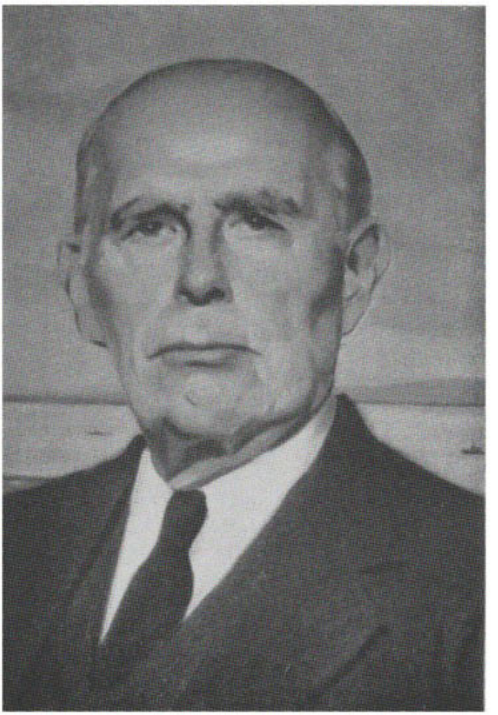
A HALF CENTURY OF INTERNATIONAL PROBLEMS:

A LAWYER'S VIEWS



FREDERIC R. COUDERT, *from a painting by Albert Smith, 1951*

A Half Century of INTERNATIONAL PROBLEMS: A Lawyer's Views

BY FREDERIC R. COUDERT

EDITED BY ALLAN NEVINS

WITH AN INTRODUCTION BY PHILIP C. JESSUP

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To My Three Sons

FREDERIC R., JR.

FERDINAND

and

ALEXIS

The Present Coudert Brothers

Introduction

THE CAREER of a successful practicing lawyer in New York City, even though he is not an officeholder appearing in the headlines of the daily press, is likely to touch many facets of American public life. When his literary and philosophical interests are broad and he possesses a charming wit, and when his practice and sense of public duty call him to deal with great issues of his time, his writings make good reading.

This volume contains occasional papers of the senior partner of Coudert Brothers, the well-known New York law firm which can now celebrate a century of legal work. The Frederic René Coudert who is the author of these papers is the second of three of that name in the firm which his father founded, with which he has been associated for sixty years, and of which three sons are also partners. The experiences of one who has had so prominent and successful a life at the Bar are a part of American history. Appropriately, the historical setting and significance of the speeches, articles, and letters here collected are brought out in editorial introductions by Professor Allan Nevins at the beginning of each of the seven sections of the book.

Mr. Coudert is widely known as an international lawyer—a member of the Institut de Droit International and a past president of the American Society of International Law. In beginning an address before the International Law Association in 1927, Mr. Coudert, in typical vein, said: "It is a rather serious charge to be told that one is an international lawyer. When another lawyer says that to me in a public place, I feel that he is aiming to get away with some of my

best domestic clients." Nevertheless, one does not hesitate to repeat the "charge" (equally applicable to Mr. Coudert's father), noting that this volume reveals also the constitutional, and, if you will, the "domestic" lawyer.

While still a student in the Columbia School of Law, Mr. Coudert accompanied his father to Paris where they took part in the presentation of the case of the United States in the Bering Sea fur seal arbitration with Great Britain. That was an Olympian period, and the young law student heard James C. Carter roll out his historical and philosophical legal argument through the course of eight days. Mr. Coudert's reminiscences of this leader of the American Bar are included in this volume. This was Mr. Coudert's first introduction to international law in the courts, but when, at the age of twenty-six, he argued his first cases in the Supreme Court of the United States, the matters involved included consular privileges and, in the leading case of *Underhill v. Hernandez*, questions of recognition, *de facto* governments, and the acts of state doctrine. Fifteen years later he was again to argue in the same court in favor of a broad construction of consular rights under treaties in another much-cited case—*Rocca v. Thompson*. In 1917, the Supreme Court decided in favor of his clients, the British owners of the ship *Appam* which had been taken as prize by the Germans and brought into Hampton Roads—another *cause célèbre*.

It was at this latter time that Mr. Coudert was counsel to the British Embassy in Washington, advising on the multitude of legal problems which clouded British-American relations during the period of American neutrality from 1914 to 1917. These legal services were rendered with the full approval of Secretary of State Lansing and Frank Polk, Counsellor of the State Department, both close friends of Mr. Coudert. One of the fascinating items in this book is

the hitherto unpublished letter from Coudert to Polk on September 28, 1915. Here the problems of British interference with neutral American ships and cargoes are revealed in terms of Mr. Coudert's discussions in London and Paris with the statesmen controlling the policies of the Allies. The cases were irritating and President Wilson was irritated, but Polk and Coudert worked together to find adjustments which would avoid any serious breach between the two English-speaking democracies and at the same time would not sacrifice the important interests of either. Mr. Coudert was able to point out that the American precedents during our Civil War weakened our legal position in protesting to the British and, in practical terms, to suggest economic measures which reconciled the demands of American cotton interests with the belligerent necessities of Great Britain. These were exacting duties regarding matters of great moment, calling for broad knowledge of the international law of prize, as well as tact and skill in negotiation. It was his desire, as he said in his letter to Mr. Polk, "to be a buffer between the State Department and the Allied Governments and to absorb as much of the shock as possible." They were congenial tasks, since Mr. Coudert, although a Wilson Democrat, was one of those who was impatient with Wilsonian neutrality. He toured the country speaking on behalf of the Allies. With Henry L. Stimson and others he went on the stump for preparedness as a speaker for the National Security League. Naturally, as the war was coming toward its close he was in favor of the League of Nations and active in the League to Enforce Peace.

These were public duties, but his law practice was also demanding. In 1925 he won another case in the Supreme Court for his British government clients, this time representing the British Public Trustee in an alien property case. Mr. Justice Holmes, in delivering the opinion of the Court, sus-

tained Mr. Coudert's argument that shares of stock have a situs where the certificates are found. In writing about this case later in the *American Journal of International Law*, Mr. Coudert noted that an interesting aspect of the case was that the British Government voluntarily appeared and submitted its claim to the courts of the United States, thus demonstrating "the confidence which the English-speaking people wisely and properly have in the judicial disposition of international controversies by the highest courts of the respective nations." This observation might well be taken to heart at a time when governments, practitioners, and scholars are concerned with re-examining the bases for sovereign immunity.

There were other governmental clients as well, including France, Belgium, Italy, and the Czarist Russian Government. For the Russian Government, Mr. Coudert again won in the leading case of *The State of Russia v. Lehigh Valley Railroad Co.*, establishing the Russian claim to more than a million and a half dollars for damages sustained in the Black Tom explosion. This case was started in 1918 in the name of "The Russian Government." Faced with the changes consequent upon the Bolshevik Revolution, Coudert Brothers moved to change the name to "The State of Russia" which had been represented in Washington by Ambassador Boris Bakhmetieff, who remained a lifelong close personal friend of Mr. Coudert's. The key to winning the case, and the reason for its abiding legal interest is found in Mr. Coudert's persuading the court to accept the distinction between a "state" and its "government." In elaborating this argument he drew upon the teachings of Professor John W. Burgess, founder of the Faculty of Political Science at Columbia University, where, be it noted, Mr. Coudert also took a Ph.D. in 1894.

There was an international flavor also to the great constitutional issues which Mr. Coudert argued in the Supreme Court in the famous Insular Cases. During the Spanish-

American War, Volunteer First Lieutenant Frederic R. Coudert found himself in command of his troop, due to the illness of his Captain, in the disease-ridden camps. He observed at first-hand the sorry condition of the islanders under Spanish rule, and this gave him a strong personal interest in the future of the Spanish islands which we acquired at the end of the war. The setting of these cases and the constitutional problems involved are described in Professor Nevins' editorial note and in Mr. Coudert's article and need not be repeated here. It may be noted, however, that Mr. Coudert argued these cases in the Supreme Court as senior counsel at the age of twenty-eight with a contemporary of his father's as junior counsel and that his brief is the only one selected for printing in the one hundred eighty-second volume of the Supreme Court Reports, which is filled almost entirely with the reports of the Insular Cases. There were later cases, too, in which he was counsel, involving the status of Hawaii and the Philippines.

An international legal practice is not confined to great questions of state and high governmental policies but is apt to be filled with practical questions of individual rights which the American lawyer characterizes as "conflict of laws" and which his European colleague is accustomed to label "private international law." Coudert Brothers had first opened an office in Paris in 1879 and the firm was constantly retained in cases involving questions of French and American private law. As the reader of the following pages will see, Mr. Coudert was at home with French legal concepts, and this aspect of his practice was one of his additional ties with France, which decorated him as Commander of the Legion of Honor. He also is an Officer of the Crown of Belgium.

It was not only in court that he argued but also from the platform and in print before the bar of public opinion. The range of subjects which interested him as illustrated in this

book and in an earlier volume, *Certainty and Justice,* published in 1913, is wide indeed. As a resident of Oyster Bay, Long Island, he had a personal as well as academic interest in the question of property rights along the shore between high and low tide, but he writes about these questions in broad historical terms in an analysis of a "perversion of stare decisis." He is always interested in seeing how great legal oaks grow from small acorns of clients' business, as one of his epochal "insular cases" involved a suit for only $60.00. He was interested in the functioning of the judiciary and in maintaining a high standard on the Bench and at the Bar, but he did not agree with either of the Roosevelts in their approaches to the correction of what seemed to them judicial evils. Perhaps naturally reflecting an interest developed in that early time in Paris during the Bering Sea Arbitration, he supported moves for the conclusion of arbitration treaties. This volume includes interesting letters on this subject from Admiral Mahan and John Bassett Moore.

No selection from the large product of a facile pen and tongue could illustrate all of the author's activities. If these introductory words overstress Mr. Coudert's international interests and accomplishments, the present writer can only plead guilty that he too is called an international lawyer. It is proper to point out, however, that Mr. Coudert's career as an active barrister begins with that new widened horizon of the United States in world affairs which opened up after the Spanish-American War. International questions, like personal contacts across the oceans, were being raised year in, year out. Many of the leaders of the American Bar were called upon to serve in matters international—Mr. Coudert's father, James C. Carter, Joseph H. Choate, Elihu Root, John W. Davis, Frank Polk, Henry L. Stimson, and many others. Mr. Coudert knew them all, many as contemporaries and friends.

"It is the fate of the lawyer," Mr. Coudert wrote in his reminiscences of James C. Carter, "to leave little impression upon history unless he chances to have occupied a prominent position in the world of politics or government." This may be true of history in the text books with their names of battles and the generals who fought them, with their lists of shifting kingdoms and republics and the names of their kings and presidents and the advisers who guided them. But history in its full sense is much more than this. As this book goes to press, Columbia University, of which Mr. Coudert has been an active alumnus and a trustee for over forty years, is celebrating its bicentennial. Its convocations are evoking the history of the mind and spirit of civilized man through the centuries. It is an appropriate time for the recording in history of these writings of Frederic René Coudert.

PHILIP C. JESSUP

New York City
September, 1954

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F.R.C.

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A HALF CENTURY OF INTERNATIONAL PROBLEMS:

A LAWYER'S VIEWS

I

THE LAW IN AN ERA OF CHANGE

"LAW HAS NOT BEEN LOGIC," *ran the famous statement of Justice Holmes; "it has been experience." In other words, legal principles have but a restricted validity; they alter as the community environment alters, and grow as society grows; and the legal logic which fitted a rural America, highly individualistic, ceased to fit an urban and industrialized America, highly organized. The old maxim that mankind is best served by "a government of laws and not of men," a phrase which the fathers of the republic borrowed from Harrington's* Oceana, *embodied a concept which was perfectly sound insofar as it ruled out arbitrary action by a despot or an irresponsible police officer. It was unsound, however, if inter-*

preted to mean that cast-iron legal principles and immutable codes could be applied to a multifariously active and rapidly changing society. Law must have a healthy evolutionary growth related to the organic growth of the community. Holmes, Pound, Cardozo, Wigmore and others have long since made this a truism. But the question of the extent to which law should be fixed in principles and codes, and the extent to which it must be kept adaptable and mutable, continues to offer ground for careful debate.

In the sheaf of papers in this section, Mr. Coudert considers the problem of the proper balance between certainty and growth in the law. The essay "Inflexible Law in a Changing Society" shows how the age-old desire for legal uniformity and certainty, embodied in the Anglo-American rule of stare decisis *and in the French and German codes, conflicts with the demands of modern society for a perpetual readjustment of law. Mr. Coudert points out that the laws cannot possibly be made fixed and certain on subjects respecting which (labor-capital relations, for example) the public mind remains uncertain. In the succeeding paper on "The Regulation of Corporations," written at the height of Theodore Roosevelt's attack on the trusts, Mr. Coudert takes up the complex questions raised by varying interpretations of the Commerce Clause, and by the claims of the so-called Beef Trust and Tobacco Trust to certain immunities and privileges under the Due Process Clause. He is for wide latitude in the evolutionary growth of law. Interpretation, he points out, "is constantly shifting with the changes in view in the courts which reflect public opinion."*

The essay on "Riparian Rights: A Perversion of Stare Decisis" *explains, with a number of interesting examples but with special reference to the long influence of the early English decision in the Philpot Case, how too earnest an attempt to freeze the law into a fixed principle may result in great in-*

justice. The paper entitled "The Eighteenth Amendment: Making Law Unworkable" points out the folly of trying to write into fundamental law principles and prohibitions which a great part of society simply will not accept. Finally, the delightful study of the character and methods of the great attorney James C. Carter emphasizes Mr. Coudert's interest in the substance of law, as distinguished from its technicalities, and his conviction that law should in the long run conform to social usage and to majority opinion.

1

Inflexible Law in a Changing Society

FROM THE YALE LAW JOURNAL

MAY 1905 *

THE LAWYER in advising his clients is really in great measure bound to assume the *role* of a prophet. When he tells them what he thinks the law is, they cannot be certain that his prediction will come true until it has been upheld by the highest appellate court in the land. If he is not so fortunate as to obtain a favorable decision he must console himself with the thought that "*eventus arbiter stultorum*," and hope that his client is a philosopher. Unlike the prophet, however, he has no unfailing illumination from above, but must content himself with obtaining what light he can from the law reports, endeavoring from the past to judge the future. He is thus little more than an expert guesser.

That delightful writer and cogent thinker, Buckle, has said that a knowledge of history is valuable in that it furnishes us a measure by which we may predict the future from the past. This is all that the lawyer can do by examining past decisions.

There is in all modern states today a general conflict between certainty in the law and concrete justice in its application to particular cases; in other words, between the effort to have a general rule everywhere equally applicable to all cases at all times and the effort to reach what may seem to be con-

* This article originally appeared under the title "Certainty and Justice and Constitutional Amendment." Portions of it were reprinted in Mr. Coudert's book *Certainty and Justice*, published by D. Appleton and Company (now Appleton-Century-Crofts, Inc.), 1913.

crete right dealing between the parties at bar upon the particular facts in each case.

In actual practice the pendulum swings first one way and then the other. The social necessity for stability in the law is unquestioned. Law is necessarily a rule of action, and unless a court decides cases according to some cohesive plan or definite rules, the justice administered is scarcely deserving of the name of *law* however greatly it may fall in with the ethical notions of the community as regards any particular case. On the other hand, when rules become so fixed and rigid that they are difficult or impossible to change, the law is out of touch with prevailing moral ideas, which like all other ideas are constantly progressing; the law thus necessarily becomes a clog upon national development, an incentive to revolutionary reform.

Among semi-civilized people, absolute adhesion to the letter of the law is the prevailing system. In the ancient Roman law of the twelve tables, contracts in order to have any validity had to be made in specific formulae, or by the repetition of certain particular words. It was not the substance of the contract relation—that is to say, the meeting of the minds and the consent of the parties as to the subject-matter of the contract—that was looked to, but the formalities by which that meeting was evidenced. The sanctity attached to the use of a seal attests the mystic value of forms among primitive peoples.

In the ancient common law, before the growth of the equitable jurisdiction of the chancery, we see the same condition. It is illustrated by the story of the customer who, going into a silk merchant's, asked the merchant the cost of enough silk to go from ear to ear, and the merchant immediately named a price. Thereupon the customer, lifting his cap, showed him the place where one ear should be,

and pointing to his remaining ear, said: "My other ear is at Newgate jail." As the ancient story goes, the merchant was forced to give him several hundred yards of silk for the price of a few inches. The same story is told in different forms and is apparently an Indo-European legal legend.

Again we find a literal adherence to the letter of the contract in the blacksmith case. An ignorant individual offered to give a blacksmith two pence for the first nail, four pence for the second and eight pence for the third, and so forth. When the four feet were shod he found that it had cost him a number of pounds, owing to his absolute ignorance of the laws of geometrical progression. Nevertheless, he was held to the letter of his bargain.

Again, in the medieval world, trial by ordeal supplanted to a great degree the rational methods of determining facts. There was no doubt felt of the guilt of the man whose feet were burned by walking on red-hot iron, and this method had the advantage of leaving open no questions for dispute. But with the growth of modern civilization came the necessity for applying to cases a general ethical standard to some degree at least in accordance with that of the age.

Nevertheless a fair degree of certainty is a necessity in every system of law; as a consequence, the common law doctrine of stare decisis was gradually evolved by the English law courts as one mode of bringing about some sort of coherence in the justice administered and in formulating that justice into rules of law. That the doctrine is an old one does not admit of doubt and modern research seems to indicate that it was first vaguely adumbrated as far back as the fourteenth century. The truth is that the doctrine is founded upon one of the peculiarities of human nature which in its ultimate analysis is based upon the imitative faculty in man. The mass of men will naturally follow in a beaten track, rather than branch out into new and untrodden ways, and the courts

naturally fell into the habit of following precedent, just as merchants fall into the habit of following certain usages of trade which after a time harden into customs. In this way the judges by making a line of uniform decisions on any question create a judicial custom which in its turn acquires, almost unconsciously, the force of law.

That the English courts have gone much farther than our own in upholding the dignity of the doctrine of stare decisis may be easily illustrated by one or two prominent instances. In 1843, the now famous case of *Queen v. Millis* came up before the House of Lords.[1] The case was one of a prosecution for bigamy. The question there involved was as to whether a marriage contracted in Ireland without the presence of an ordained clergyman or priest of the Church of England was valid. The Marriage Act not applying there, the common law alone governed. It was contended that in England the presence of a priest had been unnecessary to such marriage by the rule of the canon law prevailing throughout Western Christendom up to the time of the decree of the Council of Trent, which, owing to the separation of the Church of England from the Roman Catholic Church, had not come into force there. The House of Lords, however, decided from one or two precedents, which historic research has now discovered were erroneously interpreted, that the law of England in this particular had differed from that of the rest of Western Europe and that a marriage without the presence of such priest was invalid. The decision was reached by a divided court, the members of that tribunal standing three to three, the form of the question, however, being such that the decision was necessarily in favor of the invalidity of the marriage.

In 1861 this historically erroneous decision, reached by an equally divided court, was brought in question before the

[1] 10 Cl. and Fin. 534 (1844).

same tribunal in the case of *Beemish v. Beemish.*[2] The very same questions being again presented, a majority, at least, of the judges were of the opinion that the decision of *Queen v. Millis* was reached upon a false historical basis and that the precedents adduced from the early English law to support that decision were misunderstood by the court. Lord Campbell himself took that view. Nevertheless the court felt bound to follow that case and decided, contrary to the historic fact, that a marriage without the presence of a clergyman of the Church of England was and always had been invalid at the common law.

In rendering this decision, Lord Campbell said that he felt himself bound by the doctrine of stare decisis and that to depart therefrom would be a usurpation upon the part of the House of Lords. His theory was that the law once laid down by that tribunal became the law of the land, as binding upon the tribunal itself as upon every other subject and changeable only by the supreme authority of Parliament. This case contains the strongest utterances that I have been able to find upholding the absolute obligation of the rule of stare decisis.

> Had the present case been brought here by writ of error previously to the decision of this House in the year 1844 in the case of *Queen v. Millis*, I should not have hesitated in advising your Lordships to affirm the judgment in favor of the validity of the marriage and the legitimacy of the respondent.

After giving his reasons for believing that a marriage without the presence of a priest was valid at the common law, he continues:

> However it must now be considered as having been determined by this House that there could never have been a valid marriage in England before the Reformation, without the presence of a priest episcopally ordained, or afterward without the presence of

[2] 9 H.L. 275 (1861).

a priest or of a deacon . . . My Lords, the decision in the case of the *Queen v. Millis* that unless a priest especially ordained was present at the marriage ceremony the marriage was null and void and the children of the marriage were illegitimate, seemed to me so unsatisfactory, that I deemed it my duty to resort to the extraordinary proceeding of entering a protest against it on your Lordship's journal.

And yet he continues:

But it is my duty to say that your Lordships are bound by this decision as much as if it had been pronounced *nemine dissentiente* and that the rule of law which your Lordships lay down as the ground of your judgment, sitting judicially, as the last and Supreme Court of Appeal for this Empire, must be taken for law till altered by an act of Parliament agreed to by the Commons and the Crown as well as by your Lordships. The law laid down as your *ratio decidendi* being clearly binding on all inferior tribunals and on all the rest of the Queen's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law and legislating by its own separate authority.

The ardent law reformer, Bentham, in his dread of judicial encroachment could hardly have gone farther in limiting the power of appellate courts.

It must be remembered, however, that even in England that useful and somewhat modern instrument—the distinction—is not unknown and the results of strict adherence to stare decisis may in many cases be escaped or mitigated by the use of that now highly developed weapon, even where to the ordinary mind the distinction would not seem to involve any appreciable difference.

It is a rather curious thing that Lord Campbell's views, which at the time of their utterance seemed to be in every respect most conservative, were enunciated in almost the same language by Mr. William J. Bryan in his campaign as candi-

date of the Democratic Party for the Presidency in 1896. At that time he was generally looked upon as a radical, if nothing worse, and his views as to the Supreme Court were the subject of most severe criticisms. I do not intend to comment upon their wisdom or unwisdom, but his underlying view, as I understand it, was that, the Supreme Court once having passed upon a question, its decision became the law of the land and was binding upon that august tribunal as well as upon all other American citizens. That view, which to many seemed so startling as to savor of revolution, in any event had in it nothing of novelty, and if Mr. Bryan did not cite the authority of Lord Campbell it was probably because he had overlooked it. Whether the doctrine as enunciated by him would have sounded less harsh had it been backed by the authority of that great name, it is impossible to say. In the heat of political conflict it might have mattered little.

It is a significant but not unusual fact, however, that the same doctrine should be considered as overconservative or as overradical, dependent upon the position of the person announcing it and the circumstances of its announcement.

Mr. Justice Holmes, one of the greatest students of the development of English law, adopts what would seem to be a very different viewpoint. He believes the judge-made law to be a slow and steady growth which must adapt itself to present needs and present necessities, and that the formal rules of the syllogism do not and should not be allowed to fetter the judges in reaching a result compatible with present ethical notions and sound public policy.

On the other hand, in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considera-

tions of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted.[3]

This latter view would seem to be the one more generally prevalent in the United States. The highest courts, although expressing great regard for the doctrine of stare decisis, do not hesitate to overrule prior decisions upon the ground that they were erroneously rendered, as the Supreme Court itself has done upon several occasions, notably in the Legal Tender,[4] the Income Tax,[5] and the Passenger [6] cases. The soundness of this latter view depends upon how far conformity to present standards of justice is more important than certainty as to what the law actually is. It would surely be better if more cases were overruled directly than by the indirect method of the distinction.

By the indirect method a case once deemed to be law is gradually so honeycombed with exceptions and distinctions that after a certain number of years it finally collapses—in the meanwhile, however, like a dangerous derelict, spreading

[3] Holmes, *The Common Law* (Boston: Little, Brown, and Co., 1881), pp. 35–36.
[4] Knox v. Lee, Parker v. Davis, 12 Wall. 457 (U.S. 1870).
[5] Pollock v. Farmer's Loan and Trust Co., 157 U.S. 429; rehearing, 158 U.S. 601 (1895).
[6] Baltimore & Ohio Southwestern Ry. Co. v. Voigt, 176 U.S. 498 (1900).

confusion among litigants, and consternation, real or feigned, among lawyers.

It is to be deprecated that in many cases respect for "*la chose jugèe*" should not allow the case to be directly overruled. In the long run it may well be questioned whether the maintenance or the dignity of the doctrine of stare decisis profits by the respect apparently paid to it through a resort to distinctions that do not distinguish.

On the other hand, a strict adherence to the adjudged cases would prevent all progress in the law, as has been pointed out by Mr. Justice Matthews in the famous case of *Hurtado v. California*,[7] and would result in a rigidity incompatible with social progress:

> [To] hold that such a characteristic is essential to due process of law, would be to deny every quality of law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.[8]

That delightful and most erudite old writer, Montaigne, gives an instance of how far false respect for a judicial decision may be carried. He says that he heard of a case occurring in his time in which a thief, having been convicted by the court of a certain French province, was condemned to death. While awaiting execution the judges of a neighboring province sent word to the judges of the tribunal that had condemned the supposed culprit, that the real culprit had been found, had confessed his guilt and was about to be punished. The judges of the first court held solemn deliberation on the question as to whether justice required that the innocent man, adjudged guilty, should be freed or whether respect for "*la chose jugèe*" did not require that the court

[7] 110 U.S. 516 (1884). [8] 110 U.S., at p. 529.

should proceed with the execution of the sentence. The latter view prevailed. The dignity of the tribunal was thus sustained by the prompt and solemn execution of the legally adjudged guilty but in fact innocent victim.

The truth is that the courts are constantly oscillating between a desire for certainty on the one hand and a desire for flexibility and conformity to present social standards upon the other. It is impossible that in a progressive society the law should be absolutely certain; it is equally impossible that the courts should render decisions conforming to the prevailing notions of equity without thereby causing a considerable degree of uncertainty, owing to the constant fluctuations in moral standards and their application to new and unforeseen conditions.

New ideas are often if not always due to economic changes, and many views regarding natural rights or individual liberty which were held fundamental in the last century sometimes find little support in the public opinion of the twentieth, by reason of changed social and economic conditions.

The rights of the individual were once opposed to those of the state alone. They are now opposed not only to the state, but also to great aggregates of wealth in corporate form possessing in a great degree public powers. The rules evolved before the rise of corporations as the main factors in the business world are not always applicable to present conditions.

When a series of questions has finally become settled, such as the law relating to partnership or negotiable instruments, it is because that particular branch of business has reached for the time being at least an ultimate form, and we have certainty in law because we have fixity in business custom and opinion.

It has been happily said that the sense of equity of one generation is generally the law of the next, but this very fact

involves a slow process of change and adaptation resulting in consequent uncertainty.

There is much criticism at the Bar at the present time of the growing uncertainty of law as enunciated in judicial decisions; panaceas of all kinds are suggested by zealous and sometimes intelligent men, but the law reformer is a dangerous animal and one calculated often to do infinite mischief. He necessarily believes himself to contain more concentrated wisdom than all the generations of lawyers and judges who have gone before, and actual experience has proved that his self-valuation is not infrequently an overappraisal.

It is perhaps not unprofitable to inquire whether the people of the continent of Europe are so much better off than ourselves in regard to certainty in their law. An extended attempt at comparison on this point would involve work far beyond the scope of this article. A few reflections, however, upon the continental method may not be without interest.

The fear of the uncertainty of judge-made law and the usurpation of courts has been even more prevalent in Europe than in America. This fear is well illustrated by what took place at the time of the promulgation of the Prussian Code of 1794. It was understood, and the judges were instructed, that if a case of first impression or a case not absolutely covered by the letter of the code should arise, they were to refer to the Prussian Legislative Council for decision, which decision would, of course, have taken legislative form. Some cases arose in this way and were referred to the council, which was an active body whose time was taken up with other matters. The cases thus sent to them from the courts were quietly dropped and the judges were informed that they would have to proceed as best they could without legislation for each particular case, and thus that attempt to curtail possible judicial encroachment failed utterly.