Techniques of Judicial Interpretation in Louisiana

Albert Tate Jr.
Techniques of Judicial Interpretation in Louisiana

Albert Tate, Jr.*

It is sometimes stated that, in deciding legal disputes, a judge merely finds the correct law and applies it to the facts of the case in controversy. It is my intention to discuss here some of the techniques available to a Louisiana judge to "find the law" by which to decide the case, once the facts are established.

We must, preliminarily, make brief mention of the legal system under which a Louisiana judge works. Although this has been disputed in modern times, scholars now generally agree that Louisiana is still a civil law jurisdiction, but with substantial infusions of common law concepts and techniques. For present purposes, what this essentially means is that the primary basis of law for a civilian is legislation, and not (as in the common law) a great body of tradition in the form of prior decisions of the courts. In important respects, the statutory

---

*Judge, Court of Appeal, Third Circuit. The substance of these remarks was delivered before the student body of the Louisiana State University Law School on March 19, 1962, as part of the Law School’s 1961-1962 Law Lecture Series.

1. See, e.g., Crabites, Louisiana Not a Civil Law State, 9 LOYOLA L. J. 51 (1928); Greenburg, Must Louisiana Renounce the Common Law?, 11 TUL. L. REV. 598 (1937); Ireland, Louisiana’s Legal System Reappraised, 11 Tul. L. Rev. 585 (1937).


3. These and other generalizations concerning the civil and the common law are based upon general readings, including, besides the authorities cited in notes 1 and 2 supra: Lawson, A Common Lawyer Looks at the Civil Law (1956); Schwartz, The Code Napoleon and the Common-Law World (1956); Dainow, The Constitutional and Judicial Organization of France and Germany and some Comparisons of the Civil Law and Common Law Systems, 37 Ind. L.J. 1 (1961); Loussouarn, The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law, 13 Louisiana Law Review 225 (1953); Morrow, Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation, 17 Tul. L. Rev. 351, 537 (1943); Rheinstein, Common Law and Civil Law: An Elementary Comparison, 22 Revista Jurídica de la Universidad de Puerto...
sources are synthesized in a code which provides an integrated system of general principles governing much of the civil relationships of men among themselves and with regard to their property.

We will concentrate our attention on the part played in the decisional processes by the principal formal sources used by a Louisiana judge in adjudicating the disputes presented to him, namely:

1. The Civil Code and the statutes;
2. Doctrine;
3. Precedents.4

In conventional civilian thought, the first, as expressions of the legislative will, are regarded as the authoritative sources of the law. The latter two sources are regarded merely as interpretations of, or as persuasive sources of, the law, which itself is embodied only in legislation. The Louisiana judge must, as stated, find primarily in legislative enactments the legal principles to be applied in deciding the case before him.

I. THE CIVIL CODE AND THE STATUTES

Our Civil Code is a comprehensive, systematic, and coherent enactment regulating most of the area of private law—the family, successions, ownership, and most contracts. Although sometimes containing detailed regulation when certainty is necessary, such as in testamentary dispositions, ordinarily the code concepts are set forth as general principles. These general principles are to be applied to particular fact situations by the use of deduction, analogy, and other processes of logic. The Code is supposed to be a self-sufficient and logically interdependent enactment, to be construed as a whole, and to regulate entirely the relationships and incidents within its scope without reference to other authoritative sources of law.

The importance of the Civil Code in the regulation of our private law is not to be estimated by the comparative brevity of its text. It consists of less than four thousand articles, easily

---


4. For reasons of brevity, and because they are used with relative infrequency in deciding civil litigation in our state courts, we will omit discussion of two other sources of law sometimes applicable to the dispute, (a) constitutional provisions and (b) custom. As to the latter, see, e.g., LA. Civil Code art. 3 (1870):
contained in a normal-sized volume, as compared with the five bulky volumes containing the text of the Louisiana Revised Statutes of 1950. In general, the fifty-six titles of these latter statutes are intended to be a consolidation of all the miscellaneous non-related general statutory enactments passed over the years. Although the provisions and subjects in the Civil Code are small in number compared to those contained in the statutes, the scope of code regulation includes the major areas of private law important to the ordinary life of the average citizen— as mentioned, including family law, successions, the ownership and transfer of property, and most contractual relationships. The provisions of the Revised Statutes, on the other hand, usually regulate more specialized areas, such as workmen's compensation or chattel mortgages or criminal law and procedure.

As we have stated, in civilian theory it is primarily in these statutory sources—the Civil Code and other legislation—that the judge must find the legal precept applicable to the dispute before him. We will speak of "interpretation" in this paper as the judge's work in determining the general legal principle to apply to the decision of the particular case, and in determining the manner in which the principle will be applied so as to decide the dispute.

In most conflicts of interest, the statutory enactments provide reasonably clear guidance as to what are the legal precepts intended to govern the present conflict of interest between the parties. There is little value in extended discussion of the sometimes somewhat mechanical function of a court to apply plain code or statutory provisions to subjects clearly intended to be regulated by them; for example, such as the requirement that transfers of immovable property be in writing on pain of nullity otherwise. As our Civil Code provides, "When a law is clear

"Customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent," and annotations thereunder in 1 West's LSA—Civil Code 218 et seq. (1952). See also I Planiol, Civil Law Treatise (Translation by the Louisiana State Law Institute) §§11, 14 (1959); Cardozo, The Nature of the Judicial Process 58-65 (1921); Loussouarn, The Relative Importance of Legislation, Custom, Doctrine, and Precedent in French Law, 18 Louisiana Law Review 235, 247-54 (1958).

5. La. Civil Code arts. 2440, 2275 (1870). Hereinafter, references to articles in the Louisiana Civil Code of 1870 will simply be by article number, without further identification.
and free from all ambiguity, the letter of it is not to be dis-
regarded, under the pretext of pursuing its spirit."  

But there are other instances where the correct legal precept
to apply is not easy to ascertain.  

The very circumstance that there is litigation may mean
that the words of the statutory source are ambiguous and do
not clearly indicate the intended effect insofar as resolution of
the present conflict is concerned. There may be two or more
competing and conflicting legislative principles either of which,
it may be argued with seemingly equal reason, are applicable
to the present facts, even though producing opposite decisional
results. The present legal dispute may involve a factual situation
apparently unforeseen by the legislators and to which none of
the legislative enactments seem directly applicable. Although
the words of the statute may be clear and unambiguous, apply-
ing them to the facts of the present case may produce a result so
unreasonable or so seemingly unfair as to suggest that the legis-
lature never intended for the enactment in question to be applied
to the present type of fact situation.

What is the judge to do in such a situation? What techniques
must be utilized to determine the legal principles applicable?

I do not here mean to speak of various technical rules of con-
struction which are available as an aid in the interpretation of
statutes. Our Civil Code, for instance, lists a few, including:
language must be understood in its general and popular sense,
unless terms of art or technical terms are used, which latter must
be accorded their received technical meaning; where the words
are ambiguous, the meaning of the law must be sought by exam-
ining the context within which they are used, or by construing
laws in pari materia (that is, upon the same subject matter)
with reference to one another. Likewise, the Louisiana Revised
Statutes contain some introductory general provisions setting
forth certain specific rules of construction to aid in the inter-
pretation of the text of this enactment; and various decisions of
the Louisiana courts have established several principles of inter-
preting the meaning of the Revised Statutes with relation to the
earlier enactments consolidated in them. Again, Planiol sets

7 Articles 13-21.
9. The principles of interpretation of the Louisiana Revised Statutes enunciated
in decisions of the courts are of some interest. A provision of general interpreta-
forth accepted rules and devices of construction in the differing situations (a) where the text is clear but its application doubtful, (b) where the meaning of the text is doubtful, (c) where the law is silent, or (d) where there is a conflict between two legislative texts. 10

To narrow our inquiry somewhat, we will not discuss methods of interpretation which are based upon logical analysis of the legislative enactments available for the decision of the matter — what the French call the exegetical approach to interpretation, one based only upon the statutory text itself. We will instead concentrate our attention upon the general approach of the judge and the techniques of interpretation used by him when by exegesis the statutory enactments themselves do not provide a definitive guide to the correct principle of law to apply to the dispute.

In this difficulty, when by use of the orthodox rules of construction and methods of analysis the judge is unable with satisfying certainty to determine the statutory enactment’s application to the present dispute, a threshold problem often is to determine whether the concrete conflict of interest to be decided was intended to be regulated by the legal precept in question, which resolves in the abstract conflicts between interests based upon certain notions of policy which underlie and justify the precept. 11 An interesting related threshold problem is the consideration enacted as part of the text provides that the Revised Statutes “shall be construed as continuations of and as substitutes for” the laws which were revised and consolidated. Id. 1:16. Where the text of the former law was changed and the present revised provision is clear and unambiguous, the courts have held that the unambiguous text of the Revised Statutes should be interpreted according to its clear meaning, without reference to the prior law — that is, it is held that the revision changed rather than merely clarified or codified the prior law. Bel v. Van Kuren, 236 La. 23, 106 So.2d 703 (1958); City of Alexandria v. LaCombe, 220 La. 618, 975 So.2d 206 (1952); Note, 15 Louisiana Law Review 472 (1955). See also La. R.S. 1:4 (1950). But where the provisions of the revised text are ambiguous, to find their meaning the courts refer to the prior laws consolidated and codified by the revised text; in this event, then the presumption is applied that the legislature intended generally only to codify and continue the meaning of the prior enactments as previously interpreted by the courts. Gay v. United Benefit Life Insurance Co., 283 La. 226, 96 So.2d 497 (1957); State v. Texas Gas Transmission Corp., 128 So.2d 849 (La. App. 4th Cir. 1961), affirmed, 136 So.2d 55 (La. 1961); Perkins v. Brothers of Christian Schools, 71 So.2d 400 (La. App. 1st Cir. 1954). Also, with the civilian (and perhaps universal) penchant for synthesis and unification of the law, there are expressions in our jurisprudence that the Revised Statutes should be regarded as a single enactment adopted as a whole, so that all provisions should be construed together and reconciled whenever possible as simultaneous expressions of the legislative will. Collector of Internal Revenue v. Olvey, 238 La. 980, 117 So.2d 563 (1960), and cases cited therein. But see La. R.S. 1:12 (1950).


11. von Mehren, The Judicial Process in the United States and in France, 22
sideration of whether the legislature intended the precept in question to be an immutable rule to be applied without variation or exception (as is generally the case for instance with enactments affecting title to land) no matter how inequitable the result, or whether instead the legislative precept was more in the nature of a standard, permitting some discretionary individualization of application by the courts in order to achieve the general aim of the statute in consonance with general principles of fairness, or whether instead the enactment was intended to furnish a principle to be classified somewhere between the immutable rule and the general standard insofar as preventing or permitting judicial discretion in its application.\textsuperscript{12}

After determining that the enactment in question was intended to regulate this particular type of conflict of interest, the court must apply it, as has often been stated, according to the legislative intent expressed by the enactment. However, the approach of the court is often not so much to find the specific personal intent of the legislators who enacted the law; it is rather to find what general precept was intended to be provided by the legislation, not the legislators, to apply to factual situations of the general nature of those giving rise to the dispute now before the court.

Contrasting approaches towards ascertaining the intended meaning and application of legislation with regard to a particular conflict of interest have sometimes been characterized respectively as the "subjective" and the "objective" methods of interpretation.\textsuperscript{13} By the former, the statutory intent is determined by the purpose of the legislators in the light of the circumstances known at the time they adopted the rule. By the latter, the meaning or the application is determined in the light of the circumstances as they exist at the time the interpretation takes place, perhaps many decades after the enactment. By the objective method of interpretation (and specific examples will be given below), the general social purpose of the law is the

\textsuperscript{12} Morrow, \textit{Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation}, 17 Tul. L. Rev. 351, 362-64, 555-56 (1943). Professor Morrow notes that Dean Pound, almost alone of the great thinkers in Anglo-American jurisprudence, has been interested in this problem of the relativity of legal precept insofar as excluding judicial discretion or not, a relativity which may vary according to the field of law and the social purpose of the rule involved. See, e.g., Pound, \textit{Hierarchy of Sources and Forms in Different Systems of Law}, 7 Tul. L. Rev. 475 (1933).

\textsuperscript{13} See Guttridge, \textit{A Comparative View of the Interpretation of Statutes}, 8 Tul. L. Rev. 1 (1933), for discussion regarding the subject of this paragraph.
guide to the intention of the legislators with regard to the application of the legislative precept then before the court, and the law is regarded as intended as regulation not only of factual situations known to the legislators at the time of enactment, but also of generically similar factual situations to arise in the future.

Again, sometimes differences in general interpretative technique are also classified as either "functional" or "mechanical."\textsuperscript{14} By the functional approach, the application of a statute to the present conflict of interests is determined by considering whether the legal precept was intended to regulate that general type of conflict of interests and by considering the purpose for which the statute was enacted. On the other hand, using the mechanical approach, the court applies the statute according to its formal wording, without consideration of its intended social purpose; the words and not the purpose of the statute are relied upon as the guide to its application.

The objective and the functional methods of interpretation place great emphasis upon applying the legislation so as to carry out the general social purpose of the legislation. This calls for consideration of the general policy reasons underlying the enactment of the legal precept — the general purpose behind its enactment to regulate in the abstract a certain conflict of interest, and the practical or equitable reasons for this purpose. The particular conflict of interest now before the court is to be decided more in accordance with these general policy considerations which induced the legislation, rather than simply by logical deductions from the wording — it being remembered that, for purposes of this discussion, we have already agreed that the formal wording itself has not definitively provided us with a rule by which we may with satisfaction resolve the dispute before us.

Thus, discussing French legal thought utilizing a somewhat similar approach, Dean Loussouarn of France stated:

"The Code had been drafted and adopted to reflect and sustain the social and economic life of 1804, but as those conditions changed the provisions of the Code gradually lost their justification or appropriateness. The rules of the Code as written and originally conceived sometimes made a mockery

\textsuperscript{14} See von Mehren, \textit{The Judicial Process in the United States and in France}, 22 Revista Jurídica de la Universidad de Puerto Rico 235 (1953) for discussion regarding the subject of this paragraph.
of justice, but exegesis paralyzed the judge and prevented him from adapting the texts to the current conditions of life. Besides, problems non-existent and unforeseeable at the time of the adoption of the Code multiplied at a constantly increasing rate. Thus a new approach to the process of interpreting and applying the law had to be found. French doctrine, led by Francois Gény, successfully urged the abandonment of exclusive reliance on exegesis and the adoption of a method of interpretation which places more freedom and responsibility in the judge.

"The method of free scientific research, as Gény called it, does not ignore legislation where it clearly applies to the question at issue, but seeks to reinterpret it so as to give it an application which is consistent with the changed conditions which it is now called upon to regulate. The original intention of the legislature ceases to be controlling, and instead the judge must seek to give the text that meaning which the legislature would have enacted had it been acting at the present rather than in the past."15

*Prudhomme v. Savant,*16 decided by the Supreme Court in 1922, is an illustration of the difference between the objective and the subjective methods of interpretation. The question at issue involved the interpretation of the code provision that a nuncupative testament by public act must be "written" by the notary as it is dictated to him by the testator in the presence of at least three witnesses.17 The will in question had been typed by the notary at the testator's dictation.

In its original opinion, the Supreme Court held the will to be void because "written" by a typewriter instead of by hand, although otherwise confected with full observance of all required code formalities. An essential basis of its reasoning was that the authors of the Code could not have intended to permit the use of a typewriter, because typewriters had not been invented in 1870 when the Louisiana Civil Code was revised and re-enacted.

On rehearing, however, a majority of the court reached the opposite conclusion and held that the will was valid, with three

16. 150 La. 256, 90 So. 640 (1922).
17. La. Civil Code art. 92 (1808); La. Civil Code art. 1571 (1825); La. Civil Code art. 1578 (1870).
Justices dissenting. The final majority opinion reasoned, correctly in my opinion, that it was immaterial whether the notary typed the will at the testator's dictation, rather than wrote it by hand, for the other prescribed formalities of the will were designed to assure that it correctly set forth the testator's intention. Unlike an olographic testament, which must be in the handwriting of the testator and in which the particular characteristics of the handwriting have a function as proof that the will is indeed the act of the testator, the mechanical method of transcription of a nuncupative will by public act, whether by typewriter or by hand, has no function with regard to the aim of the statute, which in this regard only specifies that the will be "written."

While the legislators of 1870 may have known only of writing by hand and may not have even dreamed of typewriters, the court regarded them as not intending that the enactment apply only to the then present conditions. In interpreting the code article, the court looked to the functional purpose of the law, the end it sought to serve, the social interest it sought to conserve or regulate. The court did not restrict the code article to the particular fact situations known to the legislators at the time it was adopted; it assumed that the provision was enacted as a general legislative regulation to be applicable to changed circumstances arising in the future, so long as it served the same general aim and the same intended social purpose.

Perhaps another example will also illustrate these generalizations concerning the functional and objective methods of interpretation of legislation by the courts.

In Mooney v. American Automobile Insurance Co.,\(^{18}\) the question at issue was whether a motorist was contributorily negligent in passing to the right another vehicle going in the same direction on a four-lane highway, since La. R.S. 32:233(A) provides that "the driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass at a safe distance to the left thereof." (Emphasis added.)

Although under its terms the statute seemed applicable to all state highways, it was enacted at a time when only two-lane highways were in existence. Judge Ellis for the Louisiana First Circuit Court of Appeal held that the enactment did not apply to

\(^{18}\) 80 So.2d 625 (La. App. 1st Cir. 1955).
four-lane highways, such as that on which the accident occurred; he pointed out that, if it did apply to the modern four- and eight-lane highways which have been designed to facilitate the movement of traffic, then slow-moving traffic in the left lanes, slowing or stopping to turn left, for instance, would force all other traffic in the other lanes proceeding in the same direction to slow or stop, since under the enactment these other vehicles would be unable to pass to the right of the slowed or stopped vehicle in the inside left lane. In view of the unsound and impractical results ensuing if the statute were literally applied, Judge Ellis concluded that the legislators had never intended that this statute designed for two-lane highways should apply to four-lane highways such as that involved, and the court held, therefore, that the motorist's passing on the right on a four-lane highway was not negligent.

Again in Sanders v. Hisaw, the court had occasion to construe the statutory regulation requiring the driver of an overtaking automobile to sound his horn before passing a vehicle proceeding in the same direction. The case again concerns a four-lane highway, and the court again held that the statutory regulation, designed to regulate passing and overtaking on the two-lane highways in existence at the time of its enactment, was not intended by the legislature to apply to modern multiple-laned super highways, where no function would be served and only a nuisance would result from the continuous sounding of horns by the streams of traffic passing to the right and left of other traffic in other lanes bound in the same direction.

Thus, in these last two instances, the courts held that the statutory enactments did not apply to changed conditions of later decades, because their original function and social purpose was completely irrelevant to these changed conditions — it would produce absurd and unreasonable results to apply to four-lane highways these traffic regulations, which were intended for two-lane highways and useful in safeguarding the movement of traffic upon them only, not upon the larger multiple-laned highways.

As Professor Calamandrei of Italy has observed, in democratic regimes the law is a product of the social needs of the society represented by the legislators and "the judge is also part of the society in which he lives, and when he interprets the law."

19. 94 So.2d 486 (La. App. 1st Cir. 1957), cert. denied.
20. La. R.S. 233(B) (1950).
in applying it to a specific case, he must draw inspiration from the same sentiments of social utility on which the law is based; to determine 'the intention of the legislator' one must understand fully the significance and force of the law; this can be done only by turning for inspiration to the same social or political sources that inspired the legislator.'

It may not be inappropriate to note that great caution must be exercised in the use of this technique of interpreting legislation by correlating its social purpose with the current factual circumstances. The judge must be careful not to confuse what he thinks is the intended general purpose of the enactment with what is merely his own conception of how the statute should have been worded; he must not substitute a new law for that actually enacted by the legislature; he must not ignore plain statutory language not clearly inapplicable to the present decisional facts just because he does not like the result reached if it is applied literally, when that result is within the reasonable contemplation of the legislation. The judge must think of himself as the legislators' colleague, not as a super-legislator; sometimes he merely echoes the legislative rule, sometimes he completes or extends it so as to govern conflicts of interest within its scope but not specifically provided for; and even when the judge finds the formal wording of the legislative rule does not furnish the legal principle appropriate for decision of the instant case, he does so only in the spirit of cooperation and of doing what he thinks is the intention of the legislation, not in a spirit of opposition or dissent.

It also must not be overlooked that there is a place for the mechanical application of statutes, as well as for the functional application of them. The former technique is to be utilized in the preponderance of litigated instances, where the enactment in question was reasonably intended to apply to the type of conflict of interest at issue before the court — the latter technique primarily to assure that the enactment is being applied in the same sense and for the general purpose intended by the legislation. Further, the functional approach does not ignore exegesis; although exegesis may no longer furnish the sole process by which the meaning of legislation is ascertained, it is useful in determining the application and purpose of the legislative text as originally intended, from which the present rule of law may be

educed to apply to different or new or unforeseen circumstances now before the court, a rule which should be consonant with the original social intention and practical purpose of the enactment.

Before concluding these generalizations concerning the interpretation of statutory law, brief reference should be made to the decision of cases not expressly covered by statutory enactment. Civil Code Article 21 specifically provides: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent." By this blank check, the legislature specifically delegated to our courts the authority to fill in the interstices of positive law not specifically regulated by legislation.

A detailed study by Professor Dainow shows that in the exercise of this authority to decide the unprovided-for case the Louisiana courts have followed civilian techniques of judicial interpretation, including the application or extension of code concepts to new fact situations by deduction or analogy.\(^2\) The approach of the judge in deciding the unprovided-for case is not, however, simply that of the logician; it is more akin to that of the legislator, for the judge attempts "to find a rule which the legislature would have enacted had it foreseen the case."\(^2\) Not logic alone, then, but also policy considerations of what rule is best for the community as a whole and of what rule provides the fairest solution of the present controversy motivate the reasoning of the judge in formulating the rule to be used to decide the case for which the legislature did not provide.\(^2\)

The development of our mineral law is an example frequently given of the application by the Louisiana courts of ancient code concepts to changed economic and social conditions for which the Code did not provide. The detailed legal regulation of the complex rights arising out of mineral development rests upon two basic analogies—that of mineral rights to the servi-

---

\(^2\) Dainow, La Méthode Depuis Le Code Civil de 1804 au Point de Vue L'Interpretation Juridicaine Louisiana, Trauvaux de la Semaine Internationale de Droit (1950). The substance of this study is also contained in Dainow, The Method of Legal Development Through Judicial Interpretation in Louisiana and Puerto Rico, 22 Revista Juridica de la Universidad de Puerto Rico 108 (1953).


\(^2\) On another occasion, the present writer has discussed this question. See Tate, "Policy" in Judicial Decisions, 20 Louisiana Law Review 62 (1959).
tude affecting land, and that of the oil and gas lease to the lease of land. The code concepts of servitude and lease have been successfully applied to determine the nature and effects of complex mineral interests of a nature completely unimaginable to the jurisconsults who prepared our own and the French Civil Codes and to the ancient sources from which they drew.

Yet another example of the interpretation of a statute by the courts so as to decide cases concerning which the legislation has made no express provision is a court-made rule in the workmen’s compensation field. The compensation statute provides that compensation shall be paid to disabled employees, but it does not provide for the situation that sometimes arises where an employee’s disability can be relieved by a simple, customary, and non-dangerous surgical procedure. Although the statute is silent in this regard, and although the courts recognize that they have no power to compel an employee to submit to an operation, the courts have applied a rule that compensation will be ordered withheld when an employee unreasonably refuses to submit to minor surgery which will remove his disability.25 The courts interpreted the compensation statute in this manner upon the theory that the legislature never intended for a disabled employee to draw compensation indefinitely if his disability could be easily ended by minor surgery without danger to himself; although in a sense legislating, the courts regarded themselves as carrying out the general intention of the legislation in a factual situation not expressly regulated by it.

II. Doctrine

Another legal material used by the courts in finding the law to apply to the facts in litigation is “doctrine.” We are here interested in this source of law only insofar as it is used in judicial interpretation.

Doctrine to the civilian is the interpretation of law expressed in legal writings by those learned in the law. As to it, Planiol states: “[I]ts role is considerable; it gives orientation; it prepares from afar many changes in legislation and in case law. . . . [By it,] scientific principles and juridic ideas are developed and

---

come to dominate the thoughts of judges and of the legislator himself." He further comments that doctrinal interpretation "is the freest of all because it is purely theoretical. It is also the most prolific because it is developed leisurely. In its examination it does not confine itself to an isolated case. It gives to its concepts and its deductions the broadness of view, the logic and the force of a synthesis. But it has no use other than to influence court decisions."  

Commentators on Louisiana law two or three decades ago noted the relatively small part played by doctrine in the modern development of Louisiana's law, chiefly because of the general unavailability of civilian works of interpretation due to the language barrier and also because of the relative paucity at the time of Louisiana doctrinal works.

In the last two decades, however, we have seen a great increase in Louisiana doctrinal writings, as well as in their general availability to the bench and bar as guides and aids in the interpretation of law. The publication by our law schools of three fine law journals provides a constant critique and evaluation which work toward synthesis and understanding of our newer legislation and judicial decisions in their relationship to established general legal principle and to the law as a whole. We must also note the splendid work of the Louisiana State Law Institute, which since its founding in 1938 has encouraged a revival of civilian thinking and theory — think of, for instance, the recent translation of Planiol's Civil Law Treatise sponsored by it, and this treatise's undoubted impact in influencing the courts in the interpretation of Civil Code articles in the light of their purpose and context within the entire code scheme of civil relationships.

In my opinion, doctrine plays a more important part in the Louisiana decisional process than we sometimes credit it. The great treatises of Professors Daggett, McMahon, and Malone and their other writings have played an important part in synthesizing from the decided cases and other source of legal

27. Id. § 201.
28. See, e.g., authorities cited in notes 1 and 2 supra.
31. McMahon, Louisiana Practice (1939).
thought the guiding principles of law in the fields of mineral rights, procedure, and workmen's compensation, respectively. These scholars' perspective of the field as a whole, their knowledge and research into the background and purpose of the legal principles, their evaluation of the decided cases in the light of the latter, have not only described how the law has been applied in the past, but have also furnished guidelines to interpretations in the future, which have undoubtedly influenced the development and application of the law in these fields by the courts.  

Even an individual law review commentary may sometimes influence the subsequent interpretation and application by the courts of a rule of law analyzed and discussed. A dramatic example of this is furnished by the development and clarification of the law furnished through an article in 1953 by Bailey Chaney, a Baton Rouge lawyer, suggesting the proper use and availability of the thirty-year boundary prescription in title actions. In a section of the Civil Code regulating the fixing of boundaries, a thirty-year prescription is provided by which one may acquire the ownership of land outside his title, if it has been possessed within visible bounds for the requisite period. Mr. Chaney's thesis was that this code method of acquiring title should be available not only in boundary actions, but also in all other title actions—that a person should not retain or lose his title to land varying according to the procedural action in which his ownership is disputed. This conclusion was so logical and so doctrinally sound that the courts at once adopted it, relying upon the law review article in question. Further, specifically relying upon

33. To use another general example, Professor Dainow's and Professor Morrow's works on judicial interpretation in Louisiana and its functions in a civilian jurisdiction will undoubtedly aid other judges, as they have helped me, to a clearer understanding of our functions and duties in interpretation, which will assist us in applying legal precepts to controversies before us in the manner intended by the philosophy and standards of our legal system. See, e.g., Dainow, The Constitutional and Judicial Organization of France and Germany and some Comparisons of the Civil Law and Common Law Systems, 37 Ind. L.J. 1 (1961); Dainow, The Planiol Treatise on the Civil Law: French and Louisiana Law for Comparative Study, 10 Am. J. Comp. L. 175 (1961); Dainow, La Methode Depuis le Code Civil de 1804 au Point de Vue L'Interpretation Judiciale Louisianaise, Travaux de la Semaine Internationale de Droit (Paris, 1950). See also Dainow, The Louisiana Civil Law, published as an introduction to the 1961 edition of Civil Code of Louisiana xiii (Dainow ed. 1961); Morrow, Louisiana Blueprint: Civilian Codification and Legal Method for State and Nation, 17 Tul. L. Rev. 551, 537 (1943).


36. Id. art. 852.

its reasoning, the First Circuit Court of Appeal subsequently refused to follow a long line of jurisprudence which had held that a title acquired by ten years' acquisitive prescription could not be pleaded in a boundary action.\(^{38}\) (This result, incidentally, is now approved by the new Code of Civil Procedure of 1960, which specifically overruled such prior jurisprudence and adopted the sensible rule of the later decisions following the Chaney article, namely, that all questions of title and ownership can be raised in a boundary action\(^{39}\) as well as in a title action, thus avoiding multiplicity of actions or the loss of valuable substantive rights just because of the procedure used.)

In my judgment, the greater influence of doctrine instanced in the last two decades foreshadows an even greater use of doctrine in the interpretative process in the future. This will be so not alone because of the greater availability of substantial amounts of Louisiana doctrinal works. The growth of our population and the increasing complexity of our civilization have produced such a volume of case-decisional material and of statutes and amendments thereto that the practitioner and judge, in the press of disposing of the multiplying volume of legal problems resulting, must of necessity turn to general works synthesizing and evaluating decisions and statutes in their relationship to the fundamental essence of the legal principles involved.

The tremendous increase in the volume of legislation in modern times alone makes such a synthesis necessary. The multitude of various separately-considered enactments cannot be consistent from particular to particular. Additionally, the new legislation often reflects principles different from those expressed by older statutes, so that the meaning of former legislation must often be reinterpreted constantly in the light of the principles expressed by the newer enactments.

The work of the law reviews, and this includes the student notes and comments (written as they are under the supervision of the faculty or leading members of the bar), are invaluable aids in evaluating the background and context of decisions and statutes and in supplying perspective as to their legal history and legislative or social intent. Harassed by the demands of a crowded docket or a busy practice, the judge or practitioner does not ordinarily have as much time as he would like to make an ex-

\(^{38}\) Collett v. Otis, 80 So.2d 117 (La. App. 1st Cir. 1955).
\(^{39}\) LA. CODE OF CIVIL PROCEDURE art. 3693 (1960).
haustive study of legal questions presented and of all related and incidental materials; but in these law review treatments, if the question fortunately has been considered in such a source, this important and time-consuming research has normally been done in detail and with correlation to general doctrine and theory in the legal field involved, so as to serve as a very important source of interpretation of the legal principle, whether or not the conclusions suggested by the law source are adopted by the court.

III. PRECEDENTS

In orthodox civilian fashion, we come last to consideration of the place of precedents, that is, of the jurisprudence, in the Louisiana decisional processes. This is misleading, because in actual fact most Louisiana judges look for guidance in the interpretation of legal precepts first to the prior decisions of his own or of other courts; most members of the bar, also, rely principally upon the jurisprudence as a guide to the meaning of law, rather than upon theoretical doctrine or upon their own processes of sound reasoning regarding the application of a statute in the light of its fundamental purpose. In other civilian jurisdictions also, in modern times at any rate, the case law is a very important source of the legal materials and legal reasoning used by the judges in deciding litigation.

However, as noted earlier, under pure civilian theory, the sole source of law is statutory. The decisions of the courts are not law, but merely persuasive interpretations of it.

Although in practice the use of precedents may often be approximately similar in civilian and in common law jurisdictions, the essential difference lies in the attitude towards them and the sanctity with which they are regarded. Formerly, at least, common law jurisdictions regarded even a single precedent as binding on the court which established it and on all lower courts subject to its appellate jurisdiction, while even in modern times an established precedent is regarded as law, law being what the courts will do rather than some abstract principle independent of judicial interpretation and applications. In a civilian jurisdiction, however, the precedent is regarded only as an interpre-

41. Deák, The Place of the "Case" in the Common and the Civil Law, 8 Tul. L. Rev. 337 (1934), as well as authorities cited at note 3 supra.
iation of the law (i.e., of legislation); the precedent is not binding as having established a rule; it is rather valid insofar as persuasively demonstrating the correct interpretation of the statutory source.

The civilian does not regard the judicial interpretations of a statute as becoming part of the statute, so that the statute as interpreted is the law. He regards the statute alone as being the law, and prior decisions do not “insulate” him, in Professor Morrow’s happy phrasing, from going directly to the statute for its meaning. In ideal theory, the civilian judge decides cases primarily “not by reference to other decisions, but by reference to legislative texts and within the limits of such judicial discretion as the legislative texts grant.”

In some important respects, Louisiana has adopted the civilian concept of case law. Thus (although two to three decades ago this was controverted), there is now substantial agreement among scholars that the common law doctrine of stare decisis does not apply in Louisiana, although on the other hand precedents are still of importance because of the civilian doctrine of jurisprudence constante which our courts do follow.

As summarized in 1937 by members of the Louisiana State University law faculty during a famous scholastic dispute concerning whether Louisiana had abandoned its civil law heritage:

“The two most important differences, then, between the doctrine of jurisprudence constante and the rule of stare decisis, are: (1) a single case affords a sufficient foundation for the latter, while a series of adjudicated cases all in accord forms the predicate of the former; and (2) case law in civilian jurisdictions is merely law de facto, while under the common law technique it is law de jure. A third characteristic difference between the two doctrines of judicial precedent is that under the common law technique an inferior court must follow the case law announced by a superior court; under the civilian technique, in strict theory, they are not obliged to and occasionally do not, although for practical reasons, such as

44. Comment, Stare Decisis in Louisiana, 7 Tul. L. Rev. 100 (1932); and authorities cited at note 1 supra.
45. See authorities cited at note 2 supra.
fear of reversal, inferior courts ordinarily follow the jurisprudence of superior courts.”

Some twenty years later, the civilians triumphant, Colonel John H. Tucker, President of the Louisiana Law Institute and a leader in the civilian renaissance, reiterated with approval their conclusion:

"'We [in Louisiana] have never adopted stare decisis, and whatever chances it had of creeping into our system have been reduced to the vanishing point by the passage of time. Our courts have always followed, and show every disposition to continue to follow, the essential civilian judicial technique of never letting today become either the slave of yesterday or the tyrant of tomorrow.'"

Some idea of the less reverent attitude of Louisiana courts towards precedents than that of courts in common law jurisdictions is evidenced by the 1937 study of these scholars, showing that the Louisiana Supreme Court had overruled its own prior decisions seventy-six times during the preceding twenty-five year period, and that on several occasions the lower courts refused to follow Supreme Court decisions which they felt to be erroneous.

Selected at random are several other, more recent, instances: In 1957, for example, a Louisiana court of appeal refused to follow a line of many decisions, including three by the State Supreme Court (one of which had only recently reaffirmed the rule), which held that an in forma pauperis plaintiff (who is

46. Daggett, Dainow, Hebert & McMahon, A Reappraisal Appraised: A Brief for the Civil Law of Louisiana, 12 Tul. L. Rev. 12, 17 (1937). The 1937 dispute and the leading articles involved are briefly summarized in Brosman, A Controversy and a Challenge, 12 Tul. L. Rev. 229 (1938). The orthodox civilian theory regarding precedents is stated as follows in 1 PLANIOL, CIVIL LAW TREATISE (TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) § 204 (1959): "Judicial interpretation is free in principle. Every tribunal may adopt the solution which it considers the most just and the best. It is bound neither by decisions which it may have handed down previously in analogous cases nor by those of a higher court." Because of the binding effect commonly accorded higher court decisions by lower tribunals in Louisiana (see Subsection C in text infra), it would appear to me that the theoretical effect of precedent in our jurisprudence is probably more in accord with the Spanish doctrina legal than with the French jurisprudence constante, according to the explanation of the former contained in Dean Ramos' review of Herzog, Le Droit Jurisprudentiel et le Tribunal Supreme en Espagne, 22 REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO 442 (1953).


statutorily privileged to file suit without pre-payment or bonding of court costs) was not liable for court costs if he lost the suit; there was an express statutory provision apparently overlooked by these prior decisions, and the court of appeal applied it rather than the precedents following a contrary rule; on certiorari, the Supreme Court affirmed, acknowledging the error in the jurisprudence created by its own decisions.\footnote{Coulon v. Anthony Hamlin, Inc., 93 So.2d 557 (La. App. Orl. Cir. 1955), aff'd, 233 La. 798, 97 So.2d 193 (1957).} In \textit{Collett v. Otis} (1955),\footnote{80 So.2d 117 (La. App. 1st Cir. 1955).} the First Circuit refused to follow a long line of jurisprudence based upon several Supreme Court opinions, by which a title prescription could not be pleaded in a boundary action; the First Circuit found that the illogical and impractical rule had been first announced as dictum only and then blindly followed without serious consideration of its unsoundness in code doctrine and in policy.\footnote{See also text at note 38 supra.} In \textit{Washington v. Washington} (1959),\footnote{116 So.2d 125 (La. App. 1st Cir. 1959), affirmed as to issue involved,} the First Circuit refused to follow its own precedent and applied instead the contrary holding of another intermediate appellate court as to the same question, on the ground that the latter was better reasoned and more in accord with the intent of the code articles involved, also citing Planiol.

Theoretically, then, since the statutory basis is the sole source of law, the prior decisions, being merely interpretations of it, may be disregarded whenever the present court is convinced that the precedents are erroneous, however numerous and however ancient or recent.

In the actual working of the Louisiana legal system, however, lawyers and laymen rightly regard an interpretation represented by a line of several decisions as establishing a settled application of the law which the courts will with reasonable certainty follow in the future if litigation concerning the same question again arises. While reference is or should be made first to the statutory law, in actual practice the interpretation reflected by the case decisions, the law in action so to speak, is almost always heavily relied upon, with the usually correct assumption that the legal precept in question will be applied to the present facts as it was in the past and that the meaning of the precept is demonstrated by these indicative and illustrative court decisions. “The
For, in actual practice, Louisiana judges do not lightly disregard a settled line of precedents, even though in theory they are free to do so.

This is so for several reasons. First, fidelity to the institution of an ordered legal system, which we will discuss more fully below, demands general stability of legal rules. For this reason, in the absence of manifest unfairness or illogic, there is a tendency among judges not to disregard previous adjudications on the same question, even when the judge himself believes that a better-reasoned interpretation of the rule would provide a different application, one which he himself would have recommended had the question been presented to him first, before the other adjudications.

Second, the basis of a court decision is legal reasoning founded upon certain legislative precepts, and it is quite probable that the next court to which a question of law is presented will reach the same conclusion as did the courts which decided it earlier, since more likely than not the earlier reasoning was also sound.

Third, the concept that courts as a general rule will exhaustively re-examine legal rules or standards well accepted by prior decisions overlooks the tendency towards economy of effort required in this day of crowded dockets and ever-increasing litigation. Without a vast expansion in staff and a radical change in human nature, the courts simply do not have the time or inclination to re-test and re-formulate settled applications of legal principles in every instance of litigation, particularly since the settled general rule is almost always fair and practical (even though sometimes in theory a better one might be devised). In the absence of a belief that the application of the general rule sanctioned by several prior decisions produces unjust results, the court will almost always therefore determine only whether the general rule has been correctly applied to the present case, rather than also re-examine its validity.


These reasons for the general "stability" of precedent have touched upon an underlying fundamental purpose of any legal system: to establish a certainty of legal rule, and a predictability of outcome in its application in the event of litigation, upon which men regulated by that system of laws can rely in their everyday dealings. The rule of order and the relative security of human rights so established are regarded as a fundamental necessity of a civilized social system. Competing with this demand for certainty of legal rule, however, is often the need for some flexibility, so that the rule may be accommodated to changing conditions and yet still serve the same basic social purpose as originally intended, and so that when applied to changed circumstances it will not produce unfair results contrary to those intended by the legislation.

The competing needs for stability and flexibility are of varying relative importance depending upon the nature of the legal relationship involved. For instance, it is usually pointed out that the stability of land titles requires inflexible and unchanging rules and firm adherence to precedent, because many property rights are acquired in reliance thereupon. On the other hand, it is usually agreed that more flexibility is permitted in tort law, since there the legal precepts revolve about reasonable standards of conduct, which themselves are evolving and changing as the circumstances of the society which spawns them change. In this regard, a distinction should therefore be made between areas of law (1) in which consistency of interpretations is necessary because people act deliberately in reliance upon them (contract, property, security agreements, prescriptive periods, etc.) and those (2) in which consistency is not as necessary because the interpretations of the law previously given have not been a guide for action (most questions of "negligence" or "fault," unjust enrichment cases, the application of separation and divorce laws, etc.).

Thus, deciding a given legal question may involve considerations other than pure logic and the intellectually ideal resolution. In the event of conflict between such ideally right solution and a different and less logical rule previously applied by the precedents, against applying the ideal rule must be balanced considerations of the need for order and stability in the legal system. Then, in addition, the relative fairness of the ideal as compared with the precedential result must be balanced. Finally, in this
process of balancing competing policy ideas, consideration must also be given to the relative social importance of either stability or individualization of result in the application of the rule in the field of law in question.

In practice, these generalized considerations concerning policy reasons either to follow or else to overrule or ignore precedent are rarely utilized or articulated in deciding a given case. Almost always the technique of decision requires no consideration of whether a settled rule should be followed or not, but only involves the application of the settled rule to the present facts, after having selected the settled rule intended to govern them. Of course, the rule of interpretation established by precedent is not applied blindly; as Professor Llewellyn noted, the guiding principle in applying it is that "the rule follows where its reason leads; where the reason stops, there stops the rule."54

The following are some of the practical situations in which the place and use of precedent may present a problem. We will assume in each instance that prior precedent supports a legal precept which the court does not wish to follow, in the belief that a different precept formulated by it will supply a more just result and one more in accordance with the intention of the legislation upon which both precepts are based.

A. When the precedent is the decision of a court of coordinate or subordinate or another jurisdiction: In this instance, there is general agreement that the precedent of the other court of coordinate jurisdiction is merely persuasive and may be disregarded without compunction if the court feels that its own precept is better or more logical.55 Similarly, the Louisiana Supreme Court regards as merely persuasive the application of a precept established by a line of lower appellate court precedents, and it freely reaches a conclusion overruling such decisions if in the judgment of the higher court another interpretation is more correct.56 Likewise, holdings of federal courts and those of other jurisdictions on questions of law are merely persuasive and will not necessarily be followed by a Louisiana court in the determination of questions involving state law.57

57. See, e.g., Hinches v. Long Bell Petroleum Co., 235 La. 185, 103 So.2d 84 (1958).
B. When the precedent is the decision of a higher court: In theory, a civilian court is not bound by precedents even of higher courts and may go directly to the statutory source and reach its own independent conclusion as to the meaning and application of the legal precept in question. In actual practice, however, lower courts in Louisiana almost invariably feel bound to follow jurisprudence established by a higher court. This usual attitude was stated most forcefully recently in State v. Cenac, a 1961 decision of the Court of Appeal, First Circuit:

"It is too clear to admit of argument that one of the primary functions of a superior court whether acting under its direct appellate or supervisory jurisdiction via writ is to enumerate definitive interpretations of law binding upon and controlling subsequent decisions of all courts inferior thereto. It is an elementary, basic principle of law that inferior courts are bound by the decisions of superior supervisory tribunals."

In addition to legal reasons sometimes advanced based upon the constitutional power of the State Supreme Court to control inferior courts, a practical reason why courts of appeal adhere to this rule is because they do not wish to cause unnecessary expense and delay to the litigants by rendering a judgment which will certainly be reversed. Implicit in this practical reason is loyalty to the concept of a rule of order within the legal system (to be evidenced by accepting the high court's ruling until it reverses itself) and also a feeling that such a policy produces the more efficient administration of the judicial system as a whole and that a contrary policy invites public disrespect of the courts.

For the same reasons which oblige a court of appeal to follow a Supreme Court ruling with which it disagrees, a district court will usually in a similar situation follow a ruling of the court of appeal with appellate jurisdiction over the case.

Of course, there are many instances where, by considering the underlying reasons for a holding of law by the higher court, the lower court may discover that the seemingly applicable holding was not intended to apply to the legal conflict now before it. That is, a lower court is not required to apply mechanically

58. See note 46 supra.
59. 132 So.2d 897 (La. App. 1st Cir. 1961), cert. denied, 132 So.2d 928 (La. 1961).
60. See State v. Cenac, 132 So.2d 897-98 (La. App. 1st Cir. 1961).
precedents of higher courts which were never intended to supply a principle for the distinguishable type of conflict now before the lower court. Occasionally also, as noted above,\(^6\) a lower court will refuse to apply a higher court ruling when the latter has itself failed to apply or overlooked some controlling statutory enactment or is based on mere unconsidered dictum; the lower court acts then with reasonable certainty that the higher court will overrule itself when the controlling legislative principle is called to its attention.

No matter what the practice, it may be asked, what is the moral duty of a lower judge when he is absolutely convinced that the precept or interpretation announced by the higher court by a controlling and non-distinguishable precedent is unquestionably wrong, so that the higher court will surely reverse itself if presented squarely with the compelling reasons which have convinced the lower judge that the previous decision is wrong?

I am aware that, according to the true civilian philosophy of the function of judicial interpretation, a lower court should render the judgment it thinks is correct and just, regardless of an erroneous prior decision of a higher court. I am also aware that, by doing so, it will at least force the higher court to a thorough reconsideration of its prior position by requiring its review by formal written opinion of its previous precedent concerning the question.

Nevertheless, in my opinion, Louisiana judges, including me, will feel morally bound to honor a higher court precedent containing a considered holding squarely and clearly applicable to the conflict before us. We do so not only for the same general considerations of policy stated just above, in accordance with the tradition in Louisiana of respecting higher court determinations, but also because with some humility we must recognize that, no matter how obvious the error of the precedent seems to us, we may well be wrong, since judges of the higher court at least equally conscientious as ourselves have reached a different conclusion.

But (although there may be some disagreement among judges as to this) I do not feel that the lower court judge is prevented by the ethics of his craft from indicating why he feels that the higher court precedent, which he feels bound to follow,

\(^6\) See text at notes 48-51 supra.
is nevertheless, erroneous and why a more sound interpretation of the statutory source justifies a different rule, and from inviting the higher court to reconsider its previous interpretation of law. Further, in those rare instances when a Louisiana court of appeal is uncertain that the previous Supreme Court holding of law is correct and when the lower court also seriously questions that the ruling will be followed if that higher tribunal reconsiders the question, the court of appeal has the little-used constitutional authority to certify to the Supreme Court "any question of law arising in any cause pending before it concerning which, for its proper decision, it desires the instruction of that court."

C. When the Precedent is a Decision of the Same Court:
Without reiterating all the policy considerations expressed in the generalizations above, for those reasons the court will with hesitancy overrule the application of a rule settled by a course of its own considered decisions. However, when convinced of error in a single or an ancient precedent upon which no property rights are founded, the court will freely overrule its own earlier precedent; and, when the legal or practical or equitable reasons for a different application of the rule were not considered in or available for the deciding of a course of earlier precedents, the court will overrule its prior decisions when convinced they do not provide the just rule and where no property rights have been acquired in reliance upon them.

Sometimes this situation is presented: A settled application of a rule by a court is now seen by it to be clearly wrong, for reasons not previously considered or because of subsequent developments in the jurisprudence. Nevertheless, although the court desires to change the application of the rule in order to provide a sounder one, one of the litigants in the case now before the court has acted in reliance upon the former construction of the rule, and it does not seem fair that he should be penalized

62. See, e.g., the writer's concurring opinions recently in Romero v. Leger, 133 So.2d 897 (La. App. 3d Cir. 1961) and Rycade Oil Corp. v. Board of Commissioners for Atchafalaya Basin, 129 So.2d 302 (La. App. 3d Cir. 1961). In both of these instances the Supreme Court denied writs of review, indicating an additional explanation why the writer believes there are sound reasons for a lower court judge to balance against his positive conviction that the higher court precedent was erroneous, the circumstance that the higher court judges may with equal conviction and perhaps equal reason have reached the opposite conclusion.


64. See text at notes 48-51 supra.
when his course of conduct was based upon the court's former interpretations of the rule.

What shall the court do then? In the interest of providing a more sound and fair general rule for the future, shall it overrule its prior precedent, despite the individual unfairness that will result to the litigant in this particular case? Contrariwise, in the interests of individual fairness to the litigant who has relied upon the former precedents, shall the court perpetuate an interpretation which produces unsound and unfair results generally?

Yet a third approach is available, referred to as the use of the "Sunburst doctrine," so-called after the title of a 1932 United States Supreme Court decision\(^6\) which refused to interfere with the use of this technique by the Montana Supreme Court. By this approach, the court applies its old rule to the case now before it, but announces that in cases arising subsequent to the decision the new and sounder rule enunciated therein will be applied. The new precedent thus established is given prospective effect only; it is applicable only to causes arising after its decision, while the overruled former precedent still applies to causes of action arising before the new decision. Sometimes questioned by the purist as demonstrating too bald a display of legislative function by a court, this technique is nevertheless used sometimes as the most sensible and fair method of resolving the dilemma above described, where a court must either accomplish temporary individual unfairness or else perpetuate an unsound interpretation which will adversely affect others in the future.\(^6\)

Incidentally, one of the earliest instances of the use of this technique by an American court is the 1888 Louisiana decision in *Levy v. Nitsche*.\(^6\) It is of some further interest that in the 1960 decision of *Sumrall v. J. C. Penney Co.*\(^6\) our Supreme Court most recently utilized a technique of this nature. Although under strict civilian theory the law provided by the legislation and now at last correctly interpreted by the later decisions, had always governed the type of conduct in question,

\(^6\) Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932).
\(^6\) 239 La. 762, 120 So.2d 67 (1960).
both before and after the court's corrected interpretation of it, equity and practical considerations support the court's conclusion that the litigant should not be penalized for relying upon the prior precedents of the courts, even though it is now seen that they were erroneous interpretations of the law.

CONCLUSION

In this sketch of techniques used by a Louisiana judge to find the law with which to decide a particular case before him, we have only glancingly mentioned the fundamental aim of the judge in deciding the case—to decide it fairly. After all, a conscientious judge is usually not trying to find the answer to an abstract legal conundrum; he is trying to do justice, to reach a fair and reasonable solution of a conflict between the interests of human beings.

Chief Justice Udall of Arizona once stated, "The duty of all judges is to see that justice is done within the framework of the law in all cases that come before us."69 It is important to note, however, the qualification—that a judge must strive to see that justice is done, but "within the framework of the law."

When the legal rule is certain and its application to the type of conflict before the court was certainly intended, then the function of the judge is more or less to apply mechanically the legal precept in question. In these instances, comprising the vast preponderance of litigation, one can see clearly that the essential function of the judge is not to make law, but to apply it. In such instances, it is easier to conceive of the judge as some sort of a computer, although not as accurate and perfect to be sure as a real one: The type of human conduct involved in the litigation is fed into the computer, it matches the conduct with the appropriate legal precept designed to govern this type of conduct, and out comes the correct answer.

But, as we have seen, the legal problem is not always that simple, and the meaning or the application of the law may not be clear and may admit of judicial discretion in interpretation. A great international jurist once commented, "the judge is not actually a mechanism, a calculating machine. He is a living man, and the function of determining the law and applying it in a con-

crete instance, which in theory can be represented as a syllogism, is in reality a synthetic operation that mysteriously takes place in the sealed crucible of the spirit, where intuition and sentiment [for a fair disposition of the dispute] must be heated in an active conscience to solder together the abstract law and the concrete fact— in order, in sum, to produce a just result.

We must view rules of construction, techniques of interpretation, methods of development of the law, all as serving this great fundamental aim of the judge— "To see that justice is done" but, to reiterate, "within the framework of the law" provided by the legislators, to whom the people in a democratic society have entrusted the law-making function.

70. Calamandrie, Procedure and Democracy 30-31 (1956).