

MERCER BEASLEY LAW REVIEW

VOL. III

JANUARY, 1934

No. 1

THE JUDICIAL INFLUENCE OF CHIEF JUSTICE GUMMERE

Any adequate presentation of the effect of the judicial opinions of the late Chief Justice William S. Gummere upon the jurisprudence of the State of New Jersey is difficult and perhaps impossible until time has given us a better perspective. In this paper, published one year after his death, we can only examine his leading opinions and from them judge the character of his intellect, the trend of his ideas and how his mind reacted to the condition of the times in which he lived. He occupied a high position in our judiciary for a long period, and all who came in contact with him recognized at once his outstanding ability, the clarity of his thought and definiteness of his views in cases involving intricate facts and complex legal problems.

The Chief Justice was a member of the Supreme Court for over thirty-seven years, and its presiding Justice for over thirty-two years. During that long period of service, he participated in the decisions of thousands of cases of all types, and himself wrote the opinions of the Court in upwards of one thousand. Their very number and the diversity of their subject matter indicate the wide knowledge of the Chief Justice in legal affairs, and the capacity of his mind for grappling effectively with legal problems of every variety.

While he was by no means a specialist in any particular legal field, still it is noteworthy, from the classification of his decisions, that the greater number of them deal with matters involving municipal government, statutory construction and practice. Comparatively few relate to equity matters, and those that do are confined largely to cases where the rights of

'the parties and the powers of the court are sharply defined, and not to the intangible field where the court of conscience extends its influence to protect the unwary.

The very fact that Justice Gummere was assigned to and did write so many opinions dealing with matters involving statutory construction indicates and emphasizes where his interest lay and where the strength of his mentality was best applied. This type of case calls for accurate analysis of words and phrases, and the application of well-defined rules of law. In this class of decisions he reigned supreme.

Few, if any, of our Justices have had a power such as his to reduce a complicated set of facts to the essential elements and then apply the appropriate legal principle to them in a clear, definite manner.

As an illustration of this aptitude, a few examples taken at random will suffice.

"Services rendered by a wife in the home of her husband to a lodger residing with them, even though they consist largely of the personal attendance of the wife, and include the nursing of the lodger when sick, are within the range of her domestic duties, and without an express contract or promise made by the lodger to the wife, the latter cannot maintain an action against him, or in the case of his death, his executor, for the recovery of compensation for such services. The implied contract which the law raises in such a case is that the person to whom such services are rendered will make reasonable compensation therefor to the husband and not the wife."¹

"The facts set up by which the plaintiff seeks to avoid the bar of the statute (Limitation) do not deprive the defendant of its protection. The Statute of Limitation makes the lapse of time a positive and legal bar. When once it has begun to run against a person under no legal disability, it pursues its course uninterrupted by any subsequent events, except those which are specified in the statute itself. An examination of

¹ *Stevenson v. Akarman*, 83 N.J.L. 458 (E.&A. 1912).

the legislation demonstrates that the replication does not present a case within any of the express exceptions of the statute, and courts of law cannot read into it an exception by implication."²

Each of these statements contain crisp, positive phrases. There is no doubt suggested or implied, no hesitation in pronouncing what the law is and in enforcing what may be the result thereof regardless of the outcome.

One unfortunate result of this definiteness, and perhaps inability to perceive the effect of a judicial pronouncement upon the social consciousness of a large body of the citizens is shown in the furor created by his opinion in the case of *Graham v. Consolidated Traction Company*.³

The facts in this case established that plaintiff, a child between four and five years, had been killed by the defendant street railway. The jury found the defendant guilty of negligence and assessed the damage at \$5,000.00. The statute permitting recovery in death cases expressly limited the damages to an amount to compensate for the pecuniary loss to the widow and next of kin. Chief Justice Beasley had expressly pointed out that the statute authorizing the action prohibited the allowance of damages for the suffering of the bereaved family.⁴

At about the same time, Justice Depue had charged the jury in a similar action to limit their verdict to the financial loss of the family.⁵ Neither of these statements of the same legal principle aroused the popular feeling.

Chief Justice Gummere's opinion, on the contrary, following precisely the same rule and strictly correct from a legal point of view, was met by a storm of adverse criticism. Editorials, letters to the press, and printed articles abounded, most of them attacking the opinion as ruthless and unfeeling.

A contrast between the language of Justice Depue and the opinion of Chief Justice Gummere will show why the one passed unnoticed and the other became a *cause célèbre*.

² Hegedus v. Thomas Iron Co., 94 N.J.L. 292 (Sup. Ct. 1920).

³ 62 N.J.L. 90 (Sup. Ct. 1898).

⁴ Paulmier v. Erie Railroad Co., 34 N.J.L. 151 (Sup. Ct. 1870).

⁵ Toppin v. D. L. & W. R. R., 21 N.J.L.J. 249 (Sup. Ct. 1896).

(Depue) "You will perceive that this statute, (Death Act which he had just read to the jury), excludes from the consideration of the jury those elements of damages which ordinarily enter into and generally make up a considerable part of the damages recovered by a living person for personal injuries. Nothing for the pain and suffering of the deceased; nothing by way of vindictive or punitive damages; nothing for the anguish and distress of a parent because of the loss of his child. All these are excluded, and the statute which gives the right says that all that shall be recoverable is the value of the pecuniary injury sustained by the next of kin. * * * Whether the legislature ought not to provide a broader and more adequate mode of compensation in cases of this kind it is not for us to consider."

Contrast this carefully worded and considerate statement of the rule with that of Chief Justice Gummere.

"Children are more often an expense than a pecuniary benefit to the father. If at the father's death an account was stated showing, on the one side, the moneys expended by him in the education, maintenance and support of the child, and on the other side, the moneys received by the father from his child, in a majority of every hundred cases the moneys expended for the benefit of the child would be found to be far in excess of the amount received from him."

There had been a previous trial and similar application to set aside a verdict. With reference to this, he continues:—

"Nor does it (the duty of the court) grow any less plain because of the fact that another jury, on a former trial, had shown by a verdict similar to that complained of, an equal disregard of the duty which had been imposed upon it. A wrong by being persevered in does not, therefore, become a right; nor does a verdict cease to be excessive by reason of repeated renditions. Just as often as a plaintiff persists in seeking

and a jury in rendering verdicts which are palpably and grossly excessive, just so often it is the duty of this court to continue to set such verdicts aside."

This opinion is obviously sound and the result correct. It is the necessary conclusion to be reached from the provisions of the Death Act, but in its phrasing little calculated to assuage the feelings of the bereaved family. Hence, the cry arose that Justice Gummere regarded the value of a child's life at \$1.00.

The case was again subsequently before the court, and in an opinion of precisely the same effect, Chief Justice Magie also set aside a third concurring verdict of the same amount. The result was the same, but the language was carefully chosen not to hurt sensibilities, and so created none of the furor of the earlier opinion.⁶

Chief Justice Gummere, apparently regardless of the effect of his opinions upon the public mind, as shown in the case just referred to, based his decisions which did not relate merely to statutory interpretations on the fundamental principles of the Common Law. His decisions are not replete with citations of authorities. They were unnecessary. His mind was a vast storehouse of legal principles which he brought forth at will and applied accurately. He had a transcending ability to see the essentials of the case and to solve the question presented for determination in accordance with established precedents.

One or two cases as authority, perhaps merely as illustrations by analogy, sufficed to justify his conclusion. His mind was in no sense fluid. He did not believe in any new ideas or that changing conditions of life might serve to change legal concepts. That which had been established as law should remain as fixed and immutable.

This is expressed by him in no uncertain terms in *Lippincott v. Smith*.⁷

⁶ *Graham v. Consolidated Traction Co.*, 64 N.J.L. 10 (Sup. Ct. 1899).

⁷ 69 N.J.Eq. 787, at 791 (E.&A. 1905). "These cases have definitely settled the law on this subject in New Jersey, and the propriety of the rule laid down in them is no longer open to discussion." *Wooster v. Cooper*, 53 N.J.Eq. 682, at 684 (E.&A. 1895).

"Speaking for myself, I concur in the reasoning of the distinguished jurist who delivered this opinion. * * * But even if the logic of his argument was of doubtful soundness, the construction which he then put upon the statute ought not now to be departed from. Ever since its promulgation, in 1862, the decision has been followed by the Court of Chancery whenever the principle established by it was relevant to the case then under consideration. * * * So far as we are aware, it has been universally accepted by the members of the profession as a sound exposition of the statute in their dealings with questions which involved its application. Originally it may not have been of grave consequence whether the statutory provision received the broad construction given to it in *Clement v. Kaighn* or the narrower one suggested by counsel for the respondent. But, granting this, it certainly is important that the construction then adopted, and so universally followed during so long a period, should be firmly adhered to."

An interesting example of this reliance on *stare decisis* is shown in *Public Service Railway Co. v. Matteucci*.⁸ Plaintiff had recovered a judgment of \$35,000.00 against the Public Service Railway Company and Matteucci. Matteucci paid \$10,000.00 and the Public Service \$25,000.00. The Public Service then sued Matteucci for \$7,500.00 in order that their respective contributions might be equalized. The matter first came before Judge Dungan in the Essex Circuit, and he decided that contribution should be permitted, saying:—

"In this state we are free to adopt either principle (contribution or non-contribution) which appears to be more logical—more just. The weight of authority seems to favor the right of contribution."⁹

Chief Justice Gummere in writing the opinion for the Court of Errors reversing the decision of the Essex Circuit

⁸ 105 N.J.L. 114 (E.&A. 1928).

⁹ 6 N.J. Misc. 34 (Essex Co. Circ. Ct. 1928).

did not consider that the Court was free to adopt the principle accepted by Judge Dungan. There had been a decision rendered over fifty years before to the contrary, and this was to him final and unchangeable.

“A man who drives a vehicle on a public highway in negligent disregard of the rights of other users of such highway is guilty of an unlawful act, and, if the direct result of that unlawful act is the injury of some other user of the highway, he is a tort-feasor within the meaning of that term. * * * If the question was an open one in this state we should consider that where injury to a third person is the direct result of the unlawful acts of the drivers of two vehicles in negligently disregarding the rights of other users of the highway, the rule of law which denies the right of contribution as between them or their respective employers is, in our opinion, applicable * * * Assuming that this (the fact that the rule stated by Chief Justice Beasley was obiter) is so, the soundness of the principle stated therein by the Chief Justice has never been questioned by any later decision, either of the Supreme Court or of this court; and, having stood unchallenged for more than half a century, it should not now be overthrown by judicial decision.”¹⁰

Because of this single decision rendered by Chief Justice Beasley so many years before, the Court now, in his view, is not free to consider anew the question of justice and fairness as argued by the lower court. The principle has been established and should remain so, and the maintenance of uniformity of decision is more important than the accuracy of the original ruling.

Contrast this point of view with the recent opinion¹¹ of the Court of Errors rendered since the death of Chief Justice Gummere:—

“We shall adopt that view in the case at bar which

¹⁰ 105 N.J.L. 114 (E.&A. 1928).

¹¹ Loudon v. Loudon, 114 N.J.Eq. 242 (E.&A. 1933).

we adopt in all our deliberations, namely, the one that shall lead to a righteous judgment. Such a judgment necessarily must be founded on truth, reason, and justice. A rule of law which has existed in our mother country for over 150 years and has been adopted and followed in so many of our sister states would ordinarily strongly recommend itself for our favorable consideration. But the fact that the rule is based on a foundation that is unsound and leads to the suppression of the truth and the defeat of justice takes from it the customary traditional and precedential justification urging its adoption.

"It seems to us that it is a rather serious indictment against the great science of legal jurisprudence, which has for its purpose the administration of justice, to compel one who, under our judicial branch of government, is vested with the powers and duties of interpreting and administering the law, to say, *in limine*, 'I am compelled to decide this case against what seems to be the truth of it'. A law which compels such a conclusion is not only impotent and embarrassing, but is a law which, despite its tradition and universality, was never justified and should not be followed."

This approach to the solution of legal problems is more appealing to the lay mind of today when all around us the established order is being questioned and the former established concepts re-examined. Legal principles should be subject to the same re-examination to ascertain whether they do effect justice in human relations. Stability and uniformity of decision have their value, and principles long established should not lightly be set aside. Still courts of justice should ever be ready to lay them aside when it is apparent that their enforcement is working hardship. Such a concept of the power or duty of a court to disregard precedent did not find favor with Chief Justice Gummere. To him the earlier decisions of the Court of Errors bound the court, and fairness of their application was not for him or the court to settle. The Legislature must make the changes suggested by altered conditions.

If fairness and justice as set forth in the *Loudon* case had been given greater consideration in the *Matteucci* case, perhaps we would not have had the recent decision of *Fast v. Pecan*,¹² which, relying on that ruling, establishes apparently as a legal principle that (under certain conditions) if a man be injured by two people he may collect twice as much as if he received the same injury from one.

The construction of contracts and the application of the legal principles thereto is a field of law where analysis and logic find full scope. Here we would expect to find the Chief Justice's opinions clear, forceful and effective, and such is the case.

The right of a carrier to limit its responsibility was a mooted question in the early years of this century. It had been established that a carrier could not exempt itself from liability, but whether it could restrict that burden was disputed. The problem was first presented to the New Jersey courts in the case of *Atkinson v. New York Transfer Co.*¹³ The opinion of Chief Justice Gummere is in accordance with the ruling of other state courts, but is excellent for its clarity of reasoning and definite expression of the rule:

"But the rule (exempting carriers) does not, we think prevent the carrier from stipulating with the shipper as to the value of the property entrusted to it, and contracting that its liability shall be limited to the amount so stipulated. The carrier is entitled to be compensated for his services in proportion to the value of the article consigned, and the consequent risk assumed by him. The shipper is entitled to take the benefit of a lower rate, if he desires to do so, by placing a value upon his goods, for the purpose of their shipment, below their actual worth. * * * The reason why contracts exempting the carrier from liability for loss resulting from his own negligence are held to be invalid, is that they are against public policy, because their natural effect is to induce want of care on the

¹² 11 N.J. Misc. 253 (Sup. Ct. 1933).

¹³ 76 N.J.L. 608 (E.&A. 1908).

part of the carrier in the performance of his duties. But a stipulation as to the value of the goods shipped has no such tendency. It exacts from the carrier the measure of care due to the value agreed on, and is, we think, a proper and lawful mode of securing a due proportion between the amount for which the carrier can be held responsible, and the charges received by it as a consideration for the safe transportation of the goods shipped."

This admirable exposition of the doctrine, so clear and precise, has been followed many times and quoted with approval in later cases.¹⁴

Another case which also demonstrates the same clarity of reasoning and forcefulness is *Carnegie Steel Co. v. Connelly*.¹⁵ The defendant sought to avoid the effect of a contract by alleging a mistake in the number of tons of steel ordered from the plaintiff. The trial court had permitted the defendant to escape liability by submitting the question of mistake to the jury. Chief Justice Gummere had no sympathy for any such attempt to evade responsibility. Brushing aside the defense of misunderstanding or mistake as if it had no place at law, he affirms that what a man promises he must perform.

"Having declared the provisions of this contract, and thus induced the plaintiff to perform it according to the terms exhibited in this letter, the defendant cannot thereafter set up in a court of justice as a defence to his breach of it that the letter was written under a mistaken understanding of what the real contract was, or that it contained statements which he had not intended to make. The law will not permit the introduction of evidence by the defendant to show that information given by him to the plaintiff, and intended as the basis of action, by the latter, and which

¹⁴ *Perrin v. U. S. Express Co.*, 78 N.J.L. 515, at 518 (E.&A. 1909); *Florman v. Dodd & Childs Express Co.*, 79 N.J.L. 63, at 66 (Sup. Ct. 1909); *American Silk Dyeing Co. v. Fuller's Express Co.*, 82 N.J.L. 654, at 656 (E.&A. 1911); *Adams Express v. Croninger*, 226 U. S. 491, at 512 (U. S. Sup. Ct. 1912).

¹⁵ 89 N.J.L. 1 (Sup. Ct. 1916).

has in fact, been acted upon in conformity thereto, was unintentionally untrue, where the object is to throw a loss upon the plaintiff, who has changed his position, relying on the truth of such statement."¹⁶

During recent years the Court of Chancery of New Jersey has been much occupied by divorce litigation. The popular mind has in some jurisdictions approved of the granting of divorces more readily than the stricter rules of the earlier established states recognized. An unhappy spouse, finding that the laws of New Jersey would not release him from his marriage vows, became a resident of Nevada and soon returned a free man. This practise brought in its train complicated legal questions as to the status of the man or woman in the state of his original domicile. How far must this state recognize the decree of another state when that decree had obviously been procured to evade the stricter doctrine of the domicile?

The first case in which the matter was presented to the Court of Errors was *Felt v. Felt*.¹⁷ As we have already pointed out, Chief Justice Gummere believed firmly in the value of precedents, and was not only guided but controlled by them. Here, however, there was no hampering precedent, and he was free to declare the principle that should be applied.

"It will not be denied that the preservation of good morals and a proper regard for social relations make it desirable that such a decree (one of a foreign state) should be considered valid not only in the state where it is pronounced but in every other jurisdiction, provided the grounds upon which it is based are recognized in such jurisdiction as justifying the decree. By it the matrimonial relation of the husband and wife is terminated in the state in which it is rendered. Within the boundaries of that state a marriage after-

¹⁶ Again, with firm conviction of the sanctity of contracts, he declares:

"The law will not make a better contract for parties than they themselves have seen fit to enter into, or alter it for the benefit of one party and to the detriment of the other. The judicial function of a Court of Law is to enforce a contract as it is written." *Kupfersmith v. Delaware Ins. Co.*, 84 N.J.L. 271, at 275 (E.&A. 1912).

¹⁷ 59 N.J.Eq. 606 (E.&A. 1899).

ward contracted by either of the parties with a third person is entirely valid. * * * If the decree is without extra-territorial force the entire status of both parties is reversed as soon as they pass beyond the limits of that state. A subsequent marriage to a third person within that state then becomes void and the relations of the parties to it become adulterous, while sexual relations between the parties to the decree, which are meretricious if indulged in within that state, become matrimonial again when indulged in without its borders. A condition of the law which makes the intercourse of a man and woman either legitimate or adulterous as they happen to be within the limits of one state or another is not to be tolerated any further than is plainly required by public policy."

The opinion then goes on to establish the rule in New Jersey that divorces granted by a foreign state in the absence of fraud shall be given full force and effect. The decision contains practically no reference to other authorities and needs none to justify it. It has been accepted as correct by many subsequent decisions both in New Jersey and elsewhere. When the same question came before the United States Supreme Court, this opinion was cited and quoted from at some length in support of the conclusions of that court.¹⁸

The case of *Lang v. Bayonne*,¹⁹ is another interesting example of the independence of view possessed by Chief Justice Gummere when he did not feel constrained to follow precedent. Lang had been legally appointed a member of the Police Force of the City of Bayonne. Subsequent to his appointment a new Board of Police Commissioners came into power and he was discharged. The Supreme Court decided that the statute creating the new Board was unconstitutional. Lang sought reinstatement alleging that as the Board which discharged him was selected under an unconstitutional statute all of its acts were a nullity. The argument supporting this contention was

¹⁸ See *Atherton v. Atherton*, 181 U. S. 155 (U. S. Sup. Ct. 1900); *Haddock v. Haddock*, 201 U. S. 562, at 586 (U. S. Sup. Ct. 1905).

¹⁹ 74 N.J.L. 455 (E.&A. 1906).

based upon a prior opinion of the Supreme Court of New Jersey,²⁰ and an opinion of the Supreme Court of the United States.²¹

Both of these authorities were of great weight, but neither was a binding precedent upon the New Jersey Court of Errors. With boldness and independence of thought the Chief Justice points out the fallaciousness of the reasoning upon which these opinions are based, as well as the unfortunate result upon the ordinary citizen if he must determine in advance the unconstitutionality of an act of the Legislature or be penalized for not doing so. He then proceeds to uphold the discharge of Lang as a valid act of a *de facto* board.

"Notwithstanding the great weight which the opinion of so distinguished a jurist carries with it; notwithstanding that *Norton v. Shelby County* has been frequently cited with approval in other jurisdictions, I am unable to accept as sound the doctrine upon which it is rested, namely, that an unconstitutional law is void *ab initio* and affords no protection for acts done under its sanction.

"The vice of the doctrine of *Norton v. Shelby County*, as it seems to me, is that it fails to recognize the right of the citizen, which is to accept the law as it is written, and not to be required to determine its validity. The latter is no more the function of the citizen than is the making of the law.

"In my opinion the provisions of a solemn act of the legislature, so long as it has not received judicial condemnation, are as binding upon the citizen as is the judgment of a court rendered against him so long as it remains unreversed.

"In my judgment, the same public policy which requires obedience from the citizen to the provisions of a public statute which creates a municipality, and provides for its government, even though unconstitutional, so long as it has not received judicial condem-

²⁰ *Flaucher v. Camden*, 56 N.J.L. 244 (Sup. Ct. 1893).

²¹ *Norton v. Shelby County*, 118 U. S. 425 (U. S. Sup. Ct. 1886).

nation, equally justifies his obedience to every other law which the legislature has seen fit to enact until such law has been judicially declared to be invalid.”²²

During Chief Justice Gummere's period of service occurred the great development of the large corporation, and concomitantly the Courts were faced with the determination of problems involving the rights of the individual as a stockholder in these great enterprises. Many are the decisions in which the Chief Justice participated involving such questions as the rights of minority holders, the right of a corporation to issue stock for property, and rights of a director to enter into contracts with the corporation, but the field is too extensive for any analysis here. There are, however, two cases in which the opinion of the Court of Errors were written by him which are pioneer decisions and noteworthy for the simplicity of statement and conciseness of the reasons with which he disposes of problems of far-reaching importance in corporate finance and administration.

In the first case,²³ the Board of Directors of the United States Cast Iron Pipe & Foundry Company had declared a dividend on its preferred stock from a fund known as "Reserve for Additional Capital". The Certificate of Incorporation provided that dividends on preferred stock were non-cumulative and payable out of surplus net profits. The Reserve fund was accumulated out of profits during several years. The complainant, a common stockholder, objected because he claimed that if the profits were not distributed in any one year they became thereafter distributable only to common stockholders. The defendant claimed it might pay dividends to preferred stock out of any profits regardless of when they were earned, and in this view the Court of Chancery concurred. The opinion of the Chief Justice in a single paragraph disposes of the contentions of both parties, and places the whole question on a sound basis:

²² Justice Garrison described the decision as "notably expounding" the principle underlying the "de facto" cases. *Harrison v. Madison*, 81 N.J.L. 21, at 23 (Sup. Ct. 1911).

²³ *Bassett v. United States Cast Iron Pipe & Foundry Company*, 75 N.J.Eq. 539 (E.&A. 1909).

"On the one hand the corporation has no right to accumulate a reserve fund from earnings which would otherwise be paid out as dividends to the holders of common stock, and afterwards use it to pay dividends to the preferred stockholders, when the net profits of the year for which the dividend is declared are not sufficient for that purpose. On the other hand, when the reserve fund is accumulated, in whole or in part, by the cutting down of dividends which would otherwise have been paid to the preferred stockholders, that fund, so far as it represents money so retained, is available for the payment of subsequent dividends upon the preferred stock. To yield to the contention of the complainant would be to permit the directors of the corporation to defraud the preferred for the benefit of the common stockholders; while to sanction the claim of the defendant would be to put it in the power of the directors to defraud the common for the benefit of the preferred stockholders."

The opinion in the other case in the field of corporate law, involving a question of first impression in this state, is equally short and equally barren of authority to sustain the views expressed.²⁴ Without stating the problem in detail the question presented for determination involved a case of two interlocking corporations, and the right of one to vote in the name of the other shares of its capital stock which the other corporation owned. As in the *Basset* case, the opinion allows no room for doubt:

"By its acquisition of the United States Corporation stock the International company either did, or did not, become the owner of its own stock thus held by the United States Corporation. * * * If it did not, then plainly it is not entitled to vote upon the stock, for, by the express provision of the Corporation act, owners of stock alone are entitled to vote upon it at a stockholders' meeting. If, on the other hand, by its

²⁴ O'Connor v. International Silver Co., 68 N.J.Eq. 680 (E.&A. 1905).

acquisition of the stock of the United States Corporation the International company became the owner of its own stock then held by the United States Corporation, its right to vote upon it at a stockholders' meeting is prohibited by the thirty-eighth section of the Corporation act, which is in these words: 'Shares of stock of a corporation belonging to said corporation shall not be voted upon directly or indirectly'."

During the decade of great prosperity, corporations and individuals manipulated public and private affairs and thereby secured great power and wealth. Coincidentally therewith Congress and State Legislatures instituted many investigations. The oil scandal uncovered so effectively by the late Senator Walsh stirred up the public feeling and people began to believe that all wealth had been corruptly secured. As a by-product of that investigation, the Senate Committee called before it for examination Harry F. Sinclair, and, upon his refusal to answer certain questions relating to his action in securing a part of the public domain, had him committed for contempt. This action was sustained by the Supreme Court of the United States in a well-considered opinion.²⁵

At approximately the same time, the New Jersey Legislature instituted an investigation into the affairs of Hudson County and summoned Mayor Hague to testify. The Court of Errors sustained the power of the Legislature to investigate and to summon Mayor Hague before them.²⁶ The Chief Justice voted in favor of the power on every point raised.

Following that decision, Mayor Hague was again summoned before the Committee and questioned. Such questions were propounded to him as:—

"What bank accounts did you have during the year 1922-1923?"

"During the years 1922 and 1923, what was the largest amount you had in banks?"

²⁵ *Sinclair v. United States*, 279 U.S. 263; 49 Sup. Ct. Rep. 218 (U. S. Sup. Ct. 1928).

²⁶ *In re Hague*, 104 N.J.Eq. 369 (E.&A. 1929).

"Now in 1923 you purchased a property at Deal, New Jersey, in the name of John J. McMahon, as dummy, for \$30,000. The purchase price was paid by John Milton's check and you reimbursed John Milton in cash. Where did you get the cash?"

He refused to answer the several questions submitted and was held for contempt. The validity of the action of the Legislature in so doing was tested and Chief Justice Gummere wrote the opinion of the Court of Errors sustaining the position taken by Mayor Hague.

Public feeling, as in the Sinclair case, was in favor of the Legislative body. Rightly or wrongly, and perhaps due more to curiosity than to any consideration of justice, individuals and the press felt that Hague should be compelled to answer the questions propounded. Public clamor as contrasted with the rights of the individual to be protected had no apparent effect upon the Court. In the decision both Republican and Democratic members of the Court were united. Citizens were entitled to be exempt from inquiries and disclosures in respect to their personal and private affairs.²⁷ This fundamental right of the citizen, even though he happens to be a Mayor as well, is the substance that Chief Justice Gummere seeks to protect in his opinion.²⁸ He based his decision on the ground that the Legislature had no power to investigate alleged criminal practice of any individual whether he happened to be the Mayor of a large city or merely a private citizen.

"The fundamental question involved in the determination of this appeal is whether in submitting these questions the legislature was exercising a function vested in it, or was invading the judicial department of the government. * * *

²⁷ The views stated by Mr. Justice Field in the United States Supreme Court were upheld: "Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value." In re Pacific Railway Commission, 32 Fed. Rep. 241 (U. S. Circ. Ct. N. D. Cal. 1887).

²⁸ In re Hague, 9 N.J. Misc. 89 (E.&A. 1930).

“In the present case, the questions which were put to Hague, at the joint session, by Mr. Watson * * * were asked by him * * * for the purpose of showing that the profits which had resulted from the criminal conspiracies with relation to the condemnation proceedings, the bus franchises and the theatre privileges were deposited in bank by Hague. In other words that Hague was a party to the criminal conspiracies which resulted in the mulcting of the treasuries of the County of Hudson and the City of Jersey City of approximately three-quarters of a million dollars. * * * Investigations of alleged violations of the criminal law are strictly judicial in their nature, and, under the constitution the legislature has no more power to conduct such investigations than has the Governor. * * * In refusing, therefore, to answer these questions, relating as they did to matters, inquiry into which was outside of the jurisdiction of the legislature, Hague was exercising a legal right, and this being so the legislature was without power to punish him for such refusal * * *.”

No attempt is made apparently to distinguish the Sinclair case, but it is obvious from a reading of the opinion that a question such as, “Where did you get the money with which you purchased your house in Deal?” is different from a question relating to a transaction by Sinclair involving the purchase of oil rights in the public domain. One deals with and is affected by a public interest in the protection of Government lands; the other seeks to trace the source of private wealth and to relate that to a corrupt transaction. Now that the interest and turmoil has passed, we can see more clearly that a real principle was involved, and that the Chief Justice and the Court stood firm to protect what they believed to be the security of every individual from investigation by a legislature into his private affairs even though criminality is suspected.

We have had in the course of the state's judicial history two other jurists who have occupied the position of Chief Justice, and whose reputations have been preëminent. It is

interesting to contrast their approach to judicial problems with that of the late Chief Justice.

Chief Justice Mercer Beasley was the father-in-law of Chief Justice Gummere, and occupied the office for almost as long a term. In considering the cases that came before him, we find that he is constantly viewing them from the standpoint of the effect of the decision to be rendered. How ought the case to be decided so as to do justice and establish a precedent that will tend to do equity?

Take such statements or expressions as these: "The question to be decided is, Can the defendant cheat the plaintiff by due course of law?"²⁹

"The jurisdiction thus assumed is highly beneficial, if not indispensable. The class of cases which in this way have been subjected to the cognizance of this court are of a character which renders it eminently proper that they should be susceptible of being reheard before some appellate tribunal."³⁰

"In the judicial system of a state, few things can be imagined more obstructive of the progress of society than courts with jurisdictions absolutely fixed. * * * The consequence is, that when the Constitution vests power in a court 'as heretofore,' and declares that the several courts shall continue with like powers and jurisdiction as though the Constitution had not been adopted, the effect is, that the primitive powers of such tribunals remain inalienably established, while at the same time there is implanted in them that principle of development by which their cognizance may be extended over new cases as they arise, and which principle is a part of their very nature and constitution."³¹

Each of these brief extracts shows that Chief Justice Beasley is looking forward to the effect of his decision. A

²⁹ *Chism v. Schipper*, 51 N.J.L. 1 (Sup. Ct. 1888).

³⁰ *Eames v. Stiles*, 31 N.J.L. 490 (E.&A. 1864).

³¹ *Harris v. Vanderveer's Executor*, 21 N.J.Eq. 424 (E.&A. 1869).

court must not render a decision that serves to do injustice, to "cheat." The jurisdiction of the court must be extended, it must not be circumscribed if we are to have an effective judicial system that can meet new conditions as they arise.

Chief Justice Depue's viewpoint was quite different and equally distinctive. To him the problem presented was to be solved by going back to the original sources of law to see how the idea germinated and how it developed. From such a consideration of the origins of the legal principle, he determined the underlying reasons and then took the next forward step by the application of the rule to the new situation. As a result, his decisions are likely to be voluminous and replete with citations drawn from early English Law. Many of them are complete essays. In deciding certain constitutional questions concerning struck juries, he even begins with Alfred the Great.³²

Chief Justice Gummere rarely sought to discover the foundation of any legal rule, rarely considered the future effect on social conditions or jurisprudence in general. The problem is to be answered by the application of rules. The court is to enforce legal principles. The Legislature and that body alone can alter; the law as enforced by the Courts must be fixed.

The contrast in the method of approach between Chief Justice Gummere and his predecessors is shown in the field of Constitutional Law. We have already referred to the case of *Harris v. Vanderveer's Executor*,³³ where Chief Justice Beasley decided that the Court of Errors had and must have an inherent power to extend its right of review over the decisions of the Prerogative Court. A very similar question was presented to the Court of Errors in the case of *State v. Knight*,³⁴ in which the Court was asked to consider the constitutionality of an act giving it power to review the verdict of a jury in a criminal case.

³² *Brown v. State*, 62 N.J.L. 666 (E.&A. 1898). Such cases as *Woodside v. Adams*, 40 N.J.L. 417 (Sup. Ct. 1878); *Johnson v. Arnwine*, 42 N.J.L. 451 (Sup. Ct. 1880); and *Ocean City Association v. Shriver*, 64 N.J.L. 550 (E.&A. 1900) are illustrations of his method of approach and show the historical research that underlies all his more important opinions.

³³ *Supra*, note 31.

³⁴ 96 N.J.L. 461 (E.&A. 1921).

The opinion of Chief Justice Gummere sustains the power. Whether the decision be sound (and we are inclined to accept the dissent of Justice Kalisch as expressing the better view) the opinion quotes at length from the opinion of Chief Justice Beasley, and thus puts the decision squarely on the precedent of that case.

“And the converse is true, namely, that the conferring upon this Court of jurisdiction to review conclusions of fact as well as alleged errors of law in cases which, until the enactment of the statute, were outside our jurisdiction, is not inconsistent with the inherent characteristics of this court. In fact, it was expressly so decided in the *Vanderveer Will* case. To say now that the extension of our jurisdiction by the present statute is out of harmony with the inherent character of the court would be to nullify our previous declaration that a similar extension by the earlier statute is not so.”

Here he takes his stand on constitutionality not on any broad view of inherent powers nor on historical development, but as a necessary result of a former decision. He shows as one of the most salient characteristics of his mind the desire to answer a problem of law as one would a mathematical problem, reasoning from the premises established by earlier cases.

In another opinion (dissenting) we find this method of approach even more emphatically presented:³⁵

“I find no such indication in the opinion, but, if I did, I should not consider that it afforded any justification for a refusal by a state court to follow those decisions. Unless an intimation by a court of doubt as to the soundness of a legal principle which has been established by it in an earlier decision is to be given the same force and effect as an express repudiation by it of that doctrine and the promulgation of the opposite one, the principle declared by the *Gloucester Ferry*

³⁵ *N. Y. C. R. R. Co. v. Freeholders of Hudson*, 80 N.J.L. 305, at 310 (E.&A. 1910).

Company case and the Covington Bridge case *is law*, (italics by Court) until it is repudiated by the tribunal which established it."

During the Chief Justice's term of service, the automobile became the general means of transportation of large numbers of persons. At first no particular attention was paid to the new means of transportation, and the courts and Legislature treated the motor car as they had dealt with horses and carriages. With the number of such vehicles ever increasing, the Legislature, with an eye to need of increased revenue, passed a statute requiring non-residents to secure licenses, and at the same time designating the Secretary of State as the agent of the owner for service of process.³⁶ Thereafter, one Frank J. Kane was arrested and he pleaded that the Act was unconstitutional as violating the commerce clause of the federal constitution. The Chief Justice, arguing by analogy of the power of the state of charge wharfage fees and toll charges for use of canal locks, wrote the opinion in the Court of Appeals holding the Act constitutional, and establishing the power of the state to control the use of state roads by non-residents.³⁷ This case was taken to the Supreme Court of the United States and there affirmed by a unanimous court.³⁸

Other states at or about the same time passed similar regulatory statutes, but so far as we have been able to ascertain the Chief Justice's opinion was the first decision in the field and led the way for the many that followed. The reasoning of the decision is an excellent example of his best work on the bench.

Another development that occurred in modern society was the erection of numerous large apartment houses and their intrusion into the residential areas in our suburban communities. This was followed necessarily by the erection of small stores to cater to the population living in the apartment house. Immediately the private house owner was aroused as he saw the value of his property diminishing because of the proximity

³⁶ P. L. 1908, p. 615.

³⁷ Kane v. State, 81 N.J.L. 594 (E.&A. 1911).

³⁸ 242 U. S. 160; 37 Sup. Ct. Rep. 30 (U. S. Sup. Ct. 1916).

of the multiple family dwellings. As a result, zoning statutes were passed in many states which endeavored to restrict apartment houses and businesses to certain sections of municipalities. Law suits followed, raising the issue of unconstitutionality based upon deprivation of property rights.

Chief Justice Gummere by his opinion in *State v. Nutley*,³⁹ placed New Jersey squarely on the side of those states upholding the sanctity of property rights:

"On what theory can it be said that the restraining of the respondent from erecting a combined store and dwelling house upon his property will tend to promote the *general* welfare of the community? It is probable that its presence there, without regard to its use, would be objectionable to other property owners in the immediate neighborhood, who would prefer that business places should not be established in that part of the town. But that is quite immaterial, for such property owners have not acquired the right to impose upon owners of other property in the vicinity any restrictions upon the lawful use thereof. The ordinary use of property is not authorized by the general welfare clause of the statute to be prohibited, because repugnant to the sentiment or desires of a particular class residing in the immediate neighborhood thereof, but only because such use is detrimental to the interests of the public at large. In other words, the restriction authorized by this provision of the statute upon the untrammelled use of property for the promotion of the general welfare of the community must be such as will tend in some degree to prevent harm to the public generally or to promote the common good of the whole of the people of such community."

Contrast this view with that of the New York Court of Appeals:⁴⁰

³⁹ 99 N.J.L. 389 (E.&A. 1923).

⁴⁰ *Wulfsohn v. Burden*, 241 N.Y. 288; 150 N. E. 120 (Ct. of App. of N. Y. 1925).

"Acting in accordance with these general principles, courts on the whole have been consistently and sensibly progressive in adjusting the use of land in thickly populated districts to the necessities and conditions created by congested and complex conditions by upholding as a constitutional exercise of the police power zoning ordinances passed under state authority to regulate the use of land in urban districts. * * *

It seems to us that the zoning authorities of Mount Vernon had the power to make such classification really effective by adopting such regulations as would be conducive to the welfare, health and safety of those desiring to live in such a district and enjoy the benefits thereof as we ordinarily conceive them. * * *

The primary purpose of such a (residential) district is safe, healthful and comfortable family life rather than the development of commercial instincts and the pursuit of pecuniary profits. Such life goes on by night as well as by day. It includes children as well as people of mature judgment. * * *

"Therefore, it seems to us quite in accordance with the decisions and principles to which we have referred that zoning authorities should have the right in a residential district to promote these purposes and to protect the people desiring to enjoy these conditions by excluding big apartment houses like the one proposed by appellant whereby the enjoyment of light and air by adjoining property would be impaired, the congestion and dangers of traffic be augmented on streets where children might be and the dangers of disease and fires would be increased. * * *

The New York Court emphasizes "life," "children," "dis-ease," "health," not property. Changing conditions bring changing needs; the police power is progressive, expanding to meet the needs of the community for the good of the whole. Not a narrow restricted good, but general welfare in its broadest connotation; not a regulation to prevent harm but to reform living conditions.

These contrasting views and the decisions themselves were presented to the Supreme Court of the United States in *Village of Euclid, Ohio, v. Ambler Realty Company*.⁴¹ With three dissenting votes, the power to impose zoning regulations was sustained. The opinion recognizes the two viewpoints—conservative and liberal. New Jersey under the lead and guidance of the Chief Justice is in the conservative ranks supporting the property rights of the individual and the doctrine that the owner of the property can do what he likes with his own as long as he does not inflict some tangible damage on his neighbor.

Chief Justice Gummere's mental vigor continued until his brief final illness. He remained on the bench and active until a few weeks before his death. His opinions at the close of his life have the same power that was apparent throughout his earlier and more physically vigorous period. Three opinions were written by him just before his death and later adopted by the Court of Errors.⁴² None of these cases deals with any novel legal proposition and, therefore, are not of importance in themselves. Each shows, however, the same clarity of thought and expression that was one of the Chief Justice's greatest assets throughout his career. Each decision is stated with conviction and the first two without any citation of authorities to support them.

Through the death of Chief Justice Gummere, the state has lost one of its most outstanding jurists. His mind was ever keen and accurate, and capable of grappling with the difficulties of legal problems, however intricate they were. His opinions are clear and effective when untrammelled by precedent. He could and did point the way. Such limitations as he had were due primarily to a conservative trend of mind. He was not a leader in any attempt to change legal concepts or principles; his interest was in stability and the maintenance of property rights. As he saw it, the duty of the judiciary was to protect and preserve rights as they are and have been established, not to institute changes.

⁴¹ 272 U. S. 365; 47 Sup. Ct. Rep. 114 (U. S. Sup. Ct. 1926).

⁴² *Power Building & Loan Association v. Ajax Fire Insurance Company*, 110 N.J.L. 256 (E.&A. 1932); *Bater v. Cleaver*, 110 N.J.L. 259 (E.&A. 1932); and *Sanford v. Charles H. Totty Co.*, 110 N.J.L. 262 (E.&A. 1932).

Aside from this limitation, his work as a jurist was of the highest order, and the state will long remember him as a fearless judge, ever upholding the great tradition of the bench, and enforcing without favor the fundamental principles of justice as they had been established by the great judges of an earlier time.

THEODORE MCC. MARSH.

Newark, N. J.