to use any care whatever in making oral statements in the way of business or otherwise, on which other persons are likely to act.<sup>84</sup> A contrary rule was foreshadowed here,<sup>85</sup> but now it has been decided that the relations between the parties may be such as to make one liable for a negligent reply to the enquiry of another.<sup>86</sup>

Does malice ever make an act otherwise lawful, unlawful? If the motive is unjustifiable, if the only purpose is to injure another, is the act wrongful? The tendency seems to be to hold that it is although this may be doubtful.<sup>87</sup> But at least this is true. Where one has a contract with another, a third party having knowledge of such contract may not induce him to break it intentionally and without reasonable justification.<sup>88</sup>

Other matters have been discussed. The duty of a railroad to an intoxicated passenger;<sup>89</sup> of a sleeping car company as to the property of passengers;<sup>90</sup> damages in libel actions,<sup>91</sup> and in actions against innkeepers;<sup>92</sup> statutes and ordinances and whether they give a cause of action against an individual;<sup>93</sup> the rule of *respondet superior* as

<sup>82</sup>Hynes v. R. R., 231 N. Y. 229, 131 N. E. 898 (1921).

<sup>83</sup>Meiers v. Koch Brewery, 229 N. Y. 10, 127 N. E. 491 (1920).

<sup>84</sup>Fish v. Kilby, 17 C. B. (n. s.) 194 (1864).

<sup>85</sup>Bush Terminal Co. v. Ins. Co., 228 N. Y. 575, 127 N. E. 909 (1920); Glanzer v. Shepard, 233 N. Y. 236, 135 N. E. 275 (1922).

<sup>86</sup>International Products Co. v. R. R., 244 N. Y. 331 (1927).

<sup>87</sup>Beardsley v. Kilmer, 236 N. Y. 80, 140 N. E. 203 (1923).

<sup>88</sup>Lamb v. Cheney, 227 N. Y. 418, 125 N. E. 817 (1919); Campbell v. Gates, 236 N. Y. 457, 141 N. E. 914 (1923).

<sup>89</sup>Pagan v. R. R. 220 N. Y. 301, 115 N. E. 704 (1917).

<sup>90</sup>Goldstein v. Pullman Co., 220 N. Y. 549, 116 N. E. 376 (1917).

<sup>91</sup>Den Norske v. The Sun, 226 N. Y. 1, 122 N. E. 463 (1919).

<sup>92</sup>Boyce v. The Hotel, 228 N. Y. 106, 126 N. E. 647 (1920).

<sup>93</sup>Karpeles v. Heine, 227 N. Y. 74, 124 N. E. 101 (1919); Martin v. Herzog, 228 N. Y. 164, 126 N. E. 814 (1920); Ward v. R. R., 230 N. Y. 230, 129 N. E. 886 (1921); Di Caprio v. R. R., 231 N. Y. 94, 131 N. E. 746 (1921); Brown v. Shyne, 242 N. Y. 176, 151 N. E. 197 (1926).

applied to hospitals;<sup>94</sup> and as to proximate cause;<sup>95</sup> again not all showing changes in existing rules, but indicating where changes may be expected.

And so I end as I began. Changes come. Whether all or some or none result in progress, in greater justice on the whole, only the future may decide. But whether or no, change is inevitable. New needs must be recognized. I repeat, however, that I speak but for myself. If cases have been misinterpreted or the purposes of the court misunderstood, mine alone is the fault. To me, however, it is certain, viewing these decisions, that the tendency of the Court of Appeals in recent years has been toward greater liberality. There has been less regard to mere technicalities either of substance or procedure. There has been a desire to make the law require fair dealing and honesty and equity. At the same time, there has been restraint. There has been refusal to write new rules just because of logical consistency. The thought may be, in the middle path lies safety.

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<sup>94</sup>Phillips v. The Hospital, 239 N. Y. 188, 146 N. E. 199 (1924).

<sup>95</sup>Donnelly v. Contracting Co., 222 N. Y. 210, 118 N. E. 605 (1918); Bird v. Ins. Co., 224 N. Y. 47, 120 N. E. 86 (1918).